No: 16-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

BRANDON ASTOR JONES

Petitioner,

v.

BRUCE CHATMAN, Warden,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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-CAPITAL CASE-

QUESTIONS PRESENTED

1. Given that "protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment," *Montgomery v. Louisiana,* 577 U.S. ___ , (2016), slip. op at 14, and that a death sentence should be vacated when the "time comes when juries generally do not impose the death sentence in a certain kind of murder case," *Gregg v. Georgia,* 428 U.S. 153, 206 (1976), does the Constitution prohibit the execution of an inmate sentenced to death in 1979 for an offense that overwhelmingly results in the imposition of a life sentence, and for which no death sentence has been imposed in Georgia in two decades?

2. Does the Georgia capital sentencing scheme–O.C.G.A. § 17-10-30 *et. seq*.— continue to survive constitutional scrutiny given that Petitioner's death sentence was "inflict[ed]…under a legal system that permit[ed] this unique penalty to be so wantonly and so freakishly imposed," *Furman v. Georgia,* 408 U.S. 238, 310 (1972) (per curiam)?

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Petitioner Brandon Astor Jones respectfully petitions this Court for a writ of certiorari to review the February 2, 2016 decision of the Georgia Supreme Court denying Mr. Jones a Certificate of Probable Cause to Appeal. Tonight, the State of Georgia intends to execute Mr. Jones for a murder committed during the armed robbery of a convenience store, a common offense that in Georgia now uniformly results in the imposition of a sentence of life imprisonment. Mr. Jones's execution for this crime will be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Glossip v. Gross,* 135 S.Ct. 2726, 2759 (2015) (BREYER, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (STEWART, J., concurring opinion)).

I. JURISDICTION AND LOWER COURT OPINION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). *See Yates v. Aiken,* 484 U.S. 211, 214 (1988). Petitioner has asserted violations of his Eighth and Fourteenth Amendment rights in the proceedings below.

The final judgment and decree rendered by the Supreme Court of Georgia on February 2, 2016, denying Petitioner's Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County, Georgia is filed as Attachment A, hereto. The unpublished order of the Superior Court of Butts County Georgia dismissing the Petition for Writ of Habeas Corpus, entered on January 29, 2016 is attached hereto as Attachment B.

II. CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

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

The Fourteenth Amendment to the United States Constitution provides that:

> [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 Georgia capital sentencing scheme, O.C.G.A. § 17-10-30, *et. seq*. is attached hereto as Attachment C.

IV. STATEMENT OF THE CASE

A. Introduction

Since the reinstatement of the death penalty in Georgia, a death sentence has only rarely been imposed for a murder committed during the armed robbery of a retail establishment. In fact, of more than 430 known instances of this offense in Georgia over the last forty years, just **eleven** cases have resulted in a sentence of death where a single victim was killed. The vast majority of offenders who committed this crime contemporaneously with Mr. Jones's offense have been paroled. Today, *all* similarly-situated defendants in Georgia receive a sentence less than death: a death sentence has not been imposed for this armed robbery-murder offense in 20 years. There is perhaps no better evidence of the "'the evolving standards of decency that mark the progress of a maturing society'" to which this Court must look in order to "determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

B. Brief Procedural History

Petitioner was convicted of murder and sentenced to death in Georgia on October 11, 1979. On February 16, 1989, the United States District Court for the Northern District of Georgia vacated Petitioner's death sentence and remanded the case for a new sentencing trial. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Petitioner was resentenced to death on in September 23, 1997, and a divided Georgia Supreme Court affirmed his direct appeal on December 20, 2000. *Jones v.*

State, 539 S.E.2d 154 (Ga. 2000), *reh. den*. December 14, 2000. Petitioner filed a timely petition for writ of certiorari in this Court, which was denied. *Jones v. Georgia*, 534 U.S. 839, *reh. den*. 534 U.S. 1157 (2001).

Petitioner filed a petition for writ of habeas corpus in Butts County Superior Court. Following an evidentiary hearing, the state court signed the proposed order drafted by counsel for the State, denying relief. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on September 3, 2008.

Petitioner then filed a petition for writ of habeas in the United States District Court for the Northern District of Georgia, which denied the petition on August 10, 2011. The United States Court of Appeals for the Eleventh Circuit denied his appeal on March 20, 2014. After Petitioner petitioned the court for rehearing and rehearing *en banc*, the court amended its original opinion to alter its legal analysis of the state court order under 28 U.S.C. §2254, and again affirmed the district court's dismissal. *Jones v. GDCP Warden*, 753 F.3d 1171 (11th Cir. 2014). His amended petition for rehearing was denied on December 1, 2014.

On April 30, 2015, Petitioner sought a writ of *certiorari* from this Court, which was denied on October 5, 2015. *Jones v. Chatman,* 136 S.Ct. 43 (2015), *reh. den.,* 136 S.Ct. 570 (Nov. 30 2015).

On January 13, 2016, the Superior Court of Cobb County entered an order directing the Department of Corrections to execute Brandon Jones during a time period beginning at noon on February 2, 2016 and concluding at noon on February

9, 2016. The Department of Corrections scheduled Petitioner's execution for 7:00 p.m. on February 2, 2016.

On January 27, 2016, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. That Court denied the Petition on January 29, 2016. See Unpublished Order, *Jones v. Warden, GDCP*, Case No. 2016-HC-2, attached hereto as Attachment A. The Georgia Supreme Court denied Petitioner's Application for Certificate of Probable Cause to Appeal on February 2, 2106. Unpublished Order of the Georgia Supreme Court, *Jones v Warden, GDCP*, Case No. S16W0778, February 2, 2016, attached hereto as Attachment B.

C. Petitioner's Crime

The State's evidence at Petitioner's trials showed that in the early morning hours of June 17, 1979, Roy Kindel, a patrol officer with the Cobb County Police Department, stopped at a Tenneco service station/convenience store. (RT 1390-91, 1399).[1] Through the store's glass front, he saw Brandon Jones poke his head out a storeroom door at the back of the store, glance around, and close the door again. (*Id.*) Kindel entered the store with his gun drawn and heard three loud pops, followed by a pause, then a fourth and final pop. (RT 1401).

When Kindel opened the storeroom door, Mr. Jones was closest to him near the door and co-defendant Van Solomon was standing between Mr. Jones and the

[1] Citations to prior proceedings are as follows:
Transcript of Petitioner's 1979 capital murder trial = TT
Transcript of Petitioner's 1997 resentencing trial = RT
Transcript of Petitioner's 2004 habeas corpus evidentiary hearing = HT

victim, Roger Tackett, (RT 1402, 1542), who had been shot and fallen to the storeroom floor. The victim's body went unnoticed by Kindel as he ordered the two men out of the storeroom. Neither had a weapon. (*Id.*) After Petitioner stated that there was another man in the back storeroom, "bad hurt," (RT. 1447), the body of the store manager was discovered. The cash register drawer was out and in a plastic bag. Police thereafter recovered two guns from a shallow box inside the storeroom.

The primary point of contention at trial was the number of shots fired at Mr. Tackett and consequently, whether there were two separate guns fired, or just one. The victim suffered five gunshot wounds. (RT 1691–94). There is strong evidence to show that those five wounds were made by only four bullets, with a single bullet passing through the victim's thumb before entering his head. Four bullets were recovered at the scene, all from the Colt: two were recovered from the victim's body, and two were found on the storeroom floor. (RT 1692–93). All were a type of ammunition that could not be fired from the Smith & Wesson (RT 1793-95).[2] This

[2] Though the evidence accounted for only four bullets being fired, the State's pathologist at Petitioner's 1997 resentencing trial posited that the five wounds were in fact made by five separate bullets. (RT 1709-10, 1772-73). He agreed that it was possible that one bullet produced both the wound to the thumb and the wound to the head, but claimed the entry wound to the head would have been irregular in shape if this were the case. (RT 1770). Evidence in post-conviction proceedings by a well-credentialed crime scene reconstructionist, Peter DeForest, was that simply passing through a small and non-dense object such as a thumb would not alter the tight "spin" of the bullet path, particularly if the thumb were close to the head (as in a defensive posture), so that the re-entry wound that it would thereafter create would **not** be irregular in shape.

indicates that Mr. Tackett was killed by a single shooter using the smaller of the two guns (a Colt .38 revolver containing the casings of four spent rounds), and that the second, a Smith and Wesson .38 Special, was not fired during the robbery.[3]

The State's five-bullet theory fails to account for the undisputed evidence that no fifth bullet was recovered despite an exhaustive search, as well as the eyewitness testimony from the responding officer who heard only four shots. Atomic absorption testing[4] for gunshot residue indicated the presence of antimony, barium or lead on both men's hands, but no details as to which elements or the quantity was reported, making it impossible to rule out that one or more of these metals came from another source – such as lead paint,[5] and there was evidence that

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[3] At Solomon's trial, the state conceded that both guns belonged to Solomon, arguing that Solomon was "the man who knew what was going on and was in control. His van, his burglary tools, his gun." *State v. Solomon,* Cobb Co. Superior Court Indictment No. 79-1125, Trial transcript, September 25, 1979 at p. 540. The van parked near the store was owned by Solomon, and it contained burglary tools, as well as holsters for both guns. (RT 1491-93, 1561).

Mr. Solomon was mentally unstable, HT 2083-2105, and had several prior convictions for which he had served time in Oklahoma, including one for armed robbery, and another for assault with a deadly weapon after he shot a man in the leg. TT 2421-2438.

[4] The science behind that test is now regarded as unreliable. *See* Schwoeble & Exline, Current Methods in Forensic Gunshot Residue Analysis (2000).

[5] Jones and Solomon spent the days prior to the crime working in Solomon's contracting business; they were painting. TT 398-399.

Jones had handled the Smith and Wesson revolver, which was fired at some point prior to the robbery.[6]

When Officer Kindel entered the storeroom and discovered Solomon and Jones, it was Solomon who was standing closest to the body of Roger Tackett. Were Jones the shooter, he would have had to fire four rounds without hitting Solomon, who was standing in between him and the victim in a space described by the State's crime scene expert as a "little cramped area." (RT 1715).

Petitioner has consistently maintained that he did not fire at the victim and the considerable circumstantial evidence substantiates this. However, even if this Court is not persuaded the Mr. Jones did not fire his weapon, his death sentence remains arbitrary and a disproportionately severe sentence in light of hundreds of other armed-robbery murder cases in Georgia from 1975 to 2015 which resulted in life sentences, many of which involved the actual shooters.

D. The Evidence of Arbitrariness

Offenses like that committed by Mr. Jones and Mr. Solomon happen with unfortunate frequency. The proof gathered through counsel's investigation reveals that in Georgia, a murder committed while attempting to effectuate the armed robbery of a retail establishment, such as a convenience store, has occurred more

[6] In addition, Petitioner also was in close proximity to Solomon in the tiny storeroom, and thus gunshot residue could have been deposited on him when Solomon fired. *See, e.g.,* https://leb.fbi.gov/2011/may/the-current-status-of-gsr-examinations (FBI Bulletin indicating that any person or surface within three feet of the person firing a weapon may test positive for particulate of gunshot residue).

than 430 times in the modern death penalty era.[7] The investigation directed by undersigned counsel continues to identify additional instances of this crime each day, so that the number of such similar offenses in Georgia is actually higher. *E.g., State v. John Willie Williams,* Superior Ct of Richmond Co., Case No. 42 (January 1981 Term), guilty plea entered February 23, 1981 (sentenced to life plus twenty five years).

The majority of the 430 armed robbery offenses identified by counsel's investigation were similar to or more aggravated than the crime committed by Mr. Jones. Nevertheless, those defendants almost always received a sentence of life imprisonment, and indeed, some of them received a sentence shorter than life. In fact, dozens – *dozens* – of offenders who committed murders during an armed robbery *after* Mr. Jones's 1979 crime were not sentenced to death, or even life imprisonment, and have completed their sentences and have been paroled.

A small handful of these 430 cases received the death penalty. But even of those, several were reversed early in the post-*Furman* era, and a sentence of life imprisonment subsequently imposed.[8] The fact is, of 430 persons whose cases can

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[7] Petitioner's counsel has examined cases from 1975, when the Georgia capital sentencing scheme was revised to pass constitutional muster in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), through 2015.

[8] *See e.g., Smith v. State*, 290 S.E.2d 43 (1982), habeas corpus relief granted by *Smith v. Kemp,* 664 F. Supp. 500 (M.D. Ga. 1988); *Corn v. State,* 240 Ga. 130, 240 S.E.2d 694 (1977), habeas relief directed by *Corn v. Kemp,* 837 F.2d 1474 (11th Cir. 1988), *Hawes v. State,* 240 Ga. 327, 240 S.E.2d 833 (1977), *Arnold v. State,* 236 Ga. 534, 224 S.E.2d 386 (1976), *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976), habeas relief granted by Tattnall Cnty. Super. Ct. No. 77-358, Order of June 20, 1979, *Cofield v. State,* 247 Ga. 98, 274 S.E.2d 530 (1981).

be located today and examined, only eleven, other than Mr. Jones, received a death sentence that was ultimately affirmed for a homicide committed during the course of an armed robbery of a storefront.[9] This number includes Mr. Jones's codefendant, Van Roosevelt Solomon, who actually shot the victim. In other words, by Georgia's own community standards, more than 418 people who committed murder while attempting to rob a place of business over the past 40 years have received sentences of life or shorter.

In sum, Mr. Jones is "among a capriciously selected random handful upon which the sentence of death has in fact been imposed," *Furman*, 408 U.S. at 309-310, 92 S.Ct. at 2726 (concurring opinion), and his death sentence is, today, a complete anomaly. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Montgomery v. Louisiana*, __U.S.__, 2016 WL 280758 (Jan. 27, 2016). This Court should enforce that protection, stay Mr. Jones's execution and vacate his disproportionate sentence of death.

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[9] *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983) ; *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984)**;**); *Kinsman v. State,* 259 Ga. 89, 376 S.E.2d 845 (1989); *Meders v. State*, 261 Ga. 806, 411 S.E.2d 491 (1992); *Brockman v. State,* 739 S.E.2d 332 (2013); *Mobley v. State*, 455 S.E.2d 61 (Ga. 1995); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999); *King v. State,* 539 S.E.2d 783 (Ga. 2000); *McClain v. State,* 477 S.E.2d 814 (Ga. 1996).

1. 1975-1994: A Death Sentence for an Armed Robbery-Murder Is Exceedingly Rare in Georgia.

The 11 cases that resulted in death sentences share two key characteristics. First, the offenses for which death was imposed were committed early in the post-*Furman* era. Most of the eleven retail-armed robbery crimes resulting in a death sentence occurred in the late 1970s or 1980s.[10] A few happened in the early 1990s.[11] It bears repeating: None have occurred in the last twenty years.

Second, those crimes for which the death penalty was imposed typically were more aggravated than Mr. Jones's in some substantial way. *See, e.g., Campbell v. State,* 240 S.E.2d 828 (1977)(armed robbery of a barbershop in which the victim was found comatose in a pool of his own blood after being stabbed in the chest and beaten over the head with a claw-hammer); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984)(two men interrupted the robbery of a cocktail lounge; Spivey shot both multiple times and returned to fire again when he heard one of them moan, killing one; shot bar employee in the hip and took a woman hostage and fled to Alabama);

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[10] *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977) (crime occurred December 1975); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984) (crime occurred on December 1976); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981) (crime occurred June 1979); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983) (crime occurred April 1982); *Kinsman v. State,* 259 Ga. 89, 376 S.E.2d 845 (1989) (crime occurred September 1986); *Meders v. State*, 261 Ga. 806, 411 S.E.2d 491 (1992) (crime occurred June 1987).

[11] *Brockman v. State,* 292 Ga. 707, 739 S.E.2d 332 (2013) (crime occurred June 1990); *Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995) (crime occurred February 1991); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999) (crime occurred April 1994); *King v. State,* 273 Ga. 258, 539 S.E.2d 783 (2000) (crime occurred September 1994); *McClain v. State,* 267 Ga. 378, 477 S.E.2d 814 (1996) (crime occurred November 1994).

Mincey v. State, 251 Ga. 255, 304 S.E.2d 882 (1983) (Mincey chose to rob gas station after finding only a female cashier and two teenage customers inside. After voicing intent not to leave witnesses, shot approaching customer in the chest and the face while holding cashier at gunpoint, blinding him, then shot and killed cashier when she ran away); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999)(after shooting the store clerk in the face during a 1994 armed robbery of a convenience store, robbed another store the next day and again shot the clerk twice in the face, killing him. The fact is, even the few offenses similar to Petitioner's that resulted in death sentences were often characterized by factors that made those defendants markedly more culpable than Mr. Jones – such as multiple shooting victims who survived or a defendant who was the known trigger-person.

2. 1995-2015: A Death Sentence Is *Never* Imposed for This Crime in Georgia.

No constitutionally sound death sentence has been imposed for any similar offense that has occurred after 1994, in spite of the offense continuing to happen regularly during this era. The prevailing conscience of the citizens of the State of Georgia is thus shown in the most demonstrative manner imaginable: by their own jury verdicts. That community conscience is now, and has been for at least twenty years, that a murder committed while carrying out the armed robbery of a retail establishment – while extremely serious and deserving of serious punishment – is not among the "worst of the worst" offenses for which the death penalty is constitutionally reserved.

3. Many Armed Robbery-Murders That Resulted in a Life Sentence Were More Aggravated Than Mr. Jones's Offense

As noted, of 430 similar offenses since 1975, well over 400 of them resulted in non-death sentences. And an examination of those 400-plus life sentences that were imposed for the same crime further highlights just how anomalous his sentence of *death* is by comparison. None of the characteristics of Mr. Jones's offense set it apart in terms of culpability. In fact, an expert statistical study of the sentencing patterns in all 430 cases of murder during the armed robbery of a retail establishment, concludes that the factors in Mr. Jones's crime would result in a predicted sentence of life or slightly less. App. 3 at 4.

The stark – unconstitutional – severity of Mr. Jones's sentence is highlighted by comparing it to the legion of cases that resulted in a life sentence. Even for offense conduct that is uniquely vile or aggravated, a death sentence has not been imposed for murder committed during a place-of-business armed robbery. Some examples:

James T. Jackson was convicted of murder while robbing a bridal shop in Albany, Georgia in 1982. He absconded with all the cash from the store and the victim's car. When the bridal shop's proprietor did not return home for dinner, her daughter went to the store to check on her and found the following:

> At the time [the owner of the store] Mrs. Raybun was discovered, her face was lacerated and she showed no signs of life. Blood spattered the floor, the wall, Mrs. Raybun, and a telephone and desk. Her pants were off and her body was bare from the waist down. There were between sixteen and twenty-two individual stab wounds to her body, with several thin stab wounds on both sides of her neck. Deep circular puncture wounds in her chest and abdomen showed surface handle

> impressions indicating that a weapon had been inserted to the hilt. Her heart and lungs were punctured by sharp instruments and her scalp was lacerated, bruised, and torn. Her head and body were bruised. The victim died as a result of stab wounds to her chest and abdomen. Vaginal swabs were taken from the body and under analysis showed the presence of semen. Dried matter on the victim's abdomen was collected and analyzed as saliva from a person with type O blood. Jackson has type O blood and the victim had type A blood.

Jackson v. State, 249 Ga. 751, 752, 295 S.E.2d 53, 55 (1982). Jackson was not sentenced to death; the jury's verdict imposed life in prison. (App. 3 (case data) at row 69).

In 1979, **Joseph Chafin, with the help of Jackie Beaver**, robbed the Oak Park Inn in Brunswick. *Chafin v. State,* 246 Ga. 709, 273 S.E.2d 147 (1980). He fatally shot the night manager and stole the cash box. *Id.* at 709. Over the course of the night, Chafin threatened Beaver that if he did not also rob and kill someone, Chafin would kill him and a member of his family. *Id.* They then drove to another motel, where Beaver robbed and murdered the night manager. *Id.* Chafin was sentenced to life imprisonment plus twenty years, *Id.* at 710, and was paroled in 2010. (App. 3 at row 36). Beaver was sentenced to 25 years. (*id.* at row 35).

Similarly, **Anthony Cobb and Harold Sneed** went on a multi-county, multi-state armed robbery spree in 1976, robbing and killing the desk clerks at several hotels, including three robbery-murders during their time in Georgia. *Cobb v. State,* 250 Ga. 1, 295 S.E.2d 319 (1982); *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979). Cobb received a life sentence for murder in two of the Georgia counties and a death sentence in the third. That death sentence was subsequently overturned, *Cobb v. State,* 244 Ga. 344, 260 S.E.2d 60 (1979), and Cobb was resentenced to life

imprisonment on remand. Sneed received a life sentence and was paroled in 2010. (App. 3 at row 22).

In 1993, **Donnie and Monaleta Allen** robbed Spell's Place Package store in Lowndes County. Mr. Allen told everyone in the store to get down, and then began shooting. He shot at six to eight people, wounding the owner and killing a customer. Mr. Allen was sentenced to life imprisonment. (App. 3 at row 187, 188).

The *Allen* case is exemplary of any number of cases, unlike Petitioner's, in which multiple persons were shot during the course of the robbery, and yet resulted in the imposition of a life sentence. In April 1991, **Willie Parish and Allen Grace** robbed the Bee Line grocery store while Allen's uncle, James Grace, stood guard outside. *Grace v. State*, 763 S.E.2d 461, 461 (2014). One of the store employees, Anthony Justiss, was shot once in the head; he died. *Id.* A second employee, Warren Jackson, was shot twice in the head; his injuries rendered him blind in one eye. *Id.* at 461-62. Grace and his accomplices took the cash register and a cash box, and they fled to another county, where Grace opened fire on two police officers. *Id.* He shot one in the face point-blank. *Id.* Grace was indicted for malice murder, aggravated battery, and aggravated assault. *Id.* He was sentenced to consecutive terms of life for the murder and armed robbery, and consecutive terms of years for the aggravated battery and aggravated assault. *Id.* Grace's uncle James Grace was also convicted of the same offenses and was sentenced to life imprisonment for the murder, and consecutive terms of years for the remaining crimes. *Grace v. State*, 262 Ga. 746, 747, 425 S.E. 2d 865 (1993). (App. 3 at rows 152, 153). *Accord*,

Chapman v. State, 273 Ga. 348, 541 S.E.2d 634 (2001) (both proprietors of a neighborhood grocery shot during Chapman's attempt to rob the store to feed his crack cocaine addiction. Chapman did not receive a death sentence). (App. 3 at row 147).

4. The Majority of Offenders Who Committed This Crime Contemporaneously With Mr. Jones's Crime Already Have Been Paroled from a Life Sentence.

The full force of the unconstitutional sentencing disparity that this case represents is perhaps best evidenced by the fact that the majority of persons who committed this same crime during the late 1970s and early 1980s are now on parole, or have completed their sentences entirely. *Id.* This is true even for offenders who were confirmed to be, or admitted to being, the actual shooter/assailant. Of the offenders who committed their murders in the years 1978 to 1980, a full 75% are currently living outside of prison on parole. Again, some examples:

Jeffrey Rex Dillard, Jr. and three co-defendants robbed the In and Out grocery store in August 1977. (App. 3 at row 30). They entered the grocery store, selected a few items, put the items on the counter, and drew their guns on the man behind the counter, Johnny Conyers. *Id.* Conyers was not an employee; he was a customer who had simply been using the phone to make a personal call. *Id.* Believing that Conyers was calling the police, Dillard ordered him to put the phone up. *Id.* When Conyers moved, Dillard shot him in the chest and Conyers died on the

scene. *Id.* Dillard was sentenced to life imprisonment for the murder. *Id.* at 27. He was paroled in August 2006 after serving 29 years in prison.

Gregory Thompson robbed the C.B.C. Convenience Store in Chatham County in June 1984, during the course of which he murdered Richard Robinson. Thompson was charged with armed robbery and murder. He pled to voluntary manslaughter and armed robbery. (App. 3 at row 85). He was released in 2004 after serving a twenty-year sentence.

During the year of Mr. Jones's crime, 1979, a total of 14 offenders who committed a place-of-business armed robbery were documented in the study. (App. 3 at rows 43-56). Two of those men are currently serving a life sentence (App. 3 at rows 47 and 54). Two of them, Brandon Jones and Van Solomon, were sentenced to death. The other twelve men are currently on parole – some of them living successfully in the community for many years now – in spite of offenses that were similar or more aggravated than that committed by Mr. Jones.

V. REASONS FOR GRANTING THE WRIT

A. The Eighth Amendment No Longer Tolerates Petitioner's Execution.

"The arbitrary imposition of punishment is the antithesis of the rule of law." *Glossip v. Gross*, __U.S.__, 135 S.Ct. 2726, 2759 (2015) (BREYER, J., dissenting). Petitioner's sentence is grossly disproportionate and excessive when considering both the crime and the defendant as required by the federal constitution. The Georgia courts have failed to offer Petitioner a process sufficient to protect against a "death sentence[] [that is] cruel and unusual in the same way that being struck by

lightning is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (STEWART, J., concurring). This Court should enter an immediate Order staying Mr. Jones's execution, grant the Petition for Certiorari, and undertake review of his sentence. In the alternative, Petitioner asks that this Court stay his execution and remand his case to the Georgia Supreme Court with instructions to undertake a proper proportionality review.

The concept of proportionality is central to the Eighth Amendment. 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." *Weems v. United States*, 217 U.S. 349, 367 (1910). The concept of which crimes fall into that "small number of extreme cases" warranting the death penalty is not static. Rather, it is fluid and dynamic; it changes and progresses as society evolves. *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002); *Coker v. Georgia*, 433 U.S. 584, 593 (1977); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). As this Court noted in *Roper v. Simmons*, "we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society'" in order to "determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Id.* at 568 (citing *Thompson v. Oklahoma*, 487 U.S 815 (1988) (O'CONNOR, J., concurring in judgment)).

The Eighth Amendment demands that a defendant's death sentence be vacated "[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, [because] the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). An overall consensus in sentencing outcomes across cases is a predominant measure of society's "evolving standards of decency." *Graham v. Florida,* 560 U.S. 48, (2011) ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). Over time, a consistent direction of change in prosecutorial charging decisions and jury verdicts toward life sentences for a particular class of crimes can make the death penalty inappropriate and unconstitutional in an entire class of cases. *Coker*, 433 U.S. at 603; *Gregg*, 428 U.S. at 181; *Enmund v. Florida*, 458 U.S. 782, 794 (1982).

Prosecutors and jurors have reached a consensus in Georgia. A death sentence is no longer imposed or appropriate for Mr. Jones's crime, a single-victim killing during a store robbery. Petitioner maintains that his death sentence was disproportionate even when first imposed in 1979. But by 1997, a consensus had clearly been reached that the shooting death of a single victim during the course of an armed robbery of a retail business, while horrifying, does not fall into that class of cases so appalling that no other punishment is sufficient. And today the consensus is beyond doubt. This consensus is far more clear than that which compelled a number of this Court's seminal Eighth Amendment decisions, and it has been in place for a far longer period of time. *See, e.g., Kennedy v. Louisiana,* 554

U.S. 407 (2008); *Roper*, 543 U.S. at 560-61; *Atkins,* 536 U.S. at 304; *Miller v. Alabama,* ___ U.S. ____, 132 S. Ct. 2455 (2012).

Additionally, because cases more aggravated than Petitioner's routinely result in a sentence of life (even parole) and not death, Petitioner's death sentence is also unconstitutionally excessive. The Eighth Amendment requires that punishment serve a legitimate end. *Gregg* identified retribution and deterrence…by prospective offenders" as the legitimate societal purposes served by the death penalty. *Atkins v. Virginia*, 536 U.S.304, 319 (2002). "Unless the imposition of the death penalty 'measurable contributes to one or both of these goals,'" execution becomes nothing more than the "pointless and needless extinction of life" which is "patently excessive," and therefore violates the Eighth Amendment. *Id. See also Furman*, 408 U.S. at 312 (White, J., concurring); *Coker*, 433 U.S. at 592 (punishment is cruel and unusual if it does not measurably contribute to accepted goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering, or if it is grossly out of proportion to the severity of the crime.)

Given the consistency with which lesser sentences are utilized to punish conduct far more vile than Mr. Jones's, a sentence less than death would suffice to serve society's interest in retribution for Petitioner's crime, particularly when he has already served over 36 years in prison facing the death penalty.[12] With respect

[12] Petitioner's sentence is also unconstitutionally excessive in violation of the Eighth and Fourteenth Amendments by virtue of the sheer length of time he has lived under the threat of execution. *See, e.g.,* "[E]xecutions carried out after delays of this

to deterrence, it is unlikely that Mr. Jones's execution will serve to inhibit similar crimes in the future, given both the extreme rarity with which the death penalty is imposed for these offenses, and the spontaneity with which such a crime is typically committed. This likelihood is even further reduced considering that Mr. Jones's crime occurred more than 36 years ago.

B. The Georgia Supreme Court Failed to Cull Petitioner's Anomalous Death Sentence, and the Georgia Proportionality Review Does Not Safeguard Against Arbitrariness.

"[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey v Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759 (1980) (plurality). The Georgia Supreme Court has abandoned its duty to conduct meaningful review of the proportionality of Petitioner's death sentence. This could not be more clear: Petitioner was sentenced to death for a crime which over-whelmingly – indeed, now **uniformly** – results in a life sentence or a sentence of a term of years. The prior review in this case for "proportionality" demonstrably failed to actually consider the sentences "imposed in similar cases," O.C.G.A. §17-10-35(c)(1), (3).

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magnitude may prove particularly cruel" and "may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty." *Elledge v. Florida*, 525 U.S. 944 (1998) (BREYER, J. , dissenting from the denial of certiorari) (quoting *Lackey v. Texas*, 514 U.S. 1045 (1995) (STEVENS, J. opinion respecting the denial of certiorari)).

Because the Georgia Supreme Court did not and does not consider the information necessary to fulfill its constitutional duty to guard against disproportionate sentences, the Georgia capital sentencing statutory scheme is plainly in question. Petitioner asserts that the system as a whole is no longer constitutional. *Furman,* 408 U.S. at 248 (striking down the then-current system because "[j]uries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die"). *See also Glossip v. Gross*, __U.S.__, 135 S.Ct. 2775, 2776 (BREYER, GINSBURG, J.J., dissenting) (Because "[t]he circumstances and the evidence of the death penalty's application have changed radically" in the forty years since the Court upheld the death penalty statutes believing they "contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily," Justice Breyer finds it "highly likely" the death penalty violates the Eighth Amendment.)[13]

In its prior review in this case for proportionality, the Georgia court was unable to actually consider the sentences "imposed in similar cases," O.C.G.A. §17-10-35(c)(1), (3). Consideration of these sentences would have shown "that the factors that most clearly ought to affect application of the death penalty – namely, comparative egregiousness of the crime" did not. *Glossip v. Gross*, __U.S.__, 135 S.Ct. 2726, 2760 (2015)(Breyer, J., dissenting).

[13] But whether or not the sentencing scheme in general fails, there is no question that Petitioner's death sentence in particular is so disproportionate that it cannot stand.

After *Furman*, this Court required those states that permit capital punishment to institute procedures that protect against the "wanton" and "freakish" imposition of the death penalty and provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 310, 313 (Stewart, J. concurring) (White, J. concurring) (1972), *see Parker v. Dugger*, 498 U.S. 308 (1991). In striking down Georgia's capital sentencing scheme in particular in *Furman*, this Court observed that it placed unfettered discretion in the hands of juries, resulting in the arbitrary, and often discriminatory, issuance of capital sentences. *See generally Furman*, 408 U.S. at 254-56 (Douglas, J., concurring). Consequently, death sentences in Georgia were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* (quoting *Furman*, 408 U.S. at 309 (Stewart, J. concurring opinion)).

In response, Georgia amended its statutory scheme to, *inter alia*, charge the Georgia Supreme Court with the task of reviewing every death sentence imposed in the superior courts of the state. O.C.G.A. § 17-10-35. The statute explicitly directs that court to determine "whether the sentence of death is excessive or disproportionate to the penalty **imposed in similar cases**…." O.C.G.A. §17-10-35(c)(1), (3) (emphasis supplied). Specifically, the Court must focus on "how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed" and to set aside death sentences that are out of line with sentences imposed for similar crimes. *Terrell v. State*, 276 Ga. 34, 40, 572 S.E.2d 595, 601 (2002) (internal citation omitted). As that court summarized its

task in an early opinion, this new proportionality review required that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive." *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 616 (1974).

When this Court upheld Georgia's amended capital sentencing scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976), it did so because it believed the statute's new procedures would protect against the influence of impermissible factors in the imposition of death sentences. The *Gregg* Court explained how the Georgia statute had addressed the concerns of *Furman*:

> [T]he Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

428 U.S. at 204-05.

This Court subsequently held that the Georgia Supreme Court's proportionality review passed constitutional muster because its scope included similar cases in which a sentence of *life*, and not just death, was imposed. *Id.* As Justice Stevens, then a member of the Court, later wrote, "[w]e assumed that the court would consider whether there were 'similarly situated defendants' who had not been put to death because that inquiry is an essential part of any meaningful

proportionality review." *Walker v. Georgia*, ___ U.S. ___, 129. S. Ct. 453 (2008) (Stevens, J., statement respecting denial of certiorari). The Georgia Supreme Court confirmed that assumption when it responded to a certified question posed in *Zant v. Stephens*, 462 U.S. 862 (1983), stating expressly that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Stephens*, 462 U.S. at 880 n. 19 (internal citation omitted). "That approach seemed judicious," Justice Stevens wrote, "because**, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court**." *Walker*, 129 S. Ct. at 454-55 (emphasis supplied).

Over time, however, the Court began to perfunctorily cite to only a handful of other cases in which a sentence **of death** was imposed, without regard to any cases in which a lesser sentence may have been imposed. By the time Petitioner's appeal of his 1997 sentence of death reached the Court in 2000, it had become typical for the Court to summarily dispose of the proportionality review without analysis.[14] And that is what the court did in Petitioner's case. Subsequently, Justice Stevens questioned whether the Georgia Supreme Court's failure to conduct meaningful

[14] *See, e.g.*, *Johnson v. State*, 271 Ga. 375, 519 S.E.2d 221, 232 (1999); *Palmer v. State*, 271 Ga. 234, 517 S.E.2d 502, 508 (1999); *Pruitt v. State*, 270 Ga. 745, 514 S.E.2d 639, 651 (1999); *Sears v. State*, 270 Ga. 834, 514 S.E.2d 426, 437 (1999); *Speed v. State*, 270 Ga. 688, 700, 512 S.E.2d 896, 910 (1999); *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205, 215 (1999).

proportionality review brought it into conflict with the mandates of *Gregg* and the Eighth Amendment. *Walker v. Georgia,*129 S. Ct. at 453-55.

However, over time, the court In performing its proportionality review of Petitioner's 1997 death sentence, the court cited 19 cases, all resulting in the death penalty, in support of its perfunctory conclusion that the death penalty was proportionate to the sentence imposed in similar cases. *Jones v. State*, 539 S.E.2d 154, 163 (Ga. 2000). Only six, of 23, cases cited by the Georgia Supreme Court in 2000 in which a sentence of death was imposed, were even arguably similar to Petitioner's.[15] At the same time, the court ignored literally hundreds of identical – and more aggravated – Georgia retail store armed robbery-murder cases in which a sentence of life or less was imposed – similar cases that should have been weighed on the other side of the statutorily and constitutionally-required proportionality ledger.

Well over four hundred cases similar to or more aggravated than Petitioner's have been documented[16] that resulted in a life sentence or less. Only eleven times in forty years has an arguably similar crime resulted in a death sentence – and

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[15] These six cases are among the 11 total early cases that Petitioner acknowledges were similar, as discussed above.

[16] Given the time constraints of his impending execution date, Petitioner has surely not captured *all* of the available retail armed robbery-murder cases in the last forty years *that resulted in no-death sentences*. However, he *has* captured *all* of the similar cases that have yielded death sentences. While there are likely dozens more similar life sentence cases over the last forty years than the 418 Petitioner has identified. But the number of similar *death* sentences is known and fixed: no more than 11 total total since 1975, and *zero* in the last twenty years.

none in a similar crime committed in the last twenty years. Under the current Georgia scheme which was applied to Petitioner's case, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia*, 446 U.S. 420, 443, 100 S.Ct. 1759 (1980)(plurality opinion).

As shown, the citizens of the State of Georgia – as represented by their elected prosecutors and their juries – have in the last two decades determined that crimes like Petitioner's – a murder committed during an attempted armed robbery of a gas station/convenience store – do not fall in the class of offenses so "extreme" that society has deemed them the "most deserving of execution." *Id.* A death sentence was once rarely imposed for a murder committed during the course of effectuating an armed robbery – Petitioner's is one of those rare instances. But today, and for the last twenty years, a death sentence is never imposed for that crime. The proof before this Court demonstrates that Brandon Jones's sentence is a lone outlier in Georgia, a "freakish and wanton" punishment, an artifact of another era. The Eighth Amendment does not tolerate his execution.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court stay his execution, issue a writ of certiorari to the Supreme Court of Georgia, reverse the decision of that court and vacate her sentence of death. In the alternative, Petitioner asks that this Court stay his execution, issue a writ of certiorari and

remand his case to the Georgia Supreme Court for a proper proportionality review of his sentence.

Respectfully submitted this, the 2nd day of February, 2016.

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