BEFORE THE PRESIDENT OF THE UNITED STATES
AND THE UNITED STATES PARDON ATTORNEY

In re

BRANDON BERNARD,

Petitioner.

PETITION FOR CLEMENCY SEEKING COMMUTATION OF DEATH SENTENCE

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Petitioner Requests the Opportunity to Make an Oral Presentation before the Pardon Attorney

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I. An Introductory Comment

We start with this observation. The death penalty, if we are to have it, should be reserved for the worst murderers. For others who kill, our society deems it sufficient to imprison them for life without any possibility of release — itself a harsh and permanently life–altering punishment. As we detail below, Brandon Bernard was just eighteen at the time of the crime, had no prior violent criminal record, did not shoot either victim, and has lived quietly for twenty years as a model prison inmate. He has used his time to try to mitigate the harm he caused, by encouraging others to remain on a virtuous path. He is not by any measure the offender for whom the average person contemplates the death penalty. If Brandon's trial counsel had developed the available information and presented it to the Government prior to trial, the Government would likely have agreed and never sought a jury verdict authorizing Brandon's execution. Similarly, if his counsel had done their job at trial, presenting jurors with the readily available information discussed below, the jury likely would not have reached a verdict of death on the sole count where they did reach that verdict, as several jurors now confirm. In short, Brandon Bernard is someone who should not be on Death Row, and would not be if the system had not misfired. His sentence should be reduced to life imprisonment without the possibility of release.[1]

[1] While this petition contains powerful arguments showing why President Trump should spare Brandon's life, counsel was unable to marshal all evidence and arguments on Brandon's behalf because the on-going pandemic, coupled with the short time-frame between the announcement of the scheduled execution and the execution date, prevented the completion of necessary work.

II. Brandon Bernard was sentenced to death for acting as an accomplice to a crime committed in 1999, when he was only 18 years old. He did not have a leading role in that crime and has demonstrated positive behavior throughout his 20 years of incarceration, even reaching out to and counseling others not to follow in his path. When critically important charging and sentencing decisions were made in his case, both the Government and the jurors had an incomplete picture of Brandon and the offense. Today, with the ringleader in the case having been executed, five of the nine surviving jurors believe that a sentence of life imprisonment would provide sufficient punishment for Brandon.

Brandon Bernard is one of the youngest people ever sentenced to death in federal court. In June 1999, when he was 18, Brandon was one of a group of Black teenagers involved in a plan to commit a carjacking and robbery. The carjacking ultimately ended with the murders of Todd and Stacie Bagley, a white couple, on the Ft. Hood military reservation in Killeen, Texas. Although Brandon faced three capital charges, the jury sentenced him to life imprisonment for all offenses other than the murder of Stacie Bagley. Christopher Vialva, described by the Government as the "ringleader" behind the murders,[2] received death sentences for all three capital charges and was executed on September 24, 2020.

Brandon did not play a leading role in the crime. Although he provided the gun that co–defendant Christopher Vialva later used to kill the Bagleys, that was done under the belief that gun would only be used scare someone. Brandon was not present when the Bagleys were abducted, was absent for most of the events of the carjacking, and did not shoot anyone. He helped set

[2] *See, e.g.,* Brief of the United States in Opposition to Petition for a Writ of Certiorari and to Application for a Stay of Execution at 26, *Vialva v. United States*, Nos. 20-5766 and 20A49 (United States Supreme Court, September 22, 2020).

fire to the victims' car, but only at Vialva's direction and after it appeared to all present that the Bagleys had been killed by the shots fired by Vialva. Up until that point, Brandon never fully comprehended that the Bagleys were not going to be released. Todd Bagley was immediately killed by Vialva's gunshot, and the trial testimony showed that Stacie was immediately rendered unconscious when shot and did not regain consciousness before dying.

Recognizing Brandon's lesser role, the jury imposed life sentences on two of three capital counts against him, while giving Vialva death sentences on all three. As we show below, had the jury been fully advised of both the facts of the case and who Brandon is, Brandon would not have received a death sentence for the murder of Stacie Bagley. This is not idle speculation. The record makes very clear that if this case were tried today to the same jurors, a life sentence would result. We know this because five of the nine surviving jurors have stated in writing that they now believe that a sentence to life imprisonment without the possibility of parole would constitute sufficient punishment for Brandon, with three of them urging commutation of Brandon's death sentence. The jurors cite various reasons for this view, including the perception that executing Brandon would be fundamentally unfair, the fact that Brandon was neither the shooter nor the ringleader in this crime, and the fact that his counsel did little to assist him at trial.

In short, and as set forth in more detail below, Brandon's trial counsel failed him by not presenting readily available mitigation or alerting the jury to forensic issues that undoubtedly would have saved Brandon's life.

The jury also did not hear the full truth regarding Brandon and his position in the youth gang. To help secure a death sentence against Brandon, the Government argued that the teenage gang to which he belonged had no formal hierarchical structure, but that Bernard nevertheless yearned to be a

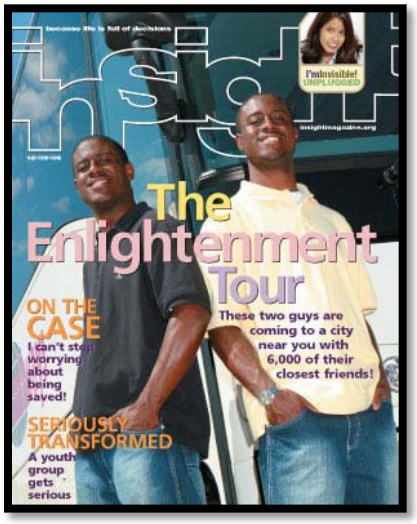
"top dog" within it. A Government's central theme in its case for death was that Bernard was an irredeemable gangster, who would continue to embrace that identity in prison and pose, in the language of the jury charge, a "continuing and serious threat to the lives and safety of others" around him. In turn, the Fifth Circuit cited this theme when affirming Brandon's death sentence.

Unknown to the defense, however, the Government's own gang expert, Killeen Police Department Sergeant Sandra Hunt, had told the Government prior to trial that the gang was in fact hierarchically organized and that Bernard occupied its very lowest level – far below codefendants Christopher Vialva, Terry Brown, and Tony Sparks. During a 2018 resentencing for Mr. Sparks, the Government disclosed Sgt. Hunt's expert opinion regarding the gang's hierarchical nature, relying on it to secure a lengthy prison term for Sparks (who, Hunt testified, occupied a powerful position in the gang, while Brandon sat at the very bottom of its power structure). Sgt. Hunt's illustration of Bernard's relative lack of power (36 levels below Sparks) is graphically illustrated in the chart that she produced prior to the Bernard-Vialva trial, which is attached as Exhibit A.

Two other teenagers in the case — one of whom was almost 18, and both of whom played roles at least as substantial as Brandon's —– received 20–year prison sentences and have satisfied their prison terms. In contrast, Brandon has now spent more than twenty years on death row. In that time, he has not just stayed out of serious trouble (such as violence or possession of contraband) — he has *never been written up for a single disciplinary infraction*.

Brandon understands that he is responsible for the Bagleys' deaths and the family's grief. He wishes he had been more of a leader in his youth, so that he would have stepped up and saved Todd and Stacie Bagley. While he cannot turn back the hands of time, he has done what he can to make modest amends,

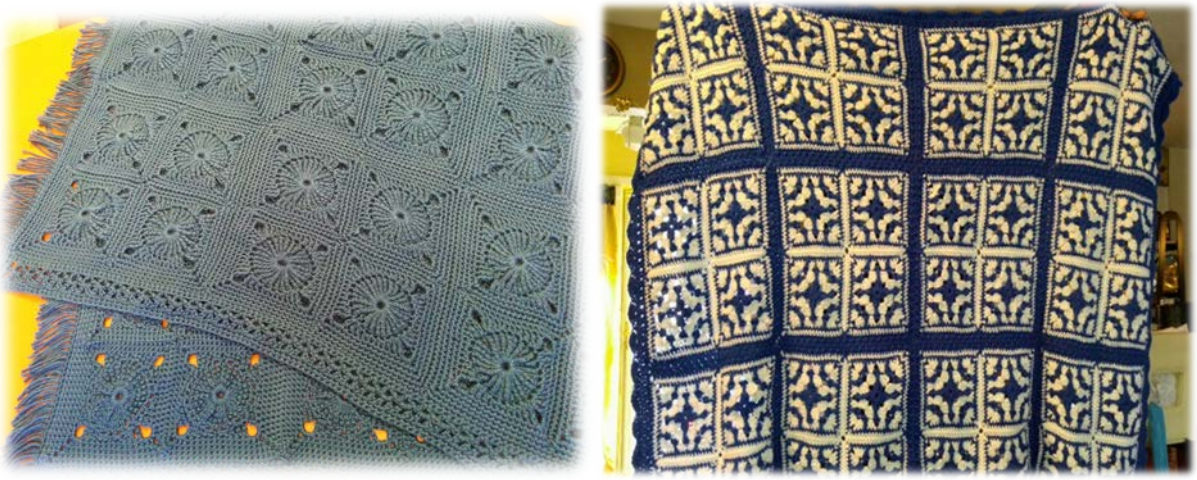
by living a life of faith and by counseling others not to follow an errant path. Specifically, he reached outside of the prison walls to take part in religious activities aimed at helping at–risk youth.



In 2006 Brandon was profiled in this magazine, in which Brandon counseled at-risk youth to stay with God

The unique circumstances of Brandon's case cry out for mercy now. As the facts presented here demonstrate, jurors in 2000 would have withheld even a single death verdict for Brandon if they had been given a fuller picture of the events of the murder and of Brandon's remorse, troubled background, and demonstrated capacity for redemption. Additionally, insights gained from Brandon's positive adjustment to prison and advances in neuroscience regarding an 18 year-old's brain development buttress the case for clemency today.

Declarations from a wide range of people who support Brandon's plea for clemency are attached here. The declarants include former jurors, clergy who ministered to Brandon (before, during, and after trial), a psychiatrist specializing in adolescent brain development, a former warden of the penitentiary in which Brandon is held, and numerous family members and friends. These statements show that Brandon has continuously expressed his sorrow over his callous acts as an adolescent. Today, Brandon spends much of his time crocheting and presents no danger to anyone.



Brandon has learned how to crotchet in prison. Examples of his "throws" are pictured above.

If spared from execution, Brandon will continue to counsel others, and be the best son, brother, and father that he can be.

The public response to Brandon's scheduled execution reinforces the conclusion that whatever one might believe about the death penalty in the abstract, Brandon is hardly among the "worst of the worst" for whom that ultimate punishment should be reserved. As of this writing, more than 5,978 people have sent letters to President Trump, asking that he show compassion by exercising his broad powers of clemency to spare Brandon's life. *See* www.helpsavebrandon.com. All these people share the recognition that while the crime was horrible, Brandon is not.

III. Commutation is appropriate because Brandon was neither the shooter nor the ringleader in the carjacking and murder of the Bagleys.

As the Government has repeatedly acknowledged, Brandon was not a leader in the events that led to the Bagleys' deaths. Rather, Christopher Vialva, who was executed on September 24, 2020, was the ringleader who bore

primary responsibility for the Bagleys' deaths and for the fire that may have contributed to Mrs. Bagley's death.[3]

More than fifteen years ago, the Government unequivocally declared that the trial evidence "showed that the Bagleys' car was set on fire based on the [sic] Vialva's plan and 'at the direction of Mr. Vialva.'"[4] More recently, the Government emphatically told the Supreme Court that Mr. Vialva was the mastermind behind these offenses, calling him "the ringleader of the murders of Todd and Stacey Bagley."[5]

And at the joint plea hearing for codefendants Christopher Lewis and Terry Brown, the Government similarly recognized that Vialva directed the codefendants to set the car on fire. Specifically, when the court asked him to describe the factual basis for the guilty pleas, the Assistant United States Attorney stated that Vialva had directed both the pouring of the lighter fluid and the actual lighting of the vehicle.[6] These facts were accepted by the court

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[3] As explained below, whether the fire contributed to Mrs. Bagley's death is debatable. But even if it did, the Government's own evidence shows that she could not have experienced any additional pain from the fire, since Vialva had inflicted an unsurvivable gunshot wound that knocked Mrs. Bagley unconscious before that fire was set.

[4] Response to Motion to Vacate, Set Aside or Correct Sentence, (dkt. 418) (December 8, 2004) at 75, *United States v. Bernard*, No. W-99-CR-70(2) (WDTX, December 8, 2004).

[5] Brief of the United States in Opposition to Petition for a Writ of Certiorari and to Application for a Stay of Execution at 26, *Vialva v. United States*, Nos. 20-5766 and 20A49 (U.S. Sup. Ct., September 22, 2020).

[6] At the change of plea hearing for codefendants Terry Brown and Christopher Lewis, the government declared this as fact:

> AUSA: Before the trunk was shut, and at the direction of Vialva, Brown poured some lighter fluid into the trunk area. *At the*

when it approved Lewis and Brown's guilty pleas.[7] Numerous other government pleadings have also recognized that "Bernard had a lesser role [a]s opposed to Vialva's leadership role."[8]

Brandon's minor role was a fact emphasized by several jurors who have written in support of Brandon's request for clemency.

A. The juror who presided over deliberations in Brandon's trial agrees that Brandon's limited role in the offense is a basis for mercy.

Presiding Juror Calvin Kruger has identified Brandon's lesser role in the crime, as well as the fact that Brandon's counsel failed to adequately represent Brandon, as reasons why he now prays for President Trump to prevent Brandon's execution:

> *direction of Christopher Vialva*, Bernard then lit a match and threw it inside the vehicle, which ignited the fire in the vehicle.

Transcript of Rearraignment Proceedings, *United States v. Terry Terrell Brown*, W-99-CR-061 (1) and *United States v. Christopher Michael Lewis*, W-99-CR-061 (2) (December 16, 1999) at 35 (AUSA Mark Frazier, describing the factual basis for the guilty pleas of both Brown and Lewis), attached as Exhibit 5 to Motion to Vacate, Set Aside, or Correct Judgment and Sentence, *Bernard v. United States*, No. 6:04-cv-00164-WSS (June 14, 2004), dkt. 377-3 at 109, 144 (emphasis added).

[7] *Id.* at 47, dkt. 377-3 at 150 (ROA.19-70021.1062).

[8] *See*, *e.g.*, Gov't Response to Motion to Authorize Successive Motion, *In re Bernard*, No. 19-50837 (5th Cir., November 20, 2019) at 13; *see also id.* ("Ultimately, the jury was already aware of evidence that Vialva was a leader, that Vialva and Sparks were more powerful members of the gang than Bernard, and that Vialva called the shots during the crime.").

> *I do not think Brandon Bernard's attorney[s] did a good job in defending him. To me, it seemed like his attorneys were going through the motions and nothing more.*
>
> *While the evidence proved that Brandon Bernard is guilty beyond any doubt, it also clearly showed that Brandon Bernard was not the ringleader behind these offenses, but a follower. Because of this, I support Bernard's death sentence being commuted to life without the possibility of parole. I am praying the President commutes Brandon Bernard's death sentence.*

Declaration of Presiding Juror Calvin Kruger at ¶¶ 3-4 (November 6, 2020) (Attached as Exhibit B, paragraph numbering removed).

Juror Jason Fuller also is opposed to Brandon's execution, citing Brandon's lesser role, compared to that of Vialva:

> *I felt that Brandon was a kid who got caught up with the wrong crowd, and I think that Brandon was prejudiced by being on trial with Christopher Vialva. It made it hard for me to disassociate Mr. Vialva's role in the crimes from Mr. Bernard's role.*
>
> *It was clear to me that Brandon was just an adolescent, trying to find belonging. Unfortunately, I think he found belonging with the wrong crowd and was in the wrong place, at the wrong time. Brandon clearly is responsible for making some horrible decisions that had horrendous outcomes. However, his young age at the time does weigh on me. I do not believe that Brandon should be executed for bad choices he made when he was 18.*
>
> *If he was the shooter or if I thought that Brandon was the mastermind behind this terrible crime, I would not feel this way about Brandon getting a second chance.*
>
> *I support clemency for Brandon Bernard.*

Declaration of juror Jason Fuller at ¶¶ 9–10 (July 21, 2016) (text reformatted with paragraph breaks) (Attached as Exhibit C).

B. Summary of the trial evidence

A more detailed review of the facts helps illustrate why so many of Brandon's jurors feel that executing him would be an excessive punishment.

Brandon was convicted of four offenses related to the murders of Todd and Stacie Bagley. He faced possible death sentences for three of those crimes: Todd's murder, the carjacking resulting in Todd's death, and Stacie's murder. Brandon was tried jointly with Christopher Vialva, who was 19 at the time of the offenses. Three other adolescents were involved in these crimes: Christopher Lewis (then age 15); Tony Sparks (then age 16), and Terry Brown (then age 17). As noted, the evidence unequivocally demonstrated that Vialva led this group and issued the orders throughout the criminal episode. *See supra*, nn. 4-6 and accompanying text.

While this group of adolescents did talk about abducting and robbing a victim by using his ATM card, neither Brandon nor any of his peers ever planned to commit murder. As the trial record documents, their original plan never involved hurting anyone. More or less following that original plan, Vialva, Lewis, and Sparks solicited a ride from the Bagleys and then abducted them, threatening them with a gun and forcing them into the trunk of their own car. Vialva, Lewis, and Sparks then drove around the area for hours with the Bagleys in the trunk as they tried to pawn the Bagleys' wedding rings and use their ATM card.

Brandon and Brown were not even present when the Bagleys were abducted or while they were driven around as captives. Brandon and Brown were playing video games in a nearby laundromat when Vialva, Sparks and Lewis abducted the Bagleys. When Brandon and Brown emerged from the laundromat, Vialva, Sparks and Lewis had vanished. Brandon and Brown drove around for a while looking for the others, but soon abandoned that effort;

they went by a local supermarket and applied for jobs before each returned home.

Vialva, Lewis, and Sparks were mostly unsuccessful in their attempts to pawn the Bagleys' rings and obtain money from their bank account. Vialva, Lewis, and Sparks were all trying to figure out what to do with the Bagleys. Eventually Vialva had Lewis call Brown to ask for Brown's help. Vialva then drove the Bagleys' car to Brown's house, with the Bagleys still locked in the trunk. Brown suggested taking the Bagleys' car to a park, leaving it there, and calling the police. The group seemed to agree on this plan, which would require another car. Brown phoned the only person they knew who had access to one: Brandon.

Brandon eventually picked up Brown in Brandon's mother's car. They (along with another teen who was not charged) drove to a local park where they met with the others, who were still in the Bagleys' car with the Bagleys locked in the trunk. After Brandon arrived, Vialva told Brown that he could not just let the Bagleys go, because his fingerprints were in their car. Vialva stated that he would have to kill the Bagleys. Even then, Brown had doubts about whether Vialva would actually follow through on his plan, later testifying that he thought Vialva "might burn the car, because it did have fingerprints in it, but [he still] didn't believe that he [Vialva] would harm the people."[9] Brandon has stated that although he was probably naïve to think so, he never really thought the Bagleys would be killed, as he had never been involved in anything like this before. He thought that the most Vialva would do was burn the Bagleys' car.

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[9] Government direct examination of Terrence Brown, May 25, 2000 Trial Transcript at 1905, *United States v Bernard*, W-99-CR-070(3) (WDTX, Waco Division, May 25, 2000); Fifth Cir. ROA.19-70021.4465.

Vialva initially stated that he would buy gas himself to burn the vehicle, but later gave $10 to Brown to purchase gas. Brandon and Brown ultimately purchased lighter fluid at a convenience store. Presley and Sparks were dropped off, and then both cars were driven to a remote area on Fort Hood.

At Fort Hood, Vialva donned a mask before opening the trunk of the Bagleys' car, suggesting that he wanted to hide his face and — with his identity protected — release them and tell them to flee. But then he fired two shots, striking each of the Bagleys once in the head. Mr. Bagley died instantly, and Vialva's bullet rendered Mrs. Bagley immediately unconscious. According to Brown's trial testimony, Brandon poured lighter fluid on the front seat of the car, and Brown poured lighter fluid on the back seat of the car and also in the trunk, where the Bagleys' bodies lay. Brown further testified that Brandon lit the fire, although he admitted that he could not see who did so. As noted *supra* at n. 6, the Government agreed that these actions were done at Vialva's direction.

After Vialva shot her, Mrs. Bagley never regained consciousness. A forensic medical examiner testifying for the prosecution, as well as another testifying for Vialva, opined that even after being shot directly in the face, Mrs. Bagley may have been breathing as the fire consumed the car in which she lay. A prominent Texas forensic pathologist has reviewed the evidence and concluded that Mrs. Bagley was likely already medically dead by the time she was exposed to the fire, as the unsurvivable gunshot wound administered by Vialva likely immediately killed her.[10]

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[10] *See* Declaration of Stephen Pustilnik, M.D. (former Chief Medical Examiner of Galveston County, Texas, and current Chief Medical Examiner of Fort Bend County, Texas), at ¶¶ 12, 14, 15 (October 25, 2012) (Attached as Exhibit D).

Regardless of whether Vialva's gunshot immediately killed Mrs. Bagley, both the Fifth Circuit and the Government have acknowledged that the wound immediately rendered her unconscious.[11] And the fact that Mrs. Bagley was instantly "knock[ed] unconscious" by the gunshot means that she did not suffer between that moment and her death very shortly thereafter, if she in fact survived that wound. As the Government has elsewhere recognized, consciousness is a prerequisite to experiencing pain or suffering.[12] Thus, the fire could not have contributed to any suffering by Mrs. Bagley.

C. The jurors found that Christopher Vialva, who has been executed, was far more culpable than Brandon for the events that led to the Bagleys' deaths.

The jurors found that life imprisonment without the possibility of release was an appropriate punishment for Brandon's aiding and abetting in Todd Bagley's murder and for his part in the carjacking that ultimately resulted in

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[11] *See United States v. Bernard*, 299 F.3d 467, 472–73 (5th Cir. 2002); *see also, e.g.,* Appellee's Brief of the United States of America, *United States v. Bernard*, No. 19-70021 (5th Cir., Feb. 21, 2020) at 2; Brief of the United States in Opposition to Petition for a Writ of Certiorari and to Application for a Stay of Execution, *Vialva v. United States*, Nos. 20-5766 and 20A49 (U.S. Sup. Ct., Sept. 22, 2020) at 5; "Statement by Department of Justice Spokesperson Kerri Kupec on the Execution of Christopher Andre Vialva," U.S. Dept. of Justice Press Release No. 20-999 (September 24, 2020) ("Vialva shot both Todd and Stacie in the head – killing Todd and *knocking Stacie unconscious*") (emphasis added).

[12] For example, in defending its current execution protocol, the Government states that pentobarbital ensures a humane death precisely because it causes the condemned prisoner to "lose consciousness within 10-30 seconds," with the result that he is "unaware of any pain or suffering before death occurs within minutes." *See* Application for a Stay or Vacatur of the Injunction Issued by the United States District Court for the District of Columbia, *United States v. Lee*, No. 20A8 (U.S. Sup. Ct., July 13, 2020).

the Bagleys' deaths. They sentenced Brandon to death only for Stacie Bagley's murder.

By contrast, Christopher Vialva — who led the others in abducting the Bagleys, drove their car around for hours with the Bagleys confined in the trunk, and ultimately fired the shots that killed them — received death sentences on all three capital counts, and was executed on September 24, 2020.

D. Christopher Lewis and Terry Brown — who were at least as culpable for the Bagleys' deaths as Brandon — received 20-year prison terms and are now free. Tony Sparks's life sentence was reduced to 35 years.

Christopher Lewis, who was then 15 years old and who, unlike Brandon, actively participated in abducting, robbing, and confining the Bagleys, as well as providing assistance at the site of the killings, testified for the prosecution. He was sentenced to 20 years and 4 months in prison for his role in the murders. He has completed that sentence.

Terry Brown also testified and received the same sentence as Lewis. At the time of the offense, Brown was not quite 18 years old, which is why he did not face a capital trial, while Brandon, who was 18, did. Brown's actions were also similar to Brandon's, in that he was neither present during the carjacking nor with the Bagleys in the hours that immediately followed, but did purchase lighter fluid and help burn the Bagleys' car at Vialva's direction. Like Lewis, Brown has completed his twenty-year sentence.[13]

[13] Given that Brown's accomplice liability mirrored that of Bernard's, this case shows the extreme arbitrariness of the administration of the death penalty. Brown escaped a capital trial because he missed the eligibility for one by roughly two months – at the time of the offense, Brown was 17 years, 9 months, and 21 days in age.

Tony Sparks, who was then 16 years old, actively participated in the Bagleys' abduction and the extended carjacking. He originally received a term of life imprisonment, but that sentence was later reduced to 35 years under *Miller v. Alabama*, 567 U.S. 460 (2012) (barring mandatory sentences of life imprisonment without the possibility of parole for juveniles), *see United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019).

E. Juror Gary McClung — who is praying that the President will grant Brandon mercy — cites Brandon's lesser role as one of the many reasons he now repudiates the sole death verdict he and his fellow jurors imposed on Brandon

Juror Gary McClung, Jr., has been troubled by Brandon's death sentence ever since he played a part in issuing it. Like jurors Kruger and Fuller, Mr. McClung authored a declaration that cites Brandon's relatively minor role as one of his many reasons for supporting this clemency petition. Portions of that declaration provide:

> *The evidence presented during the guilt phase of the trial made it clear to me and the other jurors that Mr. Bernard had a part in the crime[,] but I do not believe that his role was as significant as that of Christopher Vialva. ….*
>
> *I had no reservations about finding Mr. Bernard guilty. The penalty phase was not as easy for me. I was uncomfortable giving Mr. Bernard the death penalty and have been bothered with my decision since trial. ….*
>
> *I thought Mr. Bernard was only in that situation that led to the murders because of peer pressure from his friends.*

Declaration of Juror Gary McClung, Jr. at ¶¶ 3–5 (August 13, 2020) (Attached as Exhibit E).

The point that juror McClung makes about peer pressure is particularly acute, as it is consistent with what scientists have discovered since Brandon's trial about the brains of emerging adults, as detailed below.

IV. Brandon, only 18 at the time of the offense, barely met the legal age requirement for a capital prosecution. Perhaps more important, our nation's growing understanding of brain development in emerging adults argues against carrying out his death sentence

As he was only eighteen at the time of the offense, Brandon was barely eligible for a federal death sentence. Since his trial, the Supreme Court has ruled that the Constitution forbids executing anyone who commits a capital crime before age 18, no matter how heinous the crime or how substantial the individual's role. *Roper v. Simmons*, 543 U.S. 551 (2005). Brandon's death sentence fits uneasily with this constitutional rule, given that he was barely eligible by age, never planned to murder anyone, and did not take a leading role in the events.

Following *Simmons*, and again citing society's evolving understanding of the slow pace at which the human brain fully matures, the Supreme Court forbade sentencing juveniles convicted of non–homicide crimes to life imprisonment without chance of parole. *Graham v. Florida*, 560 U.S. 48 (2010). For much the same reasons, the Court two years later barred mandatory sentences of life imprisonment without the possibility of parole for juveniles even in homicide cases. *Miller*, 567 U.S. at 471-74.

Underlying all these cases is a newfound appreciation that the brain from adolescence through young adulthood differs vastly from a fully mature adult brain, both in its structure and its reasoning abilities. Magnetic imaging studies that were unavailable at the time of Brandon's trial have proved that even for persons in their late teens and early twenties, regions of the brain that

control reasoned decision–making are underdeveloped relative to the ones that provide for emotional and impulsive decision making. This helps explain why Brandon failed to assert himself to save the Bagleys.

Dr. Adam Andreassen — formerly a Youth Pastor who ministered to Brandon before and during his trial, and now a clinical psychologist who has worked with both the defense and the prosecution in criminal cases — has provided a declaration that describes Brandon's expressions of remorse in the immediate aftermath of the offense and also explains the limits that Brandon's adolescence imposed on his reasoning capacity at the time. Sadly, jurors did not hear from Andreassen, since trial counsel failed to even identify him (or two other supportive men of the cloth) as potential mitigation witnesses. In part, Dr. Andreassen's declaration recites:

Brandon was penitent and expressed regret for his role in the killing of the Bagleys. Brandon was only 18 years old at the time, and I believe that he was as contrite as he could be considering his developmental level and presentation as a somewhat immature adolescent. Brandon would share his regrets, and we would pray together.

Now that I am a clinical psychologist, I am able to look back on my conversations with Brandon with a more learned eye. At the time of this crime, Brandon was very immature and I do not believe he fully understood the severity of what transpired. He did not possess the insight or emotional development to perceive the situation as an adult — both with regard to his experience of the killings and their aftermath. Brandon was only a teenager at the time of the incident. As such, he likely lacked the impulse control and ego strength that would have allowed him to assert himself and prevent the crimes from happening. At that age, many adolescents do not have the capacity to make good decisions. Brandon's teenage brain gave him limitations into his own insight.

…

I was concerned about Brandon and liked him very much. I attended some of his trial to provide a measure of support. From what I saw, the picture that emerged during that trial seemed neither accurate nor fair as he did not appear nearly so sophisticated nor "hardened" as his co–defendant. It did not reflect the Brandon that I knew. I do not believe that Brandon was, or is, a hardened criminal. I wish that his attorneys would have done more to push back against the Government's portrayal of him and what I perceived as an unfair grouping together with his co–defendant. Had I been called to serve as a character witness for Brandon, I would have gladly conveyed my experiences with him, and the regret and concern that he had expressed for the victims and their families.

I know that this incident forever changed the lives of many people. This includes the families of the victims. They have suffered an immense and unimaginable loss and I wish them peace as they continue to live with the loss of their children.

Although then 18 years–old, Brandon was really only a kid when he participated in these horrific crimes. It is my hope that Brandon should be granted leniency in light of that fact. Neuroscience has now shown that an adolescent brain is not fully developed at age 18, and the portions of the brain that control decision making are the last to develop. Thus, the adolescent brain's ability to make good decisions is already compromised, relative to an adult's brain. And we know too, from scientific studies, that this limited ability is compromised even further when one is in the company of other adolescents, as was the case here. Thus, while Brandon's actions, or lack of action, resulted in the deaths of two innocent people, he should be sentenced as a kid, not as an adult. I don't believe the death penalty is appropriate for Brandon and I hope that President Trump commutes his death sentence to a life sentence. A life sentence will continue to hold Brandon accountable for his role in this crime.

Declaration of Dr. Adam Andreassen, ¶¶ 3–4 & 6–8 (August 17, 2020) (Attached as Exhibit F).

Dr. David Fassler, a Respected Fellow of the American Academy of Child and Adolescent Psychiatry and a Distinguished Fellow of the American Psychiatric Association, has also provided a declaration that explains recent advances in our biological understanding of the adolescent brain. Dr. Fassler has vast expertise in this area, as he has authored or co–authored over 30 books, chapters, and scholarly articles on topics pertaining to mental health and child and adolescent development.

As Dr. Fassler's declaration explains, the adolescent brain continues to mature into the 20s, with the regions that control impulses and enable reasoned decision–making being the last to develop. In part, the adolescent brain often fails to consider the long–term consequences of the actions that it directs, because efficient neural connections have not yet been biologically formed. As another researcher has put it, the operation of the adolescent brain can be compared to "starting the engines without a skilled driver behind the wheel." *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 56 (2009). Relevant parts of Dr. Fassler's declaration provide:

> *The brain undergoes a growth spurt in early adolescence, when neurons develop new connections. This phenomenon is known as "arborization." It is followed by a period of "pruning", during which neurons which have not been consistently utilized are selectively eliminated, thereby allowing for greater efficiency of the remaining neural connections—which is associated with heightened regulation of behavior and improved impulse control. This period can last until the mid–20's.*
>
> *The lack of a fully developed frontal cortex makes adolescents and young adults more likely to act on instinct or impulse. It also makes it harder for them to modulate emotional responses, regulate behavior, control impulses, assess risks or fully contemplate the consequences of their actions.*

> *These vulnerabilities—compounded by underdeveloped cognitive functions—render adolescents and young adults particularly prone to reckless, impulsive behavior and poor judgment.*
>
> *Research further demonstrates that such relative deficits are particularly pronounced and exacerbated when adolescents and young adults are in the presence of peers.*
>
> *In summary, scientific advances in the understanding of brain development since the time of Mr. Bernard's trial demonstrate that adolescents and young adults are biologically more likely to act on impulse, without stopping to think things through, modify their behavior or fully consider the consequences of their actions.*

Declaration of David Fassler, M.D., at ¶¶ 17–20 (September 6, 2016) (Attached as Exhibit G along with his curriculum vitae).

These new scientific insights strongly suggest that it was pure speculation to contend, as was suggested at trial, that Brandon would pose a "continuing and serious threat to the lives and safety of others" if not executed. As the next section explains in detail, Brandon's twenty years of successful, non–violent adjustment to incarceration have proven that prediction to be profoundly mistaken.

V. Squarely disproving the "junk science" evidence presented at trial to convince jurors of his supposed future dangerousness, Brandon has never posed any problem for prison authorities. Mark Bezy, a former warden for the federal penitentiary where Brandon is currently held, has reviewed Brandon's entire BOP record and concluded that if his life is spared, Brandon would integrate well into the general inmate population.

According to their special findings at sentencing, the jurors imposed a death sentence in part because they found that Brandon would pose a "continuing and serious threat to the lives and safety of others." This prediction has been conclusively disproven, as Brandon has grown on death row from an

adolescent into an adult without ever having any disciplinary problems or posing any threat to anyone's life or safety. The jurors reached their erroneous conclusion on this key point because of incomplete and misleading information.

Prior to this case, Brandon had no adult criminal history. Nor did he have any violent criminal history, even as a juvenile. He had also performed extremely well while under supervision as a juvenile, both in an independent living facility in another city and later back home in Killeen. His juvenile probation officer Novotny Baez could have told the jury about that, had Brandon's trial counsel ever identified her as a potential witness. Because they did not, the jury never heard from her. However, Ms. Baez has provided a declaration in support of this petition:

> *I supervised Brandon Bernard when he was 16 or 17 years old and remember him well. Brandon was always very low–key and respectful. He was a sweet, nice kid. …*
>
> *I never felt threatened or feared Brandon, unlike other juveniles I supervised. … I put his home visits as my last one of the day, usually at 8 or 9 at night … I never thought twice about my safety when visiting Brandon in the evening. …*
>
> *He was well liked by the staff at the probation office. He was an easy person to supervise and his supervision was terminated early because of good behavior. It does not surprise me that Brandon has done well in custody over the years.*
>
> *When I heard of Brandon's involvement in the murders, I thought the crime did not fit Brandon's character. Brandon was a follower. I did not think Brandon would do anything like this on his own. It was part of his "go along to get along" character. I thought that Brandon would not have gone along if he knew people would be killed.*

Declaration of Novotny Baez, Jr. at ¶¶ 2–3 (August 25, 2020) (Attached as Exhibit H).

No juror who decided Brandon's fate heard any evidence of his positive responses to rehabilitation. Juror Gary McClung laments that being deprived of that information prevented him from reaching the correct sentencing result:

> *I felt that Mr. Bernard's defense team made a "token" attempt at a defense during the entire trial. It was like Mr. Bernard's attorneys were "phoning it in." I felt like there might [be] something more to Mr. Bernard than what was presented. Some people had testified on Mr. Bernard's behalf during the penalty phase, which already gave me pause about sentencing him to death. I recently learned from Mr. Bernard's investigators that Mr. Bernard's juvenile probation officer says that she never felt threatened by Mr. Bernard and thought he was basically a good person. I was also told that Mr. Bernard's minister has said that Mr. Bernard expressed remorse to him before the trial. This kind of testimony would have been helpful to me in holding my ground that a life sentence was appropriate, not a death sentence.*

Declaration of Juror Gary McClung, Jr. at ¶ 9 (August 13, 2020) (Attached as Exhibit E).

Juror Laird Cooper also cites the inert performance of Brandon's trial counsel as a factor that favors clemency:

> *While the evidence [at trial] proved that there is no doubt that Mr. Bernard is guilty, I also believe Mr. Bernard's trial attorneys, failed to even adequately represent him. Due to this failure in legal representation, I am not opposed to Mr. Bernard requesting his death sentence be commuted to life without the possibility of parole.*

Declaration of Juror Laird Cooper at ¶ 3 (May 26, 2016) (minor punctuation alteration from original) (Attached as Exhibit I).[14]

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[14] Space does not permit us to catalog in this application the many grave errors and omissions by Brandon's trial counsel. We therefore attach a comprehensive critique of trial counsel's performance by David A. Ruhnke, one of the country's most experienced federal capital defense lawyers. *See* Declaration of David A. Ruhnke (June 8, 2004), attached as Exhibit J.

Instead of hearing about the positive adjustments that Brandon had made as a teenager while under supervision, the jury heard junk science from the mouth of a now-discredited "future dangerousness expert," psychiatrist Richard Coons. Dr. Coons attested that anyone associated with a gang outside prison would join the same gang in prison and inevitably grow more violent over time. While this testimony was technically offered only against Vialva, jurors almost certainly weighed it against Brandon, because his counsel took no steps to have them instructed otherwise. By their own terms, Coons's conclusions applied to anyone involved in gang activity, which according to the evidence included Brandon. Indeed, on direct appeal the Fifth Circuit cited Coons's testimony as supporting the jury's finding of future dangerousness *against Brandon*.[15] Since then, Coons's "methodology" has been debunked as a series of uninformed subjective guesses. The Texas Court of Criminal Appeals has rejected Coons's testimony about future dangerousness as wholly unscientific and thus unworthy of consideration as expert opinion.[16] The "junk science" nature of Coons's testimony is of great concern, since it is highly likely to have played a role in Brandon's death sentence.[17]

The entire premise of Coons's testimony — that association with a local youth gang meant affiliation with a violent prison gang — was premised on the

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[15] *See Bernard*, 299 F.3d at 482 n.11 and accompanying text (5th Cir. 2002).

[16] *See Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010).

[17] *See* Cunningham, Mark D.; Sorensen, Jon R.; and Reidy, Thomas J.; *Capital Jury Decision–Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL., PUB. POLICY & L. 223, 234–35, 244–45 & Table 1 (2009) (over 13–year study period, 82.4 percent of federal defendants who were found to constitute a future danger were sentenced to death, while 81.6 percent of those who were not so found were spared).

false assumption that the juvenile delinquents with whom Brandon associated were affiliated with some national group. They weren't, as Officer Baez makes clear:

> *In terms of Brandon and his friends' "gang affiliation," they were a bunch of neighborhood "wannabes." They were not in a real organized gang. They were playing like they were in a gang but had no affiliation to any. Brandon and his friends would wear the clothes and bandanas that made them appear to be in a gang, but it did not mean anything.*

Declaration of Novotny Baez at ¶ 4 (August 25, 2020) (minor punctuation alteration from original) (Attached as Exhibit H). Moreover, we now know from an expert – Sgt. Hunt – that Brandon's own connection to this "wannabe" gang was peripheral; had the jury been aware of her opinion, it would have judged it unlikely that Brandon would join a violent gang in prison.

Studies commissioned by the Department of Justice mirror Officer Baez's opinion: The Office of Juvenile Justice and Delinquency Prevention has concluded that the gangs that developed outside of major metropolitan areas during the 1980s and 1990s were not actually affiliated with the national gangs they tried to mimic. *See*, *e.g.*, *Hybrid and Other Modern Gangs*, OJJDP Juvenile Justice Bulletin (December 2001), U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, at 5 (available at https://www.ncjrs.gov/pdffiles1/ojjdp/189916.pdf) (noting that such gangs did not show allegiance to traditional gang colors [e.g., "Crip gang graffiti painted in red (the color used by the rival Blood gang)"], adopted symbols from a range of different national gangs, included members claiming "multiple affiliations, sometimes involving rival gangs," sometimes "change[d] their names or suddenly merge[d] with other gangs to form new ones," and were "increasingly diverse in both race/ethnicity and gender"); *id.* (in a national survey of law

enforcement officers, 61% of respondents indicated the presence in their localities of such "youth gangs 'that don't fit the mold'").[18]

But the jury didn't hear from Officer Baez or Sergeant Hunt, or learn anything about the research underlying the DOJ's conclusions. Hearing nothing to rebut Coons, the jurors found that Brandon would pose a "continuing and serious threat to the lives and safety of others" even if incarcerated for the rest of his life. As required by the special verdict form, they then weighed this conclusion when deciding Brandon's fate. The conclusion, however, has been proven false.

Mark Bezy was once the Warden of the BOP Correctional Complex where Brandon is confined. His accompanying letter attests that Brandon's good behavior during his confinement has been "remarkable." In fact, Warden Bezy "anticipate[s] that should Bernard's death sentence be commuted, he could and would function exceptionally well in a less–restrictive environment without posing any risk to institutional security and good order, or posing any risk to the safety and security of staff, inmates or others." His declaration explains why, notwithstanding the claim made at trial that Brandon was involved in a dangerous youth gang:

> *During Bernard's sentencing hearing, the government raised the issue of his gang involvement, suggesting that an inmate identified with the Bloods gang in the outside world would necessarily affiliate with the Bloods gang in prison, and cause problems in prison because of that affiliation. The trial record*

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[18] *See also*, *e.g.*, *Highlights of the 2001 National Youth Gang Survey* (OJJDP Fact Sheet), U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (April 2003, #01), available at https://www.ncjrs.gov/pdffiles1/ojjdp/fs200301.pdf); *Modern–Day Youth Gangs*, OJJDP Juvenile Justice Bulletin (June 2002), U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, available at https://www.ncjrs.gov/pdffiles1/ojjdp/191524.pdf).

> *suggests that whatever "gang" Bernard may have been involved with prior to his admission to the Bureau of Prisons was not terribly well organized. Moreover, in my opinion the trial testimony that suggested that Bernard would necessarily associate with any such gang in prison was exaggerated and inaccurate. The truth of the matter is that the Bloods lack a common leadership or council which would direct or influence all Blood sets; because of this lack of centralized leadership, an individual who may have associated himself with some Blood set in the neighborhood where he grew up will not necessarily associate himself with a similar set in prison.*
>
> *And it should be noted that the Bureau of Prisons classifies the Bloods as a "Security Threat Group," which reflects a lower level of violence than that exhibited by groups that the BOP deems "Disruptive." This fact seems to have been left out of the future dangerousness testimony presented in Bernard's trial, which suggested incorrectly that the Bloods were among the most dangerous entities that the BOP confronts.*
>
> *In any event, nothing in Bernard's records suggests that he has affiliated with any gang inside the BOP. Indeed, his record of zero disciplinary infractions … is strong evidence of no gang involvement, since gang activity in prison frequently leads directly to disciplinary infractions (indeed, simply displaying gang paraphernalia, clothing, signs, etc., is itself a disciplinary infraction).*

Letter of Warden Mark A. Bezy (retired) at 2 (August 20, 2016) (Attached as Exhibit K).

To our knowledge, since the federal death penalty was restored in the late 1980s, no other death-sentenced prisoner has been confined for a comparably long period without committing a single disciplinary infraction.

Brandon smiles at the memory of a rare family visit at the penitentiary where he has lived for more than 20 years. His family can afford to visit him only once a year.

VI. The jury's decision to impose death was a direct consequence of Brandon's trial lawyers' failure to challenge the prosecution's forensic evidence.

Only one fact can explain why jurors spared Brandon's life for his role in Todd Bagley's death but condemned him to die for his role in Stacie's. Specifically, the jurors believed that Stacie had suffered more than Todd because she died in part from smoke inhalation caused by a fire that Brandon set. There are several problems with this assumption.

The first and most obvious problem is that the Government agrees that Mrs. Bagley was immediately rendered unconscious by Vialva's gunshot. *See* Section III.B, *supra* at 11-12. Even though this critically important fact was undisputed at trial, Brandon's trial counsel failed to even mention to the jury that her unconsciousness meant that she suffered no pain, even if she remained alive briefly after Vialva shot her in the face. Counsel's failure directly led to Brandon's single death sentence, as explained by juror Jason Fuller:

> *I also understand that Mrs. Bagley was likely unconscious immediately after being shot by Christopher Vialva, and that her lack of consciousness would have meant that she did not feel any*

> *pain. I did not understand this at the time I made my sentencing decision because Brandon Bernard's trial attorneys did not highlight this fact. Had that been highlighted, I also would have made a different decision at sentencing. I would have voted that Brandon receive a life sentence for Mrs. Bagley's murder, as I voted for the other two death penalty counts that Brandon faced.*

Declaration of Juror Jason Fuller at ¶ 8 (July 21, 2016) (Attached as Exhibit C).

Even if it were true that Mrs. Bagley died in part from smoke inhalation, Brandon's participation in burning the car is not the sort of egregious act that should support a death sentence. Helping set the car on fire was simply not an intentional act of torture. Given that he was expecting the Bagleys to be released, Brandon was shocked when Vialva instead shot them. When the fire was set, Brandon and everyone else present believed that Mrs. Bagley was dead. Having heard all the evidence at trial, juror McClung shares this view:

> *I do not think that Mr. Bernard would have taken part in the events if he knew the Bagleys would be killed. I did not think Mr. Bernard would have burned the car if he knew anyone was alive in the car. I believe Mr. Bernard assumed that both Bagleys were dead after Mr. Vialva shot them, in the head.*

Declaration of Juror Gary McClung, Jr. at ¶ 3 (August 13, 2020) (Attached as Exhibit E).

A final problem with assuming that Mrs. Bagley must have suffered from the fire because there was soot in her airways is that evidence developed during post–conviction proceedings shows that Vialva's gunshot likely caused Mrs. Bagley's immediate medical death. If so, then the soot simply reflected "agonal respiratory effort," a primitive physiological process distinct from live breathing. This is the opinion of Dr. Stephen Pustilnik, the Chief Medical Examiner for Fort Bend County, Texas:

> *One may reasonably conclude from the evidence I have reviewed that Mrs. Bagley, who had suffered an unsurvivable gunshot wound that damaged the structures of her brain, was medically dead after sustaining that injury. That Mrs. Bagley would ultimately arrive at forensic death, as a result of the damage from this gunshot, was a foregone and inevitable conclusion.*
>
> …
>
> *If Mr. Bernard's attorneys had contacted any reasonably competent pathologist in 1999–2000, that person could have explained to counsel the distinction between medical death and forensic death, and how the autopsy findings with respect to the soot in Mrs. Bagley's airways and the carbon monoxide in her blood are consistent with physiological processes occurring in the wake of medical death from traumatic brain injury.*

Declaration of Stephen Pustilnik, M.D. at ¶ 12, 15 (October 25, 2012) (Attached as Exhibit D). Dr. Pustilnik made clear that the findings were not simply "consistent with" such a conclusion; he stated that medical death, followed by agonal respiratory effort, was a "more likely explanation for the postmortem finding of soot in the airways of Mrs. Bagley's body, as well as carboxyhemoglobin of 45% in her blood." *Id.* at ¶ 14. Evidence that these phenomena occurred "in the wake" of Stacie Bagley's medical death from the gunshot wound inflicted by Vialva could have prevented Brandon's death sentence, by persuading jurors that the fire did not cause her death and did not cause her to suffer in any event.

But Brandon's trial counsel failed to consult any "reasonably competent pathologist" — indeed, they didn't contact any pathologist at all. Two jurors have expressly lamented trial counsel's failure to provide the jury with information similar to that provided here by Dr. Pustilnik.

When meeting with Brandon's clemency investigators, juror Chris Tyner remarked that Brandon's trial attorneys were plainly overwhelmed and did a terrible job. The jurors even discussed this deficiency during deliberations,

feeling as if Brandon's attorneys had "laid down" for the prosecution. It was as though Brandon had no legal representation at all. Shown Dr. Pustilnik's declaration, juror Tyner became emotionally upset, stating that this information would have been important to have known at trial. He added that this was an example of what Brandon's trial attorneys could have done to save Brandon's life. At trial, the testimony left juror Tyner believing that Mrs. Bagley must have felt something from the fire. He subsequently e–mailed Brandon's clemency investigators with his "approval to move forward with a life in prison without parole sentence vs. the death penalty." *See E–mail of Chris Tyner to Clemency Investigators Stacey Brownstein and Charles Formosa* (March 15, 2015) (Attached as Exhibit L); *see also* Declarations of Clemency Investigators Charles Formosa and Stacey Brownstein, describing conversation with juror Tyner at ¶ 7 of each declaration (Attached as Exhibits M and N, respectively).

The views expressed by juror Tyner are echoed by juror Fuller, who unambiguously declares that he would have voted for life if he had been armed with the information provided by Dr. Pustilnik:

> *Though we ended up agreeing at the time that Brandon should receive a death sentence, we had limited information available to us that would have guided us in choosing a different sentence based on the two options available to us. If the jury had the information provided in Dr. Pustilnik's report, heard about Brandon's remorse from his minister, and heard about Brandon's upbringing, it would have helped support my feeling that Brandon did not deserve the death penalty. However, with the information we had available to us and the jury instructions, we were unable to support a sentence of life without the possibility of parole.*
>
> *I voted for death for Brandon Bernard because of the autopsy report presented by the prosecution. It stated that Stacie Bagley did not just die from the gunshot wound, but also from smoke inhalation. There was no rebuttal to this. Brandon's attorneys did*

> *not do anything to dispute this. I have since reviewed Dr. Pustilnik's report and learned that it is likely that Mrs. Bagley was medically dead immediately after she was shot by Mr. Vialva and the fire did not cause her death. If the information presented in this report had been presented at trial, I would have made a different decision at sentencing.*

Declaration of Juror Jason Fuller at ¶¶ 6–7 (July 21, 2016) (Attached as Exhibit C).

VII. Brandon came from a troubled family background and spent much of his adolescence trying unsuccessfully to fill the void left by an absent father.[19]

Another important fact that the jurors did not know when they had Brandon's life in their hands was that Brandon grew up in a troubled home, marked by violence, which, while it does not excuse the crime, is traditionally recognized as a basis for withholding a death sentence. His father Kenneth Bernard was distant and abusive, but still the most present parent that Brandon had — until his parents divorced and Kenneth disappeared for years. The divorce followed a violent assault in which Kenneth punched Brandon's mother Thelma in the chest shortly after she had heart surgery. After he was released from custody following the assault, Kenneth came to the house and threatened to kill Thelma. She then obtained a protection order. About a month later, Kenneth burglarized the family home. He was arrested for that too, and eventually served time for violating the protection order. After that conviction,

[19] This section provides an overview of Brandon's adolescence. A detailed description of Brandon's life history is contained in the Mitigation Report of Jill Miller, MMSW (June 4, 2004), which was produced well after the trial, under direction of Brandon's current counsel (attached as Exhibit O).

Kenneth abandoned the family for an extended period, during much of which time he was homeless. Brandon went three years without seeing his father.

Brandon, pictured here at age 17 or 18, with his mother and younger sister and brother

Worrying about how his father — who had few employable skills — could even survive, Brandon slipped into depression. It was during this time, around age twelve or thirteen, that Brandon became lost and began to follow a troubled crowd. When Brandon and his father finally reconnected, his dad was living in a small, roach–infested apartment, frequented by homeless friends from his days on the streets. Brandon had no room of his own, sleeping instead on the living room sofa. Brandon's father could only keep breakfast food on hand; for lunch and dinner, he and Brandon had to line up at the local soup kitchen.

Friends, family members, and Brandon's former pastor have all submitted declarations describing this bleak series of events. At trial, however,

all the jurors knew was that Brandon's parents had been divorced. Brandon's sister Quiona sets the stage for what their childhood was really like:

> *We were not raised in a home of loving parents. Our mom did her best to raise us, teach us morals through our faith, and work to pay the bills. Our dad was not really a dad to any of us. He was always in and out of our lives, and when he [was] present, he was rarely a good influence. He never acted loving or acted like a dad, really. He was particularly hard on Brandon, always giving him orders. He treated us all like servants. My dad did not get along with Brandon, and I don't think he even liked Brandon very much growing up. There was no reason for this, it was just the way he was. He did not spend time with us even when we stayed with him. He always seemed to drink.*

Declaration of Quiona Bernard at ¶ 7 (July 12, 2016) (Attached as Exhibit P).

In her declaration, Brandon's mother Thelma describes the violence that was never spoken of during the trial:

> *I tried my best to raise Brandon but was not around as much as I should have been when he was growing up. When I could not take care of Brandon, he was left with his father. Kenneth struggled to be a parent, having had no good role models of his own. …*

> *One time when Kenneth hit me, I called the cops on him. …. We got into an argument and he began pushing me around. I threatened to spray him with mace that I kept in my handbag for*

> *personal protection. Kenneth grabbed the mace from me and sprayed me. Then he hit me in the chest where I recently had heart surgery three months prior. I was shocked he would hit me, especially in the place I just had surgery. He was trying to hurt me. Despite this attack, I was able to call the police and Kenneth was arrested. Brandon witnessed this attack and took the younger kids outside. This assault precipitated my filing for divorce from Kenneth. Kenneth did not return to live in our home following his release from jail, but he came back and threatened to kill me. After that, Kenneth did not see his children for about three years by his own choice.*

Declaration of Thelma Bernard at ¶¶ 3, 10 (August 14, 2020) (Attached as Exhibit Q).

Kenneth's absence hurt Brandon deeply and put him at risk because, despite his father's failings, Brandon missed even the limited guidance and structure that life with Kenneth provided. He began to fall under the sway of others, including a troublemaker cousin who came to live with him during that time, Melsimeon Pollock. Melsimeon eventually reformed; he now has a successful career and is a proud father. Reflecting on that time, Melsimeon realizes that he was lucky to escape his own delinquency, and believes that Brandon would have done so, too, if only he had had appropriate guidance:

> *When Brandon's parents split up, he stayed with his mother, Thelma, and my family moved from Indiana to live with them.*
>
> *…*
>
> *I noticed a difference with Brandon after Brandon's father moved out of their family home. I know that Brandon needed and missed a father figure in his life.*
>
> *…*
>
> *I moved away for about six months and then moved back to Killeen. When I moved back, I was introduced to these kids [the kids Brandon was arrested with] by Brandon. I believe that these kids filled a void in Brandon's life after I left. Brandon turned to them for a sense of belonging. …*

…

I know Brandon and it is hard for me to believe that he would have been involved in any of this if he had really appreciated that people were going to be killed[.] That is completely out of character for Brandon. I believe that Brandon's new friends took advantage of his need for a sense of belonging and his willingness to go along with what they wanted to do. However, had Brandon known that going along with his friends was going to lead to two innocent people being killed, I know that Brandon would have held his line and said no.

I believe that the victims' families have suffered a great, unimaginable loss. As a parent myself, I cannot fathom experiencing and living through the death of a child. I regret any pain that my efforts on Brandon's behalf might cause them to feel and I pray that they are able to find peace.

…

I believe that my life's journey is a good example of how an African American youth can turn his life around if lucky enough to have the chance. I got into trouble when I was a teenager and had trouble following some rules. By the grace of God, my immaturity never led me into a situation as serious as the one in which Brandon ended up. If things had gone just a little differently, I could easily be in Brandon's place today. Instead, I grew to see that I needed to change and better myself. That led me to college, a degree, a good job, and a happy marriage blessed with four children. I left the life of crime years ago, and I believe Brandon would have done the same once he grew in maturity and understanding[.]

Declaration of Melsimeon Jordon Pollack at ¶¶ 6, 9, 13–15, 18 (June 3, 2016) (Attached as Exhibit R).

When living with his mother, Brandon regularly attended the Seventh Day Adventist Church in Killeen. The pastor of that church and a number of members of his congregation confirm the view that Brandon was basically a

good kid who was adversely affected by his father's absence and the negative influences of others. Church member Bonnie Wainwright explains:

> *Brandon lost a father figure in the home and Thelma was not really a role model because she was busy and gone all of the time. That was when Mel was in the house and Mel became the only role model Brandon had. With all of the dysfunction at home, I think Brandon looked for a place of acceptance.*
>
> …
>
> *Brandon is a good natured, sweet person. It is still hard for me to believe that he got into a situation where people were killed. The victims' families have lost so much. My heart goes out to them as they have suffered a terrible loss. But, I also do not think Brandon should be executed. Brandon is naturally a good person who got caught up in a bad situation at a time when he lacked the strength and especially the maturity to get himself out of it. I will hope and pray that President Trump will spare Brandon's life and commute his death sentence to a life sentence in prison.*

Declaration of Bonnie Wainwright at ¶¶ 6, 8 (August 13, 2020) (Attached as Exhibit S).

Another church member, Debra King, provides a declaration in which she describes a physical fight between Brandon and his father, shortly after Kenneth was released from jail. She, too, saw a change in Brandon when his father was sent away to jail, noting that "the absence of a father figure seemed to negatively impact Brandon…." Declaration of Debra King at ¶ 5 (September 9, 2020) (Attached as Exhibit T). Ms. King reports the congregation's shock at learning that Brandon was involved in this horrible crime. She also describes a letter that Brandon wrote to the church, expressing his remorse and begging for forgiveness. The jury heard none of this evidence because Brandon's trial attorneys never asked anyone to explain how this letter came to be written or

what it meant to the congregation. Here is what Ms. King could have testified to, had she been identified or called as a witness:

> *I first heard about the tragic incident involving the Bagleys from reading the newspaper. I noticed that Brandon's name was in the paper and associated with this horrendous crime. …. I couldn't believe what I was reading. This was not the Brandon that I knew.*
>
> *…*
>
> *I remember a letter that Brandon wrote to the congregation while he was in jail awaiting trial. Brandon wanted to apologize to the church for having become involved in the crime and he wanted the church members to know and understand that he felt remorse for what he had participated in. I remember that in the letter, Brandon wanted us to know that he was going to accept his punishment for what he had done. I truly appreciate that Brandon was able to say he was sorry and that he wanted his church to know that. I believe that under Pastor Johnson's leadership, we were able to hold Brandon and forgive him. ….*
>
> *…*
>
> *The congregation was very sad to learn about Brandon's death sentence. I was dumbfounded as well as sad for Brandon and his family. It was hard for me to understand why Brandon was charged and tried with the shooter and mastermind of the crime.*

Declaration of Debra King, Exhibit T at ¶¶ 7, 9, 11–12.

Pastor Terry Johnson also knew Brandon as a kid in trouble. He met with Brandon at the jail while he was awaiting trial and heard Brandon report that "he felt the crime never should have happened and that he felt bad for not having done something to stop it." Declaration of Pastor Andres Terry Johnson at ¶ 6 (August 12, 2020) (Attached as Exhibit U). Like so many others, Pastor Johnson was never called to the witness stand. Had he been, his testimony would have been powerful:

The years I have spent as a Pastor have given me some insight on how children respond when their parents' relationship breaks down. Brandon had a void in his life that he was trying to fill. He needed to belong to something and be accepted.

Unfortunately for a young man facing such a struggle, Brandon was a lamb and not a lion. He seemed easily influenced and impressionable. He was nowhere near emotionally or morally an adult when he reached age 18. He was more like fourteen or fifteen, "a little boy in a man's body." He could not say "no" to anybody. At church functions, this tendency was positive; Brandon seemed at ease and fit in naturally. But when he was on his own and away from the church, Brandon's tendency to be a follower left him vulnerable to the negative influences of others.

…

Brandon wrote a letter expressing his remorse to the Church. I believe that we posted it on the Church bulletin board. The Church felt a lot of grief for what happened, especially towards the families of the victims. The congregation was shocked by the circumstances of the crime. Everyone knew Brandon as a kind, gentle, young man, not a killer. Brandon had a way about him that indicated being easy going, a follower and not a leader. Brandon was someone who wanted to be accepted.

Even at the time, I did not believe Brandon should receive a death sentence. I did not think this should have been a death penalty case, but knowing Texas, I was not surprised — especially when I considered that it was a black on white crime. I do not want my thoughts about the justice system to mean I thought less of the victims themselves. I saw the victims as good Christian people and this crime was a senseless tragedy.

Declaration of Pastor Andres Terry Johnson at ¶¶ 4–5, 8–9 (August 12, 2020) (Attached as Exhibit U). [20]

[20] While Pastor Johnson sees a death verdict as unsurprising because this was a "black on white" crime, it is impossible to know just how much the outcome in Brandon's case was influenced by race. But one cannot deny that race plays a significant role in how the death penalty is administered in this country: data gathered by the FBI shows that more than 75 percent of death row defendants who have been executed were sentenced to death for killing white victims, even though in society as a whole about half of all homicide victims are Black. *See* https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers (citing Puzzanchera, C., Chamberlin, G., and Wang W. (2018) ("Easy Access to the FBI's Supplemental Homicide Reports).

Research has consistently produced robust findings that correlate race with prosecution and sentencing decisions in capital cases around the nation. *See*, *e.g.*, American Bar Association Death Penalty Due Process Review Project, *The State of the Modern Death Penalty in America: Key Findings of State Death Penalty Assessments*, 2006–2013, at 8 ("Issue 5: Charging Practices and Disparate Outcomes") (data indicates that race influences the outcomes of capital cases in Georgia, Indiana, Ohio, and Tennessee) (available at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf); Beardsley, Meg; Kamin, Sam; Marceau, Justin F.; and Phillips, Scott; *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty–First Century*, 92 DEN. U. L. REV. 431 (2015) (in Colorado, even after accounting for the heinousness of the crime, the race of the accused is a statistically significant predictor of whether prosecutors will seek the death penalty); Katherine Beckett and Heather Evans, *Race, Death, And Justice: Capital Sentencing In Washington State, 1981-2014*, 6 Colum. J. Race & L. 77 (2016) (jurors in Washington were more than four times more likely to impose a death sentence upon an African American defendant, after controlling for other factors).

The above research focuses primarily on capital prosecutions in state courts. But similar racial effects existed in federal prosecutions in the era when Brandon was tried and sentenced. In September 2000 (just four months after

As noted, the problems in Brandon's family situation do not excuse his actions. But they do help explain why he was adrift as a teenager and started following a troubled crowd, which ultimately led to his involvement in this crime. Information about Brandon's background shows that he did not and does not possess a fundamentally evil character. *See*, *e.g.*, Exhibit O at 22 ("no strong anti–social tendencies" were found when Brandon was evaluated by a psychologist after being arrested for property crimes at age 14). Instead, Brandon was someone whose painful past left him less equipped to deal with a highly-charged situation like the one that led to the Bagleys' deaths. Had the jury been presented a full and accurate picture of Brandon's background, it is far more likely that they would have spared him the death penalty.

VIII. Brandon's sole death sentence was a consequence of serious and repeated misfires of the legal machinery intended to ensure reliable verdicts in capital cases. But understanding how that death sentence came to be imposed is less urgent than commuting it now.

Few of the key facts discussed in this application were known to the Government when it made its decision to pursue the death penalty, or to the jury when it levied that sentence for the murder of Stacie Bagley. To appreciate

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Brandon was sent to death row), the Justice Department issued *The Federal Death Penalty System: A Statistical Survey* (1988–2000), a review that found numerous racial and geographic disparities in federal capital prosecutions. The report revealed that 80% of the cases submitted by federal prosecutors for death penalty review in the preceding five years (*i.e.*, during the era when it was decided to seek Brandon's execution) had involved racial minorities as defendants. In more than half those cases, the defendant was Black. Department of Justice officials described themselves as "troubled' and "disturbed" by the data. *See* Mark Lacey and Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, The New York Times (Sept. 12, 2000) (available at: http://www.nytimes.com/2000/09/13/us/reno–troubled–by–death–penalty–statistics.html).

why, a review of the procedural facts of the case is helpful. We offer this account to explain why it has fallen to the President to keep that inappropriate and excessive sentence from being carried out.

Brandon's case was assigned to, and ultimately tried before, U.S. District Judge Walter S. Smith.[21] Judge Smith failed to follow the required statutory protocol of consulting with the Federal Public Defender's Office before assigning counsel. The court appointed a single attorney who had no federal

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[21] In December 2015, Judge Smith was suspended from assignment to new cases for one year after a finding that in 1998 (two years before Brandon's trial), he came close to sexually assaulting a woman who worked in the courthouse. *See* Tommy Witherspoon, *Waco federal judge reprimanded for sexual misconduct, stripped of new cases for a year*, Waco Tribune (Dec. 11, 2015) (available at http://www.wacotrib.com/news/courts_and_trials/waco–federal–judge–reprimanded–for–sexual–misconduct–stripped–of–new/article_319e2f91–f1d7–5dfe–8311–550de00981a4.html).

Excessive drinking may have played a role in this misconduct (according to the employee, when the incident took place at 8:30 a.m., Judge Smith's breath smelled strongly of liquor). *Id.* Questions about Judge Smith's fitness in 1998 aside, it is worrisome that the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States ultimately ordered the Fifth Circuit to take another look at the matter, in part because Judge Smith is said to have "allowed false factual allegations" to be made on his behalf in responding to the complaint in 2014–2015. *See* Committee on Judicial Conduct and Disability of the Judicial Conference of the United States, Memorandum of Decision C.C.D. No. 16–01 (*In re: Complaint of Judicial Misconduct Proceeding in Review of the Order and Memorandum of the Judicial Council of the Fifth Circuit, J.C. No. 05–14–90120*), filed July 8, 2016, at 3 (available at http://www.uscourts.gov/file/document/complaint–judicial–misconduct–16–01). Judge Smith retired effective September 14, 2016. *See* Tommy Witherspoon, *Federal judge Smith retires during Ongoing Investigation*, WacoTrib.com, available at http://m.wacotrib.com/news/courts_and_trials/federal-judge-smith-retires-during-ongoing-investigation/article_a44e8589-2cfb-5719-97ec-a1362bce08f2.html?mode=jqm.

death penalty experience. That attorney waited eight months before seeking co–counsel, and then had the court appoint his own son.

While that attorney was representing Brandon solo, it was his duty to attempt to dissuade the Government from pursuing Brandon's execution. He undertook no meaningful investigation into Brandon's background to that end, visiting Brandon just three times between the day he was appointed and the day he sent the Government a cursory letter asking for a non–death resolution in Brandon's case. That letter — the substance of which occupies just three–quarters of a page — comprises just 334 words. *See* Letter of Russell D. Hunt to Mark Frazier (August 30, 1999), attached as Exhibit V.

Ultimately, the father and son team responsible for Brandon's defense collectively logged just 20% of the preparation time typically spent on a federal capital case, and compressed most of what they did into the eight weeks immediately preceding trial. Unsurprisingly, their presentation concerning Brandon's life and background was hollow, lackluster, and — most critically — incomplete.

Brandon's lawyers made no opening statement at either phase of trial. Nor did they challenge the Government's forensic evidence, including the claim that Stacie Bagley was still breathing as the fire burned, even though readily available expert opinion could have shown that, at that time, she was likely already medically dead. This was a key issue for the jurors, who, after asking for the autopsy report, sentenced Brandon to death for Stacie's murder, believing that she was alive when the fire was lit. More important, Brandon's lawyers utterly failed to emphasize the undisputed fact that after she was shot, Mrs. Bagley was unconscious and unable to feel pain. Had they done more to ensure that the jurors fully understood that Mrs. Bagley was beyond suffering once Vialva shot her, it is likely that no death verdict would have been returned

against Brandon. This conclusion follows from the fact that jurors sentenced Brandon to life imprisonment for his role in the death of Todd Bagley, who was instantly killed by Vialva's gunshot, but struggled to reach a sentencing verdict for his role in Mrs. Bagley's death, despite having been told little about Brandon's background or character.[22]

Counsel let Brandon's mother decide which penalty–phase witnesses to call (a gambit the Supreme Court has expressly condemned[23]) and did not prepare any of them to testify. Jurors heard nothing about the destructive violence young Brandon witnessed between his parents, or his struggle with depression as a teen. Nor did counsel call any of the many people (*e.g.*, ministers, a former juvenile probation officer, and fellow church goers) who could have described Brandon's remorse and good qualities. As mentioned, the Government presented a psychiatrist, who, resting on a method since repudiated by the Texas state courts, speculated that anyone with Brandon's background would pose a "future danger" even in prison; that prediction has proved wildly inaccurate, as Brandon has been completely well–behaved in custody.

In post–conviction review, Judge Smith refused to let Brandon present evidence to support his challenges to his death sentence. Then, in approving

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[22] Sentencing deliberations began around 4 p.m. on June 12, 2000. Before breaking for the night at 7 p.m., jurors condemned Vialva to death on all three death–eligible counts. *See* Jury Verdicts, attached as Exhibit W, pgs. 1–3. During the same session, and despite the horrific nature of the crime, jurors sentenced Bernard to life for his part in the carjacking and in Todd Bagley's murder. Exhibit W, pgs. 4–5. Only after unsuccessfully requesting the autopsy report on Stacie Bagley and returning for further deliberations the following day did jurors impose a death sentence on Bernard for Mrs. Bagley's murder. Exhibit W, pg. 6.

[23] *Sears v. Upton*, 561 U.S. 945 (2010).

that decision without allowing a full appeal, the Fifth Circuit employed the same approach – imposing an unfairly steep standard when deciding whether to allow a full appeal – that would lead to its third reprimand from the Supreme Court in fourteen years. *See Buck v. Davis*, 137 S. Ct. 759 (2017); *see also Miller-El v. Cockrell*, 537 U.S. 322, 341-48 (2003), and *Tennard v. Dretke*, 542 U.S. 274, 283-89 (2004). Unfortunately, the ruling in *Buck* came too late for Bernard.

The fact that the legal apparatus malfunctioned here is deeply troubling. But thankfully, the Executive is unconstrained by formal limits on what information to consider and technical rules about how to weigh it. This clemency proceeding is the only point in the long history of Brandon's case at which that unbounded assessment may be made. For that reason, the appropriate question for the President is not "*Who let this case get to this point?*", but "*Is taking Brandon's life the morally appropriate response, given everything that we know now?*" The answer to that question is a forceful "no."

IX. Executing Brandon would inflict additional suffering on his own family, in whose lives he plays an important and constructive role.

Despite having lived his entire adult life behind bars, Brandon has had a positive impact on the lives of others. In fact, Brandon's younger brother Max credits Brandon with saving him:

I was about seven years old when Brandon was arrested.

If Brandon were executed, I would be devastated. I would feel as if there were no hope in the world. He is my big brother and has always been there for me. I know that he made horrible choices years ago and I have great sympathy for the Bagleys and their families. But I believe that he has learned

> *from those mistakes. Even though he is in prison — and maybe in some ways because he is in prison — he has helped me stay clear of getting into trouble or getting mixed up with the wrong crowd. Brandon is supportive of me and has helped me through some very hard times. He has been supportive of me in positive ways, without judging me. I appreciate that. I don't have this sort of connection with anybody else.*

Declaration of Max Bernard at ¶¶ 1–2 (June 27, 2016) (Attached as Exhibit X).

Brandon's other family members would also be devastated if their father, son, brother, friend, and best friend were to be executed. Select testimonials include:

> *I believe he is worth saving. ….. He encouraged me to get good grades and graduate from high school and medical assistant training. He is still my older brother and fills that role when I need him. . . . He gives me good advice. He helps keep me calm and keep things in perspective. He helps me remember that I should not worry about things that I can't control. I love him very much.*
>
> *…*
>
> *I tell him everything. He is my best friend and my big brother. He is a kind hearted person …. Brandon cautions me against people he thinks might take advantage of me. I depend on Brandon to advise me and he helps me make better decisions.*

Declaration of Quiona Bernard at ¶¶ 13, 15 (July 12, 2016) (Attached as Exhibit P).

Despite getting to visit Brandon only once a year through a glass partition, Brandon's mother appreciates the time she can have with her son, even as she recognizes the suffering his actions have caused the Bagley family:

If Brandon were executed, it would weigh heavily on my soul. My faith is a tremendous source of strength and optimism[,] but even my faith cannot overcome the longing to hold my eldest child in my arms. I enjoy visiting him and talking with him over the phone, but it's hard for me not to be able to hug my son. At every visit, we put our palms up against the glass, but it is a poor substitute for an embrace. However, I am grateful for it since that is all I can do.

I would ask that President Trump spare my son's life. People lost their lives because of Brandon's poor decisions and it fills me with immense sorrow. I pray for their families too and know that whatever happens, it is God's will. I wish the victims could be

brought back to make their families whole again. I know it is a lot to ask for, but I hope they can forgive Brandon.

Declaration of Thelma Bernard at ¶¶ 14–15 (August 14, 2020) (Attached as Exhibit Q).

Brandon is also the father of two young girls, who he proudly reports are already growing into strong young women.

He has never been able to hold either one of them. Nevertheless, they all cherish the relationships they can have.

Sherise Scott, the mother of Brandon's 16 year–old daughter Taneah, stresses how important Taneah's relationship with Brandon has been, and hopefully will continue to be. She worries that if Brandon were executed, this would create yet another grieving family:

Brandon is important to Taneah because he is her father, and she treats him like one. Brandon's experience serves as an important life lesson for her[.] Taneah has never gotten into trouble and does well in school. Brandon encourages her to keep up her grades. He explains to her that who she has as friends is very important. He is an example of what can happen if she hangs out with the wrong friends. Taneah does not wish to make the same mistakes, so she goes to school and to work and does not go out to parties. Brandon continually reminds her of what her choices mean.

I ask that the President commute Brandon's death sentence to a life sentence. It is important for Taneah to have her father around. He can never be replaced. She can continue to learn from him and seek his guidance. He is a different person than the one who got into trouble …. If he was executed, more victims would be created, like my daughter Taneah. He has much to offer even though he is in prison. Please do not punish my daughter for something her father did. Brandon will still be punished . . . by spending the rest of his life in prison, with no chance to ever be home with his family.

I understand that the Bagley family has lost two people because of the crimes that Brandon was involved in. I am very sorry for that and wish there was something I could do to change things for them. They have suffered, and if I were them, I too would want to see Brandon punished harshly. I truly believe that if Brandon could trade places with the victims, he would. But executing Brandon will not bring back their children. It will only punish another child, our daughter Taneah. I ask the Bagleys to understand that although this was a terrible crime, Brandon committed it when he was young and that he is not that person any more. I hope that someday they can find it in their hearts to forgive him, even though they will never forget the pain of their loss.

Declaration of Sherise Scott at ¶¶ 3–5 (August 23, 2016) (Attached as Exhibit Y).

Taneah admits that it is not easy to maintain a relationship with an incarcerated parent, but values even the unconventional connection that she and her dad have established:

My father is there for me as much as he can be from prison. I have never been able to hug my dad, but mentally and emotionally he is there for me as much as possible. It might not seem like much of a relationship, but it is the best one I have and it is important to me. I will never have a normal father–daughter relationship with my dad. He will never be able to attend my graduation or take part in my wedding, but I hope to be able to share those things with him.

I have learned a lot about the consequences of my actions from my father. He is very firm with me about making the right choices, staying out of trouble, keeping away from the wrong crowd, and keeping my grades up. He stresses to me how important those things are and how one bad choice could ruin my life.

I am hoping and asking the President to spare my dad's life. I know he has done wrong, but also know he is sorry. It would be a tremendous loss to me if my dad was executed. I depend on him for his guidance and support and hope I will be able to continue to get it from him while he is in prison for the rest of his life.

Declaration of Taneah Scott at ¶¶ 3–5 (August 23, 2016) (Attached as Exhibit Z).

X. Brandon has consistently, repeatedly, and wholeheartedly demonstrated remorse for his crime.

As discussed earlier, the accounts of Youth Pastor (now Dr.) Andreassen and Pastor Johnson make clear that Brandon expressed remorse for his role in

the Bagleys' deaths from the very beginning. Yet another minister counseled Brandon as he awaited trial and could have been called upon to attest to Brandon's sorrow and regret. His name is Reverend Elmer "Jack" Hetzel; he supports the death penalty in general, but not for Brandon.[24]

Reverend Hetzel ministered to Brandon after Brandon reached out to him through another inmate who was held at the local jail. At their very first meeting, Brandon asked "how he could possibly be forgiven for what happened to the Bagleys." He also "wanted to apologize to the victims' families and ask for forgiveness, but did not know how to reach out to them or if the families even wanted to hear from him." Reverend Hetzel has provided spiritual guidance to many inmates over his lifetime; he believes that Brandon's remorse was sincere, and regrets not having had the chance to explain this to the jury:

> *Brandon showed true remorse during our conversations. I counsel and minister a lot of individuals in custody. Many of them fail to see the seriousness of their actions and seem unaware of the need to reform themselves. Brandon was different. He showed true remorse during our conversations, [and] applied himself to the task of understanding where he had gone wrong….*
>
> *Over time, Brandon told me that he felt ashamed for not having tried to stop the events that led to the Bagleys' deaths. He wanted to apologize to the victims' families and ask for forgiveness, but did not know how to reach them or if the families even wanted to hear from him….*

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[24] *See* Declarations of Clemency Investigators Charles Formosa and Stacey Brownstein, describing conversation with Reverend Hetzel at ¶ 3 of each declaration (Attached as Exhibits M and N, respectively).

I was never contacted by anyone on Brandon's trial team. Had I been, I would have liked to have shared with the jury my experiences with the young man I came to know over the year we spent talking and praying together in the Waco Jail. I would also have told the jury how remorseful and grief–stricken he was over what happened. I could have been able to tell the victims' families that Brandon had regret and sorrow for his actions.

I pray for the victims' families. I know they have suffered an insurmountable loss and nothing can be said or done to bring their children back. My wish for Brandon's life to be saved does not take away my sorrow for their loss.

I pray that President Donald Trump will spare Brandon and commute his death sentence to a life sentence. I am grateful that I had the opportunity to minister to this young man. In my professional opinion, based on years of ministering to people, Brandon Bernard could make a positive contribution to society, even if he spent the rest of his natural life in prison. I believe that his life is worth saving.

Declaration of Reverend Elmer "Jack" Hetzel at ¶¶ 11–16 (August 12, 2020) (Attached as Exhibit AA). Like the painful regrets he expressed to Andreassen and Johnson, none of Brandon's statements of remorse to Rev. Hetzel were made known to the jury.

XI. Brandon has counseled others to avoid straying down a destructive path.

Pastor Hetzel's belief has already been shown correct. Brandon can make a positive contribution to society if allowed to live, as he has shown by repeatedly reaching out to others, holding up his own life's terrible mistakes and their grim consequences as cautionary tales to other wayward youth.

Growing up, Brandon knew twin brothers David and Michael Boyd, five years his junior, as kids from his church. In 2006, Brandon saw a magazine article reporting that the grown up Boyd Brothers were launching an

"Enlightenment Tour" to travel the country reaching out to troubled youth and trying to steer them towards God. To support their efforts, Brandon offered to write a personal testimony about the perils of sin. As documented in a subsequent article, the Boyd brothers found Brandon's testimony to be "most moving":

> *Of all the blessings, one of the most moving was when Brandon Bernard, a Seventh–day Adventist and the youngest person to be put on federal death row, read our article in the Southwestern Union Record and responded to us with: "As soon as I read your article, I knew what God wanted me to do." Brandon wrote his testimony and asked us to share it with others in danger so that they won't walk the same path.*

The Enlightenment Tour, Insight Magazine Online (December 9, 2006), attached as Exhibit A to the Declaration of David Boyd (August 7, 2020), which is attached to this application as Exhibit BB.

David Boyd is a former correctional officer for the State of Texas. From his days as a prison guard, he remembers offenders "who were proud to be incarcerated," but emphasizes that Brandon, in contrast, has opened his heart to God and humbled himself. Declaration of David Boyd at ¶ 9 (August 7, 2020). In his declaration, he elaborates on the value of Brandon's help, citing Brandon's testimony at length:

> *Brandon provided powerful testimony to kids that we were trying to help. He explained how quickly he fell, how much he regretted it, and how others should learn from his mistakes. It was the most powerful testimony that we received. Here is a sample:*
>
> ***At 18 years old most kids are preparing to embark on life. At 18, I was getting processed by the FBI, but [at] 19 I was sitting on death row ....***
>
> ***A person reading this might think to themselves ... this would never happen to me. Don't be a fool! This whole place is filled with people who thought it***

couldn't happen to them; now they wish they would of [sic] listened. Most of the time it starts from doing small things. It just continues to escalate at such a rapid pace, that before you know it, it's over and your [sic] left either dead, in prison, or in here (which actually is combination of both.) How do I know, because I thought the same way ....

I didn't have a violent record or an adult [record] (matter of fact[,] I barely had a record at all.) I went to church every week. I attended numerous church functions. I even went to church school, but sin does not discriminate about whose life it will destroy. Maybe you'll understand this better if I put it this way. It took me only 3 years to ruin my life. 3 yrs from the time I first stole from my moms [sic] purse to being in death row. Now marinate on that! ...

It may be too late for me (only God knows the answer to that), but it is not too late to help others. It's not too late to let youths know that this [criminal] lifestyle is not glamorous. There are no rewards. There is only pain ....

Stop breaking those who care about your hearts! Make the decision to do what is right, walk the path of righteousness ....

Listen to my words and learn from my life's mistakes so you don't have to experience it yourself.

Declaration of David Boyd, Exhibit BB at ¶ 7 (August 7, 2020).

Both David and Michael confirm that Brandon's statement helped them redirect many at–risk youth. As Michael recalls,

> *We integrated Brandon's statement and his story into our presentation. His story changed the lives of a lot of kids for the better. Brandon's story was a real life example of what could happen to them if they followed the wrong crowd or thought only about themselves rather than others.*

I believe Brandon's statement and story helped many kids stay out of trouble. It was a very effective statement. Brandon did this out of his own will. We never asked him to do anything and Brandon did not expect anything from us other than to get his message out to the kids. The fact that Brandon reached out to us is an example of the Brandon I always knew.

Declaration of Michael Boyd at ¶¶ 5–6 (August 9, 2020) (Attached as Exhibit CC).

After he reached out to them, the Boyds' visited Brandon on death row. There they found a young man deserving of mercy. Here is how David Boyd describes that meeting and why he believes that clemency is appropriate:

Michael and I visited Brandon on death row in 2008. Brandon was calm, but happy that we cared enough to come see him. We talked about how Brandon was trying to turn his life around and stay positive in a place where it is always easy to feel sorry for yourself rather than think about how your own actions put you there. Brandon said he was doing his best to stay positive. Helping us with the Enlightenment Tour was a way Brandon stayed positive. To Brandon, it was doing something right. Brandon wishes he made better decisions when he was eighteen and blames only himself for what happened. There was no sense of falseness from Brandon. He was not pandering to us. He was being honest. He was remorseful. Michael and I told Brandon to keep his faith and Brandon said he would.

If I could say anything to the victims' families, I would tell them I am deeply sorry for their loss. I would tell them that Brandon has a good heart and Brandon knows he made terrible, life–altering decisions. I would tell them I think Brandon was following his friends and I believe he would not have gone with them if he had fully grasped the potential consequences that could follow. I would tell them Brandon apologizes to all the people and families he hurt that day.

I would also ask President Trump to spare Brandon's life and commute his death sentence to life imprisonment without the possibility of parole. It is clear to me that Brandon recognizes that

he has made seriously bad decisions and an awful tragedy resulted from his decisions. He has reached out and helped other kids stay out of trouble by sharing his story. These are the actions of a remorseful person who deserves mercy.

Declaration of David Boyd at ¶¶ 10–12 (August 7, 2020) (Attached as Exhibit BB).

Similar information comes from Pastor Aaron Chancy, a childhood friend who had his own struggles with the law, but has tried to use those struggles positively, as warnings for others:

My name is Pastor Aaron Chancy. I am a friend of Brandon Bernard and his family. I am two years younger than Brandon. I have known Brandon since he was about 7 years old.

…

I had a ministry and travelled all over parts of the country, like New York, Tennessee, North Carolina and other states and have spoken at many churches in those states. In 2008, I asked Brandon to help me use his story to reach out to kids in the community who might stray from the Lord's path.

…

Here are brief excerpts from [the letter that Brandon wrote in response]:

> ***I'm a grown man sitting on Federal Death Row. Twelve years of my life (written in 2011) is gone. Since the age of 18 (now 31 in 2011) I have called concrete walls, electric doors, and handcuffs my home.***
>
> ***The Bible says, "The wages of sin is death". When I embraced what I knew was contrary to what I was taught as a Seventh–day Adventist, I turned in my application to the devil. I had an arrogance that came with my youth, which masked my ignorance to my future. I was fixated on the here and now. For an immediate good time I was willing to throw away my whole life.***

> ***I ultimately got what I wanted for a little bit of time, then got what I deserved for a lifetime.***
>
> *Brandon wanted to reach out to kids and keep them from making the same mistakes he did. It was a way for Brandon to contribute to society from where he was. I have presented this to many people through the many states and think it has had a huge positive impact on the people who heard it.*
>
> *I believe that even if Brandon spends the rest of his life in prison, he can still continue to reach out to people who have strayed from the Lord's path. Brandon could still help me spread his word. The people who hear Brandon's story could reach out to him and learn from the mistakes he made in his life. If Brandon is put to death, we will lose the best messenger for his important story. Executing Brandon will also deprive other listeners of the opportunity to reach out to him and learn even more from his experiences.*

Declaration of Pastor Aaron Chancy at ¶¶ 4–6 (July 28, 2016) (Attached as Exhibit DD).

XII. What Brandon would like to say to those who loved Todd and Stacie Bagley.

Brandon's personal plea for clemency is included in a video that accompanies this petition, which can be downloaded here: https://www.dropbox.com/s/6ovaj951aojqpgt/Bernard.mp4?dl=0. Brandon would like everyone involved in deciding whether to proceed with his execution to know that he is no longer the traumatized and insecure youth he was in 1999. He wishes that 18–year–old Brandon had been strong enough to step up and stop the Bagleys from being killed, at whatever cost to himself and his friends. As Pastor Johnson's declaration notes, Brandon has always wished that he could communicate his shame and regret to the Bagleys. Here is a

sampling of what he would have said, as he expressed to members of his clemency team during a visit (lightly edited for readability):

> *I would first want to tell the Bagleys that I am sorry. I am sorry for the role that I played in the death of their family …*
>
> *I would like to tell them that — that wasn't me — that wasn't the person I was raised to be by my parents. I attended church every week and that is the person that I should have been at that exact moment, when they taught me to step up and do the right thing, and I didn't do it, and I wish I did. And every day that goes on, I wish I did.*
>
> *I would like to tell them that I have tried to be a better person since that day, and I have continuously tried to work in bettering myself. I can't imagine how they feel about losing their family, and I wish that we could all go back and change it. And I am sorry for all the pain that I caused.*

XIII. Conclusion

Brandon's own actions — and failures to act — contributed to the deaths of Todd and Stacie Bagley. Their deaths are an outrage and a tragedy. But Brandon was not the leader or primary actor in those events. And even with the limited defense that was presented, the jury declined to sentence Brandon to death for Mr. Bagley's murder. Given Brandon's youth, his limited and lesser role in the crime, and our improved understanding that the brain of an 18-year-old is not yet fully mature in its function, the Government would likely decline to pursue his execution if the decision were made today. Even in 1999–2000, if Brandon's appointed counsel had better acquainted themselves with Brandon's background and made a meaningful presentation to the Government, a death penalty prosecution against Brandon might well not have been authorized.

Had Brandon's jurors been fully informed when Brandon's life was in their hands, they likely would have imposed life sentences on all three death–

eligible counts, instead of on just two of them. This essential truth is well summarized by juror Jason Fuller:

> *I support clemency for Brandon Bernard. This is based on information I have learned about the medical status of Mrs. Bagley after she was shot, as well as information on how well Brandon has done while in custody in Terre Haute, IN. This includes him taking responsibility for his actions and having remorse for the pain and suffering and hurt he has caused. Also, my understanding now, as I am older, with more life experiences, about teenagers and our brain and social development factors into my current wishes for clemency. I do not want Brandon to be executed for bad decisions he made when he was a teenager. I believe that Brandon's single death sentence should be commuted to life without parole.*

Declaration of Juror Jason Fuller, Exhibit C at ¶ 10 (July 21, 2016).

For the last twenty years, Brandon has spent almost 23 hours of every day in solitary confinement. And during that entire time, he has kept to himself, following the rules and behaving peaceably. His punishment has been severe and will continue to be severe; even if the President spares him from execution, Brandon will spend the rest of his life confined in a United States Penitentiary. That is an appropriate punishment for Brandon's role in Mrs. Bagley's murder. We echo the urgent words of juror Gary McClung:

> *I have always thought about whether there was anything I could do to try to change Mr. Bernard's death sentence to a life sentence. I thought about writing a letter to the court expressing my belief that a life sentence was the appropriate punishment and that Mr. Bernard did not deserve to be put to death. I had no idea where to start, so I never did. I am grateful to have this opportunity to clear my conscience by speaking what has always been in my heart. I hope that my speaking up can help Mr. Bernard have his death sentence commuted to a life sentence. I never thought this opportunity would come. I pray that President Trump rights this wrong and commutes Mr. Bernard's sentence to life imprisonment.*

Declaration of Juror Gary McClung, Jr., Exhibit E at ¶ 10 (August 13, 2020).

We return to our starting observation. The death penalty should be reserved for the worst of the worst. Brandon is far from that: just eighteen at the time of the crime, with no prior violent criminal record, a follower – not a leader – in the crime, and a model prison inmate for the ensuing twenty years. Brandon can never undo the harm he has caused the Bagleys, but he has earnestly tried to do all that he can to deter others from making similar mistakes and hopefully prevent other families from having to endure an unimaginable loss like that of the Bagleys. He asks for mercy for his crime.[25]

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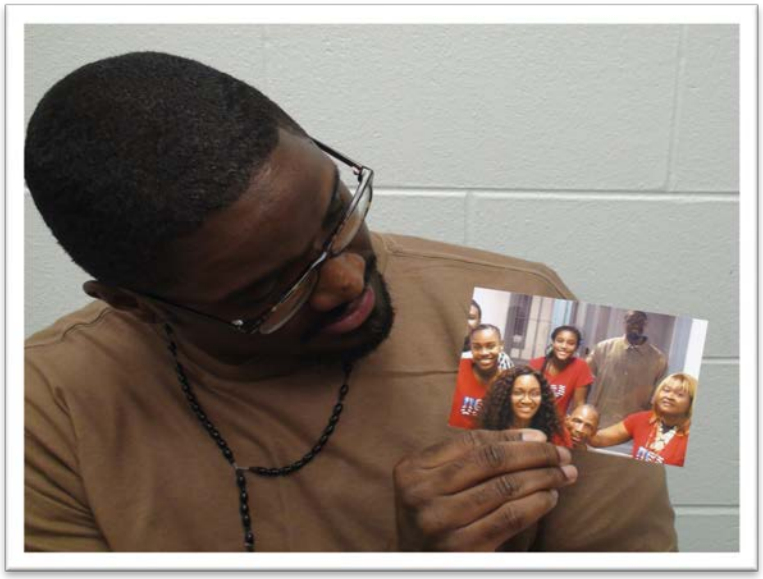
[25] Executing Brandon would be especially arbitrary, given the Government's willingness in other cases to accept sentences less than death for offenders who are more morally culpable. For example, in May 2019 the Government agreed to spare Mariah Ferry, Chase Smothermon, and Jose Torrez. The three conspired to abduct two victims after the victims stole their marijuana and cash. They beat one with a baseball bat, bound him, and then videotaped his further assault and death. They then committed "unthinkable acts of desecration" on his body. Showing pictures of the desecrated victim's body to the other victim, they assaulted him for hours and threatened to do the same to him unless he showed where the stolen drugs were, stating they killed the first victim to "serve as a lesson to others." *See* Courtney Allen, *Two final suspects take plea deals in brutal killing*, KRQE (February 13, 2020) (https://www.krqe.com/news/crime/two-final-suspects-take-plea-deals-in-brutal-killing/); United States Sentencing Memorandum, *United States v. Smothermon*, No. 18-cr-930-2 MV, dkt. 263 (D.NM, June 10, 2020).

In November 2019, the Government chose not to pursue the death penalty against Ryan Bacon and Dontae Sykes. As a result of dispute between drug dealers, Bacon, Sykes and others stalked the other dealer for over a month, placed a bounty on his head, kidnapped and murdered his girlfriend (shooting her five times), and accidentally shot a 6-year-old boy while attempting to shoot the other dealer. The boy has been left largely paralyzed. *See* Xerxes Wilson, *Drug dealer who admitted role in 6-year-old's shooting, woman's execution takes plea*, Delaware Online (January 10, 2020) (https://www.delawareonline.com/story/news/2020/01/10/man-takes-plea-

death-penalty-case-boys-shooting-womans-murder/4429530002/); Redacted Indictment, *United States v. Bacon*, No. 18-75-DNA, dkt. 3 (D. Del. October 4, 2018).

In May, 2019, the Government elected to forego the death penalty as to Jeremiah Farmer. Farmer was convicted at trial of two RICO murders in connection with gang activity. The victims died of extensive head injuries due to blunt force trauma. The charges were originally brought by the state, but were dismissed after critical witnesses recanted their statements to police following threats and intimidation. Farmer also engaged in robbery, threat to kill, and a shooting that appeared intended to kill; he described his pleasure in hitting people hard enough to break their bones. *See* Meredith Colias-Pete, *Gang member convicted in 1999 Hammond double murder*, Chicago Tribune (July 11, 2019) (https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-hammond-farmer-sentence-st-0711-20190711-32s7ti6nkbgzzd33rxhrt4wr4i-story.html); Government's Sentencing Memorandum, *United States v. Farmer*, No. 2:15 CR 72, dkt. 2791 (ND Ind. October 21, 2020).

These cases differ from Brandon's in that in each case the defendants were the principal actors in their horrific crimes. In contrast, Brandon was an 18–year–old accomplice who did not occupy a leading role in the offense for which he has been sentenced to death. They also differ in that these defendants are demonstrably more dangerous than Brandon: These cases involve torture, lying-in-wait, and other acts showing the deaths were carefully calculated. Meanwhile, Brandon has been a model prisoner and counseled others to follow the teachings of Christ.



We respectfully request that Brandon Bernard's death sentence be commuted.

Sincerely,

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