BEFORE THE PRESIDENT OF THE UNITED STATES

AND THE UNITED STATES PARDON ATTORNEY

In re

LEZMOND CHARLES MITCHELL,

Petitioner.

MEMORANDUM IN SUPPORT OF PETITION FOR CLEMENCY AND FOR COMMUTATION OF DEATH SENTENCE

DEATH PENALTY CASE

EXECUTION SET FOR AUGUST 26, 2020

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Petitioner Respectfully Requests the Opportunity to Make an Oral Presentation Before the Pardon Attorney and the President.

TABLE OF CONTENTS

Page

Mitchell will, unless spared by executive clemency, in all likelihood, suffer the ignominious fate of being the first person to be executed for an intra-Indian crime that occurred in Indian country. While this court's jurisprudence indeed gives the federal government the legal authority to exercise jurisdiction over this case for the purpose of obtaining capital punishment, succeeding in that objective over the express objections of the Navajo Nation and the victims' family reflects a lack of sensitivity to the tribe's values and autonomy and demonstrates a lack of respect for its status as a sovereign entity. Should the federal government pursue a death warrant for Mitchell, I hope that it will have better reasons for doing so than adherence to the wishes of a former attorney general.

- Judge Stephen Reinhardt, Ninth Circuit Court of Appeals[1]

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[T]he United States made an express commitment to tribal sovereignty when it enacted the tribal option, and by seeking the death penalty in this case, the United States walked away from that commitment. For all of these reasons, this case warrants careful consideration.

- Judge Morgan Christen, Ninth Circuit Court of Appeals[2]

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I do not question the government's legal right to seek the death penalty; indeed, we have already held that it had the statutory right to do so. But that the government had the right to make this decision does not necessarily make it right, and ***I respectfully suggest that the current Executive should take a fresh look at the wisdom of imposing the death penalty. . . .****The decision to pursue—and to continue to pursue—the death penalty in this case spans several administrations. The current Executive, however, has the unfettered ability to make the final decision. Although the judiciary today has done its job,* ***I hope that the Executive will carefully consider whether the death penalty is appropriate in this unusual case.***

- Judge Andrew Hurwitz, Ninth Circuit Court of Appeals[3]

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[1] *Mitchell v. United States*, 790 F.3d 881, 897 (9th Cir. 2015) (Reinhardt, J. dissenting).

[2] *Mitchell v. United States*, 958 F.3d 775, 793 (9th Cir. 2020) (Christen, J. concurring).

[3] *Mitchell v. United States*, 958 F.3d 775, 794 (9th Cir. 2020) (Hurwitz,J. concurring) (internal citations omitted) (emphasis added).

I. INTRODUCTION

Lezmond Mitchell is scheduled to be executed by the federal government on August 26, 2020. Lezmond is a 38-year-old Navajo man convicted of murdering two Navajo people on Navajo reservation land in 2001. He was barely 20-years-old at the time of the crimes, and this was his first serious criminal offense. Although the victims' family, the Navajo Nation, and the local United States Attorney's Office all advocated for a life sentence, the federal government chose to single Lezmond out for a federal capital prosecution. This case represents the only time in the history of the modern death penalty that the United States government has sought the death penalty over the objection of a Native American tribe when the criminal conduct in question was committed on tribal land.[4] In all other similar cases, the Attorney General honored the objection of tribal authorities and declined to seek the death penalty. The Navajo Nation continues to advocate for a life sentence, and sees the federal government's decision to move forward with an execution as a violation of its sovereignty. Similarly, tribal nations around the country have expressed their dismay at Lezmond's impending execution and join Lezmond in petitioning President Trump for clemency.[5] Lezmond remains the only Native American on federal death row.

[4] Attachment D, Declaration of K. McNally, ¶ 4.
[5] Attachment J, Tribal Nation Letters in Support of Clemency.

To call Lezmond's prosecution and death sentence problematic is an understatement. In addition to charging Lezmond with a capital crime over the express objections of the sovereign Navajo Nation, the FBI manipulated the tribal criminal justice system so that Lezmond was kept in a Navajo jail for 25 days, without access to a lawyer, while the FBI continuously interrogated him. Under state and federal law, this kind of interrogation could never have happened to a non-Native American.[6] These affronts to Lezmond's Navajo status and to the Navajo Nation generally were compounded when, at the government's request, Lezmond's trial was moved to Phoenix, over 200 miles from Navajo land. This virtually assured that the majority of Navajos in the region would not be able to serve on the jury. As a result, Lezmond was convicted by a jury of 11 white persons and only one Navajo.

Unfortunately, due to trial counsel's errors, the jury that sentenced Lezmond to death never heard profound mitigating evidence that would have supported a life sentence. Lezmond's history of addiction, mental illness, and trauma was never presented to the jury, nor was his family's history of violence and abuse. Nor was the jury informed of the extent of Lezmond's serious mental illness and drug

[6] *See United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001) (holding that the Sixth Amendment right to counsel does not attach to defendants in tribal custody); *see also* Creel, Barbara L., *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 Mich. J. Race & L. 317 (2013).

addiction at the time of the crimes. Had the jury heard this crucial mitigating evidence, it is more than likely that at least one of them would have determined that Lezmond's life was worth saving.

Additional considerations call for the exercise of President Trump's clemency powers. Lezmond's co-defendant, Johnny Orsinger, was the primary aggressor in this case. He instigated the carjacking and was initiated the attacks on both victims.[7] Unlike Lezmond, Orsinger had a history of lethal violence—he committed an unrelated double homicide months before the instant offenses. Yet because he was a juvenile at the time of the crimes, he received a life sentence, while Lezmond, who turned 20 just weeks before the crimes, was tried capitally and sentenced to death. Such an extraordinary sentencing disparity countenances in favor of clemency. What's more, Lezmond showed remorse for his actions by offering to plead guilty in exchange for a life sentence, but that offer was rejected by the government. He has matured and exhibited positive behavior while on death row, and has been rewarded with work assignments for his efforts. He has excelled in art, literature, health, music, and English classes, and has completed his

[7] The prosecutor who tried Mitchell's death-penalty case and also prosecuted Orsinger for an unrelated double-homicide, argued in favor of a maximum sentence for Orsinger at his 2016 re-sentencing hearing, stating: "As I've pointed out and the Court can see, [Orsinger is] the lead instigator in both cases. He fires the first gun. He stabs Alyce. He drops the first rock on Tiffany. He's always the instigator in the face of adults. He should not walk in his community again." *United States v. Gregory Nakai, et. al.*, 01-CR-1072, Dkt. No. 595 at 34:5-9.

GED. Indeed, when the Bureau of Prisons evaluated Lezmond under the First Step Act, he was found to have low recidivism risk level[8].

Perhaps most importantly, Lezmond is a beloved friend and family member with the support of many in his community. Despite the tragic nature of his crimes, a surviving victim and a relative of the homicide victims both support Lezmond's petition for clemency. As one victim family member stated, in an extraordinary showing of grace,

> Yes, Lezmond Mitchell made a mistake. I have made mistakes. You have made mistakes. When you ask God for forgiveness and you mean it, it's Done. . . .We do not need another murder (execution of Lezmond Mitchell) for our family to heal or feel better. Having his family suffer is not the right thing to do.[9]

Lezmond respectfully and with humility asks the President to show similar mercy by granting executive clemency and modifying his death sentence to life in prison without the possibility of parole. In the alternative, Lezmond respectfully asks for a reprieve from his execution date. Lezmond received only 28 days' notice of his execution and a reprieve would provide the Office of the Pardon Attorney the time it needs to conduct a full clemency hearing with the active participation of Native American advocates.

[8] Attachment K, Bureau of Prison First Step Act Assessment.
[9] Attachment G, Letter from M. Slim, at 157.

II. FACTUAL AND PROCEDURAL HISTORY

On May 8, 2003, in the District Court for the District of Arizona, a jury returned guilty verdicts on all counts against Lezmond Mitchell, convicting him of multiple counts related to the murders of Tiffany Lee and Alyce Slim. On May 14, 2003, the district court then commenced a penalty phase on Count 2 of the indictment (carjacking resulting in the deaths of Tiffany Lee and Alyce Slim), and the jury recommended that Mitchell be sentenced to death on May 20, 2003. On September 15, 2003, the district court formally sentenced Lezmond to death. In a 2-1 decision, the Ninth Circuit Court of Appeals affirmed Lezmond's convictions and sentences.[10] The Supreme Court denied Lezmond's petition for writ of certiorari on June 9, 2008.[11]

On June 8, 2009, Lezmond timely filed a motion to vacate, set aside, or correct his convictions and sentence under 28 U.S.C. § 2255.[12] The same judge who presided over Lezmond's trial denied his § 2255 motion.[13] The district court granted a certificate of appealability on three issues concerning ineffective assistance of counsel at the guilt and penalty phases.[14]

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[10] *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007).
[11] *Mitchell v. United States*, 553 U.S. 1094 (2008).
[12] *Mitchell v. United States*, 09-CV-8089, Dkt. No. 9.
[13] *Id.*, Dkt. Nos. 56, 57.
[14] *Id.*, Dkt. No. 56.

After briefing was completed, the Ninth Circuit held oral argument on February 20, 2014.[15] One week after oral argument, a three-judge panel of the Ninth Circuit (Judges Reinhardt, Silverman, and Wardlaw) unanimously referred the case to the Circuit Mediation Unit.[16] Despite the defense team's efforts, mediation was not successful.

After mediation efforts failed, the Ninth Circuit, in another 2-1 decision, denied Lezmond's appeal.[17] The Supreme Court denied Lezmond's petition for writ of certiorari on October 3, 2016.[18]

On March 6, 2018, Lezmond filed a motion to re-open his post-conviction proceedings pursuant to Federal Rule of Civil Procedure 60(b)(6).[19] In that motion, Lezmond argued that a recent decision from the United States Supreme Court established that the district court had erroneously denied him the opportunity to interview the jurors in his case. The district court denied relief. While the case was on appeal, the Department of Justice scheduled Lezmond's execution for December 11, 2019. The Ninth Circuit stayed the execution to allow Lezmond to litigate his appeal, but ultimately affirmed the lower court's decision in April, 2020. *Mitchell v. United States*, 958 F.3d 775 (9th Cir. 2020).

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[15] *Mitchell v. United States*, 11-99003, Dkt. No. 50.
[16] *Id.*, Dkt. No. 51.
[17] *Mitchell v. United States*, 790 F.3d 881 (9th Cir. 2015).
[18] *Mitchell v. United States*, 137 S. Ct. 38 (2016).
[19] *Mitchell v. United States*, 09-CV-08089, Dkt. No. 71.

On August 30, 2019, Lezmond timely filed a petition for commutation of sentence. After the Ninth Circuit issued a stay of execution on October 4, 2019, the Office of the Pardon attorney contacted undersigned counsel on October 7, 2019, and cancelled the previously scheduled October 22 oral presentation and noticed that "this office will now administratively close Mr. Mitchell's clemency petition without prejudice to his ability to reapply should an execution date be imposed again at a later time." On July 29, 2020, scheduled Lezmond's execution for August 26, 2020.

III. LEZMOND MITCHELL'S BACKGROUND

Lezmond Mitchell is not the typical federal death row inmate. As Ninth Circuit Judge Stephen Reinhardt said,

> However gruesome the crime in this case, Mitchell, who was twenty years old at the time and had no prior criminal record, does not fit the usual profile of those deemed deserving of execution by the federal government—a penalty typically enforced only in the case of mass murderers and drug overlords who order numerous killings.[20]

Lezmond[21] was born on September 17, 1981 on the Navajo Reservation in Arizona. He was presented at trial as a privileged, albeit somewhat neglected, child born into an academically gifted and professionally successful family. This

[20] *Mitchell v. United States*, 790 F.3d 881, 894 (9th Cir. 2015) (Reinhardt, J., dissenting).

[21] A complete social history of Lezmond Mitchell is described in the declarations of social historian Hilary Weaver. *See* Attachment F.

portrayal ignored Lezmond's traumatic and abusive upbringing. Lezmond never knew his father. He was raised in physically and emotionally abusive homes, and suffered violence at the hands of his maternal grandparents, who were his primary caretakers for much of his childhood.[22] Lezmond's mother, Sherry, was also physically and emotionally abused as a child by her parents, who she described as "a very dysfunctional family;"[23] yet Sherry entrusted these same people to care for her child. Lezmond's grandmother was notorious for her abusive behavior toward Lezmond. She displayed varied symptoms of mental illness including hoarding, obsessive-compulsive behavior, and chronic depression. As Auska Kee Charles Mitchell, Sherry's brother and Lezmond's uncle, recounts:

> There was a lot of emotional and physical abuse in our house growing up. . . . My father was physically abusive to my mother and to me. My mother was extremely manipulative and emotionally abusive to all of us. She and my father used to beat me with a belt. She demeaned and degraded all of us.
>
> [* * *]
>
> I wanted Lezmond to come live with me and my family. I didn't want him to grow up exposed to the violence and emotional abuse that Sherry and I lived with from our parents. He was a good kid and I wanted him to stay on the right path. But my mother and sister believed it was better for Lezmond to live with his grandfather (my father), and I deferred to them.

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[22] In addition to the facts set forth in Lezmond's social history (Attachment F), the declaration of Lezmond's uncle, Auska Kee Charles Mitchell, supports these facts. *See* Attachment G, Declaration of A. Mitchell.

[23] Attachment I, S. Mitchell Interview, at 193.

> Lezmond always seemed like a follower to me. He was raised in traumatic circumstances, and he never got the support he needed from his parents. . . . I think if Lezmond had more support growing up, more guidance and caring from his family, he could have accomplished a lot in his life. Lezmond is a caring soul.[24]

As a result of his abusive upbringing, Lezmond has suffered from post-traumatic stress disorder for much of his life, including at the time of the commitment offenses. In his early adolescence, Lezmond began self-medicating with drugs and alcohol. By the time he was seventeen, a mental health professional who treated Lezmond after he was caught with marijuana insisted that Lezmond was suicidal and required intensive psychotherapy and residential treatment to address his mental health and substance abuse issues. But Lezmond, lacking the support of his family, went untreated, and his substance abuse and mental illness worsened. In the months leading up to the commitment offenses, he was drinking alcohol and smoking marijuana daily, and using near-lethal doses of cocaine, methamphetamine, and ecstasy. On the day of the crimes, Lezmond had been awake for several days bingeing on drugs and alcohol, and he and Orsinger continued to drink and use cocaine, methamphetamine, marijuana and ecstasy. A board-certified psychiatrist has opined that Lezmond was psychotic at the time of the killings. The jury that sentenced Lezmond to death knew none of this.

[24] Attachment G, Declaration of A. Mitchell, at 162-63.

While Lezmond's trauma, mental illness, and addiction were profound, he was and is more than the terrible things that happened to him or the crimes that he committed. Those who know Lezmond well describe him as sensitive, thoughtful, and intelligent.[25] He helped friends get through high school, stressed the importance of education, and worked to better himself. When his own mother neglected him and turned him away, he was taken in by a neighboring family who loved him like one of their own, and he loved and respected them back. He has developed deep and meaningful relationships with relatives and friends that last to this day. As discussed further *infra*, these individuals continue to offer their unwavering love and support for Lezmond.

IV. REASONS FOR GRANTING CLEMENCY

A. Lezmond Mitchell's death sentence is an affront to the sovereignty of the Navajo Nation.

1. The federal government ignored the entreaties of the Navajo Nation, local prosecutors, and the victim's family and insisted on a capital prosecution.

The Navajo Nation has steadfastly objected to the use of the death penalty, both generally as well as specifically in Lezmond's case. In late 2001, the United States Attorney's Office for the District of Arizona ("USAO") inquired whether the Navajo Nation would support a capital prosecution against Lezmond. On January 22, 2002, Levon Henry, then-Attorney General for the Navajo Nation,

[25] *See generally* Attachment G.

responded to the USAO and stated the Nation's objection to a capital prosecution in this case. As Henry explained, "Navajo cultural and religious values . . . do not support the concept of capital punishment. Navajo holds life sacred. Our culture and religion teach us to value life and instruct against the taking of human life for vengeance."[26] Henry acknowledged that at the time of his letter, the Public Safety Committee of the Navajo Nation Council was in the process of holding public hearings on the issue of capital punishment. While the Navajo Nation had not yet completed those hearings, Henry emphasized that "it is, at this time, the consensus of the Public Safety Committee of the Navajo Nation Council and the Judiciary Committee of the Navajo Nation Council to maintain the historic position of the Navajo Nation opposing the sentencing option of capital punishment for crimes committed on the Navajo Nation under any section of the United States criminal code."[27] Thus, Henry formally requested that the USAO not seek the death penalty against Lezmond.[28] The USAO recommended to the Department of Justice ("DOJ") that capital punishment not be sought in this case. However, Attorney General John Ashcroft overrode the recommendation, and the Navajo Nation's stated position, and instructed the USAO to seek death against Lezmond.

[26] Attachment A, Letter to DOJ from L. Henry, at 2.
[27] *Id.* at 3.
[28] *Id.* at 2.

In order to carry out Ashcroft's wishes, the USAO had to rely on a legal loophole. With respect to crimes committed in Indian country, Congress passed the so-called "tribal option" of the Federal Death Penalty Act ("FDPA"), which allowed Native American tribes to decide whether the death penalty would apply to intra-Indian crimes committed in Indian country.[29] Thus, because the FDPA requires a tribe to "opt-in" to a federal capital prosecution for those cases where federal jurisdiction is based on the crime occurring on tribal land, Lezmond was not, and could not, be sentenced to death by the federal government for murder. However, Lezmond could technically be sentenced to death for carjacking resulting in death because it is a federal offense of general applicability (i.e., the federal government had jurisdiction to charge this offense regardless of where the crime took place).[30] As a result, DOJ took the unprecedented step of seeking the death penalty for Lezmond based on the carjacking offense alone.

This decision was a clear violation of the spirit, if not the letter, of the promise Congress made to tribal nations with the passage of the opt-in amendment. The whole purpose of the amendment was to respect tribal sovereignty and accord tribal governments a status similar to State governments by allowing them to choose whether to have the death penalty apply to crimes committed by their

[29] 18 U.S.C. § 3598.
[30] *United States v. Mitchell*, 502 F.3d 931, 946-949 (9th Cir. 2007).

members within their land. As one of the sponsors of the tribal option, Senator Daniel Inouye, pointed out during debate on the bill, "It may be difficult for most Americans to understand that Indian governments are sovereign governments. . . . [and] the U.S. Constitution and the debates in the Continental Congress recognize and address Indian nations based upon their status as governments. This has been true since the earliest of times in our history."[31] Therefore, Senator Inouye stressed, "[P]erhaps the most important point to understand about this amendment is that it is premised upon the sovereign status of tribal governments." Co-sponsor of the tribal option, Senator Pete Domenici—himself a supporter of the death penalty—put it more bluntly: "We ought to recognize the Indian people, their legislative bodies, and this amendment gives [tribal governments] the authority to elect whether or not murder committed on their land by an Indian is subject to the death penalty or not. . . . So, essentially this is fairness, a recognition of Indian sovereignty, Indian self-determination. When it really counts, are we not going to count it, or are we?"[32]

In Lezmond's case, when it really counted, the federal government failed to uphold its end of the bargain. Despite the clear intent of the opt-in provision, DOJ prevailed and ultimately sentenced Lezmond to death. As noted by Judge Christen

[31] 137 Cong. Rec. S8488-03 (1991).
[32] *Id.*

of the Ninth Circuit Court of Appeals, this decision was nothing less than "a betrayal of a promise made to the Navajo Nation and demonstrates a deep disrespect for tribal sovereignty. . . . People can disagree about whether the death penalty should ever be imposed, but our history shows that the United States gave tribes the option to decide for themselves."[33]

Shortly after Lezmond's trial concluded in 2003, the Navajo Nation completed its public hearings to gauge tribal members' position on opting in to the FDPA.[34] Once again, the Navajo Nation reaffirmed its position against the death penalty and refused to opt in. During the extensive public hearing process, Marlene Slim, the daughter of Alyce Slim and mother of Tiffany Lee, spoke at one of these hearings and expressed her opposition to the death penalty. She explained that she had requested that the USAO not seek death against Lezmond, but her wishes were "ignored and disrespected."[35]

[33] *Mitchell v. United States*, 958 F.3d 775, 793 (9th Cir. 2020) (Christen, J., concurring).
[34] Attachment B, 2004 Navajo Nation Report on the Death Penalty.
[35] *Id.* at 5; *see also* Attachment G, Letter from M. Slim.

2. The DOJ's decision to capitally prosecute Lezmond was unprecedented and contrary to its own protocols.

The DOJ's disparate treatment of Lezmond's case, and its refusal to honor the wishes of the sovereign Navajo Nation, is both notable and disturbing—and worthy of clemency consideration under the DOJ's commutation guidelines.[36]

The DOJ specifically created a capital case review protocol to promote consistency and even-handedness in federal capital prosecutions.[37] The protocol states that "National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice."[38] Both national norms and practice advise against the federal government executing Lezmond, an enrolled member of the Navajo tribe, for a crime occurring on Navajo land.[39] Yet Lezmond's death sentence remains, marking the only time in the history of the modern death penalty that the DOJ has

[36] *See* DOJ Justice Manual, Title 9-140.113, *Standards for Considering Commutation Petitions* ("Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence. . . .").

[37] USAM 9-10.030.

[38] USAM 9-10.140.

[39] United States Attorney Paul Charlton, "a local Arizonan appointed by President George W. Bush, who was intimately familiar with the relations between the Navajo tribe and the citizens of the State of Arizona, declined to seek the death penalty." *Mitchell*, 790 F.3d at 896 (Reinhardt, J., dissenting).

sought the death penalty over a Native American tribe's objection based on a crime occurring on that tribe's land.[40]

This discrepancy is made even more striking when one compares Lezmond's case to other cases where the Attorney General has rejected capital prosecutions for murders committed on tribal land. On at least twenty other occasions, under Presidents Bush, Obama, and Trump, the DOJ has considered a capital prosecution, but ultimately declined to do so, apparently based on the tribe's opposition to capital punishment. *Id.* Of these cases, several involved sources of jurisdiction independent of tribal land. For example, the Attorney General has rejected multiple capital prosecutions under 18 U.S.C. § 1114 in cases involving the murder of federal officers.[41]

The Attorney General has also rejected multiple capital prosecutions under 18 U.S.C. § 1512 in cases where a murder was committed to eliminate a witness or informant. In one such case, *United States v. Stanley Secatero,* Attorney General Reno declined to authorize capital prosecution where the defendant, a repeat violent felon, murdered four people (including a grandmother) and seriously injured a fifth.[42] In a separate case, Abel Hidalgo accepted a plea deal and

[40] Attachment D, Declaration of K. McNally, ¶ 4.

[41] *United States v. Vincent Cling,* D. Ariz. Case No. 96-CR-028; *United States v. Frank Monte Banashley, Sr.*, D. Ariz. Case No. 99-CR-1074; *United States v. Kirby Cleveland,* D. N.M. Case No. 17-CR-965.

[42] D.N.M. Case No. 98-546.

stipulated to a factual basis that set out that he murdered two women and also bludgeoned a 21-month-old child to death. While Hidalgo ultimately pled guilty to two counts of first-degree murder, a capital prosecution could have been initiated under a witness-killing theory pursuant to 18 U.S.C. § 1513.[43] And in a third case, death was not sought against Robert Pettigrew in a case in which he beat two people to death with a baseball bat.[44] Finally, in *United States v. Gregory Nakai, Jimmy Nakai, Dennie Leal, Teddy Orsinger, and Johnny Orsinger*[45], a capital prosecution was not pursued against Gregory Nakai (aged 21), Jimmy Nakai (23), Leal (24), or Teddy Orsinger (35), for a carjacking resulting in two deaths.[46]

The Attorney General has also rejected capital prosecutions in several cases involving child victims. In addition to the Hidalgo prosecution mentioned above in which a 21-month-old baby was beaten to death, in 2017, the Attorney General approved of a plea deal which allowed Tom Begaye Jr. to plead guilty to various charges in exchange for a life sentence after Begaye kidnapped, raped, and murdered an 11-year-old girl on the Navajo reservation.[47]

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[43] D. Idaho 02-CR-0043.

[44] *United States v. Pettigrew*, D.N.M Case No. 07-CR-2143.

[45] This case is the unrelated double-homicide committed by Lezmond's co-defendant, Johnny Orsinger.

[46] D. Ariz. Case No. 01-CR-1072.

[47] D. N.M. Case No. 16-CR-2376.

There is no meaningful difference between Lezmond's case and the many cases where the DOJ has respected the sovereignty of Native American nations and refused to capitally prosecute in light of the tribe's objection to the death penalty. Such disparate treatment countenances in favor of clemency in this case.[48]

3. Comity and respect for the sovereign Navajo Nation support a commutation of Lezmond's sentence to life without parole.

The Navajo Nation's letter of July 21, 2014[49] underscores the sensitive issues of comity present in this case. The letter outlines the Navajo Nation's steadfast moral opposition to the death penalty and its continuing objection to the use of general-jurisdiction statutes to circumvent the tribe's refusal to opt-in to the FDPA.[50] It also identifies two issues specific to Lezmond's arrest and trial that implicate the government-to-government relationship between the Navajo Nation and the United States.

First, the Navajo Nation objects to the FBI's use of tribal custody to interrogate Lezmond before he was appointed an attorney in federal court.[51] Lezmond was kept in tribal custody for 25 days, and during that time was continually interrogated by the FBI without arraignment or access to an attorney. Only the first of those four interviews conducted by the FBI was recorded. The

[48] *See* DOJ Justice Manual, Title 9-140.113.
[49] *See* Attachment C, Letter to DOJ from H. Yazzie.
[50] *Id.* at 2-3.
[51] *Id.* at 3.

evidence developed from these interviews was crucial to the government's argument for a death sentence.

Second, the Navajo Nation highlights the troubling jury selection process in this case, which was moved hundreds of miles from the Navajo Reservation to Phoenix.[52] The ensuing hardship to Navajo prospective jurors, as well as the exclusion of Navajo venirepersons who expressed views consistent with Navajo religion and culture or spoke Navajo as a first language, resulted in a petit jury that did not include a representative sample of Navajos.[53]

The letter also draws on the Navajo Nation's 2004 Report on the Death Penalty, which was not available at the time of Lezmond's trial and which accurately summarizes the Navajo Nation's decision to not opt in to the FDPA and the reasons therefor.[54] The Navajo Nation's position is that were it to opt-in to the FDPA, its tribal sovereignty would be significantly diminished. Lezmond's trial epitomizes the Navajo Nation's concerns for its dwindling sovereignty, and the DOJ's refusal to defer to the Navajo Nation is a reality the Navajo Nation always sought to prevent.

Professor Addie Rolnick, an expert in the field of Indian law, explains:

> [T]his case is an example of the exercise of federal jurisdiction being used to undermine the authority and

[52] *Id.*
[53] *Id.*
[54] *See* Attachment B, 2004 Navajo Nation Report on the Death Penalty.

> policy choices of a tribal justice system. Whether or not it was technically legal, the Attorney General's decision to seek the death penalty against the tribe's wishes for a crime committed by one Indian against another within tribal territory contradicts clear federal policy – in effect since 1968 and amplified since 2000 – in favor of strengthening tribal justice systems and limiting federal infringement on tribal sovereignty. The Attorney General's decision to disregard the Nation's wishes undermined its sovereignty and did so in a manner that rendered tribal officials, who assisted in the arrest and early investigation, complicit in a prosecution that the Navajo Nation opposed.[55]

As Professor Rolnick concluded, the Attorney General's 2002 decision to pursue a death sentence against Lezmond was contrary to then-existing federal policy, and an outlier when viewed in the context of federal legislative intent and recent congressional action.[56] Since Lezmond's 2003 trial, federal policy and judicial jurisprudence has shifted even further in the direction of increased tribal sovereignty and decreased non-tribal interference in tribal justice systems.[57] Congress has made efforts, most significantly with the 2010 Tribal Law and Order Act, to empower Native American tribes and allow them greater control of their

[55] Attachment E, Declaration of A. Rolnick, ¶ 8.

[56] *Id.*, ¶ 47.

[57] *Id.*; *see also, e.g., McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) ("[H]old[ing] the government to its word" and reaffirming the continuing existence of the reservations that the federal government promised to the Five Civilized Tribes in the 1830s, such that the State of Oklahoma had no jurisdiction to criminally prosecute a Creek member for a crime against a Native American on Creek land).

citizens in the federal criminal justice system.[58] These efforts continue today, with proposals by both Republicans and Democrats to remove jurisdictional hurdles that limit tribal sovereignty over criminal acts committed on their lands.[59] Yet Lezmond's death sentence lingers as an unfortunate aberration, and clemency is now his only recourse to remedy the government's unprecedented overreaching.

B. Lezmond's death sentence is disproportionate to the sentences given to his more culpable co-defendant.

Pursuant to DOJ Justice Manual Title 9-140.113, commutation of Lezmond's sentence is also warranted because of the "disparity or undue severity of sentence" compared to his more culpable co-defendant.

Because Johnny Orsinger was a juvenile at the time of the offense, he was not subject to the death penalty and was ultimately sentenced to five concurrent life sentences plus a concurrent term of 180 months in this case.[60] In a separate case involving an earlier, unrelated carjacking resulting in the deaths of two additional people, Orsinger was sentenced to nine concurrent life sentences, three additional consecutive life sentences, and consecutive terms totaling 1800 years.[61]

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[58] Attachment E, Declaration of A. Rolnick, ¶¶ 39-41.

[59] *See, e.g.*, Scott Turner, *Lawmakers seek protections for Native women, children*, Albuquerque Journal, May 12, 2019, available at https://www.abqjournal.com/1314628/lawmakers-seek-protections-for-native-women-children.html (last visited 8/29/19).

[60] *United States v. Lezmond Mitchell, et. al.*, 01-CR-1062, Dkt. No. 545.

[61] *United States v. Gregory Nakai, et. al.*, 01-CR-1072, Dkt. No 288. Since Lezmond's trial, Orsinger moved, pursuant to 28 U.S.C. § 2255, for post-conviction relief under *Miller v.*

Lezmond, who turned 20 just weeks before the offenses of conviction, was less culpable than his juvenile co-defendant. As Vincent Kirby, the prosecutor who tried both Lezmond's case and prosecuted Orsinger's unrelated double-homicide, explained, "[Orsinger is] the lead instigator in both cases. He fires the first gun. He stabs Alyce. He drops the first rock on Tiffany. He's always the instigator."[62]

It is undisputed that Orsinger initiated the attack on Ms. Slim.[63] The carjacking strongly resembles the modus operandi of the offense Orsinger committed just two months earlier, where Orsinger had personally hog-tied victim David Begay, helped steal his car, placed him on the ground, and shot him in the head.[64] The fact that Lezmond's more culpable co-defendant—who, unlike Lezmond, had a violent criminal record—did not face death or even mandatory life imprisonment compounds the disproportionate nature of Lezmond's sentence.

Indeed, the same concerns that prohibit a death sentence for Orsinger similarly apply to Lezmond. In *Roper v. Simmons*, 543 U.S. 551 (2005), the

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Alabama, 132 S. Ct. 2455 (2012), which held that the Eighth Amendment prohibits a court from imposing a mandatory life sentence on a juvenile defendant. *United States v. Mitchell, et. al.*, 01-CR-1062, Dkt. No. 545; *United States v. Gregory Nakai, et. al.*, 01-CR-1072 Dkt. No. 435; *Johnny Orsinger v. United States*, 13-CV-8159, Dkt. No. 1. Following a re-sentencing hearing on August 4, 2015, Orsinger was again sentenced to life in prison. *United States v. Gregory Nakai, et. al.*, 01-CR-1072, Dkt. No. 469, 472.

[62] *United States v. Gregory Nakai, et. al.*, 01-CR-1072, Dkt. No. 595 at 34:5-9.

[63] *Mitchell*, 502 F.3d at 943.

[64] *United States v. Nakai*, 413 F.3d 1019, 1021 (9th Cir. 2005).

Supreme Court found the death penalty unconstitutional when imposed upon a person who was under 18 when the capital offense was committed. The Court cited scientific evidence supporting a lack of maturity and underdeveloped sense of responsibility in youth versus adult offenders.[65] And in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court again noted the "fundamental differences between juvenile and adult minds."[66] Emerging research establishes that changes in white brain matter, a material that supports impulse control and other types of cognitive functioning, continues through an individual's early twenties, and even into the mid-thirties.[67]

As the Supreme Court has recognized, brain maturation does not end at the age of 18, but the courts set 18 as an arbitrary bright line to limit capital punishment.[68] The result is the unjust situation that presents itself here: Orsinger, the primary aggressor with the violent history, gets a life sentence; Lezmond, the follower with no violent criminal history whatsoever, awaits execution.

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[65] *Roper*, 543 U.S. at 569.

[66] 132 S. Ct. at 2464.

[67] *See, e.g., Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, C. Lebel and C. Beaulieu, The Journal of Neuroscience, July 27, 2011.

[68] *Roper*, 543 U.S. at 606-07.

C. Lezmond's life is worth saving because he has accepted responsibility for his actions, and has the support of his family, community members, other Native American tribes, and even surviving victims in his bid for clemency.

Lezmond has accepted responsibility for his role in the crimes since before his trial, when he offered to plead guilty in exchange for a life sentence. Members of the victim's family, then and now, have objected to the death penalty for Lezmond and supported a sentence of life in prison. And numerous friends, family, and community members all ask for the President to extend mercy to Lezmond, both for who he is as a person, and out of respect for the Navajo Nation's belief in restorative justice and objection to capital punishment.

As noted above, Navajo traditions and the official position of the Navajo government forbid the taking of human life for vengeance. As a surviving victim, a relative of the victims, and numerous members of the Navajo Nation all attest,[69] capital punishment has no place in the Navajo tradition of justice, as Navajo courts employ principles of restorative justice in their judicial system. It is their longstanding position that only through peacemaking can the harm a crime causes in a community be redressed. Thus, as former Attorney General of the Navajo Nation (and current Counsel to the President) Levon Henry explains, "Committing a crime not only disrupts the harmony between the victim and the perpetrator but it

[69] *See generally* Attachments A, B, C, G, and J.

also disrupts the harmony of the community. The capital punishment sentence removes [] any possibility of restoring the harmony in a society."[70] In a letter to the DOJ in 2014, Herb Yazzie, former Chief Justice of the Navajo Nation, echoed the harm that the Navajo community would suffer if Lezmond were executed:

> In the twelve years since we originally offered our views of this case, the Navajo Nation's position on the death penalty has not changed: we oppose capital punishment in all circumstances. We have not opted-in to the Federal Death Penalty Act and we have never supported a capital prosecution for any of our citizens, including Lezmond Mitchell.
>
> Capital punishment is a sensitive issue for the Navajo people. Our laws have never allowed for the death penalty. It is our belief that the negative force that drives a person to commit evil acts can only be extracted by the Creator. People, on the other hand, are vehicles only for goodness and healing. By subjecting Mr. Mitchell to capital punishment, the Department of Justice has violated our laws and our belief system, and impeded the healing process our tribe must undertake in the wake of this tragic crime.[71]

The reality and depth of the tribe's stated beliefs is perhaps best exemplified by the stance taken by Marlene Slim, the daughter of Alyce Slim and mother of Tiffany Lee. At the time of Lezmond's trial, Marlene expressed her opposition to the government's decision to seek a death sentence for Lezmond. Despite the unimaginable loss she and her family suffered, she asked that the government have

[70] Attachment A, Letter to DOJ from L. Henry, at 2.
[71] Attachment C, Letter to DOJ from H. Yazzie, at 18.

Lezmond serve life without parole.[72] She was dismayed when her request was "ignored and dishonored."[73]

Another victim family member and member of the Navajo Nation, Michael Slim, similarly objects to Lezmond's execution. Michael, grandson to Alyce Slim and cousin to Tiffany Lee, testified at Lezmond's trial in support of the death sentence. Since that time, Michael has had an extraordinary change of heart, and now advocates for Lezmond's sentence to be commuted to life:

> In 2003, it was very hard going to the trial and having to hear how the crime was done. There were times at this point in my life when I felt Lezmond Mitchell was getting what he deserved. I even gave testimony giving my input on this. During this time in my life I thought this was the right thing to do. As a form of revenge, thinking he should die for killing my family members. . . . I want to clarify, I'm not trying to get Lezmond Mitchell out of jail. That's not my journey. But [I now believe] that to take another person's life because he made a mistake is not forgiving. It is revenge. I Forgive Lezmond Mitchell for the double murder that affected my family.[74]

Charlotte Yazzie, one of the victims of the Trading Post Robbery, similarly supports Lezmond's bid for clemency, and states that her "heart goes out to the [Slim] family" but she does not want Lezmond "to be put to death[.]"[75]

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[72] Attachment B, 2004 Navajo Nation Report on the Death Penalty, at 5.
[73] *Id.*
[74] Attachment G, Letter from M. Slim, at 157.
[75] *Id*., Letter from Charlotte Yazzie, at 150-51.

Lezmond's family and friends, fellow members of the Navajo Nation, also talk about how Lezmond's execution would be a violation of their beliefs and a devastating loss on a personal level.[76] Lorenzo Reed is Lezmond's closest friend from childhood; his family took Lezmond in when his own family neglected and abandoned him. As Lorenzo explains:

> Lezmond was very much loved by everyone in my family, including my mother who saw him as another son. . . . My mother, who still sees Lezmond as one of her own children, is devastated and scared for him. . . . Not only are we heartbroken, but we are also very disappointed at the thought that the government is proceeding with Lezmond's execution with full disregard for Navajo beliefs and traditions. There have been many other crimes committed in the past in the Navajo reservation and no one has been given the death penalty. We ask ourselves, "Why Lezmond?" We believe that Lezmond, like everyone else, should be given the opportunity to redeem himself instead of executing him. . . . Simply put, two wrongs do not make a right. Should the government proceed with Lezmond's execution, the entire Navajo community will be heartbroken.[77]

Numerous people remember and cherish Lezmond as he was before his addiction and mental illness took hold, and pray that Lezmond's life may be spared, as the man he is now is not the boy he was at the time of the crimes. John Fontes is a clinical laboratory scientist and the former assistant principal at Lezmond's high school. He has remained close to Lezmond throughout his time

[76] *See generally* Attachment G.
[77] *Id.*

on death row. He recalls how Lezmond had a difficult home life, but excelled in his studies and extra-curricular activities designed to improve the educational experience for himself and his fellow students—in effect, making a home for himself at his school.[78] During their years of friendship, Lezmond has supported Fontes's educational and professional pursuits, even from behind bars.[79] Fontes asks for Lezmond's life to be spared as he strongly believes that Lezmond "is capable of contributing to create positive change in others and to make our country a better place for everyone, especially for Native Americans."[80]

Everyone who has submitted letters of support for clemency describe similar experiences with Lezmond. They recall how Lezmond always valued education and actively helped friends and relatives get through high school, work out problems with their families, and stay out of trouble.[81] And despite their years of hardship, Lezmond has established a close relationship with his mother, who he checks on regularly and seeks to provide whatever emotional support he can.[82] When his mother had an opportunity to work at Rough Rock, Lezmond's former high school, he begged her to take the job even though it was low-paying and

[78] *Id.* at 168-69.
[79] *Id.* at 169-70.
[80] *Id.* at 171.
[81] *See generally* Attachment G.
[82] Attachment I, S. Mitchell Interview, at 194.

"make it better, the high school there, for those kids, they need you. You're not there for a paycheck. You're there for the kids and an education."[83] With a grant of clemency, Lezmond hopes to continue to provide love and support to his relatives and friends.

Finally, nearly a dozen Native American tribes from around the country have expressed their support for Lezmond, and for the values of the Navajo Nation, by submitting letters in support of clemency.[84] As these tribal leaders state, "Federal criminal prosecutions of intra-Indian crimes occurring within the borders of Indian country bring up long-standing issues of tribal sovereignty. In order to maintain tribal rights, as well as [Mr. Mitchell's] due process rights, we support Mr. Mitchell's position" for commutation of sentence.

V. REASONS FOR GRANTING A REPRIEVE

In the alternative, Lezmond respectfully requests a reprieve of his August 26, 2020 execution date. Lezmond is mindful that the clemency process is multi-faceted and can be lengthy. As such, Lezmond believes that a reprieve would provide the Office of the Pardon Attorney the time it needs to conduct its investigation, consider an oral presentation from Lezmond's counsel and advocates from the Navajo Nation, and prepare its recommendation for the Deputy Attorney

[83] *Id.*
[84] Attachment J.

General, and provide adequate time for the Deputy Attorney General to make his recommendation to the President and for the President to make his decision.

VI. CONCLUSION

It is for these reasons that Lezmond Mitchell seeks forgiveness and clemency from the President. The disparities in sentencing between Lezmond and other Native American defendants, and Lezmond and his co-defendant in this case, are alone reasons to show mercy here. Additionally, equitable factors,[85] such as comity and respect for the sovereign Navajo Nation, and the extraordinary grace shown to Lezmond by members of the victims' family and the community that he harmed, also support clemency. Accordingly, Lezmond Mitchell, his family, his legal team, and his friends respectfully request that President Trump show mercy, grant clemency, and commute Lezmond Mitchell's sentence to life in prison without the possibility of parole.

Respectfully submitted,

DATED: July 31, 2020

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[85] *See* DOJ Justice Manual, Title 9-140.113 ("[E]quitable factors . . . may also provide a basis for recommending commutation in the context of a particular case.").