No. 17-251

IN THE
Supreme Court of the United States

ABEL DANIEL HIDALGO,
PETITIONER,
v.

ARIZONA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

BRIEF OF
THE PROMISE OF JUSTICE INITIATIVE
THE ARIZONA CAPITAL REPRESENTATION PROJECT
& THE ATLANTIC CENTER FOR CAPITAL
REPRESENTATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Promise of Justice Initiative (PJI) is a private, non-profit law office located in New Orleans, Louisiana, dedicated to upholding fairness in the criminal justice system.

The Arizona Capital Representation Project (ACRP) is a non-profit legal organization that assists indigent persons facing the death penalty in Arizona through direct representation, consultant services, training and education.

The Atlantic Center for Capital Representation (ACCR) is a non-profit resource center providing consultation services, legal advocacy, education, and training to address the death penalty and juvenile life without parole sentences in Pennsylvania.

Amici have particularized and informed perspective on how the death penalty currently operates in the United States. Further, *amici*, have a crystalized understanding of the limitations and constraints of those individuals who remain exposed to the death penalty.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part. No person or entity other than amici made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of PJI's intent to file this brief at least ten days before the due date. Copies of the consent provided by the parties to the filing of this brief have been filed with the Clerk's Office.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Promise of Justice Initiative, along with the Arizona Capital Representation Project, and the Atlantic Center for Capital Representation submit this amicus brief in support of the *Petition* for a writ of certiorari.

INTRODUCTION

Capital punishment is a vestigial appendage no longer vital to the functioning of the justice system. Members of this Court have identified the circumstance of race, geography and quality of counsel as determining features of capital punishment.

Here, *amici* focuses on an additional feature – unrelated to the gravity of the offense or the culpability of the offender – that determines who live and who dies: namely, whether a defendant offers a plea to life.

A statutory scheme that explicitly provided for capital punishment only where the defendant asserted his right to trial necessarily violates the Constitution.[2] The manner in which the death penalty now operates presents this problem.

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[2] See *United States v. Jackson*, 390 U.S. 570 (1968); *Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. Ct. App. 1998) (holding New York statutory scheme unconstitutional where only defendants who assert right to trial are exposed to capital punishment); see also

Capital punishment is now primarily reserved for those who – as a result of some combination of inadequate counsel, immaturity, mental illness or disability, or sometimes plausible claims of innocence – do not offer to plead guilty and accept a life sentence. As such, the death penalty is arbitrarily imposed and not reserved for the worst offenders culpable of the worst offenses.

Joseph Hoffman, Marcy Kahn, Steven W. Fisher, *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (May 2001).

STATEMENT OF FACTS

> ***Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.***

Gregg v. Georgia, 428 U.S. 153, 225 (1976) (Opinion of White, J., Rehnquist, J., Burger, CJ.).

> ***I have a tool of negotiating to say, 'If you don't plead, you subject yourself to the death penalty.'***

Reed Walters, Louisiana District Attorney Association Board President, District Attorney for LaSalle Parish, explaining the need for capital punishment in 2016.

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Petitioner provides an exhaustive rendition of the facts and legal background that will not be repeated. Salient for these purposes, the Petition details at length how:

> [t]he number of statutory aggravators has proliferated such that "virtually every" person—around 99%—convicted of first-degree murder is eligible for the death penalty.

Hidalgo v. Arizona, Petition for Certiorari, at 3. See id at 5 (noting the expansion of aggravators in Arizona is twice the number in the original post-

Furman regime).[3] But the Petition offers little about how those sentenced to death are selected.

The defining feature of the modern death penalty is the predominance of the life plea. Rather than identifying the most culpable offenders guilty of the most egregious murders, capital punishment schemes' anchor the availability of a life sentence.

Today, the clarifying purpose of capital punishment appears to be – not to deter offenses – but rather to deter *trials*. Indeed, in responding to legislation proposed to eliminate capital punishment in Louisiana:

> [T]he state's district attorneys are taking a hardline stance against the idea, arguing to local lawmakers the move would take away a vital tool in obtaining plea bargains — hanging the

[3] While few states have empirically assessed the reach of their statute as the petition does here, the progressive expansion of aggravating circumstances is a relatively common feature among modern capital sentencing statutes, rendering most if not all intentional murders death eligible. See e.g. Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 25 (2006); James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1614 (2006); Chelsea Creo Sharon, *The Most Deserving of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223 (Winter, 2011).

> possibility of the death penalty over defendants' heads. . . .
>
> Louisiana District Attorney Association Board President Reed Walters, . . . "I have a tool of negotiating to say, 'If you don't plead, you subject yourself to the death penalty,'"

Sam Karlin, *Lawmakers to Introduce Bills to Abolish Death Penalty in the State,* Manship School News Service for The Gambit, (Apr. 24, 2017).[4] Louisiana is not unique in this regard. *See* Gene Johnson, *Strategy Changing on Death Penalty*, News Trib. (Tacoma, Wash.) (July 30, 2007) (quoting prosecutor explaining threat of the death penalty is sometimes the only leverage available).

Other advocates for capital punishment have argued:

> The additional trial costs for the relatively few cases that go to a capital trial are offset, at least in part, by avoiding the cost of trial altogether in a

[4] Sam Karlin, *Lawmakers to Introduce Bills to Abolish Death Penalty in the State,* Manship School News Service for The Gambit (Apr. 24, 2017), *available at* https://www.bestofneworleans.com/thelatest/archives/2017/04/24/lawmakers-to-introduce-bills-to-abolish-death-penalty-in-the-state

> larger number of cases that end with a guilty plea.

Kent Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences*, Working Paper 09-01.[5] Whether using capital punishment to obtain pleas actually reduces costs is debatable,[6] but there is no debate that the death penalty is used to leverage harsh sentencing outcomes and has a "substantial causal effect on the likelihood that a defendant accepts a plea agreement."[7]

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[5] Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences*, Working Paper 09-01, *available at* http://www.cjlf.org/publications/papers/wpaper09-01.pdf

[6] See Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013) ("Of course these calculations ignore the fact that obtaining a plea bargain in a capital case may be more expensive than the total trial and appellate costs for a noncapital death-eligible case.").

[7] *Id.* at 549. *See also* Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 450 (2013) ("The death penalty is frequently used to leverage a guilty plea in exchange for a reduced sentence of LWOP.") *citing* Susan Ehrhard-Dietzel, *The Use of Life and Death as Tools in Plea Bargaining*, 37 CRIM. JUST. REV. 89, 90-91 (2012).

SUMMARY OF ARGUMENT

In 1972, this Court held that the arbitrary imposition of the death penalty violated the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972). In 1976, the Court issued five opinions addressing statutes adopted by the states to address the *Furman* arbitrariness problem.[8] Although splintered as to the reasoning, the Court's subsequent Eighth Amendment decisions made clear that capital punishment was excessive if it did not "fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) citing *Gregg v. Georgia*, 428 U.S. 153, 185 (1976).

Justice Stewart's opinion in *Gregg*, noted the ambiguous evidence of deterrence. *Gregg*, 428 U.S. at 185 (Opinion of Stewart J., Powell, J., Stevens J) ("there is no convincing empirical evidence either supporting or refuting this view.").[9] Nevertheless, the

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[8] See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

[9] See *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (Breyer J., Ginsburg, J., dissenting) (noting "30 years of empirical evidence" insufficient to establish a deterrent effect) citing *Baze v. Rees*, 553 U.S. 35, 79, (2008) (Stevens, J., concurring in judgment); see also *United States v. Fell,* 224 F. Supp. 3d 327, 349 (D. Vt. 2016) ("Although deterrence of future murders is identified as a basis for the death penalty, the statistical evidence that executions, many years after the offense conduct, affect the murder rate has not been accepted by the National Resource Council and

opinion assumed that there were some murders for which the death penalty had no deterrent effect but that "for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." *Id.* at 185-86. Moreover, the Court found that the death penalty served a purpose of ensuring confidence in the administration of justice: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law.' *See Id.*

In response to concerns that capital punishment schemes permitted standardless discretion in the use of charging and plea decisions, Justice White observed:

> ***Absent facts to the contrary***, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. . . . Thus

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continues to be unprovable."). The court in *Fell* ultimately held after a multi-week evidentiary hearing that the "[t]he time has surely arrived to recognize that the reforms introduced by *Gregg* and subsequent decisions have largely failed to remedy the problems identified in *Furman*. Institutional authority to change this body of law is reserved to the Supreme Court." *Id* at 359.

> defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong.

Gregg v. Georgia, 428 U.S. 153, 225 (1976) (opinion of White, J., Rehnquist, J., Burger, CJ.).

Experience has demonstrated that the promise of Justice Stewart and the expectation of Justice White have not borne out. Facts to the contrary are in: the vast majority of defendants receive the death penalty – not because of culpability – but because they fail to offer or accept a life plea.

Plea-primary regimes violate the central tenet of *Furman*: the death penalty is reserved for the worst of the worst. They also do not effectuate deterrence: the "calculated murderer" that *Gregg* contemplated being deterred by capital punishment is able to avoid capital punishment by offering to plead guilty, while the class of defendants that *Gregg* assumed the death penalty would have no deterrent risk the punishment.

Moreover, the winnowing that takes place today is operated by defendants who – either because they are too mentally ill, too intellectually disabled, too immature, or represented by too indifferent counsel, or because they are innocent – refuse to offer to plead guilty and accept a life sentence. Reliance upon the collective judgment of these defendants ultimately undermines rather than enhances confidence in the administration of justice.

ARGUMENT

I. THE PRIMARY PURPOSE OF THE DEATH PENALTY TODAY IS TO SECURE LIFE-PLEAS

The death penalty is no longer reserved for the worst offenders culpable of the most serious offenses but rather, in large part, is imposed on defendants who refuse to offer, or accept, a life plea.

Amici recognize that courts have upheld the constitutionality of individual death-sentences despite the exclusion of evidence that the state had previously offered to accept a life plea[10] and that this

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[10] Cf *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995) ("Evidence that the State offered a capital defendant a plea of life may be minimally relevant . . . [but] such evidence is substantially outweighed by the danger of both unfair prejudice and of misleading the jury."); *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985); *Arango v. Wainwright*, 716 F.2d 1353 (11th Cir. Fla. Sept. 23, 1983); *Cook v. State*, 369 So. 2d 1251 (Ala. 1978) (Bloodsworth, J., concurring) (court erred "in refusing "to consider, as a mitigating circumstance, that Cook may have been offered life imprisonment for a guilty plea."); *State v. Miller*, 921 P.2d 1151 (Ariz. 1996) ("We also reject Miller's argument that the state's offer of a plea with life imprisonment for Luna – which was also offered to and refused by Miller – was an unconstitutional exercise of prosecutorial discretion."); *Arango v. State*, 437 So. 2d 1099 (Fla. 1983) (rejecting claim that "[i]mposition of the death sentence after petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and fourteenth amendments.").

Court has considered the constitutionality of schemes that encouraged pleas.[11]

In this instance, *amici* does not address those legal questions but rather the impact of the plea-primary regime on the Court's consideration of the constitutionality of capital punishment.

A. *The Vast Majority of Death Penalty Cases Are Now Resolved With A Life Plea*

The number of potentially capital cases has expanded dramatically since 1976; the number of death sentences continues to decline from more than three hundred *per annum* in the 1990's to thirty-one in 2016. Although some of that decline is due to a decline in jury death verdicts, a significant portion is due to the increased emphasis on plea-resolution (identified, for instance in the ABA 2003 Supplementary Guidelines), and the expansion of the alternative of life without parole. In a number of

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[11] Compare *United States v. Jackson*, 390 U.S. 570 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) with *Corbitt v. New Jersey*, 439 U.S. 212 (1978) (statute valid when plea gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence).

places, like Texas, Georgia,[12] North Carolina[13] and Ohio,[14] statutory amendments led directly to drops in death sentences.[15] Even highly aggravated cases with highly culpable offenders have resulted in life pleas.[16]

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[12] Death Penalty Information Center*, Despite Executions, Death Penalty is in Decline in the "New Georgia*", *available at* https://deathpenaltyinfo.org/node/6333 citing G. Land, *'Life Without Parole' Leads to Shrinking Death Penalty Pipeline*, Daily Report, December 16, 2015 (noting availability of life pleas resulted in only one capital trial, in which the defendant represented himself).

[13] Death Penalty Information Center, *No Death Sentences in North Carolina for the First Time Since 1977 available at* https://deathpenaltyinfo.org/sentencing-no-death-sentences-north-carolina-first-time-1977 citing A. Blythe, *No one sentenced to death in North Carolina this year*, Raleigh News & Observer (Nov. 10, 2012).

[14] Death Penalty Information Center*, Ohio Capital Murder Indictments Plummet 77% in Five Years*, *available at* https://deathpenaltyinfo.org/node/6314 citing J. Caniglia, *Eluding death: Ohio prosecutors charge far fewer capital murder cases*, Cleveland Plain Dealer, (Nov. 25, 2015).

[15] See e.g. Scott Sundby, *Death Penalty In Practice: The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor,* 84 TEX. L. REV. 1929, 1943 (2006) (noting drops in death sentencing when states adopted life without parole).

[16] *See e.g.* Death Penalty Information Center, *South Carolina Killer Pleads Guilty to 7 Murders in Deal to Avoid Death Penalty*, *available at* https://deathpenaltyinfo.org/node/6780 (noting "Other multiple killers have also received plea deals to avoid death sentences: . . . Gary Ridgway avoided the death penalty in Washington State by pleading guilty to 48 counts of aggravated

As Professor Douglass observed: the reduction in death sentences is not due to a drop in eligible capital murders, but rather "[t]he decline in capital trials results mostly from prosecutors' increasing willingness to trade capital charges for guilty pleas." John Douglass, *Lethal Injection, Politics, And The Future Of The Death Penalty: The Future Of The Death Penalty: Death As A Bargaining Chip: Plea Bargaining And The Future Of Virginia's Death Penalty,* 49 U. RICH. L. REV. 873, 886 (March 2015); id at 873-874 ("Virginia's death penalty functions primarily as a bargaining chip in a plea negotiation process that resolves most capital litigation with sentences less than death. Virginia prosecutors have not abandoned the death penalty. Instead, increasingly, they bargain with it."). The Virginia experience is mirrored across the country.[17]

In Arizona, between 2011 and 2016, more than half the pending completed cases have been resolved with a life plea. Of one hundred and fifty-four completed capital cases, eighty-three (83) resulted in pleas for sentences less than death. Only five (5)

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murder …. Roland Dominique, who pleaded guilty to eight murders in Louisiana and was a suspect in 15 more, received a life sentence . . . ."); *id.* Death Penalty Information Center, *Pennsylvania Prosecutors Give Up Death Penalty in Murder of 4 to Learn Location of Missing Victim*, *available at* https://deathpenaltyinfo.org/node/6821.

[17] Data concerning Pennsylvania, North Carolina, Louisiana, and Arizona has been compiled by contacting resource counsel in the states, and is available on hand.

cases indicted since 2011 have resulted in a death sentence.

In Pennsylvania, there have been 401 cases of first degree murder between 2011 and 2016 in which the Commonwealth filed notice of its intent to seek the death penalty. The Commonwealth subsequently withdrew its intention in 218 cases. Of the 183 cases still subject to the death penalty, 110 (60%) pled to life or other serious offenses. Of the 73 that went to trial, twenty-two resulted in death sentences. In each of these instances, the defendant did not offer to accept a life sentence. In virtually every one of these cases a life plea would have been accepted; and indeed, in the great majority of these cases a life plea was extended by the prosecution.

In North Carolina, between 2011 and 2016, there have been 2,664 capital cases, 1870 or 70% were resolved with a plea. A significant portion were simply de-capitalized. During this time, forty-one capital cases proceeded to trial. Of those, only eight (8) were ultimately sentenced to death. Plea offers were available in at least sixteen (16) of the cases that went to trial, including a number that ended up with death sentences. In 2014, for instance, the prosecution made plea offers to life in two of the three cases that returned death sentences.

In Louisiana, between July 1, 2011, and June 30, 2016, 538 people were arrested for first degree murder. Twenty-two (22) cases remain pending. Only three of these cases from this class went to trial as death penalty cases. Each of these trials involved

defendants who did not offer to plead guilty to first degree murder prior to trial. In the first instance, the defendant agreed to waive appeals in return for a life sentence after his conviction but before the penalty phase. The second of these defendants was convicted, sentenced to death but was ultimately exonerated.[18] The third dismissed his attorneys, represented himself at penalty phase and waived mitigation resulting in a death verdict but has not yet been formally sentenced. Like the experience in other states, this is hardly the narrowing that *Gregg* had promised.

B. *The Death Penalty Is Often Imposed Despite The State's Recognition that a Life Sentence is Sufficient*

While empirical data regarding the actual number of individuals executed despite an available life plea is difficult to ascertain,[19] the literature is rife with examples of individuals executed despite the availability of a life pleas under troubling circumstances. See Carlos Deluna (executed with

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[18] See Maurice Possley, *Rodricus Crawford,* The National Registry of Exonerations, April 18, 2017, available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5123

[19] Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013) ("Empirical research addressing the use of the death penalty as leverage in plea negotiations is virtually nonexistent.").

claims of intellectually disability and innocence);[20] Cameron Todd Willingham (executed with claims of innocence);[21] Robert Sawyer (intellectually disabled executed despite life plea offer);[22] Kelly Gissender (non-trigger person executed despite plea offer);[23] Jeffrey Landigran (executed despite serious mental illness, refusal to allow presentation of mitigating evidence, and rejection of life plea).[24] In addition to these well-publicized cases, the literature is rife with examples of executions that proceeded even despite the fact that the state believed prior to trial that a life sentence was sufficient.[25] Similarly, while the vast

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[20] James Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren White, Daniel Zharkovsky, *The Wrong Carlos, Anatomy of a Wrongful Conviction* (Columbia Univ. Press 2014), at pp. 175-76, 180, 232-33, 313.

[21] See David Grann, *Trial By Fire, Did Texas Execute An Innocent Man?*, The New Yorker, September 7, 2009.

[22] Robin M. Maher, *Improving State Capital Counsel Systems Through Use of the ABA Guidelines*, Vol. 42 HOFSTRA. L. REV. 419 at 432 (2013).

[23] See Alan Blinder, *Georgia Executes Woman on Death Row Despite Clemency Bid and Pope's Plea*, New York Times, 9/29/2015 *available at* https://www.nytimes.com/2015/09/30/us/kelly-gissendaner-execution-georgia.html?mcubz=1&_r=0.

[24] See *Schriro v. Landrigan*, 550 U.S. 465 (2007); John Schwartz, *Murderer Executed in Arizona*, N.Y. Times (Oct. 27, 2010) *available at* nytimes.com/2010/10/28/us/28execute.html.

[25] Just as examples: Victor Kennedy (Alabama); Abdullah Sharif Kaazim Mahdi, f/k/a Vernon Lamont Smith, (Ohio); James Earl

majority of plea discussions are conducted off-record, there are innumerable recorded instances where defendants have been sentenced to death despite available plea offers to life or less.[26]

Indeed, pleas were available in the overwhelming majority of capital cases in the post-*Furman* era, including the cases of those who have been executed. Russell Stetler, *Commentary On Counsel's Duty To Seek And Negotiate A Disposition In Capital Cases* (ABA Guideline 10.9.1), 31 HOFSTRA L. REV. 1157 (2003); Welsh White, *Plea Bargaining in Capital*

Reid (South Carolina); Michael and Patrick Poland (Arizona); Ted Bundy (Florida); Cutris Osborne (Georgia) Kelsey Patterson, Caruthers Alexander (Texas); Angel Breard (Virginia).

[26] These include, just as examples: Recardo Cook, David L. Coulter, Louise Harris, Shonell Jackson, James Scott Largin (Alabama); Jasper Newton McMurtrey, Jahmari Manuel, Joel Escalante-Orozco, Anthony Spears, Darrel Lee, Don Jay Miller, John Vincent Fitzgerald (Arizona); Kerry Dalton (California); Richard Allen Johnson, Bobby Marion Francis, James Robertson, Gabby Tennis, James Ernest Hitchcock, Carlos Luis Arango (Florida); Joseph E. Corcoran (Indiana); Tyrone Lindsey, Marcus Reed, Terrance Carter, Lee Turner, Jarrell Neal (Louisiana); Walter Barton, James Cobb Hutto, Thong Le, Richard Jordan, Lisa Jo Chamberlin, Quintez Wren Hodges (Mississippi); Walter Barton (Missouri) David Cameron Keith (Montana); Curtis Guy (Nevada); Charles Walker (North Carolina); Phillip Elmore, Vernon Lamont Smith (Ohio); Richard Glossip, James Chandler, Marlon Harmon, Wade Greely Lay (Oklahoma); Richard Moen (Oregon); Bradley Martin (Pennsylvania); Marion Bowman (South Carolina); Andre Bland, Kevin Burns, Glenn Bernard Mann, Terrell Burgess, Gail Owens, Sidney Porterfield (Tennessee); Scott Pannetti, George Whitaker (Texas).

Cases, 20 CRIM. JUST. 38 (2005) ("75 percent of defendants who have been executed since 1976 could have avoided the death sentence by accepting a plea offer."); Hoffman, Kahn, & Fisher, *Plea-Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2359 (2001) ("Available empirical evidence strongly suggests that . . . the possibility of the death penalty provides defendants in potentially capital cases with a substantial incentive to enter into plea-bargains that result in the imposition of life without parole."); Russell Stetler, W. Bradley Wendel, *The Tenth Anniversary Of The ABA Capital Defense Guidelines: The Road Traveled And The Road To Be Traveled: Part One: The ABA Guidelines And The Norms Of Capital Defense Representation*, 41 HOFSTRA L. REV. 635 (2013) ("[E]ven with all of their limitations, the available studies consistently indicate that most death-eligible cases avoid death sentences."); John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist,* LAW & PSYCHOL. Rev. 55 (2003) ("as many as eighty percent of death row inmates are offered and refuse pleas that would have resulted in life in prison.").

Much of the geographic arbitrariness to the death penalty can be traced to unique features in plea-primary regimes. For instance, various prosecuting agencies, along with the interaction with defense counsel, often explain disproportionate sentencing. In Philadelphia, the elected District Attorney had a practice of charging everyone with a death eligible offense but accepting plea offers. The private bar had structural incentive to proceed to trial. Rob Smith, *The Geography Of The Death Penalty And Its*

Ramifications, 92 B.U.L. REV. 227 (2012) (noting financial considerations at the time that encouraged private appointed lawyers to proceed to trial). A number of jurisdictions have a defense-must-ask policy that prevents the use of the death penalty to "coerce" pleas, but incentivizes the defense to issue a plea offer.[27] Whatever the unique elements of the plea-primary regimes, each establishes that a life sentence is generally sufficient.

II. THE PLEA-PRIMARY USE OF THE DEATH PENALTY DRIVES SEVERE SENTENCING AND UNDERMINES CONFIDENCE IN THE ADMINISTRATION OF JUSTICE

One of the death penalty's remaining roles in the administration of justice is to drive other forms of severe sentencing. *See e.g.* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 481 (2013) *citing* Susan Ehrhard, *Plea*

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[27] Department of Justice policy provides: "The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position," (see Department of Justice, *United States Attorneys' Manual*, 9-10.120) but also includes as criteria for whether it is appropriate to seek the death penalty whether the defendant has offered to plead guilty and receive a life or life equivalent sentence. See USAM 9-10.140 (D) (9) ("Whether the defendant has accepted responsibility for his conduct as demonstrated by his willingness to plead guilty and accept a life or near-life sentence without the possibility of release.").

Bargaining and the Death Penalty: An Exploratory Study, 29 Just. Sys. J. 313, 319 (2008) (describing interviews with prosecutors who admitted that the death penalty is often used as a bargaining chip to secure life pleas); Carol S. Steiker, Jordan M. Steiker, *Courting Death, The Supreme Court and Capital Punishment*, 296-97 (2016) (noting steep decline in death sentences somewhat attributable to expansion of LWOP statutes, and that massive expansion of use of LWOP was directly "fueled by the existence of capital punishment").[28]

A. *Use of The Death Penalty To Secure Pleas Is Not A Permissible Purpose of Punishment*

The use of the death penalty to secure pleas does not satisfy the permissible purposes of capital punishment. As Professor Alschuler has observed:

> Plea bargaining undermines the most common rationale for the death penalty. Proponents of this penalty

[28] See also Death Penalty Information Center, *Death Penalty Often A Plea Bargaining Tool, available at* https://deathpenaltyinfo.org/node/1110 (noting "According to Ohio State University Professor Doug Berman, the death penalty "remains a relatively rarely used sanction" in Ohio and to the average prosecutor "it's a mechanism that allows them to enter plea negotiations in a stronger position." According to prosecutor Ron O'Brien, a change in state law that guaranteed life without parole in capital cases has been a factor in plea negotiations.").

> maintain that some crimes are so horrible that they simply require it. They insist that no lesser punishment can adequately express the community's condemnation.
>
> But the actions of American prosecutors convey an entirely different message: No lesser punishment can adequately express the community's condemnation unless the accused pleads guilty. For defendants who agree to save the government the costs of a trial, lesser punishments are just fine. These defendants' horrible crimes do not demand death after all. In the immortal words of Gilda Radner, "Never mind." Plea bargaining devalues the death penalty.

Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 Vol. DEPAUL L. Rev. 671, 674 (2009). As Professor Cottrol observed twenty years ago: "The retributivist view of the death penalty is difficult to reconcile with the practice, routine in many jurisdictions, of offering plea bargains that would result in life or lesser sentences to defendants in murder cases and then imposing the death penalty if a defendant refuses the plea bargain and is subsequently convicted." Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century,* 65 GEO. WASH. L. REV. 506, 525 (1997).

B. *Use of the Death Penalty to Secure Pleas Has A Perverse Impact on the Criminal Justice System*

1. *Innocence*

The threat of capital punishment has a double-negative impact on innocence. First, it increases the possibility that innocent defendants will plead guilty to avoid execution.[29] Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY at 482-483 (Spring 2013) citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 544-46 (2005) (describing cases in which innocent defendants pleaded guilty to murder, and even falsely implicated others, in order to avoid the death penalty); Paul Hammel, "*Beatrice 6" Cleared; "100 Percent Innocent*," Omaha World-Herald B1 (Jan. 27, 2009 (discussing five exonerated convicted murderers who falsely pleaded guilty after being threatened with the death

[29] Indeed, as noted above, the ABA Guidelines impose upon counsel the duty to try and resolve the case, which may have the perverse impact of encouraging an innocent to plead guilty or cause an innocent defendant or defendant with mental illness or disabilities to dismiss counsel and proceed *pro se*. For additional briefing on this unique distortion in capital cases, see briefing pending before this Court in *McCoy v. Louisiana*, 16-8255.

penalty); Marc Bookman, *The Confessions of Innocent Men*, The Atlantic (Aug. 6, 2013).[30]

But it also increases the chance that those sentenced to death will be innocent – having refused to accept a life plea. As Professor Douglass explained:

> [Some defendants land on death row not because the prosecutor failed to offer a plea to a life sentence, but because the defendant rejected the offer. . . . At best this system promotes a level of randomness in outcomes of capital cases. *At worst it tilts death sentences toward defendants who get poor advice from their lawyers, defendants with mental deficiencies who fail to appreciate the hard choices they face, or defendants with plausible claims of innocence.*

John. G. Douglas, *Lethal Injection, Politics, And The Future Of The Death Penalty: The Future Of The Death Penalty: Death As A Bargaining Chip: Plea Bargaining And The Future Of Virginia's Death Penalty,* 49 U. RICH. L. REV. 873 (2015).

"Plea bargaining may also have the perverse effect of increasing the percentage of cases in which

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[30] Available at https://www.theatlantic.com/national/archive/2013/08/the-confessions-of-innocent-men/278363/

capital defendants are wrongfully sentenced to death." As Professor White explained:

> If the defendant is in fact innocent, he or she will be more likely to reject any government offers to plea bargain. . . . But just because the defendant is innocent of the capital crime does not mean the jury will acquit. The many exonerations of death row defendants demonstrate the frequency with which juries err in capital cases. Capital defendants who are guilty are thus more likely to avoid the death sentence through a plea bargain; on the other hand, those who are innocent are more likely to be subjected to the vagaries—and potential mistakes—of a trial by jury.

Welsh White, *Plea Bargaining In Capital Cases*, 20 CRIM. JUST. 38, 49 (2005); Sean O'Brien, *2007 Survey of Books Related to the Law: Practicing Law*, 105 MICH. L. REV. 1067, 1083 (2007) (noting that "[p]lea-bargaining contributes to the arbitrary imposition of the death penalty by allowing the guilty to escape death but exposing the innocent to the risks of trial by jury" and that "documented instances in which innocent persons have pled guilty to avoid the death penalty"); James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 (2000) (noting that the death penalty "provides the best plea-bargaining leverage imaginable-leverage sufficient, indeed, to induce even innocent defendants to confess

or plead guilty to murder to avoid the death penalty, though innocent defendants almost never confess or plead guilty to other serious offenses").

The problem is not simply academic. Individuals like Carlos DeLuna and Todd Willingham refused to plea because of their strong (and post-humously validated) claims of innocence. See James Liebman, *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711, 939 (2012) ("In fact, prosecutor Schiwetz came to De Peña before trial--and again during the trial--with an offer to withdraw the request for a death sentence if Carlos would plead guilty. . . . [Carlos] was adamant that he was not guilty, and he wanted his day in court.'"); David Grann, *Trial By Fire, Did Texas Execute An Innocent Man?*, The New Yorker, September 7, 2009.

2. Intellectual Disability, Youth, and Mental Illness

Significantly, in plea-primary regimes, individuals with mental illness or intellectual disability, or the immaturity of youth – who by the very nature of their limitations are less culpable – may be unable to assist counsel in making cogent decisions regarding resolution of their case. *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002) (noting individuals with intellectual disability "may be less able to give meaningful assistance to their counsel" . . . "Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

Many defendants who miss the cutoff of *Atkins* – because age of onset cannot be determined, or an IQ

in the 75-80 range, or some lack of adaptive deficits – still lack the sophisticated decision-making skills of the most culpable. A defendant with an IQ of 80 falls far below the norm in intellectual functioning. And yet these defendants, like the 18 year old still molded by immaturity, are more likely to proceed to trial and face the death penalty, than a more sophisticated, more culpable offender.

This Court reviews at the end course cases like Jeffrey Landrigan's, executed despite significant evidence of mental illness after refusing to accept a plea prior to trial. That a prosecutor would accept a lifetime of incarceration in a particular case – if the defendant gives up his rights and pleads guilty – is strong evidence that a death sentence is excessive; and yet a sentence of death is imposed. Moreover, these cases demonstrate the arbitrariness of the process.

In *Gregg*, Justice White expected that the seriousness of the death penalty process would be assured by prosecutors making wise and responsible decisions about culpability. In the vast majority of cases, prosecutors making those decisions have determined that a life sentence is sufficient punishment. Today's death sentences are the result – not of reasoned decisions by prosecutors – but rather as a result of the decisions of a small number of defendants who are too encumbered by mental illness, intellectual limitations, or too immature to offer or accept a plea to life without parole.

What does it say about our justice system, that those who are most culpable avoid execution by pleading guilty – while that those who are most vulnerable are exposed to capital punishment? At the very least, such a penalty is arbitrary, excessive, and unrelated to either of the permissible purposes of punishment; but at its core, it undermines societal confidence in the administration of justice that the death penalty was supposed to assure.

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CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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