No. 15-946

In The
Supreme Court of the United States

Lamondre Tucker,
Petitioner,
v.

State Of Louisiana,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF FORMER APPELLATE COURT JURISTS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amici curiae ("*Amici*") hereby move, pursuant to Sup. Ct. R. 37.2(b), for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari to the Louisiana Supreme Court. Counsel for Petitioner has consented to the filing of any and all amicus briefs in support of certiorari. Counsel of record for Respondent was timely notified of the intent to file this brief. Counsel for Respondent declined to consent to filing of the brief because she had not seen the proposed brief.

As set forth in the accompanying brief's "Statement of Interest," *Amici* are former state supreme court judges who have an interest in this case because it implicates the fundamental integrity, effective operation, and public perception of the judicial system. As former state supreme court justices, *Amici* uniquely know and respect the gravity of state appellate court's responsibility to assess the personal culpability of defendants in capital cases and assure that the death penalty was applied proportionally and constitutionally. Accordingly, *Amici* respectfully request that the Court grant leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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I. INTEREST OF AMICI CURIAE

Amici, who are former state supreme court judges identified in the Appendix, have an interest in this case because it implicates the fundamental integrity, effective operation, and public perception of the judicial system.

While on the bench, Amici were called upon to review death sentences. Amici were responsible for assessing the personal culpability of defendants in capital cases and assuring that the death penalty was applied proportionally and constitutionally. State appellate courts regularly shoulder this tremendous burden. As former state supreme court justices, Amici uniquely know and respect the gravity of that responsibility.[1]

II. SUMMARY OF ARGUMENT

Despite the numerous procedural safeguards in place, juries continue to condemn to death defendants who with such substantial functional impairments that death is neither a just nor a constitutionally proportionate sentence. Juries are entrusted to determine on a case-by-case basis whether defendants meet the threshold of extreme culpability necessary to impose a death sentence.

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[1] No counsel for any party to this case authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than the Amici Curiae or their counsel made such monetary contribution.

Roper v. Simmons, 543 U.S. 551, 568 (2005) ("*Simmons*"). Not all murders—even the most egregious of murders—are automatically death-eligible. The Eighth Amendment limits the death penalty to those circumstances when the offender has "a consciousness materially more depraved than that of" the typical person who commits murder. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (capital punishment "must be limited to those offenders … whose extreme culpability makes them the most deserving of execution"); quoting *Simmons*, 543 U.S. at 568. In short, the death penalty is reserved for "the worst of the worst." *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008); see also *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) citing *Simmons*, 543 U.S. at 568. The Eighth Amendment's prohibition of "cruel and unusual punishment" demands nothing less.

This Court has developed two approaches intended to ensure that the death penalty is limited to only those offenders with extreme culpability. First, intellectually disabled and juvenile offenders are categorically excluded from capital punishment all together because they have diminished culpability relative to that of the typical adult. Second, capital defendants are permitted to introduce mitigating evidence to show that they do not possess the requisite "extreme culpability" for imposition of a death sentence. *Simmons*, 543 U.S. at 568. This mitigating evidence commonly focuses on impairments, such as mental illness, chronic trauma, head injury, or addiction issues.

Despite these safeguards, offenders who suffer or suffered from similar—or even more debilitating—degrees of functional impairment continue to be sentenced to death and executed. Jurors, who are entrusted with the task of making culpability determinations, are unable to reliably do so. A number of systemic factors contribute to this result, and appellate judges, such as Amici, are unable to remedy their mistakes. First, diminished culpability can be caused by numerous impairments, not all of which are readily apparent or measurable. Second, unless defense attorneys properly collect and prepare mitigating evidence in the first instance, the jury is unable to consider it during sentencing. Appellate judges are procedurally limited in their ability to evaluate such evidence if it is not presented until post-conviction hearings. Third, jurors often disregard mitigating evidence when faced with the details of a particularly brutal or horrific murder. Finally, the categorical exclusions for intellectually disabled and juvenile offenders are drawn too narrowly to encompass everyone who suffers from impaired culpability as a result of those conditions.

The challenge in assessing moral culpability has—since *Furman*—led to seven justices expressing concerns about the death penalty.[2] Additionally,

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[2] *Gregg v. Georgia*, 428 U.S. 153 (1976) (Brennan J., Marshall, J., dissenting); *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting); *Baze v. Rees*, 553 U.S. 35 (2008) (Stevens, J., concurring); *Glossip v. Gross*, 135 S.Ct. 2726 (2015) (Breyer, J., Ginsberg J., dissenting). Justice Powell, in conversations with his biographer J. Jeffries after his departure from the bench noted "I have come to think that capital punishment should be abolished." He stated that he would have

beyond Amici, a number of state supreme court justices have expressed concerns over the death penalty, dissenting from the bench.[3] It is unquestionably the case that some number of other state supreme court justices have deferred taking the steps herein, at least in part in deference to this Court's responsibility to address the issue.

Consequentially, the death penalty is not being meted out to only the "worst of the worst" and instead is being administered in a manner that risks that persons with severely diminished culpability receive "the harshest of punishments" though that punishment "violates his or her inherent dignity as a human being." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). The inability to reliably determine who possesses sufficiently extreme culpability to warrant a death sentence undermines confidence in its administration. For this reason, Amici urge this Court to accept review of Petitioner's case and

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changed his vote in capital cases, particularly *McCleskey v. Kemp*. J. Jeffries, JUSTICE LEWIS F. POWELL, JR. 451-52 (1994).

[3] *Doss v. State*, 2008 Miss. LEXIS 608, 41-42 (Miss. Dec. 11, 2008) (Diaz, J., dissenting); *State v. Cross*, 132 P.3d 80, 115 (Wash. 2006) (C. Johnson, J. dissenting, joined by Madsen, Sanders, and Owens, JJ.); *State v. Wogenstahl*, 981 N.E. 2d 900 (Oh. 2013) (O'Neill, J., dissenting); *see also* Reginald Fields, *Ohio Supreme Court Justice Paul Pfeifer Wants to Scrap the Death Penalty*, THE PLAIN DEALER, January 19, 2011 (noting statements by Ohio Supreme Court Justice Paul Pfeifer, who helped write the state's death penalty law).

consider the important questions surrounding the administration of the death penalty.

III. ARGUMENT

A. The Eighth Amendment's Prohibition On "Cruel and Unusual" Punishment Prohibits Sentencing Individuals With Diminished Culpability to Death.

A punishment violates the Eighth Amendment when it fails to measurably contribute to a permissible penological purpose. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). In the context of capital punishment, the Court's analysis focuses most heavily on retribution. *Id.* In order to measurably contribute to the retributive purposes of capital punishment, the death penalty must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("*Simmons*"); quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Kennedy*, 554 U.S. at 446-47 ("[The death] penalty must be reserved for the worst of crimes and limited in its instances of application."). The death penalty is not appropriate for a defendant whose baseline culpability is lower than that of a typical adult. *Atkins*, 536 U.S. at 318.

Jurors and courts are required, therefore, to consider the personal culpability of each capital defendant before imposing the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[f]or the determination of sentences, justice generally requires … that there be taken into account the

circumstances of the offense together with the character and propensity of the offender"); quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937); *see also Hurst v. Florida*, 136 S. Ct 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). The Court has followed two approaches for implementing this requirement. First, the Court has barred the application of the death penalty to entire classes of offenders, including juveniles and the intellectually disabled. "[B]ecause of their impairments," intellectually disabled offenders "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, at 318. The execution of an intellectually disabled offender does not meaningfully contribute to the goal of retribution. *Hall*, 134 S. Ct. at 1193 ("The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment."); *Atkins*, 536 U.S. at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution."). Similarly, children under the age of 18 possess insufficient personal culpability. Unlike the typical adult, children possess "a lack of maturity and an underdeveloped sense of responsibility" that "often results in impetuous and ill-considered actions and decisions." *Simmons*, at 569. Juveniles "cannot with reliability be classified among the worst offenders." They are

"vulnerable or susceptible to negative influences and outside pressures, including peer pressure: and possess "more transient, less fixed" identities.

For those offenders not categorically disqualified from receiving a death sentence, the Court mandates individualized sentencing. The Court requires that defendants be permitted to present evidence that tends to suggest that death is an inappropriately severe punishment. This process is supposed to result in a culpability assessment not based on the nature of the crime alone, which often is prejudicially brutal, but rather on those characteristics of the defendant that demonstrate that death is too severe a punishment and thus, constitutionally inappropriate. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). "[I]n all but the rarest kind of capital case, [the jury must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Simmons*, 543 U.S. at 568; quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

B. States Continue to Execute Individuals With Significant Functional Impairments.

Despite the procedural safeguards described above, and the review efforts of state appellate and

supreme courts, individuals with substantially diminished capacities are still being sentenced to death, and executed at alarming rates. A recent study of the social histories of 100 people executed in 2012 and 2013 demonstrates that a majority (eighty-seven percent) of the individuals executed suffered from a significant cognitive or behavioral deficit. Smith, Cull, and Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221 (2014). Fifty-five of the offenders were executed despite having characteristics that fell into multiple mitigation categories. *Id.* In 2015, 19 of the 29 people executed were deeply mentally impaired or disabled or experienced extreme childhood trauma and abuse. Charles Hamilton Houston Institute for Race & Justice, *Death Penalty 2015 Year End Report* (2015) (http://www.charleshamiltonhouston.org/2015/12/deathpenalty2015/) (last visited February 21, 2016). The continued execution of individuals with significant functional impairments is contrary to a constitutionally sound death penalty.

So, while the Constitution, as interpreted by this Court, requires jurors and courts to assess the personal culpability of a defendant in a capital case (*Gregg*, 428 U.S. at 197-98), a number of factors interfere with the ability of jurors and courts to reliably perform that function. These factors, and the challenges they pose, are discussed below. Any combination of these factors may result in a death sentence against, or wrongful execution of, an offender who is insufficiently culpability.

1. Diminished Culpability is Not Limited to Intellectually Disabled or Juvenile Offenders.

In addition to intellectual disability and juvenile status, a number of other impairments—medical conditions, mental health, and extreme childhood trauma and abuse—can result in significant functional deficits that reduce an individual's culpability below the constitutional threshold. The line between the culpability of the people for whom death is never appropriate—juveniles and the intellectually disabled—and the personal culpability of the many people with crippling disabilities—has become impossible to draw with precision.

For example, traumatic brain injuries are commonly associated with significant functional deficits. *Sears v. Upton*, 130 S. Ct, 3259, 3262-63 (2010) (reversing death sentence where offender's brain damage "[made] him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli"). Yet, because the clinical definition of intellectual disability excludes conditions that manifest after the individual turns 18 years old, offenders who have suffered traumatic brain injury do not meet the criteria for intellectual disability. Similarly, severe mental illness and addiction issues often result in insufficient culpability. *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007) ("Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can

serve no proper purpose."); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (defendant's serious drinking problem should have been considered as a mitigating factor). Exposure to trauma—both on the battlefield and as a result of physical or sexual abuse—can also lead to serious functional deficits that rival those of juveniles and individuals with intellectual disabilities. *Porter v. McCollum*, 558 U.S. 30, 33 (2009) (reversing death sentence where jury did not have the opportunity to fully consider the trauma the offender suffered during military service, his abusive childhood, his long-term substance abuse, or his impaired mental health and mental capacity); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (evidence that defendant experienced severe privation and abuse, physical torment, sexual molestation, and repeated rape represented "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability"). The first person executed in 2015 was Andrew Brannan, a Vietnam War veteran who was diagnosed with Post-Traumatic Stress Disorder (PTSD) and bi-polar mental illness.[4] Death Penalty Information Center, *Battle Scars: Military Veterans and the Death Penalty*, 5 (2015); *Hall v. Brannan*, 284 Ga. 716, 718-19 (2008).

The presence of any of these mitigating factors—head injury, mental illness, addiction, trauma—creates a high risk that a capital defendant can be

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[4] Estimates indicate that at least 10% of the current offenders on death row are military veterans. Death Penalty Information Center, *supra*, 4.

executed despite functional impairments suggesting death is an inappropriate, and potentially unconstitutional, punishment. These characteristics may not always be obvious and there are no easy metrics—such as chronological age or IQ score—for determining culpability in the absence of a clinically defined intellectual disability or youth. As a result, juries are unable to reliably weed out insufficiently culpable offenders and it falls on appellate judges, such as Amici, to bear the moral risk of error.

2. The Right to Present Mitigating Evidence Does Not Ensure That Such Evidence Will Be Adequately Presented or Considered.

Demonstrating that a capital defendant possesses insufficient personal culpability to warrant the death penalty requires that defense counsel first adequately investigate the offender's background and present mitigating evidence of impairment. Amici have deep concern that this does not reliably happen and as a consequence, the procedures for administering the death penalty consistent with the Eighth Amendment are disrupted. When defense counsel fail to conduct an adequate mitigation investigation, a jury is unable to perform its moral and legal function of deciding which offenders are truly among the most culpable offenders. *Rompilla*, 545 U.S. at 392-93 (jury should have been presented with evidence that defendant's "capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense"); *Wiggins*, 539 U.S. at 538 ("[A]vailable mitigating evidence, taken

as a whole, 'might well have influenced the jury's appraisal' of Wiggins' moral culpability."); quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000) ("[T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability.").

As *Rompilla*, *Wiggins*, *Williams*, and *Porter* aptly demonstrate, a full mitigation defense is often not presented until a post-conviction claim. Unlike juries, post-conviction judges do not assess (or reassess) personal culpability on a blank slate. At the post-conviction stage, a judge may only reverse a death sentence if the defense attorney performed deficiently, and an assessment of the new and old evidence, considered together, indicates that the failure to present the new mitigating evidence at trial prejudiced the defendant. Where mitigation evidence is not presented until federal habeas review occurs, the federal court must be doubly deferential to the jury verdict and the state court determination. *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) ("When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt."). Even where post-conviction review demonstrates that an offender's impairments have resulted in less than extreme culpability, the applicable standard of review may very well prevent a judge from reversing a death sentence. *See generally Clemons v.*

Mississippi, 494 U.S. 738, 754 (1990) ("[A]ppellate courts may face certain difficulties in determining sentencing questions in the first instance."); citing *Caldwell v. Mississippi*, 472 U.S. 320, 330-331 (1985). In such circumstances, courts are unable to perform their duty to ensure that the death penalty is administered in a constitutionally sound manner.

The risk that defense counsel's failure to adequately present mitigating evidence will have fatal consequences is not a hypothetical that exists in the abstract. For example, the state of Florida executed John Ferguson in 2013. David Ovalle, *Miami Killer John Errol Ferguson Executed*, MIAMI HERALD (Aug. 5, 2013) (http://www.miamiherald.com/news/local/community/miami-dade/article1953840.html). Ferguson's last words were "I just want everyone to know that I am the Prince of God and I will rise again," the result of decades-long schizophrenia. *Id.* While much was made of Ferguson's mental illness as it related to his competency to stand trial and, later, to be executed, the full extent of Ferguson's mental health issues were never presented to the jury. *Ferguson v. State*, 593 So. 2d 508, 510 (1992). Although his attorney was aware of Ferguson's history of mental illness—including his involuntary commitment to a psychiatric facility—his attorney relied solely on testimony by Ferguson's mother that Ferguson had mental problems and had been in a mental hospital. *Id.* The attorney did not present evidence from Ferguson's doctors about the extent of his mental illness. *Id.* The Florida Supreme Court held the attorney's decision was tactical and did not constitute inefficient assistance. *Id.* Despite

evidence that Ferguson did not possess extreme culpability and was not, therefore, one of the worst of the worst, his sentence was carried out.

Similarly, the state of Arizona executed Daniel Cook in 2012. *See* Jason Lewis, *Daniel Cook, Convicted Murderer With Tortured Past, Executed in Florence*, Phx. New Times (Aug. 12, 2012) (http://www.phoenixnewtimes.com/news/daniel-cook-convicted-murderer-with-tortured-past-executed-in-florence-6652814). Cook represented himself at trial and did not present any mitigation evidence. *Cook v. Ryan*, 2012 U.S. Dist. LEXIS 94363, *34, 2012 WL 2798789 (D. Ariz. July 6, 2012). Prior to trial and his waiver of counsel, Cook was evaluated by two mental health experts. *Id.* These evaluations revealed that since childhood, Cook had endured a long history of physical and sexual abuse by his immediate family and later foster parents. *Id.* As a young boy, Cook was physically abused, beaten, and raped by his mother and grandparents. Lewis, *supra.* On one occasion, Cook's father burned his penis with a lit cigarette. *Id.* Cook later lived in a series of group and foster homes where the abuse worsened. *Id.* Cook was chained to a bed naked and raped by a foster parent while other adults watched through a one-way mirror. *Id.* He was also forcibly circumcised while in foster care and subject to further rape and molestation. *Id.* Cook developed a substance abuse problem and was repeatedly hospitalized for depression and suicidal tendencies after trying to kill himself. *Id.*

And yet, because Cook represented himself, much of this evidence was not presented. *Cook*, 2012

U.S. Dist. LEXIS 94363, at *34. At sentencing, Cook told the court "the only sentence I will accept from this Court at this time is the penalty of death, your Honor. I have nothing further." *Id.* at *3 (internal quotations omitted). Cook could not successfully challenge his sentence based on ineffective assistance of counsel because his appointed counsel actually had begun to look into Cook's mental history before Cook began representing himself. *Id.* at *29. Cook's death sentence was upheld even though the prosecutor who had Cook convicted to death supported his clemency, stating that he would not have sought the death penalty against Cook if he had known about his traumatic upbringing. *Id.* at *11.

This Court's decisions in *Rompilla*, *Wiggins*, *Williams*, and *Porter* demonstrate that in extreme cases of ineffective assistance of counsel, reversal may be warranted. But as the case histories of Ferguson and Cook and numerous others demonstrate, post-conviction review cannot protect every insufficiently culpable defendant. Smith, Cull, and Robinson, *supra*. As the varied results of these six cases demonstrate, administration of the death penalty is arbitrary when defense counsel fail to adequately present mitigation evidence. Rompilla, Wiggins, Williams, and Porter managed to have their death sentences reversed on post-conviction review based on successful claims of ineffective assistance of counsel, while Ferguson and Cook were executed. Yet, all six men had serious impairments and did not possess the extreme culpability demanded by the Eighth Amendment. The only difference between the men is that four of them were represented by counsel whose performance was so deficient it met

the legal standard for ineffective assistance of counsel, offering an avenue of relief, while the remaining two were not. When existing mitigation procedures fail, the court is not always able (or willing) to remedy the error and, as a result, offenders with less than extreme culpability receive the death penalty. This arbitrariness threatens the constitutional administration of the death penalty. *Furman v. Georgia*, 408 U.S. 238, 274 (1972) ("[T]he State must not arbitrarily inflict a severe punishment.").

3. The Brutal Nature of a Crime May Mask Insufficient Culpability.

Jurors may often sentence offenders to death where the brutal nature of the crime overshadows any evidence of diminished culpability.[5] *See Simmons*, 543 U.S. at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

This concern is particularly acute for defendants suffering from serious mental illness. Examples of cases where paranoia or delusions cause or influence the commission of a senseless, bizarre or gruesome

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[5] Amici are not arguing that individuals who commit murder have no agency. "[Intellectually disabled] persons frequently know the difference between right and wrong." *Atkins*, 536 U.S. at 318.

capital murder abound, including Kelsey Patterson, a paranoid schizophrenic who shot two people for no apparent reason, went home, stripped off all of his clothes, then walked up and down his street until he was arrested, *Patterson v. Cockrell*, 69 Fed.Appx. 658 (5th Cir. 2003), and Thomas Provenzano, who became so obsessed over his arrest for misdemeanor disorderly conduct that he went to court on his scheduled trial date, dressed in military attire and armed with a 12 gauge shotgun, a .45 caliber assault rifle, and a .38 caliber revolver, and opened fire on court officers, killing one and wounding two more, *Provenzano v. State*, 497 So.2d 1177 (Fla. 1986). It is apparent that, when the jury hears that a severely mentally ill defendant has committed a disturbing and bizarre crime such as these, it is likely that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments … as a matter of course." *Simmons*, 543 U.S. at 573.

4. The Impairments that Render Capital Defendants Less Culpable Often Increase the Likelihood of a Death Sentence

In addition to failing to see past the brutal nature of a crime to consider mitigating evidence, jurors may determine based on that the mitigating evidence itself that a defendant poses is aggravating rather than mitigating, particularly because a defendant may seem more likely to pose a future danger to others—even while incarcerated—and, therefore, choose because of his or her impairments. As a result, the jury will impose the death penalty despite obvious evidence of an impairment and lack

of extreme culpability. *Atkins*, 536 U.S. at 321 (2002) ("Reliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.").

Courts reviewing death sentences have recognized the two-edged nature of many types of mitigating evidence and, as a result, have declined to find counsel ineffective even though they did not discover or present it to the sentencing jury. See, e.g., *Feldman v. Thaler*, 695 F.3d 372, 379-80 (5th Cir. 2012) (reasonable for State court to conclude that trial counsel was not ineffective where failed to investigate mental illness that would have been "'double edged,' demonstrating Feldman's future dangerousness" even if discovered); *St. Aubin v. Quarterman*, 470 F.3d 1096, 1102 (5th Cir. 2006) (finding trial counsel not ineffective for failing to investigate defendant's history of mental illness where counsel testified he was "deeply concerned the jury would be more, not less, inclined to consider St. Aubin a future danger if it were provided this information"); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003)(no ineffective assistance of counsel where attorney failed to present evidence of defendant's organic brain disease, delusional disorder and severely psychosis because it would have demonstrated he was a continuing threat to society); *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995) (defendant was not denied effective assistance by trial counsel's failure to discover and present evidence that petitioner was reared in violence-ridden and abusive home, and that he was mentally

impaired because evidence could establish he was a continuing threat to society).

This prejudice—while perhaps understandable—impairs the ability of the jury to reliably assess the culpability of an offender. A death sentence may be entered despite—or in some cases, because of—mitigating evidence demonstrating that the individual had diminished culpability in the commission of the crime.[6]

5. The Existing Categorical Exclusions For Juvenile and Intellectually Disabled Offenders Are Too Narrow.

The existing exemptions for intellectually disabled and juvenile offenders are inadequate. Even when properly presented and considered by a jury, the categories do not actually exclude all offenders with diminished culpability due to

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[6] As this Court has recognized, evaluating the culpability of an offender instead of responding to the brutality of a crime sometimes results in an arbitrary administration of the death penalty relative to the egregiousness of the crime. Some offenders who commit brutal crimes are executed, while "[s]ome of [the Court's] most 'egregious' cases have been those in which [the Court has] granted relief based on an unfounded Eighth Amendment claim." *Glossip v. Gross*, 135 S. Ct. 2726, 2753 (2015) (Thomas, C., concurring). There are two guaranteed ways to eliminate this arbitrariness: a mandatory death penalty or elimination of the death penalty. This Court has already held that a mandatory death penalty is unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

intellectual disability or youth. The exclusion for intellectually disabled offenders relies largely on the clinical definition of intellectual disability: "[C]linical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[7] *Atkins*, 536 U.S. at 318. While states cannot rely solely on a fixed IQ score to conclusively determine death eligibility, the first prong of intellectual disability—subaverage intellectual functioning—requires an IQ test. *Hall*, 134 S. Ct. at 1994. An IQ score of 70 or less is indicative of intellectual disability. *Id.* An IQ score between 71 and 84 is categorized as borderline intellectual functioning. AM. PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 684 (4th ed. 1994). The difference in terms of culpability between an offender with an IQ score that renders him intellectually disabled, and therefore categorically exempt from the death penalty, and an offender with borderline intellectual functioning is often negligible. AM. PSYCHIATRIC ASS'N, DSM-5 INTELLECTUAL DISABILITY FACT SHEET 1-2 (2013). The categorical exclusion, therefore, creates an arbitrary line as to culpability. Both intellectually disabled offenders and offenders with borderline intellectual functioning likely possess diminished culpability relative to the typical adult.

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[7] *Atkins* did not explicitly adopt the clinical definition of intellectual disability and rather left it to the States to "develop appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. at 317.

Neither, therefore, should be subject to the death penalty.

In other cases, Courts refuse to apply the categorical exemption for intellectual disability despite evidence of the same. In *Lane v. Alabama*, the trial court held that Anthony Lane was not intellectually disabled because he was "functioning relatively on his own, with little day-to-day supervision" and "was able to write and read and put words together in a coherent matter, consistent with the prevailing rap tunes that are out there today in this world." 169 So. 3d 1076, 1091 (Ala. 2013). Specifically, the trial judge:

> "[Placed] a lot of weight on how this crime was committed. What it took to commit the crime. The observation of the victim. The ability to wait and stalk him, basically. And the way the offense was committed. And the motive behind. Which in my mind, was clearly to rob Mr. Wright of his money and possibly the vehicle. But I think it was robbing Mr. Wright of his money that was the main motive behind this senseless killing."

Id.

In concluding that the defense failed to show by a preponderance of the evidence that Lane was

intellectually disabled, the trial court discounted unrefuted evidence by a clinical neuropsychologist. *Id.* This evidence showed that Lane had a full-scale IQ of 70 and "had deficits in the following areas of adaptive functioning: communication, functional academics, self-direction, leisure activities, social skills, community use, home living, health and safety, and self care." *Lane*, 169 So. 3d at 1089-90. Despite this uncontroverted evidence that Lane had a significant impairment that reduced his culpability, the appeals court held that the trial court did not abuse its discretion when it determined that Lane was not intellectually disabled.[8] *Id.* at 1094.

The third prong of the clinical definition of intellectual disability—manifest before age 18—also creates an arbitrary line. Offenders who are diagnosed with an intellectual disability before the age of 18 are excluded from the death penalty whereas offenders who are never specifically evaluated for intellectual disability prior to age 18 may be sentenced to death. For example, Michael Stallings presented evidence, via an expert witness, that he had subaverage intellectual functioning and also significant limitations in adaptive skills. *Stallings v. Bagley*, 561 F. Supp. 2d 821, 881 (N.D. Ohio 2008). The expert waivered as to whether Stallings satisfied the third prong of the clinical definition of intellectual disability used by Ohio

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[8] Lane ultimately had to file a petition with this Court in order to have his sentence administered consistent with the standards of *Hall v. Florida*. *See*, *Lane v. Alabama*, 136 S.Ct. 91 (2015).

because he was never specifically evaluated for intellectual disability prior to age 18. *Id.* The state's expert not only agreed with Stallings' expert, he opined that it was more likely than not that Stallings satisfied all three prongs of the definition of intellectual disability. *Id.* at 882-83. The state court rejected both experts' testimony and concluded that Stallings had not proven it was more likely than not that his condition began prior to age 18.[9] *Id.* at 883-84; *see also Commonwealth v. Vandivner*, 962 A.2d 1170, 1186 (Pa. 2009) (defendant failed to establish intellectual disability because he did not have any IQ scores from his childhood).

Similarly, the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Simmons*, 543 U.S. at 574. Brain development continues past the age of eighteen, particularly in the frontal lobes that control judgment, impulse control, the appreciation of consequences, empathy, and responsibility. *Id.* at 569-70, 573; citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992); see also Lawrence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death*

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[9] Stallings' death sentence ultimately was reversed on the grounds of ineffective assistance of counsel during the penalty phase unrelated to his intellectual disability. *Stallings*, 561 F. Supp. 2d at 877. Given the standard of review, however, the district court felt that it had to defer to the state's court's determination that Stallings was not intellectually disabled, although it did so "reluctantly." *Id.* at 884.

Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). Despite minimal differences in the characteristics that influence culpability between them, a seventeen year old offender is categorically exempt from the death penalty while an eighteen year old is not. For example, Richard Cobb, like the Petitioner in this case, was just past his eighteenth birthday when he committed murder. TEX. DEP'T OF CRIMINAL JUSTICE, *Offender Information – Richard Aaron Cobb*, https://www.tdcj.state.tx.us/death_row/dr_info/cobbrichard.html (last visited February 19, 2016). He had not completed high school and had only an eleventh grade education. *Id.* Cobb also had a history of mental illness and emotional problems. *Cobb v. Thaler*, No. 2:08—123, 2011 U.S. Dist. LEXIS 14885, *16-17, 2008 WL 672333 (E.D. Tex. Feb. 25, 2011). Despite the presence of numerous indicia that Cobb did not have the same level of culpability as an average adult, much less the extreme culpability required for the death sentence, the state of Texas executed him on April 25, 2013. TEX. DEP'T OF CRIMINAL JUSTICE, *Last Statement – Richard Aaron Cobb*, https://www.tdcj.state.tx.us/death_row/dr_info/cobbrichardlast.html (last visited February 19, 2016). Even though he was no more mature at the time he committed his crime, he would have been categorically excluded from execution had he been born six months later.

C. The Court Should Grant Review of the Petition and Address the Constitutionally Deficient Administration of the Death Penalty.

As Justice Stevens recently explained, the mechanisms intended to protect those with lesser moral culpability from the death penalty simply do not work. R. Sanger, *CACJ'S Past President Robert Sanger interviews United States Supreme Court Justice John Paul Stevens*, California Attorneys for Criminal Justice, February 21, 2016, available at http://www.cacj.org/Resources/Educational-Video-Archive/Interview-with-Justice-Stevens.aspx.

Amici acknowledge that not all individuals sentenced to death should be exempted due to an impairment that limits their culpability and indeed, some number may have moral culpability sufficient to warrant execution. But this acknowledgment does not trump the continued sentencing and execution of people with crippling functional deficits.

"[D]eath as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187. The Eighth Amendment prohibition on "cruel and unusual punishment," therefore, applies to the death penalty, therefore, with "special force." *Simmons*, 543 U.S. at 568. While Amici firmly believe that jurors and judges are of good faith and purpose, experience demonstrates that ensuring adequate culpability in capital cases taxes, and in many cases, exceeds human capabilities. "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall*, 134 S. Ct. at 1992.

The Court should exercise its independent judgment to determine whether the death penalty still reflects those aspirations.

IV. CONCLUSION

For the reasons discussed above, Amici respectfully request that the Court grant Petitioner's Petition for a Writ of Certiorari and accept review of this matter.

Respectfully submitted,

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APPENDIX

Amici Curiae

Harry Lee Anstead

Chief Justice Harry Lee Anstead was appointed to the Florida Supreme Court on August 29, 1994 and advanced to the highest judicial office in state government on July 1, 2002, when he became Florida's 50th Chief Justice. Prior to that, Chief Justice Anstead had been a judge of the Fourth District Court of Appeal since 1977, where he served as Chief Judge and from time to time as a circuit and county judge throughout the district. Chief Justice Anstead retired on January 5, 2009.

Pascal F. Calogero, Jr.

Chief Justice Pascal F. Calogero, Jr. of the Louisiana Supreme Court, retired, was elected to the Louisiana Supreme Court in 1972, and sworn in as Supreme Court Chief Justice in 1990. In December of 1994, Chief Justice Calogero was appointed by U. S. Supreme Court Chief Justice William H. Rehnquist to the Advisory Committee on Appellate Rules of the Judicial Conference of the United States, and, in 1995, he commenced serving on the National Center for State Courts Time on Appeal Advisory Committee. In 1997, he was elected to the Board of Directors of the Conference of Chief Justices. Chief Justice Calogero retired in 2008.

Oliver Diaz

Justice Oliver Diaz was elected to the Court of Appeals in November 1994 and served in that position until March 2000, at which time he was appointed to the Supreme Court by Governor Ronnie Musgrove. In 2000, he was elected to the Supreme Court for an eight year term beginning January 2001.

Stanley Feldman

Chief Justice Stanley Feldman served as an Arizona Supreme Court Justice for 21 years (1982-2002), including a five year term as Chief Justice (1992-1996). During his term as Chief Justice, he was active in the National Center for State Courts and the Conference of Chief Justices, and he served on the CCJ Board from 1993 through 1996. He retired from the Court in 2002. He currently serves as of counsel for Haralson, Miller, Pitt, Feldman & McAnally, P.L.C. in Tucson, Arizona.

Norman Fletcher

Chief Justice Norman Fletcher served as a Justice on the Georgia Supreme Court from 1990-2005, including a term as Presiding Justice from 1995-2001 and Chief Justice from 2001-2005. He retired from the Court on June 30, 2005.

Karla Gray

Chief Justice Gray was appointed to the Montana Supreme Court in 1991, and elected to her seat in

1992 and again in 1998. She ran successfully for Chief Justice in 2000. She is a member of the Board of Directors of the Conference of Chief Justices and the American Judicature Society, as well as a Fellow of the American Bar Foundation and a member of the National Association of Women Judges.

Joseph Grodin

Justice Joseph Grodin was appointed Associate Justice of the California Court of Appeal in 1979; in 1981, he was elevated to presiding justice of that court, and in 1982 was appointed Associate Justice of the California Supreme Court, a position he held until January 1987.

Gerald Kogan

In 1980 Justice Gerald Kogan was appointed a circuit judge in Florida's Eleventh Judicial Circuit. In 1984 he was appointed administrative judge of the Criminal Division, and he served in that capacity until his appointment to the Florida Supreme Court in January 1987. Justice Kogan retired from the Court on December 31, 1998.

Sol Wachtler

Chief Justice Sol Wachtler was appointed to the New York Supreme Court in 1968 and elected to the New York Court of Appeals in 1972 where he served as an associate judge and later Chief Judge until 1992.

Penny White

Justice Penny White served as a judge at every level of the court system in Tennessee, serving as the first female Circuit Judge in the First Judicial District from 1990 to 1992 and the second woman to serve on the Tennessee Court of Criminal Appeals from 1992 to 1994, and the Tennessee Supreme Court from 1994 to 1996.