No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KELLY RENEE GISSENDANER

Petitioner,

v.

BRUCE CHATMAN, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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-CAPITAL CASE-

QUESTIONS PRESENTED

1. Have societal standards of decency evolved to the point that the Eighth and Fourteenth Amendments now prohibit the execution of a capital defendant who did not physically participate in the murder of her victim?

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Ms. Gissendaner respectfully petitions this Court to review the decision of the Supreme Court of Georgia denying review of a final judgment rendered by the Superior Court of Butts County, Georgia, and to require adherence to the strictures of the Eighth and Fourteenth Amendments to the United States Constitutions and this Court's decisions in *Gregg v. Georgia,* 428 U.S. 153 (1976), *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Atkins v. Virginia,* 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

I. JURISDICTION AND LOWER COURT OPINION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The final judgment and decree rendered by Supreme Court of Georgia on September 29, 2015, denying Petitioner's Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County is filed as Appendix A hereto. The unpublished opinion of the Superior Court of Butts County, Georgia, dismissing the Petition for a Writ of Habeas Corpus, entered on September 29, 2015, appears as Appendix B. The decision of the Supreme Court of Georgia affirming Petitioner's conviction and sentence of death appears as Appendix C.

II. CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. AMENDMENT VIII;

The Fourteenth Amendment to the United States Constitution:

> [N]o State shall…deprive any person of life [or] liberty…without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. AMENDMENT XIV.

III. STATUTORY PROVISIONS INVOLVED

The Official Code of Georgia Annotated § 9-14-42(a) (2011):

> Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute a proceeding under this article.

The Official Code of Georgia Annotated § 9-14-51 (2011):

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

IV. STATEMENT OF THE CASE

A. Introduction

If executed, Kelly Gissendaner will be the only non-trigger person in the State of Georgia to have been executed in the era of the modern death penalty. If executed, she will be the only alleged contract killer in the State of Georgia to have been executed in the era of the modern death penalty. If executed, she will be the only person who was not present when the victim was killed to have been executed in the era of the modern death penalty. The mechanisms in place to protect against arbitrary, capricious or discriminatory winnowing of defendants convicted of crimes punishable by death have failed Ms. Gissendaner.

Nationally only ten people have been executed who were not the trigger person in the modern death penalty era. Of those ten, seven of the trigger-person co-defendants were executed.[1] Thus the United States has only executed **three** non-trigger persons whose co-defendants got lesser sentences in the modern death

[1] *See* Death Penalty Information Center, *Those Executed Who Did Not Directly Kill the Victim: Contract Killings* (2015), *available at* http://www.deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim.

penalty era.[2] Similarly, only ten people who have allegedly contracted to kill their victim have been executed during the modern death penalty. In most of those cases, the actual killer received a death sentence or died prior to execution.[3] Ms. Gissendaner would be only the fifth person in the nation in nearly forty years to face execution for a murder in which she did not physically participate and for which the actual killer did not receive a death sentence.[4]

Because a national consensus has developed against the execution of offenders who did not physically murder their victims, Ms. Gissendaner's execution would not comport with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). Such standards are the barometer by which society judges whether a punishment is cruel and unusual within the meaning of the Eighth Amendment. *Id.*

B. Procedural History

On April 30, 1997, a grand jury in Gwinnett County, Georgia, issued a two count indictment charging Petitioner Kelly Gissendaner and a codefendant, Gregory Owen, with malice murder and felony murder. The victim was

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[2] The three men executed were Doyle Skillern in 1985, Steven Hatch in 1996, and Robert Thompson in 2009. Doyle Skillern was an accomplice in the murder of an undercover narcotics agent. He was waiting in a car nearby when the murder happened. Steven Hatch and his co-defendant tied up a family of four, made the parents and sixteen year old son listen as they raped the twelve year old in the next room, ate dinner and talked about what they were going to do to the family, and then the co-defendant shot the family. Robert Thompson shot one of the two victims, but the victim survived. Ms. Gissendaner's case bears no resemblance to any of these.

[3] *See id.*

[4] *See id.*

Petitioner's husband, Douglas Gissendaner. Owen accepted a plea offer to life in prison with a contract not to seek parole for twenty-five years and testified against Petitioner. Petitioner went to trial in November 1998, was convicted of malice murder and felony murder and was sentenced to death.

Petitioner appealed. The Georgia Supreme Court affirmed her conviction and sentence on July 5, 2000. *Gissendaner v. State*, 272 Ga. 704, 532 S.E.2d 677 (2000). Her motion for reconsideration was denied on July 28, 2000. Petitioner's timely filed petition for a writ of certiorari in this Court was also denied. *Gissendaner v. Georgia*, 531 U.S. 1196 (2001).

In December 2001, Petitioner filed a petition for writ of habeas corpus pursuant to O.C.G.A. § 9-14-1, et seq., in the Superior Court of DeKalb County, Georgia. The court denied relief on February 16, 2007. A timely filed application for a certificate of probable cause to appeal with the Georgia Supreme Court. That application was denied on November 3, 2008. *Gissendaner v. Williams*, Case No. S07E1490.

Ms. Gissendaner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia on January 9, 2009. She requested discovery and an evidentiary hearing. The district court denied both requests. The court denied Ms. Gissendaner's petition for writ of habeas corpus on March 21, 2012. *Gissendaner v. Seabolt*, Case No. 1:09-cv-69-TWT, 2012 WL 983930. She filed a motion for reconsideration, which the district court also denied.

On November 19, 2013, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief. *Gissendaner v. Seabolt*, 735 F.3d 1311 (11th Cir. 2013). On January 21, 2014, Ms. Gissendaner's timely-filed Petition for Rehearing and Rehearing En Banc was denied. Ms. Gissendaner petitioned this Court for a writ of certiorari on June 20, 2014. That petition was denied on October 6, 2014. *Gissendaner v. Seabolt*, 135 S. Ct. 159 (October 6, 2014).

On February 9, 2015, the Superior Court of Gwinnett County issued a warrant for Petitioner's execution during a time period beginning on February 25, 2015 and ending on March 4, 2015. Following a hearing held February 24, 2015, the Georgia Board of Pardons and Paroles denied Ms. Gissendaner's petition for executive clemency on February 25, 2015. The Department of Corrections then rescheduled Ms. Gissendaner's execution for the night of March 2, 2015 due to predictions of inclement weather.

At around 10:19 p.m. on the night of her would-be execution, the Department of Corrections abruptly halted her execution because the drugs that they had intended to use appeared "cloudy." The warrant for her execution expired on March 4.

On September 18, 2015, the Superior Court of Gwinnett County issued a new execution warrant for Ms. Gissendaner which designated that she is to be executed between September 29, 2015 and October 6, 2015. The Department of Corrections then scheduled Ms. Gissendaner's execution for 7:00 P.M. tonight,

September 29.

On September 29, 2015, immediately after the Georgia Board of Pardons and Paroles denied her executive clemency for a second time, Petitioner filed the instant action in the Superior Court of Pulaski County. Because Ms. Gissendaner had already been transferred to Georgia Diagnostic Prison in Butts County, her habeas petition was transferred to Superior Court of Butts County. The Superior Court denied relief in a one page order on September 29, 2015. Petitioner immediately filed a Notice of Appeal.

On September 29, 2015, the Georgia Supreme Court denied Ms. Gissendaner's Certificate of Probable Cause to Appeal. This Petition follows.

Ms. Gissendaner's execution is currently scheduled to proceed at 7:00 PM this evening, September 29, 2015. A Motion for a Stay of Ms. Gissendaner's execution accompanies this filing.

C. The Crime

Both Kelly Gissendaner and Gregory Owen were convicted of murdering Douglas Gissendaner. Ms. Gissendaner has accepted responsibility and expressed deep remorse for her role in planning and assisting in her husband's murder. The evidence is unambiguous: both Owen and Ms. Gissendaner took steps which led to the murder, but it was Owen who killed Mr. Gissendaner.

On February 7, 1997, Owen killed Douglas Gissendaner in a remote section of the woods in north Georgia. Petitioner's role consisted of proposing the crime and providing Owen with an opportunity to carry it out. TT. 2273-75. On the

night of the murder, she dropped Owen off at the home she shared with her husband. *Id*. at 2278. She then left the house and went out with friends for the night. *Id*.

Owen lay in wait for Mr. Gissendaner for several hours.[5] When Mr. Gissendaner arrived home, Owen held a knife to Mr. Gissendaner's neck, forced him into a car, and directed him to drive to a remote location off of Luke Edwards Road. *Id*. at 228-85. When they arrived, Owen marched Mr. Gissendaner into the woods. *Id*. at 2292. After walking approximately 300 – 500 feet, Owen instructed Mr. Gissendaner to stop. At any point during the course of this multi-hour plot, Greg Owen could have extricated himself. Instead, he plowed forward.

Owen took Mr. Gissendaner's watch and wedding band so that it would look like he had been robbed. *Id*. at 2294-95. Owen made Mr. Gissendaner kneel on the ground. He hit Mr. Gissendaner with the night stick in the back of the head, incapacitating him. *Id*. at 2297. Mr. Gissendaner fell forward onto the ground. Owen put the nightstick back in his pants and "took the knife and I stabbed him" in his neck "maybe eight or ten times." *Id*. at 2298-99.

Petitioner later returned home and paged Owen with a numeric signal before driving to the area where Owen had murdered her husband. Owen burned Mr. Gissendaner's car with kerosene, then he and Petitioner returned to their respective homes. Owen threw the nightstick and knife, the jeans he was

[5] Greg Owen testified in state habeas proceedings that, unbeknownst to Ms. Gissendaner, he recruited a third person to assist him in the abduction and murder of Mr. Gissendaner. That third person has never been identified by Mr. Owen nor arrested.

wearing, and Mr. Gissendaner's jewelry into the trash. *Id.* at 2309-11.

Gregory Owen had many choices to make on February 7, 1997, over the course of the hours, minutes, and seconds he spent waiting for Mr. Gissendaner, kidnapping him at knifepoint, traveling with him in his car, walking him into the woods, and then killing him with his bare hands. But for Owen's choices and Owen's actions, Mr. Gissendaner would not have been murdered. The last person who could have prevented Douglas Gissendaner's murder is Gregory Owen. Given Owen's actions, especially when compared to Ms. Gissendaner's actions, Ms. Gissendaner's death sentence can only be considered disproportionate.

V. REASONS FOR GRANTING THE WRIT

A. The Eighth Amendement Does Now Prohibit the Execution at ____ Who Did not Participate in Killing Their Victim

When this Court upheld the constitutionality of the death statute in *Gregg v. Georgia* in 1976, its holding was premised on three major factors, one of which was that the Georgia Supreme Court engage in proportionality review of cases in which death could potentially be imposed, to ensure that, when looking at both aggravating and mitigating factors, death sentences were being meted out in an even-handed fashion. *Gregg v. Georgia*, 428 U.S. 153 (1976). While a proportionality review is not constitutionally required where it is not part of the state's statutory scheme for fair imposition of the death penalty, *Pulley v. Harris*, 465 U.S. 37 (1984), in Georgia, this review **is** such a statutory requirement, and was one of the pillars of reliability in sentencing used by this Court to uphold the Georgia death statute. *Id.;* O.C.G.A. § 17-10-35 (c)(3).

Where the Georgia Supreme Court has previously found death to be comparatively inappropriate, it has reduced the sentence to life imprisonment. The court has noted that it "will not affirm a sentence of death unless in similar cases throughout the state the death penalty has been imposed generally and not wantonly and freakishly." *Horton v. State,* 295 S.E. 2d 281, 289 (Ga. 1982).

The full panoply of cases and the charges in contemporary community standards that demonstrate society's clear directive that people who do not physically participate in their victims' murders should not be executed was not available until now. Over the seventeen years between the time that a jury sentenced Ms. Gissendaner to death and the date that the state sought her execution, it has become abundantly clear that society simply does not tolerate the execution of people who were neither the person who committed the actual murder nor present at the time. This intervening evolution in the law places Petitioner's case outside of the restrictions on successive habeas petitions found in O.C.G.A. § 9-14-51. *See State v. Cusack,* 296 S.E.2d 534 (Ga. 2015) ("a claim that could not reasonably be raised in an earlier petition would likely include the circumstance in which a change in the law after the first petition might render a later challenge successful").

The death penalty is constitutionally permissible only if the class of defendants who face death is genuinely narrowed throughout the process. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972); *Zant v. Stephens*, 462 U.S. 862 (1983). There are safeguards at each stage of the process to ensure that the

defendant who is ultimately executed is similarly situated to others who have been executed. Sometimes that process fails, as it did here.

A. The Evolving Standards of Decency

Murder alone is not constitutionally sufficient to warrant the use of the death penalty. "The culpability of the average murderer is insufficient to justify the most extreme sanction available to the State." *Atkins v. Virginia*, 536 Ct. 319. Crimes for which the offender is executed must fall within that narrow class of murders "more horrid than others." *Thomason*, 268 Ga. 298, 315, 486 S.E.2d 861 (Ga. 1997) (Benham, C.J. concurring in part and dissenting in part); *see also Roper,* 543 U.S. 551. When the crime falls outside this core class of the most abhorrent murders, a death sentence cannot be carried out. OCGA 17-10-35(c)(3); *Enmund v. Florida,* 458 U.S. 782, 798 (1982).

Courts must analyze the specific characteristics of the crime. "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010) (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)). "As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560 (internal citations omitted). Many crimes fall into the class of severe or aggravated crimes, yet they never merit the imposition of a death sentence. *See, e.g., Kennedy v. Louisiana*, 433 U.S. 407 (2008) (banning the death penalty for brutal rape of a child).

As this Court has made clear, contemporary community standards inform any Eighth Amendment analysis, and a national consensus against executing a certain class of people is highly relevant to the determination of who should face the execution chamber. A link between "contemporary community values" and the criminal justice system must exist. *Gregg,* 428 U.S. at 190. Without such a connection, "the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 190 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968) and *Trop v. Dulles*, 356 U.S. at 101.

Across the state and the nation, prosecutors, juries, judges and clemency boards have expressed the conscience of the community: people who did not directly kill their victims are not being executed for their crimes. These are not "the worst of the worst" offenses for which the death penalty is reserved.

Justice Breyer recently addressed the evolution of the death penalty in detail in his dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2755, using data found on the Death Penalty Information Cite that supports the argument that the use of the death penalty as an appropriate sentence is in decline. "[T]he direction of change is consistent. In the past two decades, no State without a death penalty has passed legislation to reinstate the penalty. *See Atkins, supra*, at 315–316; DPIC, States With and Without the Death Penalty, *supra*. Indeed, even in many States most associated with the death penalty, remarkable shifts have occurred. In Texas, the State that carries out the most executions, the number of executions

fell from 40 in 2000 to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015). DPIC, Executions by State and Year." *Id.* at 2774.

One of the three key reasons that Justice Breyer argued that the death penalty is cruel is because it is arbitrarily imposed, failing to meaningfully distinguish between the worst of the worst crimes and killers while at the same time being improperly influenced by factors relating to race, gender, geography, disparities in the exercise of prosecutorial discretion, insufficient resources to represent capitally charged inmates, and political pressures on elected judges. Specifically he noted:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) **arbitrariness in application**, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

Id. at 2755-56 (emphasis added).

This trend, noted by Justice Breyer, continues to move toward complete abolition of the death penalty. In February of this year, the Governor of Pennsylvania declared a moratorium on the death penalty in that state until issues involving the high error rates in capital cases could be resolved.[6] Then in

[6] CNN, "Pennsylvania Governor Halts Death Penalty While 'Error Prone' System

May 2015, Nebraska through legislation, abolished the death penalty for that state.[7] Finally, on August 14, 2015, Connecticut's Supreme Court overturned the death penalty.[8] Connecticut's Governor had previously signed a bill in 2012 that abolished the death penalty, but inmates already on death row were considered exempt from the law and it was not until the Supreme Court acted that it was clear Connecticut would no longer execute anyone. These are only the states that have abolished the death penalty this year. In the past 10 years, 5 states have abolished the death penalty bringing the total to 19[9]. The trend is clear: the death penalty is no longer an appropriate sentence, particularly in cases where the defendant did not commit the actual murder.

The nature of the evolving standards of decency is that punishments that were once thought to be constitutional and proportionate are no longer viewed as such due to a change in contemporary standards. In *Coker v. Georgia,* 433 U.S. 584, (1977), this Court held that the state may not impose a death sentence upon a rapist who did not take a human life. In *Kennedy*, 128 S. Ct. 264, the Court held that this was true even when the rape victim was a child. In *Coker*, the Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime

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Reviewed," cnn.com, Feb. 14, 2015.

[7] Julie Bosman, "Nebraska Abolishes the Death Penalty," nytimes.com, May 27, 2015.

[8] http://www.cnn.com/2015/08/13/us/connecticut-death-penalty.

[9] New York (2007), New Jersey (2007), New Mexico (2009), Illinois (2011), Maryland (2013). www.deathpenaltyinfo.org/states-and-without-death-penalty.

committed. A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker*, 433 U.S. at 592. In order that judgment not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions...." *Id.* While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public." *Id.* at 598.

In *Kennedy*, the Court found that both "evolving standards of decency" and "a national consensus" preclude the death penalty for a person who rapes a child. 128 S. Ct. 2649, 2653. The Court noted that, since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an

area where a failed experiment would result in the execution of individuals undeserving of the death penalty. **Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.**" Id. at 2661 (emphasis added).

Applying the *Coker* analysis, the Court ruled in *Enmund* that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. While a few more States imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus similarly opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because the death penalty is a likely deterrent only when murder is the result of premeditation and deliberation, and because the justification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and not as a result of his own intention serves neither of the purposes underlying the penalty. In *Tison v. Arizona*, however, the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the

Enmund culpability requirement." *Tison*, 481 U.S. 137, 158 (1987). Petitioner asserts that, as is evidenced by the number of states who no longer execute persons with *Tison* sentences coupled with the number of states that have moved away from the death penalty completely, this consensus no longer exists.

Because Kelly Gissendaner did not carry out the robbery, beating and brutal murder of Doug Gissendaner, her execution would be a constitutionally intolerable event. As will be shown below, society has now determined that Petitioner's crime does not fall in the class of offenses so "extreme" that society has deemed them the "most deserving of execution." *Kennedy*, 430 U.S. at 420.

B. Both National and State Consensus Hold That Persons In Cases Similar To Ms. Gissendaner's Do Not Get Executed.

Of the 1414 individuals who have been executed nationally over the course of the modern death penalty era, the overwhelming majority were the actual killers. *See* Death Penalty Information Center (DPIC), http://www.deathpenaltyinfo.org /documents/ FactSheet.pdf. By contrast, a mere 20 of those executed did not (or may not have) directly killed the victims in their cases. *Id.* Further, even among those who were not the so-called "trigger person" or whose level of culpability as compared with a co-defendant or co-defendants was ambiguous, the crimes and/or the defendants are, once again, more aggravated than those in the instant case. In most of those cases, the actual killer received a death sentence or died prior to execution.[10]

[10] *See id.* (noting the outcomes in the following cases: (1) Anthony Antone, whose co-defendant committed suicide; (2) Mark Hopkinson, whose co-defendant died

In Georgia, no similarly situated persons have been executed in the modern death penalty era: no non-trigger persons, no alleged contract killers, no persons who were not present when victim was killed. To the contrary, cases with facts similar or more egregious than Ms. Gissendaner's have routinely ended up with sentences of life or less. For example:

In *Miller v. State*, 485 S.E. 2d 752 (Ga. 1997), Laneika Thomas hired Jamel Miller to kill her husband, Larry Thomas. Ms. Thomas drafted a written contract in which she agreed to pay Miller $1500 to kill her husband. Miller shot Larry Thomas ten times in the back. The State did not seek death against her.

In *Broomall v. State*, 391 S.E. 2d 918 (Ga. 1990), Ms. Broomall conspired with Cecil Booher to murder her husband in order to obtain life insurance. They agreed to make the crime look like a robbery by taking some of his possessions. Broomall and Booher orchestrated the crime together. Broomall agreed to pay Booher $25,000 from the insurance policy. The State did not seek death against her.

Only three persons have been executed in Gwinnett in the modern death penalty era, and each of those cases were far more aggravated than Ms.

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before questioning; (3) Markham Duff-Smith, whose co-defendant was executed; (4) Marilyn Plantz, one of whose co-defendants was executed; (5) Clarence Ray Allen, whose co-defendant received a death sentence, but died while incarcerated; (6) Gregory Lynn Summers, whose co-defendant received a death sentence; (7) Bearford White (both defendant's executed), (8) G. W. Green, shooter executed, (9) William Andrews (shooter executed), (9) Williams Andrews (shooter executed), (10) Callos Santana (executer executed), (11) Jessie Guttierrez (shooter executed), and (12) Gregory Desnover (shooter executor).

Gissendaner's.

- James Willie Brown, who raped his victim while she suffocated to death on her panties. *Brown v. State*, 250 Ga. 66, 71-72 (1982). The underwear were stuffed so far down her throat that they were not discovered until well into her autopsy. Id. Brown was executed in 2003.

- Tracey Housel, who went on a two-month crime spree in 1985, killing a man in Texas, stabbing a man in Iowa, sodomizing a New Jersey woman, and, finally, beating a woman to death in Gwinnett County. *Housel v. State*, 275 Ga. 115 (1987). He was executed in 2002.

- Buddy Earl Justus, who raped and murdered a woman who was 8.5 months pregnant in Virginia, raped and murdered a 32-year-old woman in Georgia, and raped and murdered a woman who was on the way to her son's birthday party in Florida – all during a short period of time in 1978. Justus received the death penalty for all three murders, and he was executed by the commonwealth of Virginia in 1990. *See Associated Press, Man who killed 3 women dies in Virginia electric chair*, New York Times, December 15, 1990; *see also Justus v. State*, 247 Ga. 276 (1981); David Staba, Serial killer lived quiet life in falls, saved sadistic lifestyle for weekends, Niagara Falls Reporter, August 5, 2003.

When defendants are equally culpable, or when all defendants are present at the site of the murder but it is unclear who actually committed the murder, co-defendants in Georgia regularly receive the same sentence.

- In *Solomon v. State*, the evidence showed that Van Roosevelt Solomon and Brandon Jones robbed a gas station, in the course of which they murdered the manager by shooting him five times. 247 Ga. 27, 27-28, 277 S.E.2d 1(1980). When the police found the victim, they discovered two guns lying near the body, both of which had been fired. *Id.* at 28. Testing revealed that both Solomon and Jones had recently fired a weapon. *Id.* Both men received death sentences. *Id.* at 27.

- In *Moore v. State*, Carzell Moore and Roosevelt Green kidnapped, raped, and murdered a young woman. 240 Ga. 807, 808-09, 243 S.E.2d 1 (1978). Although Moore fired the shot that killed the victim, Green participated in the kidnapping, initiated the rape of the victim, and assisted with the disposal of her body. *Id.* at 809. Both men

received death sentences. *Id.*; *see also Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980).

- The evidence in *Burger v. State* demonstrated that Christopher Burger and Thomas Dean Stevens hijacked and robbed a cab driver. 242 Ga. 28, 28-29, 247 S.E.2d 834 (1978); *see also Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978). Stevens raped the victim, and they stuffed him into the trunk of his cab. *Id.* at 28. The two men drove the cab into a pond, where the victim drowned. *Id.* at 29. Thomas Stevens was executed on June 29, 1993, and Christopher Burger was executed on December 7, 1993.

In this case, it is undisputed that Kelly Gissendaner was not present at the scene of the murder. She merely provided Greg Owen with a window of opportunity, and he carried out the killing of Doug Gissendaner. In contrast to this case, people who are not present when their victims are killed are regularly sentenced to life, either by a jury or pursuant to a plea agreement. This holds true even when the non-killer's involvement is much more sinister or substantial than Ms. Gissendaner's.[11]

For instance, in 1992, Fred Tokars arranged to have his wife, Sara Tokars,

[11] In the rare case where trial sentences result in an imbalance in culpability, the appellate and post-conviction processes seek to correct the imbalance. For example, Rebecca Smith (a/k/a Machetti) and her second husband John Smith (a/k/a Anthony Machetti) devised a plan to murder Rebecca's first husband, John Adkins, and his wife. *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (Ga. 1976). At trial, the state asserted that the motive was to collect on insurance policies that Rebecca had taken out while she and John Adkins were married, for which she and her daughters were still the beneficiaries. *Id.* at 311. John and an accomplice lured the Adkinses to a secluded area of a housing development and shot them both at close range. *Id.* Rebecca was not present at the scene of the murder. *Id.* Rebecca Smith/Machetti was nevertheless sentenced to death. *Id.* However, she received relief on appeal and was retried. At her retrial, she received two life sentences. In 2010, she was released on parole.

murdered. *U.S. v. Tokars*, 95 F.3d 1520 (11th. Cir. 1996). He planned the murder for about four months, offering to pay one of his drug-dealing associates $25,000 plus a portion of the proceeds of Sara's $1.75 million-dollar life insurance policy to murder her. *Id.* at 1528. Tokars's associate hired a third party, Curtis Rowar, to murder Sara Tokars. *Id.* Rowar shot Sara in front of her two children as they were returning from their Thanksgiving trip. *Id.* at 1528-29. Tokars was sentenced to life in prison. *Id.* at 1524.

In addition, defendants who are physically present for the murder of the victim, but do not themselves commit murder, tend to receive life sentences. Several cases are illustrative: Timothy Carr and Melissa Burgeson plotted and carried out the murder of a 17-year-old acquaintance, Keith Young. *See Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997). Carr, Burgeson, and Young attended a party together, after which Burgeson took Young's car keys and convinced him to allow her to drive him home. *Id.* at 548. She stopped the car on a dirt road, and when Young exited the vehicle, she "motioned to Carr to kill him." *Id.* Carr slashed Young's throat, and "[a]t Burgeson's urging, Carr stabbed the victim repeatedly and then beat him in the head with a baseball bat." *Id.* Carr and Burgeson fled to Tennessee, and the police arrested them following a high-speed chase. *Id.*

At trial, the prosecutor argued that Burgeson was the moving force behind the murders, and Carr was nothing but her puppet, just as they did in Ms. Gissendaner's case. However, Melissa Burgeson was sentenced to life.

Like Burgeson, John Brown was present when John Alderman murdered his wife, but did not physically complete the murder. Brown did not receive a death sentence. *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978). Alderman approached Brown about murdering his wife, Barbara, telling Brown that he would split the proceeds of her life insurance policy if Brown assisted with the murder. *Id.* at 497. When Brown arrived at Alderman's house, Brown hit Barbara Alderman with a wrench, and Alderman then tackled her. *Id.* The men strangled or suffocated her, and after she passed out, Alderman dragged her body to the bathroom, put her in the bathtub, and drowned her. *Id.* At trial, Brown testified against Alderman. Brown served 12 years in prison before being released on parole.

David Cargill and his brother, Tommy Cargill, committed an armed robbery of a service station. *See Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986). In the course of the robbery, David shot and killed a service station employee and another man. *Id.* at 621. Tommy did not physically commit either murder, and he received a life sentence following a jury trial.

On the night of April 12, 1982, Robert Jones, Timothy Jenkins, and Terry Mincey robbed a convenience store. *Mincey v. State*, 251 Ga. 255, 255-56, 304 S.E.2d 882 (1983). All three of the men carried weapons. *Id.* at 256. In the course of the robbery, Mincey shot two people; one died, and one survived. *Id.* Jones and Jenkins, who did not physically shoot either victim each received a life sentence. *Id.* at 266.

Rick Soto, who like Ms. Gissendaner provoked his lover to kill his spouse, also received a life sentence following a jury trial. Soto and his young girlfriend, Teresa Whittington, plotted the murder of Soto's wife, Cheryl. *See Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73 (1984); *see also Soto v. State*, 252 Ga. 164, 312 S.E.2d 306 (1984). Soto provided the weapon, taught Teresa how to shoot, arranged the murder, and remained on the scene while Teresa shot and killed his wife. *See id.*

Rick Soto was significantly more culpable than Kelly Gissendaner. Soto provided the only weapon used in the crime and actually coached the killing, whereas Greg Owen obtained the knife with which he murdered Doug Gissendaner on his own. *Id*. at 170. Rick Soto was on the scene at the time of the murder, whereas Petitioner was far removed. *Id.* at 176. At trial, Soto was sentenced to life in prison. *Id.* at 178.

C. Georgia's Board Of Pardons And Parole: The Role Of Proportionality In Clemency Procedures

When the legal process fails to eliminate those less culpable at the trial or post-conviction stages, the Georgia Board of Pardons and Parole has the power to balance the scales of culpability. Clemency is "the historic remedy for preventing miscarriage of justice where judicial process has been exhausted," *Harbison v. Bell*, 556 U.S. 180, 192 (2009), (*quoting Herrara v. Collins,* 506 U.S. 390, 415 (1993)("far from regarding clemency as a matter of mercy alone, we have called it a 'fail safe' in our criminal justice system.")(footnote omitted)). In the unlikely event that a prisoner who did not kill his or her victim reaches the clemency stage,

he or she is highly likely to obtain relief.

The Georgia Board of Pardons and Paroles has commuted nine death sentences since *Gregg*: Charles Harris Hill (1977), Freddie Davis (1988), William Neal Moore (1990), Harold Williams (1991), Alexander Williams (2002), Willie James Hall (2004), Samuel David Crowe (2008), Daniel Greene (2012), and Tommy Waldrip (2014). In four of those cases, the disproportionality of the sentence was one of the primary issues (if not *the* primary issue) before the board. These four prisoners were the *only* death-sentenced prisoners to come before the board who either (1) did not substantially participate in the murder of the victim, or (2) received a death sentence when their equally culpable co-defendant(s) did not:

- Charles Harris Hill and two other men were involved in a burglary that went awry, resulting in a murder. *See* Adam Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 Mich. L. Rev. 1, 21 (2014) (hereafter "Gershowitz"). The actual killer pled guilty to murder, and he received a life sentence. *Id.* The Board of Pardons and Paroles commuted Hill's sentence. *Id.*

- In 1988, the board granted clemency to Freddie Davis, citing concerns about his role in the crime and his co-defendant's recantation.[12] Davis had been convicted of rape and murder, but his co-defendant, who was the likely killer, later admitted that Freddie had not been in the room when the victim was murdered. *Id.*

- Harold Williams received a commutation in 1991. Harold Williams and Dennis Williams had been convicted of murdering Harold's grandfather. *Williams v. State*, 250 Ga. 553, 300 S.E.2d 3-1 (1983). A spokesperson for the Board of Pardons and Paroles said that "there was ample

[12] *Execution Halted in Georgia*, Associated Press (June 16, 1988), http://www.apnewsarchive.com/1988/Execution-Halted-In-Georgia/id-9e90dce69c67f98623cc83529b dfffd3; *see also* Gershowitz at 34.

evidence the codefendant…was the ringleader in the murder." Gershowitz at 33; *see also* Jingle Davis, *Ex-Marine's Death Sentence for Murder is Commuted*, Atlanta J.-Const., Mar. 23, 1991, at B5.

- Most recently, the board commuted Tommy Waldrip's death sentence. Tommy Waldrip, John Mark Waldrip, and Howard Livingston had all been convicted of the murder of Keith Evans.[13] The primary issue before the board was the disproportionality of Tommy Waldrip's sentence, given that he was not the impetus for the crime and that his son, John Mark, had killed Evans. *Id.*

It is worth noting that the death sentence of Tommy Waldrip, which was commuted to life without parole by the Georgia Board of Pardons and Paroles last year, is the sole case on which the Georgia Supreme Court relied when upholding the proportionality of Ms. Gissendaner's case with respect to that of her co-defendant, Gregory Owen. *Gissendaner v. State*, 272 Ga. 704, 718-19, 532 S.E.2d 277, 691-92 (Ga. 2000).[14] Thus, based on the Georgia Supreme Court's own proportionality review, Ms. Gissendaner's case is no longer proportional to cases of other similarly situated defendants.

E. This Claim Is Properly Before The Court For Review

The instant action could not have been brought previously, and it is therefore properly before this Court for relief. Petitioner's claim was unripe until

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[13] *See Waldrip's Death Sentence Commuted to Life Without Parole*, Atlanta J.-Const. (July 9, 2014), http://www.ajc.com/news/news/breaking-waldrips-death-sentence-commuted-to-life-/ngcRm/; *see also Georgia Death Row Inmate Granted Clemency 24 Hours Before Execution*, The Guardian (July 10, 2014), http://www.theguardian.com/world/2014/jul/10/georgia-death-row-inmate-granted-clemency-24-hours-before-execution.

[14] *Hall v. State,* 244 S.E.2d 833, which the Court used to compare, also resulted in a non-death sentence for the defendant.

all other avenues for challenging – and for correcting – her unconstitutional sentence of death had been exhausted. At the time of the instant filing, Petitioner had just learned that she has been denied her renewed request for executive clemency from the Georgia Board of Pardons and Paroles. The Georgia Department of Corrections has scheduled her execution for today, September 29, 2015.

Because Petitioner's claim did not arise until the threshold of her execution, it is analogous to a competency-to-be-executed claim. Under Georgia law, a petitioner has no obligation to raise a competency-to-be-executed claim until the state seeks her execution. *See* O.C.G.A. § 17-10-63 ("An application brought under this article shall…set forth the fact that a time period for execution has been set, [and] give the date of the signing of the order and the dates of the designated time period for execution…"). This Court similarly has ruled that habeas petitioners cannot raise the type of claims that arise on the threshold of execution until the execution is imminent. *See Panetti v. Quarterman*, 551 U.S. 930, 942 (2007). This is one of the "narrow circumstances" that does not compel dismissal of a claim presented in a second-in-time habeas petition. *Id.*

Indeed, forcing courts to review claims before they ripen would undermine the purposes of the bar on successive habeas petitions and squander limited judicial resources. Successive petition bars exist to promote finality, to reduce piecemeal litigation, and to conserve judicial resources. Because the possibility of relief existed when Petitioner's earlier appeals were pending, raising a claim

challenging her execution would have been nothing but an exercise in futility. *See, e.g., Panetti*, 551 U.S. at 943 ("if the State's interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse"). In other words, the factual basis for the instant habeas corpus action did not arise until Petitioner's execution was imminent.

III. CONCLUSION

While the undisputed actual killer in this case will be eligible for parole in just seven years as a result of the deal he struck with the prosecution in exchange for his testimony against Ms. Gissendaner, she received a death sentence. Thereafter, Ms. Gissendaner was denied relief by the courts and by the Georgia Board of Pardons and Parole. Ms. Gissendaner now stands to be executed at 7:00 PM TODAY, September 29, 2015.

This case represents an anomaly, where the criminal justice process has failed to prevent the kind of "wanton and freakish" imposition of the death penalty that prompted the the Georgia Supreme Court to strike down Georgia's death penalty statute more than forty years ago. Each of the remedies for correcting her disproportionate sentence have failed. Given the offense and given Ms. Gissendaner's role, her execution would not comport with the evolving standards of decency that track the progress of a civilized nation.

If Ms. Gissendaner were to be executed it would be as if she drew the black marble in some macabre criminal justice system lottery. The State of Georgia has never executed someone who did not substantially participate in the murder and

was not on the scene when the victim was killed. Societal standards of decency make clear that execution is now a disproportionate response given Ms. Gissendaner's role in her crime. Clearly, imposition of the death sentence in this case would be arbitrary and capricious, in clear violation of the Eighth and Fourteenth Amendments. This is *not* a death case and this Court should recognize that the death sentence in this case is disproportionate, and vacate Ms. Gissendaner's death sentence.

A death sentence is no longer a constitutionally acceptable societal response to Kelly Gissendaner's criminal conduct. Accordingly, habeas corpus is a proper vehicle for the protection of Ms. Gissendaner's Eighth and Fourteenth Amendment rights and is cognizable in these proceedings. For the foregoing reasons, Petitioner respectfully asks that this Court stay her execution, issue a writ of certiorari to the Supreme Court of Georgia, reverse the decision of that court and vacate her sentence of death.

Respectfully submitted, this the 29th day of September, 2015.

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