

## CHAPTER 20

# CAPITAL PUNISHMENT

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### I. OVERVIEW

#### A. *Recent Trends*

##### 1. *33% Further Drop in New Death Sentences, Mostly Imposed in a Few Jurisdictions*

The number of death penalties imposed in the United States in 2015 dropped by 33% from the previous year.<sup>1</sup> Death sentences reached their annual peak at 315 in 1996.<sup>2</sup> In 2010, 114 people were sentenced to death, the lowest number since 1973, the first full year that states began reintroducing capital punishment following *Furman v. Georgia*.<sup>3</sup> In 2011, the number dropped considerably, to 85. The numbers were slightly lower in the next two years: 82 in 2012 and 83 in 2013.<sup>4</sup> Then, in 2014, the number dropped to 73.<sup>5</sup> In 2015, the Death Penalty Information Center estimated that the number of new death sentences had dropped precipitously further, to 49. While that number is subject to revision by the Bureau of Justice Statistics, it reflects a decline of approximately 33% in one year and another new low in the post-*Furman* era.<sup>6</sup>

More than half of all death sentences in 2015 reported by the Death Penalty Information Center were in California (14), Florida (9), and Alabama (6), with all but one of California's death sentences coming from four counties in Southern California. This was the eighth consecutive year in which Texas' total was under a dozen – falling to just two – well below its prior yearly totals (which peaked in 1999 at 48).<sup>7</sup>

Georgia was one of the many states that did not impose any new death sentences in 2015. This was such a milestone given Georgia's death penalty history that a legal publication there, the *Daily Report*, named as its “newsmaker of the year” the drop to zero

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<sup>1</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2015: YEAR END REPORT, at 1, 2 (2015) [hereinafter DPIC, 2015 YEAR END REPORT].

<sup>2</sup> TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES, tbl.16, at 19 (2014).

<sup>3</sup> 408 U.S. 238 (1972); SNELL, *supra* note 2, tbl.16, at 19.

<sup>4</sup> SNELL, *supra* note 2, tbl.16, at 19.

<sup>5</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2014: YEAR END REPORT, at 2 (2014).

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 3-4.

of new death sentences. Explanations for this included the Georgia Capital Defender's taking the initiative by approaching prosecutors with reasons not to seek the death penalty, the cost of capital punishment, and the credibility of life without parole as an alternative.<sup>8</sup> Similar explanations were given for the 77% decline in capital murder indictments in Ohio over the past five years.<sup>9</sup>

One reason for the tremendous drop in new death penalties in Texas was the Texas Regional Public Defender for Capital Cases Office's initiative to present well-researched narratives of their clients' life stories, buttressed by expert testimony.<sup>10</sup> Another reason was that the combination of DNA-based exonerations and the introduction of life without parole ("LWOP") as an alternative led Harris County prosecutors to ask for the death penalty less frequently and juries to vote for capital punishment more rarely.<sup>11</sup> Similar factors, including changes in who served as district attorney, plus concerns about a local police chemist scandal, plus cost factors and concern over racial disparities, also led to dramatic declines in the number of new death sentences in Oklahoma County, Oklahoma and Philadelphia County, Pennsylvania.<sup>12</sup>

According to a study by Professor Brandon Garrett released in October 2015, the huge drop in Virginia death sentences in the last 20 years is due to improvements in defendants' representation, including the creation of teams of defense counsel who specialize in death cases, improved investigations, and the use of experts – especially with regard to mental health matters. He noted that in the past decade, only seven Virginia counties had sentenced anyone to death.<sup>13</sup>

A change in district attorneys may lead to a decline in new death sentences in Caddo Parish, Louisiana – the source of three-fourths of Louisiana's 12 new death sentences in recent years. Many of the death sentences in this parish with a population of only 257,000 were secured by Dale Cox, who in 2015 became interim district attorney but then decided against seeking a full term. In April 2015, Cox told *The Times* of Shreveport that capital punishment's "only reason" for existing is "revenge."<sup>14</sup> In August 2015, a study concerning Caddo Parish was reported to have found that prosecutors used discretionary challenges against African American potential jurors at three times the rate that they used such challenges against other prospective jurors from 2003-2012.<sup>15</sup> Later in 2015, the MacArthur Justice Center said it would bring a federal civil rights lawsuit seeking to enjoin prosecutorial actions that allegedly lead to under-representation of African Americans on juries.<sup>16</sup>

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<sup>8</sup> Greg Land, *'Life Without Parole' Leads to Shrinking Death Penalty Pipeline*, DAILY REP. (Atlanta), Dec. 16, 2015.

<sup>9</sup> John Caniglia, *Eluding death: Ohio prosecutors charge far fewer capital murder cases*, CLEV. PLAIN DEALER, Nov. 25, 2015.

<sup>10</sup> Richard Acello, *A new defense approach to storytelling changes capital cases in Texas*, A.B.A. J., Mar. 1, 2015.

<sup>11</sup> Tom Dart, *Why Texas county known for death sentences has given none in 2015*, THE GUARDIAN, Nov. 18, 2015.

<sup>12</sup> Simone Seiver, *Why Three Counties That Loved the Death Penalty Have Almost Stopped Pursuing It*, THE MARSHALL PROJECT, Aug. 11, 2015.

<sup>13</sup> Alex Hickey, *Virginia's use of death penalty declines as lawyering improves, professor says*, CAVALIER DAILY (Univ. of Va.), Oct. 21, 2015.

<sup>14</sup> Gary Hines, *Acting Caddo DA Dale Cox will not run in fall election*, KTBS-TV, July 14, 2015, <http://www.ktbs.com/story/29545637/acting-caddo-da-dale-cox-will-not-run-in-fall-election>.

<sup>15</sup> Adam Liptak, *New Questions on Racial Gap in Filling Juries*, N.Y. TIMES, Aug. 17, 2015.

<sup>16</sup> Alexandria Burris, *Caddo DA office facing federal civil rights lawsuit*, THE TIMES (Shreveport), Nov. 13, 2015.

On the other hand, Robert J. Smith characterized Riverside County, California “as the buckle of a new Death Penalty” in a September 7, 2015 op-ed. He noted that Riverside County had imposed more death sentences (seven) in the first half of 2015 than the state’s other 57 counties did collectively – and more than any other state and all the Deep South states combined.<sup>17</sup>

## **2. Further Drop in Executions, and Some Issues They Raised**

### **a. 20% Further Decline in 2015**

The number of executions in the United States dropped from 98 in 1999 to 42 in 2007, when many executions were stayed due to the Supreme Court’s pending *Baze* case regarding the manner in which lethal injection is carried out. In 2008, the year the Supreme Court upheld Kentucky’s lethal injection system, there were 37 executions. Executions then rose to 52 in 2009 before declining to 46 in 2010, 43 in 2011 and 2012, 39 in 2013, 35 in 2014, and 28 in 2015 – the fewest since 1991.<sup>18</sup> Executions dropped by 20% from 2014 to 2015 and by over 46% since 2009.

### **b. Tremendous Concentration Among a Few States**

Just six states accounted for all the country’s executions in 2015. Three of those states – Texas (13), Missouri (6), and Georgia (5) – were responsible for 86% of the country’s executions in 2015.<sup>19</sup>

Meanwhile, as noted above, only two people were sentenced to death in Texas in 2015, and there were no new death sentences in either Missouri or Georgia.

### **c. 75% with Significant Questions About Mental Health, Trauma, Abuse, or Innocence**

The Charles Hamilton Houston Institute for Race & Justice at Harvard Law School issued a report on December 16, 2015 finding that three-fourths of all executions in the United States in 2015 involved people who “were mentally impaired or disabled, experienced extreme childhood trauma or abuse, or were of questionable guilt.”<sup>20</sup>

## **3. States Ending the Death Penalty (and Close Defeats in Two Other States)**

After New York achieved *de facto* abolition, New Jersey, New Mexico, Illinois, Connecticut, and Maryland became the first five states to abolish the death penalty by legislative action since the 1960s. Nebraska’s legislature voted for abolition in 2015, but a 2016 ballot initiative could prevent abolition.

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<sup>17</sup> Robert J. Smith, Opinion, *Is Southern California the New Deep South?*, SLATE.COM, Sept. 7, 2015.

<sup>18</sup> SNELL, *supra* note 2, at 3, 14; DPIC, 2015 YEAR END REPORT, *supra* note 1, at 1.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, DEATH PENALTY 2015 YEAR END REPORT, at 2 (2015).

**a. New York**

In New York State, capital punishment has become inoperative. In 2004, New York's highest court held unconstitutional a key provision of the death penalty law.<sup>21</sup> After comprehensive hearings, the legislature did not correct the provision.<sup>22</sup> In 2007, New York's highest court vacated the last death sentence.<sup>23</sup>

**b. New Jersey**

New Jersey abolished the death penalty in December 2007.<sup>24</sup>

**c. New Mexico**

On March 18, 2009, New Mexico abolished the death penalty prospectively, that is, with regard to future cases.<sup>25</sup>

**d. Illinois**

Illinois abolished the death penalty on March 9, 2011.<sup>26</sup> Governor Quinn signed the bill and also commuted the sentences of everyone on Illinois' death row to life without parole.<sup>27</sup> In the years since Quinn lost his 2014 re-election effort, there has been no discernible effort to bring back the death penalty.

**e. Connecticut**

In April 2012, Connecticut repealed the death penalty prospectively. Both legislative houses had voted in 2009 to abolish the death penalty but did not override Governor M. Jodi Rell's veto.<sup>28</sup> In November 2010, Connecticut elected a new governor, Dannel Malloy, after a campaign, in the midst of a high profile death penalty trial, in which Malloy was attacked for his anti-death penalty position.<sup>29</sup> Following the trial of a second defendant in

<sup>21</sup> *People v. LaValle*, 3 N.Y.3d 88, 817 N.E.2d 341 (2004).

<sup>22</sup> See N.Y. ASSEMBLY COMMS. ON CODES, JUDICIARY & CORRECTIONS, *THE DEATH PENALTY IN NEW YORK: A REPORT ON FIVE PUBLIC HEARINGS* (2005). An effort in 2006 to revive the New York death penalty law also failed. See Yancey Roy, Gannett News Service, *Senate pushes death penalty for cop killers; Assembly resists*, June 14, 2006; Michael Gormley, Associated Press, *Senate Republicans Say Assembly is Coddling Murderers*, June 13, 2006.

<sup>23</sup> *People v. Taylor*, 9 N.Y.3d 129, 878 N.E.2d 969 (2007).

<sup>24</sup> Tom Hester, Jr., Associated Press, *New Jersey Bans Death Penalty*, Dec. 17, 2007; Henry Weinstein, *New Jersey Lawmakers Vote to End Death Penalty*, L.A. TIMES, Dec. 14, 2007; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007.

<sup>25</sup> Associated Press, *Death Penalty Is Repealed in New Mexico*, Mar. 18, 2009.

<sup>26</sup> John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011.

<sup>27</sup> Statement from Gov. Pat Quinn on Senate Bill 3539, Mar. 9, 2011, <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

<sup>28</sup> Jon Lender & Daniela Altamari, *Death penalty abolition gets final legislative approval in Senate*, HARTFORD COURANT, May 22, 2009.

<sup>29</sup> Christopher Keating & Eric Gershon, *Bysiewicz: Malloy Winner of Governor's Race*, HARTFORD COURANT.COM, Nov. 3, 2010; Christopher Keating, *Foley Concedes Governor's Race To Malloy*, HARTFORD COURANT, Nov. 8, 2010.

the case, also sentenced to death, the legislature passed the abolition bill. As the voters had known he would do, Governor Molloy signed it into law.<sup>30</sup> Molloy was re-elected in 2014.

As is discussed in more detail below, on August 25, 2015, the Connecticut Supreme Court held, by a 4-3 vote, that capital punishment violates Connecticut's constitution (see Part I.A.9.c below). This holding will prevent executions of those not prospectively exempted from the death penalty by the 2012 law.

#### **f. Maryland**

In March 2013, Maryland repealed the death penalty prospectively.<sup>31</sup> A subsequent effort to seek a reinstatement referendum got too few signatures to be put on the ballot.<sup>32</sup> On January 20, 2015, Governor O'Malley, shortly before leaving office, commuted the death sentences of those still on Maryland's death row.<sup>33</sup>

#### **g. Nebraska**

In May 2015, Nebraska's overwhelmingly Republican unicameral legislature voted by 30-19 to override Governor Pete Ricketts' veto of capital punishment repeal legislation. However, the legislation will not become law unless a referendum to preclude such legislation is defeated in the November 2016 election.<sup>34</sup>

#### **h. New Hampshire**

On March 12, 2014, a bill to repeal prospectively New Hampshire's death penalty passed in the House of Representatives by 225-104.<sup>35</sup> Since Governor Maggie Hassan has said she would sign such a bill, it would have been enacted had a single Senator voted differently in the April 17, 2014 flat-footed tie vote.<sup>36</sup>

Future repeal efforts appear to require changes in the legislature's 2015-2016 composition. Although Governor Hassan was re-elected in November 2014, the House changed from a 40-seat Democratic majority to a 79-seat Republican majority,<sup>37</sup> and the Senate Republicans' majority rose from one seat to four seats.<sup>38</sup>

<sup>30</sup> J.C. Reindl, *Senate Votes to Abolish the death penalty*, THE DAY (Conn.), Apr. 5, 2012.

<sup>31</sup> Maggie Clark, *Maryland Repeals Death Penalty*, STATELINE, May 2, 2013.

<sup>32</sup> John Wagner, *Petition drive to halt Maryland's death penalty repeal falls short*, WASH. POST, May 31, 2013.

<sup>33</sup> Associated Press, *Outgoing Gov. O'Malley Officially Commutes Death Sentences*, Jan. 20, 2015, <http://baltimore.cbslocal.com/2015/01/20/outgoing-gov-omalley-officially-commutes-death-sentences>.

<sup>34</sup> JoAnne Young, *Nebraska's death penalty is repealed*, LINCOLN J. STAR, May 28, 2015.

<sup>35</sup> Garry Rayno, *House overwhelmingly adopts death penalty repeal*, N.H. UNION LEADER, Mar. 12, 2014.

<sup>36</sup> Lynne Tuohy, Associated Press, *N.H. Senate votes to leave death penalty intact*, Apr. 17, 2014, [http://www.bostonglobe.com/news/nation/2014/04/17/new-hampshire-senate-votes-leave-death-penalty-intact/bTCJcu6sZnDQowVG9cVWIJ/story.html?s\\_campaign=sm\\_tw](http://www.bostonglobe.com/news/nation/2014/04/17/new-hampshire-senate-votes-leave-death-penalty-intact/bTCJcu6sZnDQowVG9cVWIJ/story.html?s_campaign=sm_tw).

<sup>37</sup> New Hampshire House of Representatives elections, 2014, BALLOTEDIA, [http://ballotpedia.org/New\\_Hampshire\\_House\\_of\\_Representatives\\_elections,\\_2014](http://ballotpedia.org/New_Hampshire_House_of_Representatives_elections,_2014).

<sup>38</sup> New Hampshire State Senate elections, 2014, BALLOTEDIA, [http://ballotpedia.org/New\\_Hampshire\\_State\\_Senate\\_elections,\\_2014](http://ballotpedia.org/New_Hampshire_State_Senate_elections,_2014).

**i. Delaware**

A death penalty repeal bill passed the Senate in April 2015 by 11-9. The Governor said on May 7, 2015 that he would sign a repeal bill.<sup>39</sup> On January 28, 2016, the House defeated the repeal bill by 23-16. However, a few hours earlier, the Delaware Supreme Court had announced that it would consider the law's constitutionality in light of the U.S. Supreme Court's *Hurst v. Florida* holding to invalidate a portion of Florida's capital punishment statute.<sup>40</sup> On January 25, 2016, Judge Paul R. Wallace had certified five questions to the Delaware Supreme Court in light of *Hurst*.<sup>41</sup>

**4. Five States with Moratoriums on Executions**

**a. Colorado**

On May 22, 2013, Colorado Governor John W. Hickenlooper granted a temporary reprieve of Nathan J. Dunlap's execution. He stated:

If the State of Colorado is going to undertake the responsibility of executing a human being, the system must operate flawlessly. Colorado's system of capital punishment is not flawless. A recent study ... showed that under Colorado's capital sentencing system, death is not handed down fairly. ... The fact that ... defendants [who committed similar or worse crimes than Dunlap's] were sentenced to life in prison instead of death underscores the arbitrary nature of the death penalty in this State, and demonstrates that it has not been fairly or equitably imposed. As one former Colorado judge said to us, "[The death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or economic circumstance of the defendant."<sup>42</sup>

On August 17, 2014, Governor Hickenlooper, while seeking re-election, said he opposed the death penalty, whereas in 2010 he had publicly supported it. He said in 2014 that he changed his view because he got new facts, such as that "it costs 10 times, maybe 15 times more money" and does not deter. He now realized there were "good reasons" why no country in Europe (except Belarus), South America, Mexico, Australia, or Israel supports it.<sup>43</sup> Hickenlooper was re-elected.

<sup>39</sup> Jon Offredo, *Gov. Markell: I will sign Delaware death penalty repeal*, NEWS JOURNAL (Wilmington), May 18, 2015.

<sup>40</sup> Tom McParland, *Push to Repeal Death Penalty Fails in Delaware House*, DELAWARE LAW WEEKLY, Jan. 28, 2016, available at <http://www.delawarelawweekly.com/id=1202748276245/Push-to-Repeal-Death-Penalty-Fails-in-Delaware-House?slreturn=20160217153923>.

<sup>41</sup> *State v. Rauf*, ID No. 1509009858, 2016 WL 320094 (Del. Super. Ct. Jan. 25, 2016).

<sup>42</sup> Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013) (second alteration in original), <http://www.cofpd.org/docs-dun/governor-executive-order.pdf>.

<sup>43</sup> Eli Stokols, *In interview, Hickenlooper offers new anti-death penalty stance, light support for Keystone*, KDVR-TV, Aug. 18, 2014, <http://kdvr.com/2014/08/18/in-interview-hickenlooper-offers-new-anti-death-penalty-stance-light-support-for-keystone/>.

### **b. Oregon**

Since reinstating capital punishment in 1984, Oregon has executed twice, both in the 1990s while John Kitzhaber was Governor. On November 22, 2011, Governor Kitzhaber, who in 2010 had again been elected Governor, announced that he would prevent executions while Governor. He explained that the executions he had permitted in the 1990s had neither “made us safer” nor “more noble as a society.” His new policy precluded – while he was Governor – executions of those already on or later added to Oregon’s death row. His moratorium policy was upheld by the Oregon Supreme Court in 2013.<sup>44</sup> During his 2014 re-election campaign, Governor Kitzhaber strongly supported the policy, whereas his opponent attacked him for refusing “to enforce the law.”<sup>45</sup> Governor Kitzhaber was re-elected. After his resignation for unrelated reasons, the new Governor, Kate Brown, said on February 20, 2015, that she would continue the moratorium.<sup>46</sup>

### **c. Pennsylvania**

In an October 8, 2014 debate, Pennsylvania Governor Tom Corbett said he supported the death penalty and had recently signed several execution warrants. Democratic candidate Tom Wolf said, “[W]e ought to have a moratorium on capital punishment cases,” due to doubts the system was functioning properly or having a positive impact.<sup>47</sup> Wolf defeated Corbett in the November election. On February 13, 2015, Governor Wolf announced a moratorium on executions until a bi-partisan commission on the death penalty appointed by the State Senate issued its report, Governor Wolf reviewed it, and “any recommendations contained therein are satisfactorily addressed.”<sup>48</sup>

On December 21, 2015, the Pennsylvania Supreme Court unanimously held that Governor Wolf was entitled to impose the moratorium while the legislative commission continued its work.<sup>49</sup>

### **d. Washington**

On February 11, 2014, Washington Governor Jay Inslee (previously pro-death penalty) announced a moratorium on executions for as long as he is Governor. The Governor pointed to the fact that most Washington death sentences get reversed in appeals and the habeas process; his doubt that “equal justice is being served”; and his belief that

<sup>44</sup> William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011; Jonathan J. Cooper, Associated Press, *Oregon court upholds governor’s execution delay*, June 20, 2013, <http://www.seattletimes.com/seattle-news/oregon-court-upholds-governors-execution-delay/>.

<sup>45</sup> Laura Gunderson, *Tough Question Tuesday: Kitzhaber on death penalty decision; Richardson says he won’t impose personal convictions*, OREGONIAN, Oct. 21, 2014.

<sup>46</sup> Jonathan J. Cooper, Associated Press, *New Oregon Governor Will Continue Death Penalty Moratorium*, Feb. 20, 2015, <http://abcnews.go.com/Politics/print?id=29114589>.

<sup>47</sup> Nick Field, *PA-Gov: The Third Gubernatorial Debate*, POLITICSPA.COM, Oct. 8, 2014.

<sup>48</sup> Memorandum from Gov. Tom Wolf, Feb. 13, 2015, at 1, 4, available at <http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>. On January 14, 2011, just before leaving office, Governor Edward G. Rendell, who had ardently supported capital punishment, urged considering its abolition. He also suggested considering if a faster process could provide “thorough and exhaustive review of the facts and the law in each case.” *Governor Rendell Urges General Assembly to Review Effectiveness of Pennsylvania’s Death Penalty*, PR NEWSWIRE, Jan. 14, 2011.

<sup>49</sup> Chris McDaniel, *Court Backs Pennsylvania Governor’s Suspension Of Death Penalty*, BUZZFEED NEWS, Dec. 21, 2015.

there are “too many flaws” in the capital punishment system and its continued application to people with mental retardation and substantial mental illness. He also cited Washington’s lack of any meaningful type of proportionality review and the overall lack of certainty associated with its capital punishment system. On February 16, 2014, the *Seattle Times*’ editorial board, which had supported the death penalty, said the Governor’s announcement had caused it to finish reassessing its position and to call for capital punishment’s abolition.<sup>50</sup>

**e. Montana**

On October 6, 2015, Montana District Court Judge Jeffrey M. Sherlock permanently enjoined the use of pentobarbital in Montana’s lethal injection protocol unless and until the statute authorizing lethal injection is modified in conformance with his decision. He held that the protocol violated state law, which limits executions to those using an “ultra-fast acting barbiturate.”<sup>51</sup>

Judge Sherlock’s holding has the impact of keeping executions from occurring in Montana indefinitely. Months earlier in 2015, a bill to abolish capital punishment lost on a tie vote in Montana’s House of Representatives.<sup>52</sup>

**5. States Considering Reform of the Death Penalty**

**a. Ohio**

In September 2011, the Supreme Court of Ohio and the Ohio State Bar Association formed the Joint Task Force to Review the Administration of Ohio’s Death Penalty.<sup>53</sup> The 22-person Task Force included judges, prosecutors, defense counsel, the state public defender, legislators, and law professors. In its final report, released on May 21, 2014,<sup>54</sup> the Task Force made 56 recommendations, including (among many others): attempting to ensure recording of custodial interrogations; adoption of the ABA capital case counsel guidelines and supplemental guidelines regarding mitigation, and other reforms and funding to enhance counsel’s performance; precluding death penalty eligibility for anyone with serious mental illness at the time of either the crime or the intended execution; inclusion in proportionality review of cases in which death was sought but not imposed; prohibition of jailhouse informant testimony without independent corroboration; various steps to inhibit racial disparities including adoption of a Racial Justice Act; annual reviews and reforms of capital jury instructions; and use of “plain English” in instructions throughout trials, such as clearly informing jurors that they could vote for life (a) based on

<sup>50</sup> Governor Jay Inslee, Remarks Announcing a Capital Punishment Moratorium, Feb. 11, 2014, [http://governor.wa.gov/news/speeches/20140211\\_death\\_penalty\\_moratorium.pdf](http://governor.wa.gov/news/speeches/20140211_death_penalty_moratorium.pdf); Editorial, *It’s time for the state to end the death penalty*, SEATTLE TIMES, Feb. 16, 2014.

<sup>51</sup> *Smith v. State*, No. BDV-2008-303, slip op. at 2, 11 (Mont. 1st Jud. Dist. Ct. Oct. 6, 2015), <http://aclumontana.org/wp-content/uploads/2015/10/Lethal-Injection-Ruling.pdf>.

<sup>52</sup> Mike Dennison, *House deadlocks on bill to abolish death penalty in Montana*, BILLINGS GAZETTE, Feb. 23, 2015.

<sup>53</sup> Chief Justice Maureen O’Connor, First State of the Judiciary Address, Sept. 8, 2011, [http://www.sconet.state.oh.us/PIO/Speeches/2011/SOJ\\_090811.asp](http://www.sconet.state.oh.us/PIO/Speeches/2011/SOJ_090811.asp).

<sup>54</sup> Jeremy Pelzer, *Supreme Court task force’s final report proposes major reforms to Ohio’s death penalty system*, CLEV. PLAIN DEALER, May 21, 2014.



mercy arising from evidence and (b) even when the number of aggravating factors exceeds the number of mitigating factors.<sup>55</sup>

On February 1, 2015, the Ohio Supreme Court issued final “Rules for Appointment of Counsel in Capital Cases” that fell short of its original version, which would have (as the Task Force had recommended) mandated compliance with the ABA Guidelines. Instead, compliance is optional. The final rules do make it much easier to file a formal complaint with a new Commission on Appointment of Counsel in Capital Cases, asserting that appointed counsel’s defense was insufficiently diligent. The Court said the rules are unrelated to the Task Force’s recommendations.<sup>56</sup>

On October 14, 2015, former Ohio Supreme Court Justice Evelyn Lundberg Stratton testified before the Ohio Senate Criminal Justice Committee that people who were seriously mentally ill at the time of their offenses should be exempt from the death penalty. She said that the deterrence rationale did not apply in such instances. She testified that the Supreme Court’s rationales for categorical exemptions of people with intellectual disability or juveniles apply at least as strongly here. One reason for her conclusion is that “like people with intellectual disabilities, those with serious mental illnesses are significantly impaired in their reasoning, judgment, and impulse control. Therefore, they do not act with the level of moral culpability required for imposition of the death penalty.”<sup>57</sup> Justice Stratton was testifying in favor of S.B. 162, which Republican Senator Bill Seitz and Democratic Senator Sandra Williams had introduced in May 2015.<sup>58</sup>

### **b. Florida**

On January 12, 2016, in *Hurst v. Florida*, the Supreme Court held unconstitutional Florida’s capital sentencing scheme in which the judge not the jury has had the ultimate power to decide whether facts exist that establish an aggravating circumstance making the defendant eligible for imposition of the death penalty.<sup>59</sup> On March 3, 2016, the Florida legislature passed and sent to Governor Rick Scott legislation – which he said he would sign – in light of *Hurst*. Under the new law, the jury must unanimously find the existence of every aggravating factor that the judge then proceeds to consider in deciding whether to impose the death penalty. Going beyond the *Hurst* holding, the new law also requires that the judge may not impose capital punishment unless at least 10 jurors vote to recommend that death be imposed. Previously, a simple majority of the jury sufficed for a death penalty recommendation. State Senator Arthenia Joyner, who voted for the new law, predicted that the Florida Supreme Court would hold that the jury’s death penalty recommendation must be unanimous.<sup>60</sup>

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<sup>55</sup> JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO’S DEATH PENALTY, FINAL REPORT & RECOMMENDATIONS (2014).

<sup>56</sup> Rules for Appointment of Counsel in Capital Cases (effective Feb. 1, 2015), <http://www.supremecourt.ohio.gov/LegalResources/Rules/capitalCases/capitalCases.pdf>.

<sup>57</sup> Testimony by Evelyn Lundberg Stratton Before the Senate Criminal Justice Committee on S.B. 162, Oct. 14, 2015, <http://oamie.org/wp-content/uploads/2015/11/S.B.-162-Testimony-Stratton.pdf>.

<sup>58</sup> Alan Johnson, *Lawmakers want to exclude mentally ill from death penalty*, COLUMBUS DISPATCH, May 11, 2015.

<sup>59</sup> *Hurst v. Florida*, 136 S. Ct. 616 (2016).

<sup>60</sup> Steve Bousquet and Michael Auslen, *Florida lawmakers send death penalty fix to Gov. Rick Scott*, MIAMI HERALD, Mar. 3, 2016; Associated Press, *The Latest: Florida Governor to Sign Death Penalty Overhaul*, ABC NEWS, Mar. 3, 2016.

An analysis in January 2016 by the *Tampa Bay Times* showed that when Florida judges sentenced people to death after their juries had not been unanimous in recommending death, there was a significant risk of innocent people being executed. The *Times* located information about how juries voted in 20 of the 26 cases in which Florida death-row inmates were later exonerated. In 15 of these cases, the jury had not been unanimous; and in three others, judges imposed the death penalty over a jury's recommendation of life in prison.<sup>61</sup> In a separate analysis of Florida's 390 prisoners on death row, *The Villages Daily Sun* reported on January 10, 2016, that in 74% of their cases, juries had not unanimously recommended death and that in 43% of their cases, fewer than 10 of the 12 jurors had recommended death.<sup>62</sup>

## 6. Public Opinion

On November 17, 2015, the Public Religion Research Institute reported that a poll of 2,695 Americans found that LWOP was favored over the death penalty by 52% to 47%. Racial attitudes affected the internals of the poll. 37% of those who felt there were race-of-the-defendant disparities in applying the death penalty (as 82% of African Americans, 59% of Hispanics, and 45% of whites did) supported the death penalty, whereas 59% of those who did not believe there are such disparities favored the death penalty. Belief in race-of-the-defendant disparities was considerably greater among college-educated whites than among other whites.<sup>63</sup>

On October 15, 2015, a Gallup poll – which did not ask a question offering any alternative – reported that support for capital punishment had dropped by 2 percentage points since 2014, to 61% (within one point of a 40-year low), with 37% opposed – “the most in 43 years and 21 points above levels reported in the mid-1990s.” 55% of African Americans opposed capital punishment, whereas 68% of whites supported it – again, with no alternative mentioned.<sup>64</sup> Polls (including Gallup in certain years) that do offer LWOP as an alternative always show lesser support for capital punishment than when the same polls give no alternative. National polls released in April 2015 by Pew Research Center and CBS News that offered no alternative both found 56% support for the death penalty. This was the lowest percentage in the history of the CBS News poll and the lowest in 40 years recorded in the Pew poll. Pew found that as compared with 2011, there were “large drops” in capital punishment support in 2015 “among liberal Democrats (11 percentage points), women (10 points), those under age 30 (8 points), and conservative Republicans (7 points).”<sup>65</sup>

A poll that did offer an LWOP plus restitution to the victims survivors as an alternative was conducted in Oklahoma in November 2015 – finding 52.4% supporting abolishing the death penalty if that were the alternative, 34.0% still preferring capital

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<sup>61</sup> Anna M. Phillips, *How the nation's lowest bar for the death penalty has shaped death row*, TAMPA BAY TIMES, Jan. 31, 2016.

<sup>62</sup> Katie Sartoris, *Redefining Justice*, THE VILLAGES DAILY SUN (Fla.), Jan. 10, 2016.

<sup>63</sup> PUB. RELIGION RES. INST., ANXIETY, NOSTALGIA, AND MISTRUST: FINDINGS FROM THE 2015 AMERICAN VALUES SURVEY, at 47 (2015).

<sup>64</sup> Death Penalty Info. Ctr., Gallup Poll: Support for Death Penalty Declines 2%, Opposition Reaches Highest Level in 43 Years, <http://www.deathpenaltyinfo.org/node/6275>.

<sup>65</sup> Death Penalty Info. Ctr., National Polls Show Historic Declines in Support for Death Penalty, <http://www.deathpenaltyinfo.org/node/6118>.

punishment, and about 14% with no opinion. A different October 2015 poll in Oklahoma that gave no alternative showed around 67% favoring capital punishment (down from 74% in a similar poll in 2014), while half favored a moratorium on executions.<sup>66</sup>

## **7. Possible Influences on Public Opinion**

Among the possible influences on public opinion (in addition to the particular issues relating to methods of execution and botched executions, plus the issues discussed later in this chapter) are the views expressed by a growing number of people – many of them conservatives – who oppose or are skeptical (as is President Obama) about the death penalty *in practice* (even if they favor it *in theory*).

### **a. Changed or Newly Expressed Views on the Death Penalty**

In 2015, past supporters of the death penalty, including a notable number of conservatives, criticized its implementation – as did some who had not publicly expressed their views previously. Many of them advocated abolition of the death penalty.

#### **i. Conservatives**

The *ABA Journal* reported in June 2015 that even in egregious cases, “many of those calling for an end to capital punishment in North Carolina are conservative Republicans who once supported it.” Among their reasons for opposing the death penalty are its higher costs and wrongful convictions. The conservative anti-death penalty group in North Carolina is part of a national group that began in Montana: Conservatives Concerned About the Death Penalty. Marc Hyden, national advocacy coordinator of the national organization, said, “There is no bigger government program than one that can kill you.” He observed that the “growing skepticism of government ... really paved the way for us.”<sup>67</sup>

On November 17, 2015, *The Harvard Law Record* published an opinion piece saying there are three main conservative arguments against the death penalty: “[Its] incompatibility with (1) limited government, (2) fiscal responsibility, and (3) promoting a culture of life.”<sup>68</sup>

#### **ii. Evangelical Religious Groups**

In October 2015, the National Association of Evangelicals, whose membership includes congregations with millions of American evangelical Christians, passed a resolution retreating from its longstanding solid support of capital punishment. The resolution states: “Evangelical Christians differ in their beliefs about capital punishment, often citing strong biblical and theological reasons [for their differing views]. We affirm the conscientious commitment of both streams of Christian ethical thought.” The resolution also states, “Nonpartisan studies of the death penalty have identified systemic problems in

<sup>66</sup> Death Penalty Info. Ctr., POLL: Majority of Oklahomans Favor Replacing Death Penalty With Life Without Parole Plus Restitution, <http://www.deathpenaltyinfo.org/node/6307>.

<sup>67</sup> Kevin Davis, *Faith and fiscal responsibility cause many conservatives to change their view of the death penalty*, ABA JOURNAL, June 2015.

<sup>68</sup> Ben Jones, Opinion, *Ending the Death Penalty Because of, not in Spite of, Conservative Principles*, HARV. L. REC., Nov. 17, 2015.

the United States,” and noted “the alarming frequency of post-conviction exonerations.”<sup>69</sup> Shane Claiborne, an activist author from the Evangelical community, said the new position was “a big deal” and reflects concern about the implications of capital punishment for a core evangelical tenet: “[T]hat no one is beyond redemption.”<sup>70</sup>

Seven months earlier, the National Latino Evangelical Coalition, a major “coalition of Latin American evangelicals” called upon its 3,000 congregations to support abolition of the death penalty.<sup>71</sup>

### *iii. Catholic Church*

The most public expression of the Catholic Church’s opposition to capital punishment was Pope Francis’ address to a joint session of Congress on September 24, 2015. The Pope said he supports “global abolition of the death penalty. I am convinced that this way is the best, since every life is sacred, every human life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes.” He encouraged “all those who are convinced that a just and necessary punishment must never exclude the dimension of hope and the goal of a rehabilitation.”<sup>72</sup> The Pope’s statements to Congress were in accordance with other statements the Pontiff made in 2015.<sup>73</sup>

The Pope spoke in support of, among others, Cardinal Sean O’Malley, chair of the U.S. bishops’ Committee on Pro-Life Activities, and Archbishop Thomas G. Wenski, chair of the bishops’ Committee on Domestic Justice and Human Development, who on July 16, 2015 issued a joint statement opposing capital punishment.<sup>74</sup> On March 5, 2015, four publications “that speak for often antagonistic niches of Catholic public thought” ran a joint editorial opposing capital punishment. The editorial urged “the readers of our diverse publications and the whole U.S. Catholic community and all people of faith to stand with us and say, ‘Capital punishment must end.’ ... The practice is abhorrent and unnecessary.”<sup>75</sup>

### *iv. Present and Former Judges and Prosecutors*

On May 12, 2015, former Georgia Chief Justice Norman Fletcher advocated repeal of capital punishment. Having reflected on the subject during the decade since he retired from the court (where he had often voted to uphold death sentences), Judge Fletcher said those who had criticized such votes had been correct. He pointed to executions of innocent people,

<sup>69</sup> Nat’l Ass’n of Evangelicals, Resolution, *Capital Punishment 2015*, Oct. 15, 2015, <http://nae.net/capital-punishment-2/>.

<sup>70</sup> Sarah Pulliam Bailey, *The National Association of Evangelicals has changed its position on the death penalty*, WASH. POST, Oct. 19, 2015.

<sup>71</sup> Ruth Gledhill, *NaLEC becomes first major evangelical group to oppose death penalty*, CHRISTIAN TODAY, Mar. 28, 2015.

<sup>72</sup> Mark Berman, *Pope Francis tells Congress ‘every life is sacred,’ says the death penalty should be abolished*, WASH. POST, Sept. 24, 2015.

<sup>73</sup> See, e.g., *Pope Francis: the death penalty is inadmissible*, NAT’L CATH. REP., Mar. 20, 2015; *Pope Francis: no crime ever deserves the death penalty*, VATICAN RADIO, Mar. 20, 2015.

<sup>74</sup> *Mercy, Justice, and the Gospel of Life: US bishops on ending the death penalty*, CATH. NEWS AGENCY, July 20, 2015.

<sup>75</sup> Mark Oppenheimer, *Catholics on Left and Right Find Common Ground Opposing Death Penalty*, N.Y. TIMES, Mar. 28, 2015.

the unfair and inconsistent implementation of capital punishment, and that it made “no business sense.”<sup>76</sup>

In March 2015, the *University of Richmond Law Review* published an article by former Virginia Attorney General Mark L. Earley, who was Attorney General during three years in which Virginia executed 36 people. Attorney General Earley stated that he opposes capital punishment because it “is based on a false utopian premise ... that we have had, do have, and will have 100% accuracy in death penalty convictions and executions.” He acknowledged that he had had doubts while serving as Attorney General but that political concerns had “walled of my doubts.”<sup>77</sup>

On March 20, 2015, A.M. “Marty” Stroud III, the lead prosecutor who secured Glenn Ford’s conviction and death sentence in December 1984, wrote an extensive apology in Shreveport’s *The Times*. Ford was exonerated in 2014 and released on March 11, 2014. Stroud attacked the State’s “appalling” effort to deny “Ford any compensation for the horrors he suffered in the name of Louisiana justice.” He noted that if the evidence belatedly uncovered had “been disclosed during the investigation there would not have been sufficient evidence to even arrest Mr. Ford!” Stroud had, at the time, been unconcerned that Ford was represented by “appointed counsel who had never tried a criminal jury case much less a capital one, ... had insufficient funds to hire experts ... [and, being civil lawyers] were in the wrong arena.” Stroud also said he had knowingly overseen jury strikes that resulted in an all-white jury.

He stated that he had been “not as interested in justice as I was in winning.” Stroud concluded: “We are simply incapable of devising a system that can fairly and impartially impose a sentence of death because we are all fallible human beings.” He said capital punishment is “anathema” in any civilized society, “an abomination that continues to scar the fibers of this society,” and a “barbaric penalty ... that condones state assisted revenge and that is not justice in any form or fashion.”<sup>78</sup>

By the time of Stroud’s apology, Mr. Ford knew that he was dying of lung cancer. He had lived for decades “in solitary confinement for 23 hours a day ... in a concrete cell the size of a bathroom.” Although a 2011 blood test had shown he could have cancer, he was not permitted to see an oncologist.<sup>79</sup> Mr. Ford died, destitute, on June 29, 2015.<sup>80</sup>

Natrona County, Wyoming, District Attorney Mike Blonigen stated on January 2, 2016 that Wyoming should seriously reconsider having capital punishment. Referring to inadequate funding of capital defense counsel, he said, “You’ve got to have the resources and have the commitment to it to carry through with it ... . I think the Legislature has to decide do we really want this or not.” Blonigen spoke after a federal judge overturned Dale Wayne Eaton’s death sentence, which Blonigen had secured in 2004 – the most recent

<sup>76</sup> Bill Rankin, *Former justice calls for end to death penalty*, ATLANTA J.-CONST., May 13, 2015.

<sup>77</sup> Mark L. Earley, *A Pink Cadillac, an IQ of 63, and a Fourteen-Year-Old from South Carolina: Why I Can No Longer Support the Death Penalty*, 49 U. RICH. L. REV. 811, 813 (2015).

<sup>78</sup> A.M. “Marty” Stroud III, *Opinion, Lead prosecutor apologizes for role in sending man to death row*, THE TIMES (Shreveport), Mar. 20, 2015.

<sup>79</sup> Dana Spiotta, *All Alone: Nearly three decades in solitary for a crime he did not commit*, N.Y. TIMES MAG., Dec. 15, 2015.

<sup>80</sup> Alexandria Burris, *Glenn Ford, exonerated death row inmate, dies*, THE TIMES (Shreveport), June 29, 2015.

death sentence imposed in the state. Eaton was held to have had unconstitutionally ineffective assistance of counsel.<sup>81</sup>

Former Texas prosecutor Tim Cole, whom the *Dallas Morning News* said had been “a no-holds-barred lawman” during his four terms as district attorney for three Texas counties, wrote a July 23, 2015 op-ed urging Texas to abolish the death penalty. He said the huge decline in new death sentences in Texas shows that “we can live without the death penalty.” He emphasized the inaccuracies of the capital punishment process. Cole stated that the standards used by prosecutors as to whether to seek the death penalty had changed. He said, “There are probably a lot of people who have already been executed where those cases would not be death penalty cases these days ... . It’s become more acceptable for a district attorney not to seek death.”<sup>82</sup>

**v. Former Corrections Leaders, Death Row Chaplain, and Execution Supervisor**

On April 13, 2015, two retired prison wardens, a retired chaplain, and a retired execution supervisor spoke about the adverse impact that participating in executions continued to have on them. Former Texas death row chaplain Carroll Pickett cogently summarized the views of the four speakers, when he said: “Standing by the gurney almost 100 times, and watching innocent men killed, watching repentant men killed, and seeing the pain among families and men and my employee friends, cannot leave my memories.”<sup>83</sup>

**vi. Focus on Veterans, Including Those Suffering from PTSD**

Increased attention was paid in 2015 to veterans sentenced to death row – of whom many have later been executed. Indeed, the first person executed in this country in 2015 was Andrew Brannan, who after serving in Vietnam was granted 100% disability status because of his Post-Traumatic Stress Disorder (“PTSD”) and other issues arising from his army service. As three retired Brigadier Generals stated in an op-ed, Brannan’s execution by Georgia served no purpose. Brannan had irrationally reacted to being halted for speeding by killing the police officer who had stopped him.<sup>84</sup>

The generals and the Death Penalty Information Center’s November 11, 2015 report pointed out that PTSD creates a trauma that, as the generals said, “can simmer under the surface for years, then erupt in violence ... . It can be triggered by anything that jars a memory of a time when a person was under violent attack, demanding immediate and

<sup>81</sup> Ben Neary, Associated Press, *Casper prosecutor says Wyoming needs to reconsider death penalty*, Jan. 2, 2016, [http://trib.com/news/local/casper/casper-prosecutor-says-wyoming-needs-to-reconsider-death-penalty/article\\_ac9616e5-de24-5a7b-a920-39306731b430.html](http://trib.com/news/local/casper/casper-prosecutor-says-wyoming-needs-to-reconsider-death-penalty/article_ac9616e5-de24-5a7b-a920-39306731b430.html).

<sup>82</sup> Editorial, *Living without the death penalty in Texas*, DALL. MORNING NEWS, July 29, 2015; see also Tim Cole, Opinion, *This year, Texans live without imposing new death sentences*, STAR-TELEGRAM, July 23, 2015.

<sup>83</sup> Kim Bellware, *This Is What It Feels Like To Spend Your Life Working On Death Row*, HUFFINGTON POST, Apr. 13, 2015 (updated May 7, 2015).

<sup>84</sup> RICHARD C. DIETER, DEATH PENALTY INFO. CTR., BATTLE SCARS: MILITARY VETERANS AND THE DEATH PENALTY, at 25-26 (2015); James P. Cullen, David R. Irvine & Stephen N. Xenakis, Opinion, *Vets suffering from PTSD need our help*, USA TODAY, Nov. 11, 2015.

forceful reaction. ... PTSD can be treated, but in one study only about half of the veterans who needed treatment received it.”<sup>85</sup>

**vii. President Obama**

As part of President Obama’s consideration in 2015 and early 2016 of actions he might take prior to his presidency’s ending on January 20, 2017, he thought about capital punishment but expressed his views more obscurely about it than about other criminal justice issues. In November 2015, the President reiterated that he is “deeply concerned” about how capital punishment is handled but conceded that it has not been one of his priorities. He told the Marshall Project that among the aspects of the death penalty system that bother him are racial disparities, convictions of the innocent, and issues regarding “gruesome and clumsy” executions. White House personnel indicated, equally opaquely, that President Obama was trying to come up with a sensible response and considering legal factors.<sup>86</sup>

**8. Lethal Injection Controversies Continue to Slow Moves Towards Executions**

A substantial reason why executions declined from 2010-2015 was the shortage of drugs useable in lethal injections. Starting in late 2013, there were several very problematic executions arising from the drug shortages.

**a. Developments in 2010-2012**

Many foreign governments and foreign manufacturers began by 2010 to restrict or object to the export of sodium thiopental for use in executions – and outright bans later followed. In January 2011, Hospira, the drug’s only U.S. manufacturer, decided to permanently cease producing it, at the demand of Italy.<sup>87</sup> Shortly thereafter, Tennessee gave eight grams of sodium thiopental to Alabama, having bought them from a United Kingdom wholesaler. Apparently after Drug Enforcement Administration (“DEA”) intervention, Alabama handed over the eight grams to the DEA.<sup>88</sup> In March 2011, the DEA seized Georgia’s death row prison’s sodium thiopental supply.<sup>89</sup>

In December 2010, due to difficulties in securing sodium thiopental, Oklahoma began using pentobarbital – already used in euthanizing animals – in executions, but refused to identify the manufacturer.<sup>90</sup> Other efforts to switch to pentobarbital were undercut by actions such as Lundbeck’s. That Danish company told states that it “adamantly opposed” pentobarbital’s use in executions.<sup>91</sup> By June 2011, Germany had

<sup>85</sup> Cullen, Irvine & Xenakis, *supra* note 84.

<sup>86</sup> Kathleen Hennessey, Associated Press, *Obama still pondering death penalty’s role in justice system*, Nov. 27, 2015, [http://www.journaltribune.com/news/2015-11-27/World\\_%7C\\_National/Obama\\_still\\_pondering\\_death\\_penaltys\\_role\\_in\\_justi.html](http://www.journaltribune.com/news/2015-11-27/World_%7C_National/Obama_still_pondering_death_penaltys_role_in_justi.html).

<sup>87</sup> Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J., Jan. 22, 2011; AMNESTY INT’L, USA: AN EMBARRASSMENT OF HITCHES, at 47 & n.247 (2011).

<sup>88</sup> AMNESTY INT’L, *supra* note 87, at 3.

<sup>89</sup> Kevin Sack, *Executions in Doubt in Fallout Over Drug*, N.Y. TIMES, Mar. 17, 2011.

<sup>90</sup> Nathan Koppel, *Oklahoma Conducts First U.S. Execution of 2011*, WALL ST. J. LAW BLOG, Jan. 7, 2011.

<sup>91</sup> Sack, *supra* note 89.

joined the Danish and British governments in opposing the export of such drugs as pentobarbital and sodium thiopental for use in executions.<sup>92</sup>

**b. Developments in 2013 and into July 2014**

On July 23, 2013, the U.S. Court of Appeals for the District of Columbia unanimously affirmed the district court's decision that the Food & Drug Administration (the "FDA") had not properly carried out its responsibilities when it allowed, without inspection, foreign drugs to be imported for use in executions.<sup>93</sup>

By the autumn of 2013, several states had started to use "new, untested drugs" in executions, while some swapped drugs, and several (such as Missouri) approached "compounding pharmacies," which are mostly unregulated by the FDA. Some of these were out-of-state pharmacies that provided execution drugs to states in which they were not licensed.<sup>94</sup> Some states changed how they paid for execution drugs. Oklahoma began using petty-cash accounts, so there would be "no public paper trail of the identities of drug suppliers or the state's executioners."<sup>95</sup>

In October 2013, Florida utilized midazolam for the first time, in a three-drug mix, when executing William Happ. He reportedly stayed conscious longer, and, once unconscious, exhibited more movement, than those previously executed.<sup>96</sup> Anesthesiologist Joel Zivot said Florida acted unethically by using midazolam in an execution, since it was an "essential medication" that was "in short supply."<sup>97</sup>

In 2012, Missouri altered its execution protocol to permit a large dose of propofol – the drug that caused Michael Jackson's death. After harsh reactions from both the United Kingdom and propofol's remaining U.S. manufacturer, Governor Jay Nixon stayed Joseph Paul Franklin's October 2013 execution and ordered the Department of Corrections to find a new drug. It quickly decided to use a form of pentobarbital made by a compounding pharmacy – but refused to indicate where it came from or who manufactured it. It used this in executions in late 2013.<sup>98</sup> On February 12, 2014, U.S. District Judge Terrence Kern issued a temporary restraining order, pending a hearing, prohibiting the Apothecary Shoppe, the Oklahoma compounding pharmacy that had supplied the drug used in Missouri's last three executions, from supplying compounded pentobarbital to Missouri for use in Michael Taylor's scheduled February 26, 2014 execution.<sup>99</sup> Less than a week before that date, Missouri changed its protocol – saying it had located a different compounding

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<sup>92</sup> AMNESTY INT'L, *supra* note 87, at 6 & nn.28, 30.

<sup>93</sup> *Cook v. Food and Drug Administration*, 733 F.3d 1 (D.C. Cir. 2013).

<sup>94</sup> Abby Ohlheiser, *Missouri Turns to Compounding Pharmacies for Lethal Injection Drugs*, THE WIRE, Oct. 22, 2013.

<sup>95</sup> Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES, Nov. 8, 2013.

<sup>96</sup> *Id.*

<sup>97</sup> Joel Zivot, Opinion, *Why I'm for a moratorium on lethal injections*, USA TODAY, Dec. 15, 2013.

<sup>98</sup> Associated Press, *The return of the firing squad? US states reconsider execution methods*, Jan. 28, 2014, <http://www.theguardian.com/world/2014/jan/28/return-firing-squad-us-states-execution-methods>.

<sup>99</sup> *Taylor v. Apothecary Shoppe*, No. 14-CV-063-TCK-TLW (N.D. Okla. Feb. 12, 2014), <https://assets.documentcloud.org/documents/1017669/doc-no-8-temporary-restraining-order-highlighted.pdf>.



pharmacy, whose identity it refused to disclose, to prepare the drug. Taylor was executed as scheduled.<sup>100</sup>

Before Taylor's execution, three members of the Eighth Circuit dissented from an order denying Taylor's petition for rehearing *en banc*. In an opinion by Judge Kermit Bye, they said that "even the most well-trained and well-intentioned pharmacist may be unable to properly test compounded pentobarbital. Missouri is actively seeking to avoid adequate testing of the alleged pentobarbital, which raises substantial questions about the drug's safety and effectiveness."<sup>101</sup>

In July 2014, Missouri executed John Middleton. In his execution, as in all others since November 2013, Missouri used significant amounts of midazolam – contrary to testimony by its top corrections officials that it would never again be used.<sup>102</sup>

In executing Dennis McGuire on January 16, 2014, Ohio had also used midazolam (which Florida had so problematically used in the Happ execution three months earlier) as a sedative, and then "the pain killer hydromorphone." *Columbus Dispatch* reporter Alan Johnson, who had attended 18 prior executions, said, "This one was different. After three to four minutes, Dennis McGuire began gasping for breath, his stomach and chest were compressing deeply, he was making a snorting sound, almost a choking sound at times." And his left hand "had clenched into a fist." For about 10 minutes, McGuire seemed "to be trying to get up or at least raise up in some fashion."<sup>103</sup> After the execution, Leah Libresco, writing in the *American Conservative*, said, "The real mystery is why Ohio, faced with a shortage of drugs, found it so urgent to put Mr. McGuire to death that they turned to an experimental, poorly-tested combination of drugs. ... [W]hy would Ohio find killing on schedule as desperate a need as saving a life? ... The guillotine looks monstrous and savage, and leaves spectators bespeckled by blood, but is believed to be more merciful to the victim and is even favored by the inventor of the three-drug legal injection. Mr. McGuire's uncomfortable death exposes the illusion that we can usher criminals out of this world simply and peacefully. If we design our execution protocols to obscure the reality of the death we are inflicting, we must ask whether we can honestly endorse a sentence we can't stand to see unveiled."<sup>104</sup> On August 12, 2014, an anesthesiologist working for McGuire's family said McGuire had experienced pain and suffering before losing consciousness.<sup>105</sup> In light of the botched execution, Ohio Governor John Kasich granted an eight-month execution reprieve to Gregory Lott.<sup>106</sup>

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<sup>100</sup> Ed Pilkington, *US judge attacks states' lethal injection methods as 'high school chemistry'*, THE GUARDIAN, Feb. 26, 2014.

<sup>101</sup> *Zink v. Lombardi*, No. 14-1388 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting), <http://www.deathpenaltyinfo.org/documents/MichaelTaylorDissent.pdf>.

<sup>102</sup> Chris McDaniel, *Missouri Swore It Wouldn't Use A Controversial Execution Drug. It Did.*, ST. LOUIS PUB. RADIO, Sept. 2, 2014.

<sup>103</sup> Tom Watkins, *Family, experts: Ohio execution snafu points to flaws in lethal injection*, CNN, Jan. 19, 2014.

<sup>104</sup> Leah Libresco, *An Unsettling Death in Ohio*, AM. CONSERVATIVE, Jan. 20, 2014.

<sup>105</sup> Associated Press, *Ohio execution 'was not humane,' anaesthesiologist determines*, Aug. 12, 2014, <http://www.theguardian.com/world/2014/aug/12/ohio-execution-not-humane-drugs-dennis-mcguire>.

<sup>106</sup> Andrew Welsh-Huggins, Associated Press, *Ohio governor issues 8-month reprieve for condemned inmate after recent lengthy execution*, Feb. 7, 2014, <http://www.startribune.com/politics/national/244395351.html>.

**c.     *Developments Since Mid-July 2014***

**i.     *Ohio***

On August 11, 2014, U.S. District Judge Gregory L. Frost extended his previously ordered stay of Ohio executions to January 15, 2015, due to the continuing need for discovery regarding, and necessary preparations for adopting and implementing, a new execution protocol.<sup>107</sup> On January 8, 2015, Ohio's Department of Corrections announced that it would no longer use the two-drug combination used in McGuire's execution, would resume using sodium thiopental, and would delay the scheduled February 11, 2015 execution of Ronald Phillips while securing sodium thiopental. In December 2014, Governor Kasich had signed legislation effective in late March 2015 intended to avoid disclosure of the sources of drugs used in lethal injections.<sup>108</sup>

Ohio's stratagem did not work. On October 19, 2015, its Department of Rehabilitation and Correction stated that Ohio would not execute anyone until at least 2017, due to Ohio's inability to get the necessary lethal injection drugs. Governor Kasich accordingly granted reprieves to 12 death row inmates with execution scheduled through January 2017 – and their execution dates were reset between 2017-2019. The December 2014 law had been unsuccessful due to Ohio pharmacies' refusal to be involved in executions, and because Ohio (which the FDA had warned in June 2015 against importing execution drugs) had not succeeded in importing such drugs.

**ii.    *Pharmaceutical Organizations and Pharmaceutical Companies***

The actions by Ohio's pharmacists were consistent with policies announced in 2015 by several pharmaceutical groups. On March 30, 2015, the American Pharmacists Association, the country's biggest group of pharmacists, adopted a policy saying that its members should not take part in executions because their involvement would violate pharmacists' roles as health care providers. Thomas E. Menighan, the Association's Executive Vice President and CEO, stated that the Association's new policy was essentially the same as policies of such other large health care groups as the American Medical Association, the American Nurses Association, and the American Board of Anesthesiology.<sup>109</sup> A week earlier, on March 24, 2015, the International Academy of Compounding Pharmacists adopted a similar policy;<sup>110</sup> and on June 7, 2015, the American Society of Health-System Pharmacists adopted a policy saying that pharmacists should not take part in executions.<sup>111</sup>

On March 4, 2015, Akorn Pharmaceuticals, which manufactures midazolam and hydromorphone, said it had taken actions to prevent their further sale to prisons (such as a

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<sup>107</sup> Alan Johnson, *Moratorium on Ohio's executions extended until January*, COLUMBUS DISPATCH, Aug. 12, 2014.

<sup>108</sup> Robert Higgs, *Ohio to discard controversial two-drug cocktail from use in executions*, CLEV. PLAIN DEALER, Jan. 8, 2015.

<sup>109</sup> Kim Bellware, *American Pharmacists Association Discourages Members From Providing Lethal Injection Drugs*, HUFFINGTON POST, Mar. 31, 2015.

<sup>110</sup> Int'l Acad. of Compounding Pharmacists, Press Release, *IACP Adopts Position on Compounding of Lethal Injection Drugs*, Mar. 24, 2015, <http://www.deathpenaltyinfo.org/documents/IACPPressRelease.pdf>.

<sup>111</sup> Am. Soc'y of Health-Sys. Pharmacists, Press Release, *ASHP Adopts Policy Opposing Pharmacist Participation in Capital Punishment*, June 9, 2015, <http://www.ashp.org/menu/AboutUs/ForPress/PressReleases/PressRelease.aspx?id=859>.

recent sale to Alabama).<sup>112</sup> Similar actions had been taken by Par Pharmaceuticals and at least one other U.S.-based company and some European companies. Then, in September 2015, Sun Pharma, an India-based company, publicly objected to Arkansas' planned use of Sun Pharma drugs in eight executions – about which it had learned from the Associated Press. Arkansas had tried to keep the source secret under a newly adopted execution drug secrecy law, but the Associated Press had gotten the information via a Freedom of Information Act request. Other companies had previously objected to Arkansas' use of their drugs: Hikma Pharmaceuticals, whose midazolam Arkansas may have secured; and Hospira, whose potassium chloride Arkansas may have secured.<sup>113</sup>

### *iii. Arizona and Texas*

On July 23, 2014, it took Arizona more than two hours to execute Joseph Wood III, using the same drugs that Ohio had used in its botched execution six months earlier of Donnie McGuire. Mr. Wood “gasp[ed] and snort[ed]” over “600 times” while being executed.<sup>114</sup>

On November 29, 2015, CBS News' *60 Minutes* aired a segment about Mr. Woods' execution, which it reported was the longest execution in American history and had gone horribly awry. CBS stated that “the process has become a messy testing ground for unproven, toxic drugs.” But Arizona Attorney General Mark Brnovich told CBS he did not believe this execution was botched. Ninth Circuit Judge Alex Kozinski, a highly regarded conservative, said on the broadcast that “[t]he state of Arizona and other states want to make this look like it's benign, want to make it look like ‘Oh, it's just a medical procedure.’ They ought to just face the idea that this is cruel and this is violent. And they ought to use some method that reflects that.” He suggested using firing squads, and to “[m]utilate the body. And this would express the sense of that's what you're doing, that we're actually committing violence on another human being.” He added that the guillotine might be a good option: “The guillotine works. Never fails. It's quick. It's effective.” The segment concluded with Judge Kozinski stating, “The death penalty is barbaric. And I think we as a society need to come face-to-face with that. If we're not willing to face up to the cruelty, we ought not to be doing it.”<sup>115</sup>

In late July 2015, Arizona and Texas were thwarted by the FDA from illegally trying to import sodium thiopental.<sup>116</sup> The DEA, in “lockstep” with the FDA, took the same view in June 2015 regarding Nebraska's purchase of lethal injection drugs from India's HarrisPharma.<sup>117</sup>

<sup>112</sup> Akorn, Inc., Press Release, *Akorn Adopts Comprehensive Policy to Support the Use of Its Products to Promote Human Health*, Mar. 4, 2015, <http://investors.akorn.com/phoenix.zhtml?c=78132&p=irol-newsArticle&ID=2022522>.

<sup>113</sup> Associated Press, *Arkansas: Objections Raised Over Use of Drugs in Executions*, Sept. 22, 2015, [http://www.nytimes.com/2015/09/23/us/arkansas-objections-raised-over-use-of-drugs-in-executions.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&\\_r=0](http://www.nytimes.com/2015/09/23/us/arkansas-objections-raised-over-use-of-drugs-in-executions.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=0).

<sup>114</sup> Mark Berman, *Arizona execution lasts nearly two hours; lawyer says Joseph Wood was ‘gasp[ing] and struggl[ing] to breathe,’* WASH. POST, July 23, 2014.

<sup>115</sup> Bill Whitaker, *The Execution of Joseph Wood*, CBS NEWS: 60 MINUTES, Nov. 29, 2015, <http://www.cbsnews.com/news/execution-of-joseph-wood-60-minutes>.

<sup>116</sup> Chris McDaniel & Chris Geidner, *Arizona, Texas Purchased Execution Drugs Illegally Overseas, But FDA Halts The Import*, BUZZFEED NEWS, Oct. 22, 2015.

<sup>117</sup> David Earl, *DEA in ‘lockstep’ with FDA on execution drugs, spokesperson says*, KETV-7, June 12, 2015, <http://www.ketv.com/news/dea-in-lockstep-with-fda-on-execution-drugs-spokesperson-says/33553946>.

In December 2015, Arizona officials agreed not to schedule any executions until a federal court challenge to the state's lethal injection protocol and secrecy policy is resolved.<sup>118</sup>

#### *iv. Oklahoma*

In early January 2014, Oklahoma may have used pentobarbital that was beyond its expiration date when it executed Michael Lee Wilson – whose last words were “I feel my whole body burning.”<sup>119</sup>

On April 29, 2014, Clayton D. Lockett “gaped and struggled against his restraints before dying 43 minutes into the” execution. Thereafter, Oklahoma suspended executions so it could enhance its training and procedures. A subsequent state investigation determined that a doctor had improperly inserted an intravenous needle into Lockett's groin, resulting in first midazolam (the controversial sedative used in Ohio's and Arizona's botched executions earlier and later in 2014) and then “paralytic and heart-stopping agents to diffuse in surrounding tissue.” Oklahoma later claimed it had come up with new procedures to avert the same mistake. But experts expressed concern because the procedures entailed doubling the dosage of midazolam used in Lockett's execution.<sup>120</sup>

Oklahoma executed Charles Frederick Warner on January 15, 2015, after a 5-4 Supreme Court vote denying a stay.<sup>121</sup> The Court on January 23, 2015 granted the certiorari petition of three inmates on their constitutional challenge to Oklahoma's use of the new three-drug protocol. This led to the holding in *Glossip v. Gross* – discussed below in Subpart d.

#### *v. Arkansas*

In March 2015, the Arkansas Supreme Court, by a 4-3 vote, upheld the state's lethal injection protocol.<sup>122</sup> But on October 20, 2015, it issued a stay due to Arkansas' secrecy law. Then, in early December 2015, it granted an emergency stay of a lower court order requiring the State to disclose information about companies that supply drugs for lethal injection.<sup>123</sup> It still might uphold the lower court later.

#### *vi. Montana*

As discussed above in Part I.A.4.e, Montana District Court Judge Jeffrey M. Sherlock, on October 6, 2015, permanently enjoined the use of pentobarbital in Montana's

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<sup>118</sup> Gary Grado, *Arizona executions on hold as death penalty lawsuit gains new life*, ARIZ. CAP. TIMES, Dec. 14, 2015.

<sup>119</sup> Ian Steadman, *Prisons Are Now Using Scary, Untested Drugs to Execute Death Row Inmates*, NEW REPUBLIC, Jan. 14, 2014.

<sup>120</sup> Erik Eckholm, *Four Oklahoma Inmates Seek Delay in Executions*, N.Y. TIMES, Jan. 9, 2015.

<sup>121</sup> Erik Eckholm, *Oklahoma Executes First Inmate Since Slipshod Injection in April*, N.Y. TIMES, Jan. 15, 2015.

<sup>122</sup> Kim Bellware, *Executions May Resume In Arkansas After High Court Rules In Favor Of Lethal Injection*, HUFFINGTON POST, Mar. 20, 2015.

<sup>123</sup> Claudia Lauer, Associated Press, *Order for Arkansas to release execution drugs source on hold*, Dec. 4, 2015, <http://bigstory.ap.org/article/2c571e6abbc34df09c292492eb5b8ff8/arkansas-high-court-decision-expected-drug-disclosure>.

lethal injection protocol unless and until the statute authorizing lethal injection is modified in conformance with his decision. As of February 2016, that has not occurred.

**vii. California**

On January 22, 2016, there was a contentious informational hearing in Sacramento concerning a proposed new protocol that would permit executions using one drug, a barbiturate. If adopted by California corrections officials and not enjoined by a court, this would replace a three-drug protocol that was held unconstitutional a decade earlier.<sup>124</sup>

**d. Supreme Court holding in *Glossip v. Gross***

On June 29, 2015, by a 5-4 vote, the Supreme Court rejected several Oklahoma death row inmates' federal civil rights lawsuit that sought to enjoin Oklahoma from continuing to use midazolam in its three-drug protocol. The Court's first basis for rejecting the lawsuit was that "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain." Secondly, the Court held that the federal district court had not clearly erred in finding that midazolam was very likely to make the person being executed incapable of feeling pain.<sup>125</sup> In a preliminary discussion before explaining that basis for its holding, the Court stressed that this type of claim was a "test" of "the boundaries of the authority and competency of federal courts" – which should not become entwined "in ongoing scientific controversies beyond their expertise."<sup>126</sup>

Justice Sotomayor's opinion for the four dissenting justices began by criticizing the Court's second rationale and then attacked the first rationale. The dissent attacked the Court for deferring to the "District Court's decision to credit the scientifically unsupported and implausible testimony of a single expert witness" and for requiring the prisoners "to satisfy the wholly novel requirement of proving the availability of an alternative means for their own executions."<sup>127</sup>

**9. Dissent in *Glossip v. Gross* by Justice Breyer, Joined by Justice Ginsburg**

**a. The Dissent Itself**

The opinion in *Glossip* that has received the most attention did not address directly the issues presented by the case. Justice Breyer's dissenting opinion, joined in solely by Justice Ginsburg, began by saying, "[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution."<sup>128</sup>

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<sup>124</sup> Reuters, *California lethal injection plan spurs capital punishment fight*, Jan. 22, 2016, <http://www.businessinsider.com/r-california-lethal-injection-plan-spurs-capital-punishment-fight-2016-1>.

<sup>125</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

<sup>126</sup> *Id.* at 2740 (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)).

<sup>127</sup> *Id.* at 2781 (Sotomayor, J., dissenting).

<sup>128</sup> *Id.* at 2755 (Breyer, J., dissenting).

Justice Breyer proceeded to indicate strongly that the answer to that question would be yes, in light of major developments in the decades since *Gregg v. Georgia*<sup>129</sup> and other decisions by the Court in 1976. Summing up these developments before discussing them in detail, he stated:

Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.<sup>130</sup>

Justice Breyer's discussion of "serious unreliability" set forth data, examples, and explanations for the large number of cases in which it is either certain or quite likely that innocent people have been sentenced to death – with some of them having been executed. This section of the dissent also emphasized the frequency with which the death penalty was imposed without following the proper procedures so that the underlying "convictions (in the law's view) do not warrant the death penalty's application."<sup>131</sup>

Justice Breyer, in discussing "arbitrariness," said it had become "increasingly clear" that capital punishment was being imposed "without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's demands."<sup>132</sup> Justice Breyer cited studies that "indicate that the factors that most clearly ought to affect application of the death penalty – namely, comparative egregiousness of the crime – often do not," whereas "[o]ther studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*."<sup>133</sup> Justice Breyer then described how these studies appeared to be borne out by his own two decades' experience in dealing with death penalty cases as a member of the Court.

Justice Breyer also reiterated an oft-expressed concern: that the number of years that people remain under sentence of death is an "independent constitutional problem."<sup>134</sup> This has been the basis for grants of relief outside the United States but has thus far not garnered here anything approaching the support for Justice Breyer's first two areas for constitutional concern. In any event, as Justice Breyer stated, the extensive delays before most executions in this country undermine the Court's key rationales for capital punishment: deterrence and retribution. Whenever he makes this point, the inevitable response (such as in the concurrences by Justices Scalia and Thomas in *Glossip*) is that the delays are largely due to legal proceedings initiated by death row inmates. Justice Breyer's reply in *Glossip* was that efforts to reduce delay would likely aggravate the first two constitutional problems by eliminating even the pretense of attempting to achieve "reliability and fairness in the death penalty's application."<sup>135</sup>

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<sup>129</sup> 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

<sup>130</sup> *Glossip*, 135 S. Ct. at 2755-56 (Breyer, J., dissenting).

<sup>131</sup> *Id.* at 2759.

<sup>132</sup> *Id.* at 2760 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 2764.

<sup>135</sup> *Id.* at 2772.

Justice Breyer's discussion of capital punishment's being increasingly "unusual" relied on the dramatic decline in the number of new death sentences and in executions, and the increasing geographic concentration of most new death sentences and most executions in a quite small number of jurisdictions.

The dissent concluded by stating that ultimately the constitutionality of what remains of the death penalty in this country is a matter for judicial determination and by saying: "I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question."<sup>136</sup>

**b. Justice Ginsburg's Discussion of the Dissent a Month Later**

In an interview excerpted in the *Huffington Post* on July 29, 2015, Justice Ginsburg said she had previously avoided expressing a categorical view about the death penalty's unconstitutionality in order to be able to persuade other justices with regard to particular capital punishment cases. She said that by the time she joined in Justice Breyer's dissent in *Glossip*, evidence which Breyer had pointed to had "grown in quantity and in quality."<sup>137</sup>

**c. Connecticut Supreme Court's August 2015 Decision**

On August 25, 2015, the Connecticut Supreme Court, by a 4-3 vote, held capital punishment unconstitutional under the state constitution – even retrospectively (whereas the 2012 repeal statute was prospective only).<sup>138</sup>

Commentator Linda Greenhouse wrote that by going far beyond the narrowest potential basis for its holding and engaging in a "cleareyed dissection of the irreconcilable conflict at the heart of modern death-penalty jurisprudence, the Connecticut Supreme Court not only produced an important decision for its own jurisdiction; but it addressed the United States Supreme Court frankly and directly. The decision engages the Supreme Court at a crucial moment of mounting unease, within the court and outside it, with the death penalty's trajectory over the nearly four decades since the court permitted states to resume executions."<sup>139</sup>

The Connecticut high court said the key question is whether the court's mandate that capital sentencing decisions be made individually in each case "inevitably allows in through the back door the same sorts of caprice and freakishness that the Court sought to exclude in *Furman*, or, worse, whether individualized sentencing necessarily opens the door to racial and ethnic discrimination in capital sentencing. In other words, is it ever possible to eliminate arbitrary and discriminatory application of capital punishment through a more precise and restrictive definition of capital crimes if prosecutors always remain free *not* to seek the death penalty for a particular defendant, and juries not to impose it, for any reason whatsoever? We do not believe that it is."<sup>140</sup>

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<sup>136</sup> *Id.* at 2776-77.

<sup>137</sup> Samantha Lachman & Ashley Alman, *Ruth Bader Ginsburg Reflects On A Polarizing Term One Month Out*, HUFFINGTON POST, July 29, 2015.

<sup>138</sup> *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

<sup>139</sup> Linda Greenhouse, Opinion, *Talking About the Death Penalty, Court to Court*, N.Y. TIMES, Aug. 20, 2015.

<sup>140</sup> *Santiago*, 122 A.3d at 67-68 (footnote omitted).

Ms. Greenhouse said that the Connecticut Supreme Court majority and the Breyer-Ginsburg dissent “to a notable degree each found an audience in the other.” Since the Connecticut Supreme Court had been having tremendous difficulty in coming up with a majority opinion, Ms. Greenberg stated that “the Breyer dissent must have appeared to the majority justices as a gift from on high, an open door. And clearly Justices Breyer and Ginsburg mean to spur hard thinking about the death penalty by every judge in the country.”<sup>141</sup>

### **10. *Press Analyses Regarding Prospects for an End to the U.S. Death Penalty***

Both before and after Justice Breyer’s *Glossip* dissent, there were high profile press analyses saying that the death penalty in the United States was nearing its end. When read carefully, it is apparent that some of these analyses said the death penalty in the United States was not likely to end very soon. All of these were written before Justice Antonin Scalia’s death on February 13, 2016.

#### **a. *Time, June 8, 2015***<sup>142</sup>

David Von Drehle, a long-time reporter on capital punishment, wrote *Time*’s June 8, 2015 cover story, entitled *The Death of the Death Penalty*. He wrote that “the tide is turning on capital punishment, as previously supportive judges, lawmakers and politicians come out against it.” He cautioned, “Change is not coming quickly or easily.” Von Drehle added that “[t]he shift [in public attitude] is more pragmatic than moral, as Americans realize that our balky system of state-sponsored killing simply isn’t flexible.”

His bottom line: “For the first time in the nearly 30 years that I have been studying and writing about the death penalty, the end of this troubled system is creeping into view,” due to our getting no better at implementing it, crime rates having greatly dropped, and the justifications for it having become much weaker, even though it still does not offend most people’s sense of justice (at least in some cases). He said that “it is a system that costs too much and delivers too little,” and that elements that could lead to a Supreme Court decision holding capital punishment unconstitutional were emerging: abolition by legislatures, opinions by lower court judges, and decisions by certain governors.

His article concluded by saying: “The Justices all know that the modern death penalty is a failure. When they finally decide to get rid of it, ‘evolving standards [of decency]’ is how they will do it. The facts are irrefutable, and the logic is clear. Exhausted by so many years of trying to prop up this broken system, the court will one day throw in the towel.”

#### **b. *The New York Times, August 20, 2015***<sup>143</sup>

At the end of her August 20, 2015 analysis in *The New York Times* (discussed above at Part I.A.9.c), Supreme Court expert Linda Greenhouse said that “it’s not easy to imagine

<sup>141</sup> Greenhouse, *supra* note 139.

<sup>142</sup> David Von Drehle, *The Death of the Death Penalty: Why the era of capital punishment is ending*, TIME, June 8, 2015, <http://time.com/deathpenalty/>.

<sup>143</sup> Greenhouse, *supra* note 139.



the John G. Roberts Jr. court” holding the death penalty unconstitutional. She noted that Justice Kennedy “signed neither of the dissenting opinions” in *Glossip*, and instead “silently joined the majority opinion of Justice Samuel A. Alito Jr. – the justice who during the oral argument, in one of the uglier performances that I can recall on the Supreme Court bench, asked the lawyer for the Oklahoma death-row inmates whether it was ‘appropriate for the judiciary to countenance what amounts to a guerrilla war against the death penalty.’”

Ms. Greenhouse’s bottom line forecast was: “I’m not counting the days, or the Supreme Court terms, until the court declares the death penalty unconstitutional. But from two courts, the highest in the land and the highest court of one of the smallest states, a fruitful conversation emerged this summer that will inevitably spread, gain momentum and, in the foreseeable if not immediate future, lead the Supreme Court to take the step that I think a majority of today’s justices know is the right one.” As with much else, a great deal will depend on who replaces Justice Scalia on the Court and when.

**c. *USA Today, September 14, 2015*<sup>144</sup>**

*USA Today*’s September 14, 2015 feature story on capital punishment said that “despite Supreme Court support,” the death penalty in the United States “may be living on borrowed time.” The story attributed this to, among other things, “[t]he emotional and financial toll of prosecuting [a] case to its conclusion, ... the increased availability of life without parole and continuing court challenges to execution methods, ... [and] capital punishment’s myriad afflictions: racial and ethnic discrimination, geographic disparities, decades spent on death row and glaring mistakes that have exonerated 155 prisoners in the last 42 years.” One indication of the changes noted throughout the story was the life without parole verdict at the trial of James Holmes, who had murdered 12 people at a Colorado movie theater. The story also pointed out that “[t]he quality of defense lawyers has been upgraded with the creation of regional defender systems dedicated to death penalty cases.”

**d. *The Economist, December 19, 2015*<sup>145</sup>**

Near the end of 2015, *The Economist* ran a story treating the possible demise of capital punishment in the United States as a “whodunnit,” with the title *Who killed the death penalty?* The story said that “[t]he proof is overwhelming: capital punishment is dying. Statistically and politically, it is already mortally wounded, even as it staggers through an indeterminate – but probably brief – swansong.”

Among the “suspects”: increasingly skeptical juries, who have been influenced by the alternative of life without parole, their increased “willingness ... to weigh murders’ backgrounds and mental illnesses”; defense counsel, acting with “greater skill,” aided by “generally better” funding and training, who “muster ... mitigating evidence”; “the swelling ... cadre of death-row exonerees”; prosecutors who “have botched capital cases – by suppressing evidence, rigging juries or concentrating on black defendants” and other prosecutors who have chosen – “abetted by ... victims’ relatives” – not “to seek death in the

<sup>144</sup> Richard Wolf & Kevin Johnson, *Courts, states put death penalty on life support*, USA TODAY, Sept. 14, 2015.

<sup>145</sup> *Who Killed the death penalty?*, THE ECONOMIST, Dec. 19, 2015, <http://www.economist.com/news/united-states/21684142-many-suspects-are-implicated-capital-punishments-ongoing-demise-one-stands-out-who>.

first place”; “the American taxpayer,” affected by the much greater cost of seeking capital punishment as compared to seeking another punishment; the pharmaceutical industry’s efforts to prevent drugs it manufactures from being used in lethal injection; possibly the Supreme Court; and already “a joint enterprise between state courts, legislatures and governors.”

After identifying these “suspects,” the story concludes that “in a way, they all did it. But in a deeper sense, all these are merely accomplices. In truth capital punishment is expiring because of its own contradictions. As decades of litigation attest – and as the rest of the Western world has resolved – killing prisoners is fundamentally inconsistent with the precepts of a law-governed, civili[z]ed society. In the final verdict, America’s death penalty has killed itself.”

**11. *The U.S. Supreme Court’s Actions Since *Glossip* and Prior to Justice Scalia’s Death, Which Showed No Indication That the Court Would Call for Briefing on the Death Penalty’s Constitutionality***

The Supreme Court’s decisions since Justice Breyer’s dissent in *Glossip* but prior to Justice Scalia’s death showed no indication that the Court was ready to declare capital punishment unconstitutional. However, a great deal will depend upon who replaces Justice Scalia and when – and when other vacancies on the Court are created and how they are filled.

**a. *Hurst v. Florida*:** This January 12, 2016 decision held unconstitutional the failure of Florida’s death penalty system to give jury’s the final say on whether aggravating factor(s) exist that make the defendant eligible for consideration of imposing the death penalty. But the Court remanded the case to the Florida Supreme Court for a determination of whether the constitutional violation constituted harmless error and did not address the question of whether its holding would be retroactive. The lead case on which the holding relied, *Ring v. Arizona*, has itself not been held retroactive. (See Part II.G below.)

**b. *Kansas v. Carr*:** On January 20, 2016, the Court held by an 8-1 vote that there is no constitutional requirement to instruct jurors that they need not find a mitigator beyond a reasonable doubt, and rejected a challenge to having a simultaneous capital penalty phase for co-defendants. Justice Alito’s majority opinion (in which Justices Breyer and Ginsburg joined without any separate comment) included a variety of statements about mitigation, jury instructions, and joint sentencing proceedings that – while not holdings – were not suggestive of receptivity towards a due-process-based constitutional challenge to the death penalty. (See Part II.H below.)

**c. *Brooks v. Alabama*:** On January 21, 2016, the Court denied a stay of execution.<sup>146</sup> Justice Breyer wrote a dissent, focusing on his and two other justices’ belief that in light of *Hurst* Alabama’s death penalty system is unconstitutional. Those two others, Sotomayor and Ginsburg, concurred in the result because they believed the Court could not have granted relief due to “procedural obstacles.” Justice Breyer concluded his short dissent by saying: “The unfairness inherent in treating this case differently from

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<sup>146</sup> *Brooks v. Alabama*, 136 S. Ct. 708 (2016) (mem.).

others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment” and referred to his *Glossip* dissent.<sup>147</sup>

## **12. Some Litigators’ Attempts to Get the Death Penalty Held Unconstitutional Fairly Soon**

The Eighth Amendment Project was described in November 2015 by BuzzFeed News as “a centralized effort to advance death penalty abolition research, raise issues of legal system responsibility and help capital defense efforts – all with the Supreme Court in mind.” Project leaders Henderson Hill (a superb attorney) and Robert J. Smith (author of leading studies about the incredible geographic concentration of capital punishment) spoke with BuzzFeed News prior to the early 2016 Court decisions but after Justice Breyer’s *Glossip* dissent. They said the Project was trying to get the Court to declare capital punishment unconstitutional in the next few years.<sup>148</sup>

The Project’s strategy of seeking abolition within a few years via the Supreme Court seemed premised on a misunderstanding of the likelihood of success in the then-existing Court. That premise was cogently set forth in Mr. Smith’s July 2015 Slate.com piece, entitled *The End of the Death Penalty? Recent Supreme Court opinions suggest there are five votes to abolish capital punishment*.<sup>149</sup> As noted above, Linda Greenhouse reached the opposite conclusion in her August 20, 2015 opinion piece (see Part I.A.9.c above). The subsequent Supreme Court actions before Justice Scalia’s death tended to suggest that Ms. Greenhouse’s analysis was more astute. A failed implementation of that strategy could set back abolition efforts by decades.

Some defense teams were already, prior to Justice Scalia’s death, raising challenges to capital punishment’s constitutionality. United States District Judge Geoffrey Crawford (D. Vt.), who is preparing for the retrial of federal death row inmate Donald Fell, announced on February 10, 2016 that he would hold a hearing, probably in the summer, and then rule on a constitutional challenge to capital punishment.<sup>150</sup>

## **13. Continuing International Trend Versus Capital Punishment**

Most of Latin America, Canada, and Western Europe abolished capital punishment by the early 1980s, as did South Africa when it ended apartheid. Following the fall of the Iron Curtain, all European portions of the former Soviet Union, except Belarus, either abolished capital punishment or, as did Russia, implemented moratoriums on execution that remain in effect.<sup>151</sup>

<sup>147</sup> *Id.* at 708 (Breyer, J., dissenting).

<sup>148</sup> Chris Geidner, *The Most Ambitious Effort Yet To Abolish The Death Penalty Is Already Happening*, BUZZFEED NEWS, Nov. 8, 2015.

<sup>149</sup> Robert J. Smith, Opinion, *The End of the Death Penalty? Recent Supreme Court opinions suggest there are five votes to abolish capital punishment*, SLATE.COM, July 1, 2015.

<sup>150</sup> Associated Press, *Judge Accepts Challenge of Law in Death Penalty Case*, Feb. 10, 2016, <http://www.necn.com/news/new-england/Judge-Accepts-Challenge-of-Law-in-Death-Penalty-Case-368336481.html>.

<sup>151</sup> AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2009, at 11, 18 (2010).

**a. 2014**

Amnesty International reported that in 2014, not counting China – for which there is not reliable data, there was an almost 22% drop in executions worldwide. Executions declined in all areas of the world except Europe – where Belarus resumed executing after a 2-year hiatus. The United States was the only country in the Americas that executed anyone in 2014.<sup>152</sup>

Amnesty International further reported that 140 countries have abolished the death penalty in law or practice. Of the countries that did execute people in 2014, the United States executed the fifth most people – trailing only China, Iran, Saudi Arabia, and Iraq. The unknown number of executions in China was clearly, Amnesty International said, so high as to be greater than the rest of the world’s executions.

On December 18, 2014, the U.N. General Assembly voted by a record margin, 117 to 38 with 34 abstentions, for a resolution calling for a moratorium on executions and encouraging all countries not to implement the death penalty with regard to those with mental or intellectual disabilities. The most recent vote had been 111 to 41 with 34 abstentions in 2012.<sup>153</sup>

**b. 2015-2016**

On July 4, 2015, *The Economist* reported that “the global total of executions continues to fall – and the trend is toward abolition, whether *de jure* or *de facto*.” It noted that since December 2014, Fiji, Madagascar and Suriname had abolished capital punishment. It said that the long-term trend in China was toward fewer executions.<sup>154</sup> Mongolia abolished capital punishment in the latter half of 2015.<sup>155</sup>

On the other hand, by the time of *The Economist’s* story, Indonesia had already executed 14 persons, mostly aliens, in 2015 for committing drug crimes. Three other Islamic countries – Iran, Pakistan, and Saudi Arabia – were “executing people with increasing enthusiasm.”<sup>156</sup> Since beginning to execute people again in late 2014 (as did Jordan, to a far lesser extent), Pakistan had executed about 300 people by early January 2016.<sup>157</sup> Saudi Arabia’s “enthusiasm” continued into early 2016. On January 2, 2016, it executed 47 people – after having reportedly executed 158 people in 2015 (up from “at least 90 people” in 2014). Iran hanged at least 830 people in the first 10 months of 2015, Human Rights Watch said. This led to protests during President Hassan Rouhani’s trip to France on January 28, 2016.<sup>158</sup>

<sup>152</sup> AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2014, at 5 (2015).

<sup>153</sup> *Id.* at 9-10, 9 n.8.

<sup>154</sup> *On the way out – with grisly exceptions*, THE ECONOMIST, July 4, 2015.

<sup>155</sup> Somini Sengupta, *Death Sentences Surge, Even as More Countries Drop Capital Punishment*, N.Y. TIMES, Jan. 5, 2016.

<sup>156</sup> THE ECONOMIST, *supra* note 154.

<sup>157</sup> Sengupta, *supra* note 155.

<sup>158</sup> Adam Nossiter, *Rouhani Goes Shopping in Europe as Iran Enjoys New Economic Freedoms*, N.Y. TIMES, Jan. 29, 2016.

## **B. Important Issues**

The following are among the issues concerning capital punishment that have received recent attention.

### **1. Supreme Court Jurisprudence, the AEDPA, and Variations Between States: Overview**

#### **a. Discordancies Analyzed by Carol and Jordan Steiker**

In their trenchant analysis of capital punishment jurisprudence and the actual implementation of the death penalty, Professors Carol S. Steiker and Jordan M. Steiker said the following in a 2014 law review article:

[T]he ultimate result of the Court's regulatory efforts was to require fairly minimal departures from the pre-*Furman* regime [that were] unlikely to actually achieve the regulatory goals of predictability, fairness, and accuracy that the Court had articulated in 1972 and 1976... [T]he most common form that state statutory innovations took in response to the Court's innovations – imposing [a] process by which juries compared “aggravating” and “mitigating” factors in their capital sentencing deliberations – itself helped both to distance jurors from the essentially moral task of deciding life or death and to cloak their decisions for public consumption in an aura of scientific computation rather than essentially free discretion.<sup>159</sup>

There is, as noted above, great divergence between states with capital punishment statutes in the extent to which people are sentenced to death, and even more divergence with regard to the extent to which those sentenced to death are actually executed. The Steikers said the latter “creates a new and potentially unconstitutional form of arbitrariness.”<sup>160</sup> They noted that “the Supreme Court has ... embraced significant substantive proportionality limits on the reach of the death penalty” – such as holding unconstitutional the execution of those who were juveniles at the time of their crimes, people with intellectual disability, and those who committed many nonhomicidal crimes such as rape of a child. “In crafting proportionality limits, the Court has developed a methodology [albeit one not ‘without difficulties’] conducive to judicial abolition . . . .”<sup>161</sup> The Steikers concluded that since *Gregg*, actual experience “has shifted the debate from the death penalty as a punishment in the abstract to the adequacy of the American death penalty in practice. This shift, in turn, has made the death penalty more vulnerable to constitutional and political attack, given the highly visible failures of the prevailing system (e.g., wrongful convictions, continued arbitrariness and discrimination, inadequate lawyering, etc.).”<sup>162</sup>

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<sup>159</sup> Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 752-53 (2014).

<sup>160</sup> *Id.* at 754-56, 759.

<sup>161</sup> *Id.* at 764 (citations omitted).

<sup>162</sup> *Id.* at 775-76.

**b. *AEDPA and Related Barriers to Ruling on the Merits of Meritorious Federal Constitutional Claims***

Any analysis of capital punishment *as applied* must consider various barriers that preclude the federal courts from ruling on the merits or meritorious federal constitutional claims. Many are set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>163</sup> Professor Anthony G. Amsterdam discussed AEDPA in a 2004 talk, selectively excerpted as follows:

[T]he so-called Antiterrorism and Effective Death Penalty Act, [built] on issue preclusion and review-curbing ideas that the Court had initiated and ratcheted] them up so as to make federal habeas relief for constitutional violations still more difficult to obtain.

[One of the AEDPA’s key features is that] postconviction remedies are restricted by . . . a standard which, in practical effect, leads postconviction judges to dismiss almost all claims of constitutional error in trial and sentencing proceedings by saying that the prosecution had a powerful case and therefore nothing else that happened at trial or on appeal matters. . . . [Indeed,] the Antiterrorism and Effective Death Penalty Act [provides] that, in various situations, federal habeas corpus relief is not available to persons whose constitutional rights were violated in the state criminal process unless these persons show “by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found . . . them guilty . . . .

Congress . . . further . . . provided that if a state court has rejected a criminal defendant’s claim of federal constitutional error on the merits, federal habeas corpus relief . . . can be granted only if the state court’s decision involves an “unreasonable application” of federal constitutional law – an application so strained that it cannot be regarded as within the bounds of reason. . . . Federal habeas corpus courts . . . [now] ask only whether any errors that the state courts may have committed in rejecting a defendant’s federal constitutional claims were outside the range of honest bungling or were close enough to it for government work.<sup>164</sup>

After 11 more years’ experience with AEDPA, Ninth Circuit Judge Alex Kozinski, a justly renowned conservative, said AEDPA was “a cruel, unjust and unnecessary law” that had “abruptly dismantled” habeas corpus as a “safeguard[ ] against miscarriages of justice.” It has “pretty much shut out the federal courts from granting habeas relief in most cases, even when they believe that an egregious miscarriage of justice has occurred.” Indeed, they “now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted.” He has urged AEDPA’s repeal (as well as an end to judicial elections – the subject covered immediately below).<sup>165</sup>

<sup>163</sup> Pub. L. 104-132, 110 Stat. 1214 (1996).

<sup>164</sup> Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law*, 33 HOFSTRA L. REV. 403, 409-12 (2004) (alterations omitted) (citations omitted).

<sup>165</sup> Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xli-xlii (2015).

**c. *Variations Between States, as Aggravated by Judicial Elections in Some States***

The greatly increased geographic concentration of new death sentences is discussed above in Part I.A.1. The greatly increased geographic concentration of executions is discussed above in Part I.A.2.b.

A factor that aggravates variations between states is judicial elections. A Reuters study published in September 2015 found that elected judges overturn death sentences at a rate more than 50% less than appointed judges.<sup>166</sup>

Reviewing decisions by 37 states' highest courts in the past 15 years, Reuters found that "[i]n the 15 states where high court judges are directly elected, justices rejected the death sentence in 11 percent of appeals, less than half the 26 percent reversal rate in the seven states where justices are appointed" – and justices who, after originally being appointed, run in "retention" elections (as occurs in 15 states), overturned 15% of capital sentences on appeal. The Reuters analysis concluded that this "election effect was a far stronger variable in determining outcomes of death penalty cases than state politics and even race."

**2. *Pervasive Problem of Prosecutorial or Other Law Enforcement Misconduct or Serious Error That Rarely Adversely Affects the Careers of Those Involved***

**a. *False and Contaminated Confessions***

A report by University of Virginia Law Professor Brandon L. Garrett discussed how false confessions had contributed greatly to putting on death row 10 of the 20 people who had been exonerated via DNA testing. Sometimes, the "confessions" resulted from extended police interrogations in which the suspects were provided with facts of the crimes – a tactic particularly effective with intellectually limited defendants. In other situations, "jailhouse snitches" and others in the prison inaccurately claimed that defendants had confessed to them.<sup>167</sup>

Slate.com writer Mark Joseph Stern in December 2015 described the case of Corey Williams, who "confessed" – almost surely falsely – to a 1998 Shreveport, Louisiana murder and was sentenced to death. Due to his being intellectually disabled, with an IQ of 68, his sentence was later changed to life without parole – over the prosecution's strenuous objections. Of the four men at the scene when the crime was committed, Williams was the only one *not* "implicated by evidence and eyewitnesses," yet two of the other three were never incarcerated.

How did this occur? Stern said the prosecution hid for over 15 years the fact that "transcripts of interrogations conducted on the night of the murder" show that Williams

<sup>166</sup> Dan Levine & Kristina Cooke, Reuters, *Uneven Justice: In states with elected high court judges, a harder line on capital punishment*, Sept. 22, 2015, <http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/>.

<sup>167</sup> Brandon L. Garrett, *Coerced confessions and jailhouse snitches: why the death penalty is so flawed*, THE CONVERSATION, Aug. 5, 2015.

was innocent and was coerced into confessing; and the others told police Williams had not been involved – until “detectives presented them with Williams’ false confession.” “The prosecutor ... was aware of all this. He didn’t report it or inform the defense.” The defense only got the transcripts in 2015.<sup>168</sup>

**b. FBI and Other Forensic Errors**

**i. Hair “Matches” and Other FBI Crime Lab Errors**

In April 2015, the FBI publicly acknowledged that witnesses from its laboratory’s microscopic hair comparison unit had provided inaccurate “expert” testimony in 32 cases that had ended in death sentence – including nine in which the defendants had been executed. The FBI “experts” had testified that crime scene hair evidence matched the defendant’s hair to a degree of certainty that was wildly exaggerated. The impact of their testimony in securing convictions and death sentences is not certain – but as discussed two paragraphs below, it may have helped lead to an innocent person’s execution.<sup>169</sup>

The FBI’s April 2015 statement resulted from a still-continuing review announced in July 2012 after the *Washington Post* revealed that “authorities had known for years that flawed forensic work by FBI hair examiners may have led to convictions of potentially innocent people, but ... had not aggressively investigated problems or notified defendants.” The FBI Laboratory had stated internally in the 1970s that although hair association could not yield positive identifications, “some FBI experts exaggerated the significance of ‘matches’ drawn from microscopic analysis of hair found at crime scenes.” The impact of flawed “hair matches” extended far beyond cases in which FBI “experts” had testified. Whereas the FBI had had 27 hair examiners, “about 500 people attended one-week hair comparison classes given by FBI examiners between 1979 and 2009” – nearly all “from state and local labs.”<sup>170</sup>

In July 2014, the Justice Department’s Inspector General’s office issued an assessment of a departmental task force’s review, initiated in 1996, of the FBI’s crime lab. The review was not limited to hair examiners. In April 1997, the Inspector General’s office had criticized 13 FBI crime lab examiners for having used scientifically unsupportable analysis and for providing overstated testimony. But despite the Task Force’s existence, the FBI then took five years to identify the 64 people sentenced to death after involvement (not necessarily material) by at least one of the 13 examiners. Even then, the Justice Department failed to notify state authorities, who thus “had no basis to consider delaying scheduled executions.” Benjamin H. Boyle was executed based on scientifically unsupportable and overstated, inaccurate “expert” testimony after the April 1997 report’s publication but before the Task Force focused on his case. “In all, the Task Force referred only 8 of the 64 death penalty cases involving the criticized examiners for review by an independent scientist . . . and . . . the independent scientists’ reports were forwarded to [defense counsel] in only two cases.”<sup>171</sup>

<sup>168</sup> Mark Joseph Stern, *How to Frame a Man for Murder*, SLATE.COM, Dec. 22, 2015.

<sup>169</sup> Spencer S. Hsu, *FBI admits flaws in hair analysis over decades*, WASH. POST, Apr. 18, 2015.

<sup>170</sup> Spencer S. Hsu, *U.S. reviewing 27 death penalty convictions for FBI forensic testimony errors*, WASH. POST, July 17, 2013.

<sup>171</sup> U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AN ASSESSMENT OF THE 1996 DEPARTMENT OF JUSTICE TASK FORCE REVIEW OF THE FBI LABORATORY, at i-ii (2014).



## *ii. Bite-Mark “Matches”*

On February 12, 2016, the Texas Forensic Science Commission concluded that bite-mark identification evidence should no longer be used in criminal trials because it has not been validated scientifically. After a half-year investigation, the “influential,” “respected and non-ideological” Commission rejected any reliance on dental “expert” testimony purporting to identify whose teeth caused a victim’s wounds. “In one study” considered by the Commission, “a panel of leading forensic dentists studied photographs of purported bite wounds and in most cases could not even agree whether the marks were caused by human teeth.” The Commission is looking into 35 cases in which “now-discredited bite comparisons” were used, in an effort to see in which cases this testimony was so significant that the Commission will inform the people who were convicted and their lawyers. The Commission’s conclusion “is likely to affect criminal trial across the country.”<sup>172</sup>

One of those exonerated after having been convicted through the use of bite-mark testimony is Ray Krone. He was convicted twice in Arizona, and spent three years on death row. He was released in 2002 after DNA testing matched (and thus implicated) someone else. Another person erroneously convicted and sentenced to death was Kennedy Brewer. After his conviction was vacated and he was off of Mississippi’s death row awaiting retrial, DNA testing matched someone else, who confessed. The bite marks – which “forensic dentist” Dr. Michael West had testified “matched Brewer’s teeth” – “later were determined to be more likely made by crawfish and insects in water” where the victim’s body was dumped.<sup>173</sup> The FBI does not utilize bite-mark analysis, nor is it recognized by the American Dental Association.<sup>174</sup>

## *c. Decades of Misconduct in an Oklahoma County’s Prosecutions*

Misconduct by prosecution witnesses can also lead to death sentences and executions. *ThinkProgress*’ October 2015 report discussed “Cowboy Bob” Macy, Oklahoma County’s District Attorney for 21 years. During those years, Macy outdid all other prosecutors in the county by securing death sentences for 54 people. Oklahoma County was, as of 2015, one of the 2% of U.S. counties that account for 56% of the country’s death row inmates.<sup>175</sup>

Of the 54 people for whom Macy secured death sentences, 23 were convicted based in significant part on the now-discredited testimony of police chemist Joyce Gilchrist, who “went beyond the acceptable limits of science,” according to the FBI. Indeed, in one of three cases in which a Macy-prosecuted death row inmate has been exonerated, Gilchrist lied by testifying to hair and blood type matches.

According to David Autry, who during Macy’s tenure as District Attorney was an Oklahoma County public defender, “Macy would pretty much do whatever it took to win,”

<sup>172</sup> Erik Eckholm, *Texas Panel Calls for an End to Criminal IDs via Bite Mark*, N.Y. TIMES, Feb. 13, 2016.

<sup>173</sup> Amanda Lee Myers, Associated Press, *Men wrongly convicted or arrested on bite evidence*, June 13, 2013, <http://www.dailytribune.com/article/DT/20130616/NEWS04/130619694>.

<sup>174</sup> Amanda Lee Myers, Associated Press, *Once key in some cases, bite-mark evidence now derided as unreliable*, June 17, 2013, [http://www.denverpost.com/ci\\_23474835/once-key-some-cases-bite-mark-evidence-now](http://www.denverpost.com/ci_23474835/once-key-some-cases-bite-mark-evidence-now).

<sup>175</sup> Erica Hellerstein, *Cowboy Bob, Black Magic, And The Courtroom Of Death*, THINKPROGRESS, Oct. 29, 2015, <http://thinkprogress.org/justice/2015/10/29/3716039/cowboy-bob-and-black-magic/>.

such as not disclosing to the defense exculpatory evidence and by making inflammatory arguments.

**d. *Two Rare Instances of Consequences for Prosecutors for Their Misconduct***

**i. *Texas Prosecutor of Innocent Man Disbarred***

On February 8, 2016, the Texas State Bar’s disciplinary board upheld the Bar’s determination to disbar Charles Sebesta, who had been in charge of the prosecution of Anthony Graves. Graves served 12 years on death row and a total of 18 years in prison before being released. The disciplinary board termed Sebesta’s misconduct in the case “egregious.” In 2010, the Fifth Circuit reversed Graves’ conviction, due to prosecutorial misconduct that included failing to disclose crucial evidence to the defense and suborning perjury.<sup>176</sup>

The ABA Section of Litigation’s magazine reported in Fall 2015 that violations of prosecutors’ constitutional obligation to disclose exculpatory evidence to the defense “are all too common.” It further reported, in part based on a *USA Today* investigation, that it remains extremely rare for prosecutors to be disciplined at all – let alone disbarred – even when judges have overturned convictions or castigated prosecutors due to prosecutorial misconduct.<sup>177</sup>

**ii. *Orange County, California, District Attorney’s Office Precluded from Prosecuting Death Penalty Case Due to the Office’s Systemic Misconduct in Undisclosed Use of Prison Informants***

In March 2015, Superior Court Judge Thomas Goethals disqualified the entire Orange County District Attorney’s Office (which has 250 prosecutors) from continuing to prosecute a high-profile death penalty case in which the defendant had pled guilty to killing eight people. He imposed this unusual sanction because of the office’s years of misusing jailhouse informants and prosecutors’ extensive failures to provide defense counsel with exculpatory information. Although the judge initially thought these failures arose principally from negligence, he later concluded that the situation was far worse – including the existence of a massive but secret data base at the sheriff’s office containing much information that the judge had been actively seeking.<sup>178</sup>

**3. *Inadequacies or Unavailability of Counsel for People Facing Execution***

Problems with the quality or performance of counsel representing capital defendants and death row inmates have been mentioned several times above, and will be further discussed below. An improvement in the quality of defense counsel in certain states has

<sup>176</sup> Brandi Grissom, *State Bar board affirms disbarment of prosecutor who sent innocent man to death row*, DALL. MORNING NEWS, Feb. 8, 2016.

<sup>177</sup> Natasha A. Saggat Sheth, *Prosecutor Disbarred for Wrongful Death Row Conviction*, LITIG. NEWS (Fall 2015).

<sup>178</sup> Dahlia Lithwick, *You’re all out: A defense attorney uncovers a brazen scheme to manipulate evidence, and prosecutors and police finally get caught*, SLATE.COM, May 28, 2015.

also been discussed above, in the context of the decline in new death sentences in those states. This section focuses on a few other recent developments regarding counsel.

**a. *Illustration of a Frequent Problem: The Failure to Have Properly Functioning Defense and Postconviction Teams***

United States District Judge Mark W. Bennett described in 2013 how a judge who authorizes large sums and help for capital defense counsel may inadvertently make disastrous appointments. Handling separately two capital cases, he appointed three criminal defense lawyers in each. He appointed two “of the [four] finest criminal defense lawyers in the state” in the first case and the other two in the second case. He had prior experience with all four. One team included two lawyers who had been co-counsel “on many other high profile cases.”<sup>179</sup>

After presiding over the federal habeas proceeding in one of the cases, Judge Bennett realized that the “dream team[]” had become “my worst judicial nightmare” – largely because the lawyers never recognized how crucial having a team approach was. “[T]hey never developed a united theory of the defense or a consistent and cohesive mitigation strategy . . .” Acting as “lone wolves,” and ceding virtually all responsibility for interacting with their client to a paralegal, they did not develop the rapport necessary to persuade their client to accept an offer of life without parole. The lawyers all wanted him to accept the offer but didn’t realize that their paralegal was severely undercutting them by urging him to reject the offer.<sup>180</sup>

Moreover, this “team” failed to develop a strategy integrating their guilt-phase and penalty-phase approaches. They “inexplicably” failed to investigate psychological mitigation evidence about their client’s state of mind at the times of the crimes – ignoring “a virtual pretrial mental health mitigation ‘roadmap’” provided by an extraordinary resource counsel. Trial counsel also ignored their mitigation specialist’s “straightforward list of forty-four mitigating factors,” which could have guided them in drafting proposed jury instructions on mitigating factors. The defense instead proposed mitigation instructions that “were remarkably poorly drafted” and in many ways incoherent. Ignoring his “significant misgivings,” the judge instructed the jury essentially as defense counsel had requested.<sup>181</sup>

Judge Bennett concluded, in retrospect, that he “should have been more vigilant to ensure” there was a team approach, as articulated in the ABA Guidelines for capital case counsel. Only “in the § 2255 proceeding, [did he begin] to fully understand the critical need for the ‘team approach.’” It simply had “never dawned on” him that the lack of a defense “team approach” would ultimately undo years of efforts . . . and waste literally millions of dollars of taxpayer funds. He urged that “[t]rial court judges in capital cases . . . be aware that, not only is the sum of the parts of the defense team not always greater than the whole, indeed, it can be far less – with dire consequences.”<sup>182</sup>

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<sup>179</sup> Mark W. Bennett, *Sudden Death: A Federal Trial Judge’s Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 391 (2013).

<sup>180</sup> *Id.* at 406.

<sup>181</sup> *Id.* at 411, 413.

<sup>182</sup> *Id.* at 407

Judge Bennett also belatedly learned that he should have been “vigilant in appointing the post-conviction team.” Relying on an apparently impeccable source, he appointed the § 2255 “learned counsel.” Two years later, he removed and replaced “the § 2255 defense team, shortly before the scheduled hearing.” He filed his first ever “formal disciplinary grievance” – against the “learned counsel,” who had literally abandoned the retained experts, his client, and his two junior co-counsel. This lawyer had “repeatedly lied” on the record about his preparation, in a situation in which every expert had quit due to lack of follow-up and contact.<sup>183</sup>

**b. Combined Impact of Lawyers’ Errors and the AEDPA and Other Procedural Roadblocks to Relief**

A Marshall Project analysis, published in two parts in the *Washington Post* in November 2014, discussed implementation of the AEDPA’s one-year statute of limitations for filing a federal habeas petition. It found that out of 80 situations in which the AEDPA deadline was missed, 16 inmates already had been executed.

In approximately two-thirds of these 80 cases, death row inmates lost the chance to seek federal habeas corpus relief, “arguably the most critical safeguard” in the U.S. capital punishment system. In the other cases, federal courts had found ways to permit the death row inmates to proceed with federal habeas petitions. The analysis showed that complexities in interpretations of the AEDPA’s one-year deadline and missteps by judges had sometimes contributed to failures to miss the deadline – which in a number of cases had been missed by a single day.

The Marshall Project said “powerful claims” had been waived in some of these cases. These included a Mississippi case in which a death row inmate was barred from challenging a conviction that was based in part on “a forensic hair analysis that the FBI now admits was flawed,” and a Florida case in which a death row inmate was precluded from challenging a conviction that was based on “a type of ballistics evidence that has long since been discredited.” That latter was one of 37 Florida cases among the 80 in which the AEDPA’s one-year deadline was missed.

Even in cases where lawyers missed the AEDPA deadline “through remarkable incompetence or neglect – it is almost always the prisoner alone who suffers” any consequence. Only one of the “dozens” of attorneys who missed the deadline in 80 cases was sanctioned by a disciplinary body for missing the deadline. Hence, the Marshall Project observed, “many of the lawyers who missed the habeas deadlines” are eligible to “handle” new capital habeas matters.<sup>184</sup>

**c. Possible Change in Way of Determining Opt-In to Prosecution-Friendly Habeas Provisions**

As part of its re-authorization of the Patriot Act in 2006, Congress changed the manner in which a state can be found to have “opted-in” to “special Habeas Corpus

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<sup>183</sup> *Id.* at 408-09.

<sup>184</sup> Ken Armstrong, *Death By Deadline*, Part One, *A lethal mix. Lawyers’ mistakes, unforgiving law*, WASH. POST, Nov. 15, 2014; Ken Armstrong, *Death By Deadline*, Part Two, *When lawyers stumble, only their clients fall*, WASH. POST, Nov. 16, 2014.

Procedures in Capital Cases”<sup>185</sup> under which, for example, there could be a far shorter deadline than AEDPA’s one year for filing a federal habeas petition and new, draconian deadlines for resolving such cases. To opt-in, a state would have to establish “a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings” and “standards of competency for the appointment of counsel in [such] proceedings.” Any decision on whether a state qualifies for opt-in would be made initially by the U.S. Attorney General, subject to *de novo* review by the Court of Appeals for the District of Columbia, which could then be reviewed by the Supreme Court.<sup>186</sup> Opponents of this change (including the ABA) say the Attorney General may be a biased decision-maker, given the Justice Department’s close relationships with state attorneys general and its frequent amicus briefs supporting state-imposed death sentences. Moreover, the D.C. Circuit has *no* experience with the determinative issue regarding “opt-in”: the quality of postconviction counsel in state court proceedings in capital cases.

The Justice Department’s most recent effort to implement the opt-in mechanism was halted when U.S. District Judge Claudia Wilken granted partial summary judgment precluding the Department from implementing “a final rule.” Her August 7, 2014 order said that before any rule could be implemented, the Department must “remedy” numerous aspects of its “final rule.”<sup>187</sup> The Ninth Circuit vacated that stay in a decision issued on March 23, 2016, holding that the organizations lacked standing to bring the action and that the case was not ripe for review.<sup>188</sup>

#### **4. The Continuing Danger of Executing Innocent People**

##### **a. Exoneration in 2014 and Full Pardon in 2011 for Executed Men**

##### **i. George J. Stinney, Jr.**

On December 16, 2014, South Carolina Circuit Court Judge Carmen T. Mullen vacated the conviction of George J. Stinney, Jr., who had been convicted and executed in 1944. Having held a two-day hearing the previous January, Judge Mullen held that Stinney’s lawyer had done essentially nothing, “the essence of being ineffective.”<sup>189</sup> The prosecutor decided not to appeal Judge Mullen’s decision.

An African American aged 14, Stinney was the youngest person executed in the United States in the 20th century.<sup>190</sup> His purported confession was never produced, an available alibi witness was not called, no defense investigation occurred, and no prosecution

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<sup>185</sup> Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>186</sup> RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, at 153-56 (7th ed. 2015) (quoting 28 U.S.C. § 2265(a)(1)(A),(C); discussing 28 U.S.C. § 2265 (c)(1)-(3) (2006)).

<sup>187</sup> *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. C 13-4517 CW, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014).

<sup>188</sup> *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. 14-16928, 2016 WL 1128112 (9th Cir. Mar. 23, 2016) (“the Defender Organizations have not suffered a legally cognizable injury as a result of the promulgation of the Final Regulations”).

<sup>189</sup> *State v. Stinney*, Order (S.C. 3d Jud. Cir. Dec. 16, 2014), <http://nuweb9.neu.edu/civilrights/wp-content/uploads/Stinney-Order.pdf>.

<sup>190</sup> Alan Blinder, *Family of South Carolina Boy Put to Death Seeks Exoneration 70 Years Later*, N.Y. TIMES, Jan. 23, 2014.

witness was cross-examined. An all-white jury took 10 minutes to convict after a three-hour trial.<sup>191</sup> Stinney’s lawyer did, however, find time to seek an almost all-white electorate’s votes for a legislative seat.<sup>192</sup>

**ii. Joe Arridy**

On January 7, 2011, Colorado Governor Bill Ritter, Jr. “granted a full and unconditional pardon . . . to Joe Arridy, . . . convicted of killing a 15-year-old girl [in 1936], sentenced to death and executed by lethal gas” in 1939. Governor Ritter said “an overwhelming body of evidence indicates” that Arridy (whose IQ was 46) “was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else.”<sup>193</sup>

**b. People Granted Relief and/or Released in 2015 Due to Innocence Considerations, After Years on Death Row**

**i. Debra Jean Milke**

On March 23, 2015, all murder charges against Debra Jean Milke were formally dismissed in Maricopa County Superior Court. The previous week, the Arizona Supreme Court had rejected the prosecution’s appeal<sup>194</sup> of a December 11, 2014 Arizona appeals court decision dismissing murder charges against Milke and barring her retrial “because of the state’s severe, egregious prosecutorial misconduct in failing to disclose impeachment evidence.”<sup>195</sup>

In 2013, the Ninth Circuit had granted habeas relief because the prosecution had not disclosed many past cases of misconduct by its key witness, a Phoenix police detective. The state’s case against Milke relied heavily on the detective’s testimony that she had confessed – a “confession” of which there was no recording. Milke spent 22 years on death row.

**ii. Anthony Ray Hinton**

In 2014, the U.S. Supreme Court remanded Anthony Ray Hinton’s case, due to ineffective assistance of his counsel. The most egregious ineffectiveness was counsel’s failure – in part due to his mistaken belief that he had only \$1,000 for experts – to use a qualified gun expert (he had instead used a sight impaired civil engineer without much experience with firearms).<sup>196</sup>

<sup>191</sup> Lindsay Bever, *It took 10 minutes to convict 14-year-old George Stinney, Jr. It took 70 years after his execution to exonerate him*, WASH. POST, Dec. 18, 2014.

<sup>192</sup> Jeffrey Collins, Associated Press, *George Stinney Gets Day in Court 70 Years After Teen Was Executed For Killing White Girls*, Jan. 23, 2014, [http://www.huffingtonpost.com/2014/01/23/george-stinney-new-trial\\_n\\_4650905.html](http://www.huffingtonpost.com/2014/01/23/george-stinney-new-trial_n_4650905.html).

<sup>193</sup> Governor Bill Ritter, Jr., Press Release, *Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, Jan. 7, 2011, <http://www.deathpenaltyinfo.org/documents/ArridyPardon.pdf>.

<sup>194</sup> Jennifer Soules, *Debra Milke speaks out after 23 years on death row*, ARIZ. REPUBLIC, Mar. 24, 2015.

<sup>195</sup> Michael Muskal, *Arizona court tosses charges against woman on death row for 22 years*, L.A. TIMES, Dec. 11, 2014.

<sup>196</sup> *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam).

After the remand, the prosecution – which had scoffed at Hinton’s postconviction experts – asked government experts to review the evidence. These experts “found that they could not conclusively determine that any of the six bullets were or were not fired through the same firearm or that they were fired through the firearm recovered from the defendant’s home.” On April 2, 2015, the case was dismissed at the request of the Jefferson County district attorney’s office. Hinton was freed the next day.<sup>197</sup>

On January 10, 2016, CBS News’ *60 Minutes* reported:

Ray Hinton’s life was never what he thought it would be after 1985 when he was misidentified by a witness who picked him out of a mug shot book. His picture was in there after a theft conviction. When police found a gun in his mother’s house, a lieutenant told him that he’d been arrested in three shootings including the murders of two restaurant managers.

Ray Hinton: I said, “You got the wrong guy.” And he said, “I don’t care whether you did it or don’t.” He said, “But you gonna be convicted for it. And you know why?” I said, “No.” He said, “You got a white man. They gonna say you shot him. Gonna have a white D.A. We gonna have a white judge. You gonna have a white jury more than likely.” And he said, “All of that spell conviction, conviction, conviction.” I said, “Well, does it matter that I didn’t do it?” He said, “Not to me.”

The lieutenant denied saying that. But Hinton was convicted at age 30. He was 57 when the U.S. Supreme Court [unanimously held] that his defense had been ineffective. A new ballistics test found that the gun was not the murder weapon.<sup>198</sup>

### *iii. Willie Manning*

In 2015, the Mississippi Supreme Court ordered a retrial in one of the two capital murder cases for which Willie Manning had been sentenced to death. After additional exculpatory information was found and the key prosecution witness recanted most of his testimony, Circuit Judge Lee Howard dismissed the case against Manning for that murder.

The prosecution’s “proof” in the other case for which Manning had been convicted and given the death penalty unraveled just days before his scheduled May 2013 execution. The Mississippi Supreme Court stayed the execution after the FBI advised the prosecutor that “testimony containing erroneous statements regarding microscopic hair comparison analysis was used” in Manning’s case.<sup>199</sup> Two days later, the FBI wrote again, saying that additional statements were made about the hair comparison “that exceeded the limits of science and [were], therefore, invalid.” A third FBI letter said that “[t]he science regarding firearms examinations does not permit examiner testimony that a specific gun fire a

<sup>197</sup> Alan Blinder, *Alabama Man Freed After Decade on Death Row*, N.Y. TIMES, Apr. 3, 2015.

<sup>198</sup> Scott Pelley, *Life After Death Row*, CBS NEWS: 60 MINUTES, Jan. 10, 2016, <http://www.cbsnews.com/news/60-minutes-life-after-death-row-exoneration/>

<sup>199</sup> R.L. Nave, *Why Does the State Still Want to Kill Willie Jerome Manning?*, JACKSON FREE PRESS, Apr. 29, 2015.

specific bullet ... . The examiner could testify to that information, to reasonable degree of scientific certainty, but not [as was testified] absolutely.”<sup>200</sup>

Manning remained on death row because of earlier murders.

***iv., v. Henry Lee McCollum and Leon Brown***

On June 4, 2015, North Carolina Governor Pat McCrory granted pardons to Henry Lee McCollum and Leon Brown. This made it possible for them to perhaps get compensation for their wrongful convictions.<sup>201</sup>

Nine months earlier, on September 2, 2014, McCollum, who had spent 30 years on death row, and his half-brother Leon Brown, who had initially been sentenced to death and was serving a life sentence, were declared innocent and ordered released by a Superior Court judge. These two intellectually disabled inmates, who had always said their “confessions” had been coerced, secured this relief when the prosecution case, “always weak, fell apart after DNA evidence implicated another man” whose possible involvement the authorities had overlooked “even though he lived only a block from where the victim’s body was found, and he had admitted to committing a similar rape and murder around the same time.”<sup>202</sup>

In 1994, Justice Antonin Scalia, criticizing Justice Harry Blackmun for using Bruce Edwin Callins’ case as “the vehicle” for stating that the capital punishment is always unconstitutional, said Blackmun’s position would seem far weaker had he instead articulated his views in the context of McCollum’s then-pending case. Justice Scalia said McCollum’s case involved an “11-year-old girl raped by four men and then killed by stuffing her panties down her throat. *See McCollum v. North Carolina*, cert. pending, No. 93–7200. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within ‘the Court’s Eighth Amendment jurisprudence’ should not prevent them.”<sup>203</sup>

So, Justice Scalia said that executing McCollum would be justified to avenge a horrific crime. But it was a crime for which McCollum was innocent.

***vi. Alfred Dewayne Brown***

On June 8, 2015, Harris County District Attorney Devon Anderson decided to dismiss the capital murder case against Alfred Dewayne Brown because there was insufficient evidence to corroborate the testimony of Brown’s co-defendant. In 2014, the Texas Court of Criminal Appeals had overturned Brown’s conviction and death sentence

<sup>200</sup> Carimah Townes, *How The FBI Majorly Screwed Up A Death Penalty Case And Admitted It Just In Time*, THINKPROGRESS, May 6, 2015, <http://thinkprogress.org/justice/2015/05/06/3655660/one-inmate-four-death-penalty-sentences-exonerated-twice/>.

<sup>201</sup> Craig Jarvis, *Gov. McCrory pardons half-brothers imprisoned for decades*, NEWS & OBSERVER, June 4, 2015.

<sup>202</sup> Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES, Sept. 3, 2014.

<sup>203</sup> *Callins v. Collins*, 510 U.S. 1141, 1142-43 (1994) (mem.) (Scalia, J., concurring in denial of certiorari).



because the prosecution had failed to turn over to the defense a telephone record that may have supported his alibi.<sup>204</sup> Numerous additional troubling aspects of Brown's prosecution and the underlying police investigation are discussed in Pulitzer Prize-winning columns by the *Houston Chronicle's* Lia Falkenberg.<sup>205</sup>

**vii. William Lawrence "Larry" Lee**

After Larry Lee's four Georgia murder convictions were reversed on appeal, District Attorney Jackie Johnson announced in June 2015 that she would not seek to retry him for three of the killings (the ones for which he had been sentenced to death), because her office did not have sufficient evidence available. She said if new evidence emerged, Lee might be prosecuted later.<sup>206</sup> Although eligible for parole consideration on the fourth murder, Lee remains in prison.

**viii. Michelle Byrom**

In March 2014, the Mississippi Supreme Court unanimously vacated Michelle Byrom's conviction and ordered that the trial judge be recused from participating in the retrial. This decision was handed down in a postconviction proceeding. The *Jackson Free Press* said that "Court records reveal that Byrom's original attorneys, who were trying their first capital case, made numerous errors and questionable decisions that ultimately led Byrom to death row."<sup>207</sup>

On June 26, 2015, Byrom entered a no contest plea on a conspiracy charge, got time served, and was released.<sup>208</sup> Her prison time had included 14 years on Mississippi's death row.

**ix. Montez Spradley**

Montez Spradley, sentenced to death by an Alabama judge in 2008 despite a jury's 10-2 recommendation of LWOP, was freed from prison on September 4, 2015. Spradley had spent 9.5 years incarcerated, including 3.5 years on death row.

Radley Balko wrote in a *Washington Post* blog on September 21, 2015 that "the state's case against Spradley began to fall apart" in the few years after 2011.<sup>209</sup> The Alabama Court of Criminal Appeals held in 2011 that Spradley should get a new trial. Among many evidentiary problems, the court found that there was no clear evidence that the security camera photographs used at trial were taken at the relevant time – or even that the victim's credit card was used where the prosecution asserted it had been used. The only evidence that connected Spradley to the victim was based solely on the testimony of the police detective working on the case.

<sup>204</sup> Brian Rogers, *DA drops charges against Alfred Brown*, HOUS. CHRON., June 8, 2015.

<sup>205</sup> E.g., Lisa Falkenberg, *Evidence mounts that wrong man on death row for killing HPD officer*, HOUS. CHRON., Dec. 20, 2014 (updated Apr. 20, 2015).

<sup>206</sup> Terry Dickson, *Convicted killer in Wayne County slayings could go free*, FLA. TIMES-UNION, June 22, 2015.

<sup>207</sup> Ronni Mott, *Michelle Byrom Gets Stunning Sentencing Reversal*, JACKSON FREE PRESS, Apr. 1, 2014.

<sup>208</sup> Jerry Mitchell, *Almost executed by Mississippi, Michelle Byrom free*, CLARION-LEDGER, June 26, 2015.

<sup>209</sup> Radley Balko, Opinion, *The outrageous conviction of Montez Spradley*, WASH. POST, Sept. 21, 2015.

After the 2011 ruling, the prosecution began to prepare for a retrial, but “new information further crippled the state’s case.” The many existing problems with the testimony of the prosecution’s key witness, Spradley’s ex-girlfriend Alisha Booker, were greatly compounded when Spradley’s new lawyers learned that she had received \$5,000 for her testimony from a fund run by the Governor’s office – after Spradley’s conviction but before his sentencing. The trial judge had approved this, but the defense did not know either about this or about Booker’s receipt of another \$5,000 from a private fund. When Booker tried to recant prior to the trial, law enforcement officials had threatened her with a perjury prosecution and with losing custody of her children. There were also serious issues regarding the testimony of a jailhouse informant.

Spradley agreed to an Alford plea, or “best interest” plea, in which a defendant does not admit guilt but finds it in his best interest to plead guilty. Richard Jaffe, one of Spradley’s new lawyers, said, “Montez is innocent. But you don’t mess around with the death penalty. If my client has the chance to save his own life, I always advise him to take it.”<sup>210</sup>

**x. Kimber Edwards**

On October 2, 2015, four days before Kimber Edwards’ scheduled execution, Missouri Governor Jay Nixon commuted his death sentence to LWOP based on “significant consideration of the totality of the circumstances.” Although the Governor said Edwards’ conviction was proper, the main prosecution witness had recanted. Edwards’ lawyers asserted that his confession resulted from a kind of autism that made him susceptible to confessing falsely under coercive interrogation.<sup>211</sup> Attention was also paid to the jury having become all-white after prosecutors used discretionary challenges to remove three potential African American jurors. State courts had found that St. Louis County prosecutors had since 2002 unlawfully acted on the basis of race when removing African American jurors in at least five trials. (Ferguson is in St. Louis County, Missouri.) Three other African Americans had been executed after sentencing by all-white Missouri juries.<sup>212</sup>

**xi. Derral Wayne Hodgkins**

Death row inmate Derral Wayne Hodgkins was released from prison on October 12, 2015, based on the Florida Supreme Court’s June 18, 2015 decision to vacate his conviction and to order that upon remand he be acquitted. In its 6-1 decision, the Florida Supreme Court stated:

In this circumstantial case, the State simply has not pointed to legally sufficient evidence establishing a nexus between Hodgkins’ DNA and any criminal conduct on his part. Furthermore, we find that the State’s evidence is wholly consistent with Hodgkins’ hypothesis of innocence that someone else killed Lodge. Preliminarily, we conclude that the timeframe within which Lodge could have been killed was far too lengthy to reasonably infer that only Hodgkins made contact with Lodge. ... Lodge was murdered

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<sup>210</sup> *Id.*

<sup>211</sup> Jeremy Kohler, *Nixon commutes death sentence for convicted murderer Kimber Edwards*, ST. LOUIS POST-DISPATCH, Oct. 2, 2015.

<sup>212</sup> Editorial, *Too many black men sent to death by white juries*, ST. LOUIS POST-DISPATCH, Apr. 9, 2015.

between approximately 2:30 p.m. that Wednesday and 5:30 a.m. the following day – a fifteen-hour window. ...

We, therefore, conclude that the evidence before us is insufficient to sustain Derral Hodgkins' first-degree murder conviction."<sup>213</sup>

On September 24, 2015, the Florida Supreme Court denied the prosecution's Motion for Rehearing. On October 12, 2015, it issued a Mandate to the Pasco County Circuit Court commanding it to act in accordance with the June 18, 2015 holding. Hodgkins was released later that day, and the Pasco County Circuit Court entered a judgment of acquittal on October 20, 2015. Hodgkins' probation violation and sentence based on his murder conviction was also vacated. The constitutional prohibition against double-jeopardy bars Hodgkins' retrial.<sup>214</sup>

### *xii. Reginald Clemons*

On November 24, 2015, the Missouri Supreme Court vacated death row inmate Reginald Clemons' convictions and death sentence for the killings of two sisters in 1991. The court's 4-3 decision sent the case back to a circuit court for possible retrial. The majority relied on retired judge Michael Manners, its Special Master for this case. He concluded that the State committed harmful error by (in the court's words) "failing to produce evidence ... that a witness observed an injury to Mr. Clemons' face shortly after a police interrogation and that the witness documented his observations of the injury in a written report that was later altered by the state." The Court found that because the State had unconstitutionally averted the possible exclusion of "a critical part of the state's case" – Clemons' "confession" – "the jury's verdicts are not worthy of confidence."<sup>215</sup>

Clemons was only weeks away from execution in 2009 when the Eighth Circuit granted a stay.<sup>216</sup> On January 25, 2016, Circuit Attorney Jennifer M. Joyce announced that she would retry Clemons for the murders, as well as try him for forcible rape and first-degree robbery, and would seek the death penalty.<sup>217</sup>

### *c. Significant Doubts About the Guilt of People Still or Until Recently on Death Row, or Who Died While on Death Row: None Have Gotten Final Relief Regarding Their Convictions, and Most Have Not Gotten Sentencing Relief*

#### *i. Daniel Dougherty*

In 2000, Daniel Dougherty was convicted and sentenced to death for purportedly causing the 1985 fire that killed two children. His lawyer did nothing to challenge an

<sup>213</sup> *Hodgkins v. State*, 175 So. 3d 741, 749-51 (Fla. 2015) (per curiam).

<sup>214</sup> Hans Sherrer, *Derral Wayne Hodgkins Released From Death Row After Acquittal By Florida Supreme Court*, JUSTICE DENIED, Oct. 22, 2015.

<sup>215</sup> *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 63 (Mo. 2015).

<sup>216</sup> Jeremy Kohler, *Missouri Supreme Court throws out Reginald Clemons murder conviction*, ST. LOUIS POST-DISPATCH, Nov. 25, 2015.

<sup>217</sup> Mike Lear, *Death penalty case to be re-tried in 1991 Chain of Rocks Bridge murders*, MISSOURINET, Jan. 25, 2016.

assistant fire marshal's testimony that arson caused the fire – despite better understandings by 2000 concerning fires' causes. In 2012, the prosecution agreed to change the sentence to life, due to defense counsel's omissions. In 2014, the Pennsylvania Superior Court ordered a retrial because “no reliable adjudication of guilt or innocence took place.” On October 2, 2014, the state Supreme Court denied the State's effort to be allowed to appeal. If the Philadelphia District Attorney proceeds with a retrial, the defense has two experts prepared to testify that there is no support for concluding that arson occurred.<sup>218</sup>

*ii. Thomas Arthur*

Andrew Cohen wrote in 2012 about Alabama death row inmate Thomas Arthur, who had been convicted and sentenced to death for a murder that took place 30 years before. Cohen noted many similarities between the problems with Arthur's case and those with Tyrone Noling's case (discussed below in Subpart iv). He said Arthur was “one of the few prisoners in the DNA-testing era to be this close to capital punishment after someone else confessed under oath to the crime.”<sup>219</sup>

As Cohen stressed, the prosecution based its whole case on the testimony of the victim's wife. She had been convicted of the murder and sentenced to life for having hired someone to kill her husband. Years later, she agreed to change her testimony and implicate Arthur, in return for the prosecution's recommending her early release. Her revised testimony led to his third conviction – the first two having been reversed. Then, in 2008, Bobby Ray Gilbert confessed under oath to having committed the killing. He had, at the time of the killing, started an affair with the victim's wife. He said he finally came forward because of a Supreme Court holding precluding the death penalty for someone under age 18 at the time of the crime (as he had been). Thereafter, Gilbert “took the Fifth Amendment” at a hearing. Arthur's counsel said this resulted from Gilbert's being punished by prison officials after admitting to the murder. The State took a different view, and the victim's wife said Gilbert's confession was false. The trial judge then ruled against Arthur.

Arthur's counsel sought “more advanced DNA testing on the wig” that Gilbert's statement said Arthur had used during the killing. Earlier DNA testing had not resulted in a link to either Gilbert or Arthur. Arthur's counsel said all involved agreed that the perpetrator wore this wig during the crime, and counsel offered to pay for the additional DNA testing. The State said the requested DNA testing would be no better than the prior testing and that the wig had no additional DNA that could be tested.<sup>220</sup> On January 6, 2014, the Eleventh Circuit held, on procedural grounds, that Mr. Arthur had not shown an “extraordinary circumstance” permitting him to seek federal court relief again.<sup>221</sup>

After U.S. District Judge W. Keith Watkins stayed Arthur's February 19, 2015 execution date, Alabama appealed to the Eleventh Circuit in January 2015.<sup>222</sup>

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<sup>218</sup> Jeff Gammage, *Advances in fire science cast doubt on arson-murder cases*, PHILA. INQUIRER, Oct. 9, 2014.

<sup>219</sup> Andrew Cohen, *Another Death Row Debacle: The Case Against Thomas Arthur*, THE ATLANTIC, Feb. 27, 2012.

<sup>220</sup> *Id.*

<sup>221</sup> *Arthur v. Thomas*, 739 F.3d 611 (11th Cir.), *cert. denied*, 135 S. Ct. 106 (2014).

<sup>222</sup> Kim Chandler, *Alabama asks federal appeals court to allow Arthur Execution*, WASH. TIMES, Jan. 22, 2015.

**iii. Tyrone Noling**

In 2012, Andrew Cohen wrote about Tyrone Noling, who had been convicted and sentenced to death in 1996 for the murder of an elderly couple in 1990. Initially, there was neither physical evidence nor any witness against him. After a new investigator became involved in 1992, Noling was indicted, but the charges were dropped after he passed a polygraph test and his co-defendant recanted his incrimination of Noling. Several years later, having been (they later said) threatened by an investigator, some witnesses testified against Noling, saying he had been at the scene of the crime and had confessed to the murders.

Cohen was very troubled by, among many other things, the prosecution's preventing DNA testing of a cigarette butt that might be tied to Daniel Wilson, whom Noling's lawyers say was the real murderer. Wilson was executed for a murder committed a year after the murders at issue. Previously, he had attacked an elderly man in the man's home. In 2009, prosecutors very belatedly produced handwritten police notes from 1990 in which Wilson's foster brother apparently identified his "brother" as the murderer in *this* case.<sup>223</sup>

On May 2, 2013, the Ohio Supreme Court held, 5-2, that a judge had to reconsider DNA testing, since Noling's most recent request for testing should not have been rejected merely because he had unsuccessfully sought testing before. It further held that new standards and expanded criteria for testing enacted in 2010 should have been considered.<sup>224</sup> On December 19, 2013, Portage County Common Pleas Judge John Enlow ordered the Ohio Bureau of Criminal Investigation to conduct new DNA tests on a cigarette butt found in the driveway at the home of the elderly victims,<sup>225</sup> but it did not produce any "hits." Noling's lawyers then sought DNA testing of other items by a private lab. The prosecution argued that any such items would have been contaminated in 1990. In 2014, Judge Enlow denied the motion for further testing. Noling appealed.<sup>226</sup> On September 30, 2015, the Ohio Supreme Court agreed to consider Mr. Noling's case, and in particular his efforts to get DNA testing.

**iv. James Dennis**

On August 21, 2013, Senior U.S. District Judge Anita B. Brody overturned the 1992 conviction of James Dennis, who she said had been death-sentenced improperly for a murder he likely did not commit.<sup>227</sup> Judge Brody said Philadelphia police and prosecutors had either overlooked, lost, or "covered up" evidence of Dennis' innocence – including a sworn statement from another inmate three weeks prior to Dennis' arrest saying a cousin had admitted to committing the crime. Judge Brody said some of the government's misconduct and errors could have been rectified contemporaneously if Dennis had had an effective lawyer – unlike his actual lawyer, who neither interviewed any eyewitness, tested the evidence, nor used experts. District Attorney Seth Williams said the judge was taken in

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<sup>223</sup> Andrew Cohen, *Is Ohio Keeping Another Innocent Man on Death Row?*, THE ATLANTIC, Jan. 31, 2012.

<sup>224</sup> *State v. Noling*, 992 N.E.2d 1095 (Ohio 2013).

<sup>225</sup> Ed Meyer, *Death row inmate Noling wins new DNA tests of cigarette evidence in 1990 double murder*, BEACON JOURNAL (Ohio), Dec. 19, 2013.

<sup>226</sup> Dave O'Brien, *25 Years Later, Atwater murder case, conviction still generate controversy*, REC.-COURIER (Ohio), May 27, 2015.

<sup>227</sup> *Dennis v. Wetzel*, 966 F. Supp. 2d 489 (E.D. Pa. 2013).

by “slanted factual allegations” and a “newly concocted alibi defense.”<sup>228</sup> The State appealed to the Third Circuit, which heard the case *en banc* on October 14, 2015.

*v. Kevin Cooper*

There is substantial doubt about the guilt of California death row inmate Kevin Cooper. In 2009, Judge William A. Fletcher, dissenting, said Cooper could be innocent. He stressed the government’s failure to disclose some evidence and its tampering with other evidence.<sup>229</sup> In December 2010, Professor Alan Dershowitz and David Rivkin Jr. (who served in the Justice Department and White House Counsel’s Office under two Republican Presidents) wrote that although they differed about the death penalty, they felt that “too many of the facts allegedly linking Cooper to the murders just don’t add up.” These included a statement that the perpetrators were white (Cooper is black), law enforcement’s “blatantly mishandl[ing]” crucial “evidence pointing to other” possible killers and the strong possibility that the state’s chief forensic witness had falsified evidence.<sup>230</sup>

*vi. Donnis Musgrove*

Donnis Musgrove died of cancer while on Alabama’s death row on November 25, 2015, after his lawyers attempted unsuccessfully to persuade a federal district judge to rule on his claims very expeditiously. Co-defendant David Rogers, who had earlier died while on death row, was convicted of the same 1986 murder. Rogers’ lawyer, Tommy Nail, now a state circuit court judge, says Musgrove and Rogers “got a raw deal” and thinks both were innocent. Their case had these similarities with the case of Anthony Ray Hinton (see Part I.B.4.b.ii above), who was exonerated in April 2015: the same prosecutor and judge; and the prosecution’s use of the same ballistics “expert” whose testimony was so badly discredited by government ballistics experts that Hinton’s prosecutor got the charges dropped. Musgrove’s attorneys also said the case against him was infected by falsified eyewitness testimony, misconduct by the prosecution, and perjury by a jailhouse informant who later recanted. The State argued that new procedural bars precluded consideration of the merits of Musgrove’s assertions. It did not directly challenge his claims.<sup>231</sup>

*vii. Max Soffar*

Texas death row inmate Max Soffar had hoped for relief before dying of liver cancer. His conviction and death sentence at a 2006 retrial for murdering three people in 1980 while robbing a bowling alley were based solely on a “confession” that was contradicted by facts about the crime and by the recollections of a man who survived (although with brain damage) after being shot during the crime. The “confession” was obtained after three days of unrecorded questioning. Soffar’s counsel presented evidence that a serial killer was far likelier to be the perpetrator. Federal District Judge Sim Lake relied heavily on AEDPA in

<sup>228</sup> John P. Martin, *Citing ‘miscarriage of justice,’ judge overturns murder conviction*, PHILA. INQUIRER, Aug. 23, 2013.

<sup>229</sup> *Cooper v. Brown*, 565 F.3d 581, 581 (9th Cir. 2009) (Fletcher, J., dissenting), *discussed in* John Schwartz, *Judges’ Dissents for Death Row Inmates Are Rising*, N.Y. TIMES, Aug. 13, 2009.

<sup>230</sup> Alan M. Dershowitz & David B. Rivkin Jr., *Opinion, A time for clemency*, L.A. TIMES, Dec. 1, 2010.

<sup>231</sup> Andrew Buncombe, *Donnis Musgrove dies on Alabama’s death row still trying to clear his name over 30-year-old murder*, INDEP., Nov. 26, 2015; Kent Faulk, *Attorney: Alabama Death Row inmate dies in prison*, AL.COM, Nov. 27, 2015.

denying Soffar's claims in December 2014 – saying the conduct of Soffar's trial counsel and the trial judge's rulings were “not unreasonable.” Texas' Board of Pardon and Paroles declined to consider clemency absent a warrant for Soffar's execution.<sup>232</sup> After spending 35 years on Death Row in Texas, Soffar died of natural causes on April 24, 2016.<sup>233</sup>

**viii. Bernardo Aban Tercero**

On August 25, 2015, the Texas Court of Criminal Appeals stayed the execution scheduled for the following evening of Bernardo Tercero, and remanded his case to the Harris County trial court so it could consider Tercero's claim that a key prosecution witness had given perjured testimony. Tercero had always contended that the shooting had been the unintentional result of a struggle during a robbery.<sup>234</sup>

In a *Houston Chronicle* op-ed a few days before the stay was issued, Melissa Hooper of Human Rights First said that important facts about the crime had never been investigated, in large part due to the ineffectual work by his attorneys – who also did not properly look into his background. There was “no investigation” regarding his “family history of extreme hereditary mental illness ... his own mental impairments” and his possible intellectual disability. There was also no investigation regarding Tercero's never-located associate, who held everyone else at the scene at gunpoint during the dry cleaning shop robbery. There had never been a hearing on the claim of ineffectiveness of Tercero's counsel. The Inter-American Commission of Human Rights, after filings by Human Rights First (where Hooper headed the Pillar Project), concluded earlier in August 2015 that Tercero had been deprived of his rights to a fair trial and effective counsel, in violation of international standards.<sup>235</sup>

**ix. Rodney Reed**

As of February 2016, the Texas Court of Criminal Appeals continued to consider the case of Rodney Reed, whose scheduled March 5, 2015 execution it stayed on February 23, 2015.<sup>236</sup> In November 2014, *The Intercept* published an extensive article about the case, entitled *Is Texas Getting Ready to Kill An Innocent Man?*<sup>237</sup>

**d. Significant Doubts About Past Executions (in Chronological Order by Execution Date)**

**i. Carlos DeLuna**

The May 2012 *Columbia Human Rights Law Review* included a lengthy article (later expanded into a book) concluding that Texas executed Carlos DeLuna in 1989 for a murder

<sup>232</sup> Michael Berryhill, *The lost appeals of Max Soffar*, HOUS. CHRON., Apr. 3, 2015.

<sup>233</sup> Michael Hall, *Max Soffar Dies in Death Row Hospital*, TEXAS MONTHLY, Apr. 25, 2016, <http://www.texasmonthly.com/the-daily-post/max-soffar-died-on-death-row/>.

<sup>234</sup> Associated Press, *Texas court halts planned execution of Nicaraguan man convicted of murder*, Aug. 25, 2015, <http://www.theguardian.com/us-news/2015/aug/25/texas-court-halts-execution-bernardo-tercero-nicaragua>.

<sup>235</sup> Melissa Hooper, Opinion, *Death row inmate deserves new, fair trial*, HOUS. CHRON., Aug. 21, 2015.

<sup>236</sup> Terri Langford, *CCA Issues Stay of Execution for Rodney Reed*, TEX. TRIB., Feb. 23, 2015.

<sup>237</sup> Jordan Smith, *Is Texas Getting Ready to Kill An Innocent Man?*, THE INTERCEPT, Nov. 17, 2014.

actually committed by Carlos Hernandez.<sup>238</sup> The authors determined, after a five-year investigation, that DeLuna had been executed solely based on contradictory eyewitness accounts that mistakenly identified him, whereas the witnesses had actually seen his “spitting image,” Hernandez. The authors said law enforcement’s investigation was extremely inadequate and fatally flawed by many overt mistakes plus numerous omissions, including failures to follow up on clues. DeLuna’s court-appointed lawyer ineptly said it was unlikely anyone named Hernandez was involved. The lead prosecutor told the jury Hernandez was a “phantom” made up by DeLuna. Yet, Hernandez existed, had a history of using a knife in attacking people and was once jailed for killing a woman using the same knife as in the killing for which DeLuna was executed.<sup>239</sup>

Andrew Cohen said the article “establishes beyond any reasonable doubt” that Carlos Hernandez committed the crime for which DeLuna was executed. He noted that *Chicago Tribune* reporters, investigating in 2006, found five people to whom Hernandez had admitted killing both (a) the victim for whose killing DeLuna had been executed and (b) another woman four years earlier for which Hernandez had been indicted but not tried. One of the reporters said that although crime scene photos showed tremendous amounts of blood, DeLuna, when arrested nearby soon after the crime, had no blood on him. His fingerprints were not found at the crime scene, and when arrested he did not have the victim’s hair or fibers on his person. Cohen said that “the only eyewitness to the crime . . . identified DeLuna [when DeLuna] was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene.”<sup>240</sup>

## *ii. Ruben Cantu*

CNN focused the second year premiere of *Death Row Stories* on Ruben Cantu, whom Texas executed in 1993. Sam Millsap, Jr., who had a perfect record when seeking death sentences as San Antonio’s District Attorney, never had qualms over his cases until the *Houston Chronicle*’s Lise Olsen interviewed him in 2005. Olsen, writing 12 years after Cantu’s execution, raised serious questions about his guilt. Millsap, whose views on capital punishment were changing, was stunned by Olsen’s findings. He said he had over-relied on a purported eyewitness identification and that if he could do things over, he would not seek the death penalty for Cantu.

Olsen’s story led the then-district attorney to re-examine the case, but she concluded that Cantu was guilty. Millsap has sought the death penalty’s abolition for over a decade due to systemic imperfections. Lise Olen “feels little vindication for her work,” since “Ruben Cantu is dead. There is no victory in this story.”<sup>241</sup>

<sup>238</sup> James S. Liebman et al., *Los Tacayos Carlos: Anatomy of a Wrongful Execution*, 43 COLUM. HUM. RIGHTS L. REV. 711 (2012); JAMES S. LIEBMAN & THE COLUMBIA DELUNA PROJECT, *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* (2014).

<sup>239</sup> Chantal Valery, AFP, *Wrong man was executed in Texas, probe says*, May 14, 2012, <http://www.google.com/hostednews/afp/article/ALeqM5gKjcKUa17t1CXiTjPw8tN-V6fNSg?docid=CNG.37ab293d08346aa6f7c1d1bfbd5758f.491>.

<sup>240</sup> Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, THE ATLANTIC, May 14, 2012.

<sup>241</sup> Stephanie Gallman, *From seeking the death penalty to fighting it*, CNN, Aug. 7, 2015.



**iii. Benjamin Herbert Boyle**

As noted above in Part I.B.2.b.i, the Justice Department Inspector General's office reported in July 2014 that Texas' 1997 execution of Benjamin Herbert Boyle occurred *after* that office had concluded that his conviction was based in substantial part on scientifically baseless "expert" testimony.

**iv. Claude Jones**

New DNA tests completed in November 2010 raised significant doubts about the guilt of Claude Jones, whom Texas had executed in December 2000. His conviction was based principally on a strand of hair recovered from the crime scene – hair the prosecution asserted was his. That was the only *physical* evidence supposedly tying him to the scene. The only other evidence was later-recanted testimony by an alleged accomplice. Under Texas law, that testimony had never been sufficient for conviction, absent independent corroborating evidence.

The technology to do proper DNA testing did not exist at the time of Jones' trial. Before his execution, he unsuccessfully asked the Texas courts and Governor George W. Bush for a stay to permit DNA hair testing. Bush's office's lawyers never told him of the request or that DNA testing might tend to exonerate Jones. Bush had stayed another execution to permit DNA testing. When the testing was finally done a decade later, it showed that the hair was the victim's. The Innocence Project's Barry Scheck said this proved the hair sample testimony "on which this entire case rests was just wrong . . . . Unreliable forensic science and a completely inadequate post-conviction review process cost Claude Jones his life." The *Texas Observer* said this was "a highly questionable execution – a case that may not have resulted in a conviction were it tried with modern forensic science."<sup>242</sup>

**v. John Hardy Rose, Desmond Carter, and Joseph Timothy Keel**

In 2010, former FBI agents completed an audit of North Carolina's State Bureau of Investigation (the "SBI") that state Attorney General Roy Cooper had requested. They found that SBI agents repeatedly helped prosecutors secure convictions, but sometimes "information . . . [possibly] material and even favorable to the defense . . . was withheld or misrepresented." They recommended that 190 criminal cases in which SBI reports were, at best, incomplete be thoroughly reviewed. These included three cases where defendants who had confessed were executed and four of people still on death row. Although the audit did not determine that any innocent person had been convicted, the audit report said that defendants' confessions and guilty pleas may have been affected by tainted SBI reports.<sup>243</sup>

Counsel for John Hardy Rose (executed on November 30, 2001) said if they had known about the undisclosed negative results from a test for blood, the sentence might not have been death – since there already was a question whether the crime was premeditated or impulsive. Desmond Carter (executed on December 10, 2002) had inexperienced counsel

<sup>242</sup> Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEX. OBSERVER, Nov. 11, 2010.

<sup>243</sup> Associated Press, *Outside Review Finds Flaws in 190 SBI Prosecutions*, Aug. 19, 2010, <http://www.wral.com/news/state/story/8153666/>.

who assumed the SBI lab evidence was accurate. Counsel for Joseph Timothy Keel (executed on November 7, 2003), began considering the undisclosed evidence's possible impact but said "[T]here are no do-overs with the death penalty. We can't go back and fix these errors."<sup>244</sup>

#### vi. *Cameron T. Willingham*

Controversy over Texas' 2004 execution of Cameron T. Willingham for arson/murder continues to grow. Governor Rick Perry failed in 2004 to grant a 30-day reprieve despite – as later revealed – receiving material from a renowned arson expert (retained by Willingham's lawyers) who found major problems with the prosecution's trial evidence about arson. It was unclear whether Governor Perry reviewed that material. In 2009, shortly before the State Forensic Science Commission was to hold hearings at which its arson expert, Craig L. Beyler, was to testify, Governor Perry replaced the Commission's chair and two other members. The hearings were cancelled.<sup>245</sup> Beyler, "a nationally known fire scientist," had prepared "a withering critique" concluding – as did *Chicago Tribune* reporters in 2004 – there was no proof that the fire was set and it may have been an accident. His report said the state Fire Marshal's findings "are nothing more than a collection of personal beliefs that have nothing to do with science-based fire investigation."<sup>246</sup>

The Commission's new chair John Bradley tried to have the Commission close the case and say there had been no professional misconduct. But other Commission members disagreed. After lengthy delay, the Commission held a special hearing on January 7, 2011, at which it heard from several arson experts, including Beyler (then chair of the International Association of Fire Safety Science). Although the state Fire Marshal's Office and some others from Texas supported the arson finding, John DeHaan, author of *Kirk's Fire Investigation*, "the most widely used textbook in the field," stated, "Everything that was documented post-fire was consistent with accidental rather than intentional fire. There was no basis for concluding that this was arson."<sup>247</sup> Texas Attorney General Greg Abbott ruled in July 2011 that the Commission could not investigate evidence collected or tested prior to 2005.<sup>248</sup> So, on October 28, 2011, it closed its investigation. But the October 2011 addendum to its report recognized that unreliable science about fires had played a role in Willingham's conviction. The Commission found that arson investigators who testified for the prosecution had relied on common beliefs that by 2011 were generally recognized to be incorrect.<sup>249</sup>

On September 23, 2013, the Innocence Project, plus an exoneree and several Willingham relatives, asked Governor Perry to open an investigation into whether Willingham should be pardoned – in light of (in addition to everything else) "new evidence

<sup>244</sup> Joseph Neff & Mandy Locke, *For Executed Men, Audit's Too Late*, NEWS & OBSERVER, Aug. 19, 2010.

<sup>245</sup> James C. McKinley, Jr., *Controversy Builds in Texas Over an Execution*, N.Y. TIMES, Oct. 20, 2009.

<sup>246</sup> Steve Mills, *Cameron Todd Willingham case: Expert Says Fire for Which Father Was Executed Was Not Arson*, CHI. TRIB., Aug. 25, 2009.

<sup>247</sup> Erin Mulvaney, *National experts criticize state's study of fatal '91 fire*, DALL. MORNING NEWS, Jan. 8, 2011; see also Associated Press, *Texas panel re-examines arson execution case*, Jan. 8, 2011.; Charles Lindell, *Experts criticize, defend Willingham arson investigators*, AUSTIN AM.-STATESMAN, Jan. 7, 2011; Yamil Berard, *Arson experts testify that Willingham investigators violate standards*, STAR-TELEGRAM, Jan. 7, 2011.

<sup>248</sup> Claire Cardona, *Forensic Science Panel Recommends Arson Probe*, TEX. TRIB., Oct. 28, 2011.

<sup>249</sup> Chuck Lindell, *Willingham inquiry ends, but effects linger*, AUSTIN AM.-STATESMAN, Oct. 28, 2011.

that the prosecutor in the case paid favors to” Johnny Webb, the jailhouse informant who testified that Willingham had confessed to him.<sup>250</sup> On July 25, 2014, the Innocence Project, on behalf of Willingham’s survivors, filed a grievance against trial prosecutor John H. Jackson with the State Bar of Texas. The grievance was based on Jackson’s alleged nondisclosure of a deal with Johnny Webb concerning Willingham’s supposed confession. That purported confession played a major role at trial (where Webb was the first witness Jackson called to testify).<sup>251</sup>

On March 9, 2015, the *Washington Post* reported on a newly discovered letter from Webb to Jackson imploring Jackson to follow through on a promise to get Webb’s conviction downgraded. Within days after getting that letter, Jackson secured an order from Willingham’s trial judge that changed “the record of Webb’s robbery conviction to make him immediately eligible for parole.” The *Post* reported that Jackson never disclosed to the defense even the possibility of a deal with Webb. The *Post* also reported that Jackson had recently admitted – after long denying it – that he had intervened to try to get Webb’s conviction changed to be for the lower charge. It further reported that in two days of recent interviews, Webb said Jackson had threatened him with a life sentence if he did not implicate Willingham. Webb also reportedly said, “I did not want to see Willingham go to death row and die for something I damn well knew was a lie and something I didn’t initiate.” He said he had been forced into lying by Jackson’s pressure.<sup>252</sup>

On March 18, 2015, the *Post* reported that “the State Bar of Texas has filed a formal accusation of misconduct against” Jackson – alleging he had obstructed justice, made false statements and hid evidence favorable to the defense. The March 5 bar action asserted that Jackson had frequently interceded to help Webb.<sup>253</sup>

### *vii. Troy Davis*

Georgia’s execution of Troy Davis on September 21, 2011 was the most controversial execution in the United States in many years. On August 17, 2009, the Supreme Court transferred Davis’ petition for an original writ of habeas corpus to a Georgia federal district court, instructing it to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner’s innocence.”<sup>254</sup> The district judge found that Davis had not met that extremely high burden.<sup>255</sup> And he questioned the credibility of several witnesses who had, in whole or part, recanted trial testimony before the hearing.<sup>256</sup>

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<sup>250</sup> Jason Heid, *Innocence Project Asks Governor Perry to Pardon Cameron Todd Willingham*, DMAG. FRONT/BURNER BLOG, Sept. 27, 2013.

<sup>251</sup> Maurice Possley, *Fresh doubts over a Texas execution*, WASH. POST, Aug. 3, 2014.

<sup>252</sup> Maurice Possley, *A dad was executed for deaths of his 3 girls. Now a letter casts more doubts*, WASH. POST, Mar. 9, 2015.

<sup>253</sup> Maurice Possley, *Prosecutor accused of misconduct in disputed Texas execution case*, WASH. POST, Mar. 18, 2015.

<sup>254</sup> *In re Davis*, 557 U.S. 952, 952 (2009)(mem.).

<sup>255</sup> Greg Bluestein, Associated Press, *Ga. execution leaves debate over guilt unresolved*, Sept. 22, 2011, <https://www.highbeam.com/doc/1A1-1d250a317f5743e7a54e67be56571e86.html>.

<sup>256</sup> *In re Davis*, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

**5. Geographic, Racial, and Economic Disparities, and Other Arbitrary Factors, in Implementing Capital Punishment**

**a. Study Regarding Such Disparities in Colorado**

After extensive statistical analysis, three University of Denver professors and a lawyer found that in Colorado, even after accounting for other factors (such as the crime's heinousness), the defendant's race and geography play a disproportionate role in whether the death penalty is sought. They said this is particularly true in the Eighteenth Judicial District, from which all three of Colorado's death row inmates have been prosecuted.<sup>257</sup>

**b. Repeal of North Carolina's Racial Justice Act, After Decisions Implementing It**

North Carolina's Racial Justice Act, enacted in 2009, provided that a defendant prior to trial could seek to preclude the prosecutor from seeking the death penalty by showing that race had a significant impact on the decision to seek death. And a death row inmate could seek to have a death sentence overturned by showing that race had a significant impact on the death sentence's imposition. Statistical evidence could be used in seeking relief, but prosecutors could seek to rebut it.<sup>258</sup>

After being significantly amended and limited in 2012, the law was repealed in June 2013.<sup>259</sup> Before its amendment, Judge Gregory A. Weeks held in April 2012, that in death row inmate Marcus Robinson's 1994 trial "race was [so great] a materially, practically and statistically significant factor" in the prosecutor's use of peremptory challenges during jury selection as "to support an inference of intentional discrimination." Judge Weeks resented Robinson to LWOP.<sup>260</sup>

On December 13, 2012, Judge Weeks applied the amended Racial Justice Act to grant relief to Tilmon Golphin, Christina Walters, and Quintel Augustine.<sup>261</sup> He stated, "In the writing of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making." Judge Weeks held that the evidence – ironically, buttressed by the State's own evidence and experts – overwhelmingly showed that in all three cases prosecutors had distorted juries' compositions to make them extraordinarily white. There was also statewide evidence, including evidence concerning "trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned ... to circumvent the constitutional prohibition against race discrimination in jury selection."<sup>262</sup>

<sup>257</sup> Meg Beardsley et al., *Disquieting Discretion: Race, Geography & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 431 (2015).

<sup>258</sup> Associated Press, *Perdue signs Racial Justice Act*, Aug. 11, 2009, <http://wral.com/news/state/story/5769609/>.

<sup>259</sup> Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013.

<sup>260</sup> Anne Blythe, *Racial Justice Act spares 1st inmate from death sentence*, NEWS & OBSERVER, Apr. 20, 2012; Emery P. Dalesio, Associated Press, *Judge: Race played role in NC death penalty case*, Apr. 20, 2012, <http://cnsnews.com/news/article/judge-race-played-role-nc-death-penalty-case>.

<sup>261</sup> Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 14, 2012.

<sup>262</sup> *State v. Golphin*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35004, 01 CRS 65079, at 3-5 (N.C. Gen. Ct. Just. Cumberland Cnty. Dec. 13, 2012).

On December 18, 2015, the North Carolina Supreme Court vacated Judge Weeks' two decisions. It ordered new hearings to enable the State to respond further to the defendants' statewide statistical study of peremptory challenges, to give both sides the chance to submit more statistical studies, and to permit the lower court to appoint its own expert "to conduct a quantitative and qualitative study." It also held that the three defendants whose claims were dealt with together in the December 13, 2012 decision should have been had separate hearings.<sup>263</sup>

**c. *Studies of Racial Bias in Death Penalty Decision Making***

In a study published on August 25, 2014, Professor Cynthia Willis-Esqueda and Russ K.E. Espinoza reported on what happened when they presented to people who had reported for jury duty in Southern California a hypothetical case's facts, including the defendant's poverty. Among white "jurors," those who were told that the defendant was Latino were considerably more likely to recommend the death penalty than those who were told that the defendant was white. There was no similar difference among Latino "jurors."<sup>264</sup>

Results at least as troubling are reported in Professors Mona Lynch and Craig Haney's 2015 and 2011 articles – discussed below in Part I.B.6.d.i.

**6. *Failure to Limit Executions to People Materially More Culpable Than the Average Murderer***

The Supreme Court repeatedly has held that the Eighth Amendment permits application of capital punishment only to those convicted of "a narrow category of the most serious crimes" where they have such extreme "culpability" that they are "the most deserving of execution."<sup>265</sup> For example, in holding capital punishment categorically unconstitutional for people with what it then called mental retardation (later referred to as intellectual disability) and for those below age 18 at the times of their crimes, the Court said that the retribution rationale for the death penalty's constitutionality did not apply. The Court stated in *Roper v. Simmons*:

[W]e remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." The same conclusions follow from the lesser culpability of the juvenile offender.<sup>266</sup>

However, the Court has thus far not ensured that this constitutional requirement applies to everyone with intellectual disability (who are supposed to be categorically

<sup>263</sup> *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015); *State v. Augustine*, 780 S.E.2d 552 (N.C. 2015) (mem.).

<sup>264</sup> Russ K.E. Espinoza & Cynthia Willis-Esqueda, *The Influence of Mitigation Evidence, Ethnicity, and SES on Death Penalty Decisions by European American and Latino Venire Persons*, CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL., Aug. 25, 2014.

<sup>265</sup> *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

<sup>266</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (second alteration in original) (quoting *Atkins*, 536 U.S. at 319). The Court also held, for similar reasons, that the other constitutional rationale for capital punishment – deterrence – was also inapplicable.

excluded), or to those whose severe mental illness at the time of the crime or other substantial mitigating factors make their culpability well below that of the “average murderer.” This section’s Subparts make this clear (see below).

**a. 100 Recently Executed People in the United States**

A starting point for considering this subject is a study published in 2014 regarding the 100 most recently executed people in the United States as of the time of the study (excluding two others who had refused to permit any introduction of mitigating evidence). Based on the incomplete information that the authors could locate, they “found that the overwhelming majority of executed offenders suffered from intellectual impairments, were barely into adulthood, wrestled with severe mental illness, or endured profound childhood trauma. Most executed offenders fell into two or three of these core mitigation areas, all [of] which are characterized by significant intellectual and psychological deficits.”<sup>267</sup>

**b. Intellectual Disability (Formerly Called Mental Retardation)**

Notwithstanding *Atkins*’ categorical constitutional bar to executing people with intellectual disability (formerly referred to as mental retardation), people with intellectual disability have been and may continue to be executed. Only beginning in 2014 has the Court begun to address ways in which *Atkins* has been undermined. It is not clear how far the Court will go in addressing this further.

**i. Texas’ Apparent Misapplications of Atkins Led to Executions in 2012 and 2015**

A 2014 study of state practices concluded that “some states attempt, either through procedural obstacles or substantive deviations, to eviscerate the holding of *Atkins*.”<sup>268</sup> Texas is one of those states.

Texas carried out an execution in 2012 that clearly violated *Atkins*, in the opinion of the two organizations whose expertise the Court had specifically cited in *Atkins* (and cited again in 2014, in *Hall v. Florida*<sup>269</sup>): the American Association on Intellectual and Developmental Disabilities (the “AAIDD”) and the American Psychiatric Association. Both have long recognized that strengths can co-exist with weaknesses and that what is crucial in assessing mental retardation are the weaknesses and not the strengths (or such things as whether the person can tell lies). Texas has “a separate set of questions, known as the Briseño standard, that ask psychologists to determine whether the defendant has demonstrated leadership abilities or planning skills, whether their families thought the defendant was mentally retarded during development, or whether the defendant can lie.”<sup>270</sup> Using these factors, the Texas Court of Criminal Appeals upheld Marvin Wilson’s death

<sup>267</sup> Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1255 (2014).

<sup>268</sup> John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court’s Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 414 (2014).

<sup>269</sup> 134 S. Ct. 1986 (2014).

<sup>270</sup> Maggie Clark, *Mentally Challenged Defendants Still Face Execution*, MAGGIE CLARK’S BLOG, Dec. 3, 2010, <http://maggieclarkblog.wordpress.com/2010/12/03/mentally-challenged-defendants-still-face-execution/> (discussing *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004)).

sentence despite his IQ of 61 and his having been “diagnosed with mild mental retardation by a court-appointed specialist, the only expert in the case.”<sup>271</sup> He was executed on August 6, 2012.

In May, 2014, the Court in *Hall* held unconstitutional Florida’s categorical IQ cutoff, in large part because it egregiously deviated from how IQ is dealt with by most experts in assessing for intellectual disability. A month later, the Fifth Circuit dealt with what most experts feel are “Texas’ gross deviations from clinical definitions of adaptive functioning” – the other key factor in assessing for intellectual disability.<sup>272</sup> In *Mays v. Stephens*,<sup>273</sup> the Fifth Circuit “roundly disagree[d]” that *Hall* cast doubt on Texas’ continued use of the Briseño standard. The Supreme Court denied certiorari on January 12, 2015, and Randall Mays’ execution was scheduled for March 2015. But the Texas Court of Criminal Appeals has stayed the execution, most recently on December 16, 2015, so a county court can determine Mays’ competency to be executed.

Meanwhile, Texas on January 29, 2015 executed Robert Ladd, who in 1970 had been diagnosed as “obviously retarded,” and had an IQ of 67. Using the Briseño standard, the Texas courts denied relief. Jordan Steiker observed: “There’s a professional definition of intellectual disability ... embraced by psychologists and psychiatrists, and [referenced in the Supreme Court’s *Hall*] opinion... . But Texas has taken the view that the definition of intellectual disability used broadly is not appropriate in a criminal context because it might just exempt too many people.”<sup>274</sup>

**ii. Georgia’s January 2015 Execution of a Man Whom All Experts Agreed Had Intellectual Disability**

Georgia’s death penalty law – ironically, the first in the country to bar executions of people with intellectual disability – is unique in requiring that defendants at trial must establish their intellectual disability beyond a reasonable doubt. In 2011, the *en banc* Eleventh Circuit rejected Warren Lee Hill’s constitutional attack on this burden of proof.<sup>275</sup>

Long before Hill was executed on January 27, 2015, all the experts in his case agreed he had intellectual disability. Originally, in 2000, Hill’s four experts testified to this but the prosecution’s three experts disagreed. The state court concluded that Hill had shown his intellectual disability “by a preponderance of the evidence” but not “beyond a reasonable doubt.” By February 2013, “all three of the State’s experts” changed their views and testified via sworn affidavits that Hill satisfied all criteria for intellectual disability.<sup>276</sup> But later that year, the Eleventh Circuit held that Hill’s claim was barred by AEDPA. Certiorari was denied.<sup>277</sup> On January 20, 2015, a week before his scheduled execution, the Georgia Supreme Court voted 5-2 to deny Hill’s application for leave to appeal from the

<sup>271</sup> Brief of American Ass’n on Intellectual and Developmental Disabilities as Amicus Curiae Supporting Petitioner at 2, *Wilson v. Thaler*, No. 12-5349 (U.S. 2012), <http://www.yettercoleman.com/wp-content/uploads/2012/08/No-12-5349-Wilson-v-Thaler-Amicus-Brief-of-AAIDD.pdf>.

<sup>272</sup> Blume et al., *supra* note 268, at 414.

<sup>273</sup> 757 F.3d 211, 215, 219 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015).

<sup>274</sup> Ned Resnikoff, *Texas set to execute “intellectually disabled” inmate*, ALJAZEERA AM., Jan. 28, 2015.

<sup>275</sup> *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 2727 (2012).

<sup>276</sup> *In re Hill*, No. 13-10702-P, slip op. at 3-5 (11th Cir. Feb. 19, 2013).

<sup>277</sup> *In re Hill*, 715 F.3d 284 (11th Cir. 2013).

denial of his habeas corpus petition. His later efforts to get a court to consider the merits of his claims all failed.

***c. The Frequent Failure to Consider Serious Mental Disabilities as Mitigating or as a Sufficient Basis for Clemency***

As reflected in discussions above and below, numerous mentally ill people have been executed without their sentencers' considering their mental illness, due to errors or omissions by their counsel. Jurors who are presented with evidence of serious mental illness often do not consider them as mitigating and frequently consider them as aggravating, due to sentencers' implicit biases, compounded by misleading or otherwise inadequate jury instructions (see Subpart d below). Following trial, procedural obstacles or unreasonable burdens often doom efforts by subsequent counsel to seek relief. And serious mental illness is infrequently deemed important in clemency proceedings.

The following are three 2015 examples and a few from other recent years.

On June 9, 2015, Missouri executed Richard Strong, after Governor Jay Nixon denied clemency. Strong suffered from (among other things) PTSD, depression, and schizotypal personality disorder, according to his lawyer.<sup>278</sup>

Three months earlier, Missouri executed Cecil Clayton, on March 17, 2015. He was 74, suffered from dementia, had an IQ of 71, and was missing a significant part of his brain due to an accident. His attorneys asserted that he was not competent to be executed. His brain was injured in 1972 in a sawmill accident. About 20% of his frontal lobe was removed in treating him. The frontal lobe affects impulse control, problem solving, and social behavior. In 1983, psychiatrist Dr. Douglas Stevens said after interviewing Clayton that "[t]here is presently no way that this man could be expected to function in the world of work. Were he pushed to do so he would become a danger both to himself and to others. He has had both suicidal and homicidal impulses, so far controlled, though under pressure they would be expected to exacerbate." In the decade before his execution, six psychiatric evaluations concluded that Clayton should be exempt from execution because he did not understand that he would be executed, or the reasons for his execution.<sup>279</sup>

On January 13, 2015, Georgia executed Andrew Brannan, a decorated Vietnam veteran. His attorneys had asked the Georgia Board of Pardons and Paroles to grant clemency because Brannan had PTSD and bipolar disorder. A police video from the crime scene illustrated Brannan's erratic behavior. Joe Loveland, one of Brannan's attorneys, said, "There was a direct connection between his service in Vietnam and the violence what he was exposed to there and the ultimate events that occurred here. ... The basic question really is, should a 66-year-old Vietnam War veteran with no prior criminal record and who

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<sup>278</sup> Marshall Griffin, *Missouri executes Richard Strong for double murder*, ST. LOUIS PUB. RADIO, June 10, 2015 (with original story).

<sup>279</sup> Timothy Williams, *Missouri Executes Killer Who Had Brain Injury*, N.Y. TIMES, Mar. 17, 2015; Timothy Williams, *Lawyers Seek Reprieve for Killer Who Lost Part of His Brain Decades Earlier*, N.Y. TIMES, Mar. 7, 2015; Tony Rizo, *Missouri lawyers say man on death row is mentally incompetent because of a sawmill accident*, KAN. CITY STAR, Mar 8, 2015.



was 100 percent disabled under the [VA] standards, both with PTSD and bipolar disorder, at the time of the murder ... be executed?"<sup>280</sup>

Missouri executed John Middleton in July 2014 notwithstanding a federal district judge's concerns arising from the facts that he "frequently talks to people who are not there and tells stories that could not have any basis in reality."<sup>281</sup>

The *Texas Tribune's* February 2013 six-part series, *Trouble In Mind*, focused on Texas death row inmate Andre Thomas. He "began exhibiting signs of mental illness as a boy," then in 2004 "committed a brutal triple murder," and while imprisoned became blind after removing his eyes. Reporter Brandi Grissom said this "case offers a lens through which to examine the effects of a mental health system in Texas that is too fractured and too underfunded to care for the mentally ill, ... a system that often punishes the deluded instead of helping them to recover and protecting society from them."<sup>282</sup> The final story said that "[i]n 2009, months after he pulled out his second eye and ate it, the Texas Court of Criminal Appeals denied Thomas' appeal."<sup>283</sup> Judge Cathy Cochran's concurring statement said it was "an extraordinary tragic case," since Thomas "has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia. He also has a long history of drug and alcohol abuse. ... [His] behavior in the months before the killings became increasingly 'bizarre' ... ," and when he twice tried to commit suicide within 20 days before the killings, he was taken but never seen at places where he could be observed or get psychiatric treatment. Judge Cochran concluded by saying, "Applicant is clearly 'crazy,' but he is also 'sane' under Texas law."<sup>284</sup> As of March 2013, his "eyelids [were] surgically closed."<sup>285</sup> He remains on death row.

Oklahoma executed Garry Allen on November 6, 2012. He had been diagnosed with schizophrenia. In 2005, the Board of Pardons and Paroles recommended commutation to LWOP. That same year, an Oklahoma State Penitentiary doctor concluded, after a psychological examination, that Allen had dementia arising from seizures, drug abuse, and being shot in the face. During his execution, he spent his last minutes making "unintelligible ramblings."<sup>286</sup>

Two days later, Rachel Petersen, who witnessed and reported on Allen's execution – the eighth she witnessed, wrote an opinion column. She said: "I watched as . . . one of Allen's attorneys lowered her head in her hands as Allen rambled on unintelligibly about Obama, Romney and Jesus. In fact, Allen said a lot of things in his lengthy ramblings – I just couldn't understand what he was saying . . . . My judgment, my bias, my opinion: Allen had no idea he was about to be executed. . . . And when the deputy warden said 'Let the execution begin,' Allen turned his head and looked at him and said 'Huh? What?' And then

<sup>280</sup> Tristan Smith, *Georgia executes Vietnam veteran who killed a sheriff's deputy*, CNN, Jan. 14, 2015; Quil Lawrence, *Lawyers Try To Fight Death Penalty With New PTSD Understanding*, NPR, Jan. 6, 2015.

<sup>281</sup> Ed Pilkington, *Missouri inmate's execution blocked over mental health concerns*, THE GUARDIAN, July 15, 2014.

<sup>282</sup> Brandi Grissom, *Trouble In Mind*, Part 1, *Andre Thomas: Mental Health, Criminal Justice Collide*, TEX. TRIB., Feb. 20, 2013.

<sup>283</sup> Brandi Grissom, *Trouble in Mind*, Part 6, *Andre Thomas: Questions of Conscience*, TEX. TRIB., Feb. 26, 2013.

<sup>284</sup> *Ex parte Thomas*, No. WR-69,859-01, 2009 WL 693606 (Tex. Crim. App. Mar. 18, 2009) (Cochran, J., concurring).

<sup>285</sup> Grissom, *J* note 280.

<sup>286</sup> Rachel Peterson, *Okla. Death Row Inmate Garry Allen Executed*, MCALESTER NEWS-CAP., Nov. 6, 2012.

when the lethal dose of drugs ran through his body, he looked again at the deputy warden and loudly groaned. I truly believe he didn't know what was happening to him. And now, . . . I am questioning myself. I was a witness, I was there, and I sat quietly taking notes with a pen and paper. I watched an injustice take place before my own eyes and I did nothing. I merely scribbled words on a piece of paper."<sup>287</sup>

**d. *Jurors' Failures to Consider Mitigating Factors as Mitigating Due to Their Implicit Biases, Whose Impact Is Magnified by Inadequate Mitigation Instructions***

**i. *2011 and 2015 Articles on Individual Considerations of, and Simulated Jury Deliberations Regarding, Capital Sentencing***

In a 2011 article, University of California Professors Mona Lynch and Craig Haney discussed an experiment in which "400 jury-eligible, non-student, death-qualified participants" individually viewed a video of a simulated death penalty trial and decided on either death or life without parole. The videos that particular people saw varied. In some, the victim and the defendant were both white; in others, the defendant was white and the victim was black; in yet others, the defendant was black and the victim was white; and in the final variation, both the defendant and the victim were black. All participants were to complete questionnaires about themselves and their decision-making processes.<sup>288</sup>

Those who saw a video with a black defendant "were significantly more likely to sentence him to death, especially" where the victim was white. The participants who least well understood the jury instructions "were the most prone to racial bias." Those with "high comprehension" of the instructions sentenced the black and white defendants in "equal proportions." Overall, the participants "were less willing to give the identical evidence mitigating weight" when the defendant was black than when the defendant was white; and they "were significantly more likely to improperly use *mitigating* evidence in *favor* of a death sentence" when the defendant was black than when the defendant was white.<sup>289</sup>

In a follow-up study, over 500 participants "deliberate[d]" in 100 small group "juries": the deliberations were videotaped and transcribed. The black defendant was more likely to be sentenced to death than the white defendant – but "the race effect was manifested only after deliberation." Again, the extent to which jurors understood the jury instructions had a "significant" impact: those with poor understanding were more likely to be affected by race – both in "the straw vote" and "final vote" of the "juries." The authors said "the evaluation of mitigating evidence was key to the measured race effects." White males seemed to be the "driving force" for these effects. As compared with white women and non-whites, they were far more likely to sentence the defendant to death, "but only when the defendant was Black"; and they alone accounted for the entire race effect – apparently due to their reactions to what was presented as mitigating evidence. Moreover, the more white men there were on a "jury," the higher the death-sentencing of a black defendant, with white "jurors" becoming even more "disproportionately influential." The authors concluded that "capital cases that involve Black defendants, particularly when the victims

<sup>287</sup> Rachel Petersen, Editorial, *A heartbreaking day – Execution Day*, MCALESTER NEWS-CAP., Nov. 8, 2012.

<sup>288</sup> Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573.

<sup>289</sup> *Id.* at 583-84 (emphasis added).

are White, and where a concentration of White men serve on the juries, are especially prone to racially-biased outcomes.”<sup>290</sup>

In a 2015 article, Lynch and Haney used the transcribed and videotaped deliberations to examine “the group-level decision-making *processes*, focusing especially on how judgment, emotion, and demographic dynamics interact in sentencing deliberations.” They concluded that the simulated deliberations apparently were “infused with emotion, which in many instances was strongly expressed. Emotional responses helped shape the content and outcome of the deliberations and were tightly interwoven with the ‘cognitive’ aspects of the decision-making task. Emotions were used to give meaning to the defendant’s life and deeds, which led directly to judgments about the appropriate sentence.”<sup>291</sup>

The authors further concluded that there was “an asymmetry”:

Pro-life jurors, in particular, appeared to have more difficulty expressing and using emotions than their pro-death counterparts. Expressions of mitigating emotional reactions, emotions that seemed to convey sympathy or empathy for the defendant, or were expressed in order to advance life rather than death verdicts appeared to have less built-in legitimacy, seemed more difficult to simply and forcefully convey, were regarded with more skepticism by other jurors, and appeared to be easier for others to dismiss outright. Pro-life jurors typically voiced their mitigating emotions and empathic responses more cautiously and, in some cases, almost apologetically. Making an emotionally rich and empathic but nonetheless logical and coherent argument was generally a necessary but not sufficient condition to persuade the others to vote for a life sentence. Those who were successful in doing so often acknowledged the legitimacy of the pro-death position first, including any angry feelings or emotions that the pro-death jurors likely felt (which the pro-life jurors often conceded they felt as well). [In contrast,] negative emotional reactions to the case facts and defendant were not only much easier to voice but were simply treated as legitimate and ‘natural,’ even when used to support very extreme pro-death (sometimes even racist) positions. They rarely were met with much critical reaction or scrutiny by others, did not require any real ‘explanation,’ and almost never faced delegitimization as out of place or inappropriate in the decision-making process.”<sup>292</sup>

The authors found that the overall effect was to change “the tenor of the deliberations,” such “that group discussions appeared to move participants more in the direction of death verdicts overall, especially” where the defendant was black. About three-fourths of those who changed their vote during deliberations changed from “life to death [sometimes silently] ... . The deliberations seemed to confirm that a death verdict served in some sense as an emotionally laden default judgment; a life verdict needed to be justified more explicitly, on both logical and emotional grounds.”

Lynch and Haney also found that:

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<sup>290</sup> *Id.* at 584-86.

<sup>291</sup> Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 L. & SOC. INQUIRY 377, 378, 401 (2015).

<sup>292</sup> *Id.* at 401.

[T]he role of emotion, both as something that affected jurors' judgments and as a tool used to persuade others, was by no means race neutral. The quantitative data from this study indicated that the same sympathetic life history testimony was given less mitigating significance when it was offered on behalf of a black defendant. Here, we found that the black defendant was less likely to have a spokesperson on the jury to mount a coherent and compelling argument in support of a life sentence. This was especially true for juries dominated by high concentrations of white men. Part of the problem was the gendering of the narrative space, such that the male 'authority figures' asserted their views with more certainty and conviction than did the women. Many of the men were prone to interrupting women, telling them how they should think about the case . . . . [T]he men-as-authorities used declarative language, asserted opinions as facts and knowledge, and seemed more comfortable directing others to their desired outcomes.

In sum, emotion "appeared to be inseparable from the critically important judgments that capital jurors were called on to make. As such, emotion was interwoven into the narratives constructed by and debated among the group members about the defendant and the crime." The outcome "was negotiated through emotional claims as much as through factual ones."<sup>293</sup>

Accordingly, "to the extent that anger and contempt toward the defendant are legitimized and regarded as 'natural' from the very outset of the deliberations, capital defense attorneys face a daunting task. They not only must provide a coherent mitigating narrative but also somehow neutralize enough of the anger and contempt generated toward the defendant to allow other emotions to be expressed and to play a role in the deliberation and decision-making process. This requires that jurors be provided a legitimate and defensible counternarrative that allows them to empathize with and feel aspects of the defendant's plight, maintain these feelings during the deliberation, and explain them to their more skeptical and dismissive peers. Otherwise, [jury instructions] that life is and should be considered the default sentence in a capital penalty phase will ring hollow."

The authors said the simulated deliberations provide evidence of "the apparent intractability of racism in capital decision making," suggesting that "racial bias can operate emotionally as well as cognitively. In fact, a superficial visual stimulus that revealed the defendant's (and his family's) race activated complex processes that shaped the way jurors felt about the defendant's life and his crime. The same narrative information not only meant something different, but created diverse emotional reactions in people, simply as a function of the defendant's race. This process operated differently for various jurors, especially as a function of their own race and gender."

The authors' findings are consistent "with those obtained by a number of other researchers from interviews conducted with former capital jurors and archival analyses of capital jury verdicts." The authors concluded that, "among other things ... ensuring

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<sup>293</sup> *Id.* at 402.

demographically diverse juries is a fundamental necessity in the effort to mitigate racial disparities in death sentencing.”<sup>294</sup>

**ii. *Experimental Study of Jurors’ Implicit Biases, from 2014***

Justin D. Levinson, Robert J. Smith and Danielle M. Young’s “experimental study,” published in 2014, addressed the extent to which “implicit bias” affects people eligible to sit on capital juries in Alabama, Arizona, California, Florida, Oklahoma, and Texas. “Implicit bias refers to the automatic attitudes and stereotypes that appear in individuals.”<sup>295</sup> Their findings included these: (1) “jury-eligible citizens implicitly associate Whites with ‘worth’ and Blacks with ‘worthless’”; (2) the process of “death qualification” (which excludes those who would never vote for the death penalty and is supposed to exclude jurors who would always vote for the death penalty) exacerbates the impact of implicit and self-reported biases, primarily by disproportionately excluding minority group jurors; (3) “explicit bias matters too” in capital cases, and “predicts race-of-victim effects”; (4) “race-of-defendant effects” are predicted “by implicit racial bias” and may be attributable to an unintentional decrease in receptivity to mitigation evidence proffered by a Black defendant” and (5) “[a]t least at an implicit level, we value White lives more than Black lives, and we thus seek to punish those individuals who have destroyed those whom we value more.”<sup>296</sup>

**iii. *Jurors’ Misunderstandings About Mitigation***

In a 2014 article, John Robert Barner of the University of Georgia analyzed interviews of 36 jurors who had sat in capital cases in a variety of states, and the jury instructions they had been given. They had been interviewed for three to four hours each, in open-ended questioning by the Capital Jury Project. It had also collected the jury instructions. Barner’s analysis showed “failures to achieve ... fairness and procedural integrity or to allow for full and equal consideration of mitigating and aggravating factors.” In particular, juror interviews “seemed to indicate that by the time of sentencing deliberations,” jurors “either thought they could not access mitigating evidence, or were barred [when seeking] procedural clarification.”<sup>297</sup>

**e. *Failure to Adopt Policies Regarding Mental Illness Advocated by Three Leading Professional Organizations***

**i. *The Policies These Groups Advocate***

The American Bar Association, the American Psychiatric Association, and the American Psychological Association all have adopted three policies concerning mental disability and capital punishment.<sup>298</sup> The first would implement *Atkins* in a manner comporting with the positions of the AAIDD and the American Psychiatric Association. It

<sup>294</sup> *Id.* at 403 (citations omitted).

<sup>295</sup> Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 518 (2014).

<sup>296</sup> *Id.* at 564, 567, 571, and 573.

<sup>297</sup> John Robert Barner, *Life or death decision making: Qualitative analysis of death penalty jurors*, 13 QUALITATIVE SOC. WORK 842, 846, 855, 854 (2014).

<sup>298</sup> See *Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006).

would also exempt from execution anyone with dementia or traumatic injury at the time of the crime. These disabilities have very similar impacts as intellectual disability but may not come within its definition since they always (dementia) or usually (head injury) arise after age 18.

The second policy would prohibit executing someone with severe mental disability where demonstrated impairment of mental and emotional functioning at the time of the offense make execution disproportionate to his culpability.<sup>299</sup>

The third policy deals with a death-sentenced prisoner: (a) whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly impaired by a mental disorder or disability, (b) whose mental illness impairs his ability to assist counsel or otherwise take part meaningfully in postconviction proceedings regarding one or more specific issues on which his participation is necessary, or (c) whose understanding of the nature and purpose of the punishment is so impaired as to render him incompetent for execution.<sup>300</sup> Contrary to the second part of the third policy, the Supreme Court held in 2013 that if a death row inmate’s mental inability to help his counsel is likely to continue *indefinitely*, his execution should not be stayed – even if there are one or more issues on which the inmate’s help would be important to his counsel.<sup>301</sup>

**ii. *Growing Support for Excluding from the Death Penalty People Severely Mentally Ill at the Time of Their Capital Crimes***

There has been increased support in recent years for the second policy of the three leading professional organizations. Most significantly, in 2014, the final report of the Ohio’s Joint Task Force to Review the Administration of Ohio’s Death Penalty proposed excluding from death penalty eligibility people who had a diagnosable “serious mental illness” at the time of the crime.<sup>302</sup>

**iii. *Breakdown of Legal System in Dealing with Issue of Competency To Be Executed: Judge Gregory M. Sleet’s Discussion of Shannon Johnson’s Case***

United States District Judge Gregory M. Sleet of the District of Delaware (Chief Judge at the time of the events related here) wrote an article published in the Summer 2015 issue of *Criminal Justice* about “the impediments that precluded a federal court, or any court, from meaningfully assessing the constitutionality of a” proceeding about a death row inmate’s competency to be executed. After trying to deal fairly with Shannon Johnson’s competency to be executed in 2012, Judge Sleet found that “the process is broken.” He had issued a stay to give him sufficient time to deal fairly with a next-friend petition filed by Johnson’s sister. But the Third Circuit vacated the stay, emphasizing that Johnson wanted

<sup>299</sup> For detailed discussion of the first and second paragraphs, see *id.* and Christopher Slobogin, *Mental Disorder As an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005).

<sup>300</sup> For detailed discussion of the third paragraph, see *Recommendations and Report*, *supra* note 298, and Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

<sup>301</sup> *Ryan v. Gonzales*, 133 S. Ct. 696, 708-09 (2013).

<sup>302</sup> FINAL REPORT & RECOMMENDATIONS, *supra* note 55, at 6.

his execution to proceed and that “nothing we have reviewed so far suggest to us that [the sister] will be able to meet that burden.” However, Judge Sleet’s article points out, “Notably absent from the Third Circuit’s decision ... was any discussion of the primary argument advanced in the next friend petition – that the state court competency proceeding was arguably nonadversarial and, therefore, constitutionally infirm.” Judge Sleet reinstating a stay, which the Third Circuit quickly vacated. After two speedily rejected final efforts by the sister, Johnson was executed.<sup>303</sup>

Judge Sleet and his staff believed then and still believe that the “next friend petition raised serious doubts about the constitutionality of the competency hearing and Johnson’s competency – doubts that the court was precluded from examining.” In his 39 years of legal practice, including four years as the U.S. Attorney for Delaware and 17 years as a federal district judge, “the Johnson case, and its result, is by far the most troubling [Sleet] ha[s] encountered [due to] ... the unnecessary haste to execute Johnson before his execution certificate expired,” which “sacrificed,” or, at minimum, “undermined,” “the judiciary’s fundamental role of ensuring due process.” Judge Sleet is most troubled by “the lack of fail-safes in our death penalty process that could allow a potentially incompetent individual to waive appeals and be adjudged competent in a nonadversarial proceeding without a single reviewing court examining the constitutionality of that proceeding.”<sup>304</sup>

The initial problem, in his view, is that every party in the state competency hearing agreed Johnson was competent, and the appointed amicus counsel “was prevented from effectively presenting an adverse position.” The Third Circuit held the state determination was entitled to deference, whereas Judge Sleet says deference was unwarranted because the state fact-finding proceedings were constitutionally flawed. The Third Circuit referred to the constitutional flaw point as a “side issue.”<sup>305</sup>

Judge Sleet’s second major concern is that the state court-appointed amicus counsel and her experts never got to meet with Johnson. This led the State to challenge one expert’s conclusion that Johnson was incompetent – on the ground that the expert had not personally met with Johnson, whereas the State’s expert had met with Johnson for 18 hours. After “facilitating” the amicus’ experts’ inability to meet with Johnson, the state court judge, in finding Johnson competent, “discredited [amicus counsel’s] experts because they did not meet with Johnson.”

Judge Sleet seriously doubts the amicus counsel “was able to serve [her presumable] role effectively, if at all.” She could not even tell Johnson about his potential claims of ineffective assistance of counsel. She “ultimately believed [her] position was relegated to ‘window dressing.’” And she was not permitted to appeal to the Delaware Supreme Court – so there was no appellate review.<sup>306</sup>

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<sup>303</sup> Gregory M. Sleet, *The Execution of Shannon Johnson: A Subversion of Due Process and the Adversarial System?*, CRIM. JUST., Summer 2015, at 9, 10, and 12.

<sup>304</sup> *Id.* at 13.

<sup>305</sup> *Id.* at 14.

<sup>306</sup> *Id.* at 15.

***f. Clemency Proceedings Theoretically Might Be, but Usually Are Not, Fail-safes to Permit Consideration of Facts and Equitable Arguments That Are Barred from or Fail in Courts***

***i. Denials Are the Norm***

Clemency proceedings could be fail-safes to permit consideration of facts and equitable arguments whose consideration by the courts is barred by the AEDPA and other legal hurdles. But clemency proceedings have become far less likely to be fail-safes in recent decades than in the pre-1972 incarnation of capital punishment. The death penalty became considerably more politicized since it re-emerged in the mid-1970s, making it far more difficult to secure clemency than before – as reflected in intellectual disability and mental illness cases discussed above.

Former Ohio Governor Bob Taft stated in a December 29, 2014 op-ed that before taking office he had not considered much the Governor’s key role on capital clemency requests. But during the execution of a death row inmate who had waived appeals and sought execution, “it suddenly struck me” and “I felt somehow complicit in a dire and irrevocable act.” Thereafter, he “was never really comfortable with this responsibility,” although he granted capital clemency only once. Now, “[c]onsidering the cases that came to me and developments after I left office in 2007, I believe the days of the death penalty may be numbered, in Ohio and across the country.” Noting problems in the execution process, lack of consistency among Ohio’s counties, the years and great cost involved, and the fact that since life without parole became an option in 1996 Ohio prosecutors had sought the death penalty much less often, Taft concluded: “It may be time to ask the question whether the death penalty in Ohio is a ‘dead man walking.’”<sup>307</sup>

***ii. Usual Failures of Innocence-Based Efforts***

One of the few contexts in which some death row inmates have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt. Yet, even where such doubt should exist, governors, pardons and paroles boards, and other clemency bodies usually deny relief (as reflected in several cases discussed above in Part I.B.4). In doing so, they often cite the number of times the inmate unsuccessfully attempted to get relief in the courts. These recitations almost never mention that the courts either completely failed to consider the new evidence bearing on guilt/innocence, or considered the evidence under such an extraordinarily difficult standard that only a conclusive DNA exclusion or other 100% proof of innocence might lead to relief.

***iii. Rare Clemency Grants Based on Severe Mental Illness or Other Mitigating***

Ohio Governor John Kasich, a conservative Republican, sometimes has used his clemency power in cases not involving strong evidence of factual innocence – although not for Brooks or Slagle (see above and below). He has granted clemency on the basis of “limited mental capacity,” being abused as a child, and inadequate defense counsel performance, as well as doubts about guilt. He has been referred to as “a nationwide leader in death-row

<sup>307</sup> Bob Taft, Opinion, *No going back*, UNIV. DAYTON MAG., Dec. 29, 2014.



clemencies.”<sup>308</sup> Governor Kasich easily won re-nomination and re-election in 2014. So, granting clemency where other governors would not do so has not caused Kasich the adverse political consequences that so many public officials who deny clemency seem to fear.

In a rare action, the Georgia Board of Pardons and Paroles commuted Tommy Lee Waldrip’s sentence to life without parole on July 9, 2014, just 26 hours before his scheduled execution. One possible reason was that although Waldrip, his son, and his brother were all convicted of a 1991 murder, prosecutors did not seek the death sentence against his brother and the jury did not return a death verdict against his son – the triggerman who fired buckshot into Keith Evans’ face and then used a blackjack to beat Evans to death. Waldrip’s son was sentenced to life with possibility of parole and has been parole-eligible since 1998.<sup>309</sup>

#### *iv. Potential Equitable Argument for Clemency*

Life without parole was not an available alternative to the death penalty for capital murder at the time of the trials of many people now coming up for execution. If it had been, it is likely that many would have received life without parole, and that in some cases death would not even have been sought.

Interviews of actual jurors by the Capital Jury Project have revealed that many voted for capital punishment for defendants they did not believe should be executed. They did so because they incorrectly thought the alternative was parole eligibility in as little as seven years. Now that life without parole is – and is believed by many jurors to be – an alternative in which there is no chance of parole, many juries have voted for life without parole instead of the death penalty. This likely happens most often when jurors have lingering doubt about guilt, or believe the defendant should be severely punished but not executed. Moreover, as discussed early in this chapter, a major reason that far fewer death sentences are now being *sought* than in the past is that there is far greater awareness that life without possibility of parole really exists and really means “without possibility of parole.”

The fact that life without parole is now, but was not at the time of trial, understood to be an available alternative to the death penalty is one of many reasons to believe that if many death row inmates’ cases had arisen in recent years, they would not have received the death sentence. Yet, this is typically not considered in clemency proceedings.

It *was* considered by Cuyahoga County Chief Prosecutor Timothy McGinty, who wrote the Ohio Parole Board in 2013 to ask it to recommend a form of clemency changing Billy Slagle’s death sentence to LWOP.<sup>310</sup> McGinty pointed to changes in Ohio law and in how he and his team now assess potential death penalty cases. He said these changes “would likely have led a jury to recommend a sentence of life without the possibility of parole had that been an option,” which in 1988 it was not. On July 16, 2013, the Parole

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<sup>308</sup> Jeremy Pelzer, *Gov. John Kasich has been a nationwide leader in death-row clemencies*, CLEV. PLAIN DEALER, June 30, 2014.

<sup>309</sup> Rhonda Cook, *Waldrip’s death sentence commuted to life without parole*, ATLANTA J.-CONST., July 9, 2014.

<sup>310</sup> Robert Higgs, *Parole board recommends against clemency for murderer, despite urgings of Cuyahoga prosecutor*, CLEV. PLAIN DEALER, July 16, 2013.

Board voted 6-4 not to recommend clemency. Governor Kasich denied clemency. Mr. Slagle was found hanged in his cell on August 3, 2013, three days before his scheduled execution. He was unaware of a recent revelation that the prosecutor's office had been prepared to enter into a plea deal in 1988 that would have averted imposition of the death penalty.<sup>311</sup>

A particular example of the impact of LWOP's being a recognized sentencing alternative in Georgia is Brian G. Nichols' case. He was convicted of murdering four government employees, including a judge and a court reporter killed in a courtroom. No one doubted his guilt. After a highly contested, extremely costly trial in 2008, he was sentenced to multiple life sentences without parole.<sup>312</sup>

The Supreme Court has repeatedly limited the categories of cases in which capital punishment may be implemented by reference to "evolving standards of decency." It seems utterly at odds with today's standards of decency, and with actual prosecutorial and juror practices, plus improved performance by defense counsel in many jurisdictions, to execute a person for whom death most likely would *not* be sought or even less likely would be imposed if the exact same case were to arise today. A considerable majority of those now being executed most likely would not be sentenced to death if charged with the same crimes today.

7. ***Problems of the Capital Punishment System (Beyond Those Already Discussed) Illustrated by Innocence Cases***
  - a. ***Extraordinarily High Burden on a Death Row Inmate to Disprove Guilt or Prove Ineligibility for the Death Penalty, if Evidence Emerges Belatedly***

One systemic factor involves situations in which a death row inmate receives inadequate representation from trial lawyers who do not raise available attacks on the evidence purporting to show guilt, and/or the trial prosecution presents questionable evidence or withholds from the defense evidence that might cast doubt on guilt. Ordinarily, such issues would be raised first in the initial state postconviction proceeding. Federal constitutional issues raised unsuccessfully in that proceeding may be raised in federal habeas corpus, although AEDPA has made it far more difficult to grant relief on meritorious constitutional claims.<sup>313</sup>

Where evidence casting doubt on the constitutionality of a conviction emerges only *after* the initial state postconviction proceeding has concluded, it is extraordinarily difficult to get the newly uncovered evidence considered *by any court* on its merits. This is so for two reasons: most states have laws severely limiting what can be presented in a second or subsequent state postconviction proceeding; and there are extremely difficult barriers to what can be presented, and a contorted legal standard for granting relief, in second or later federal habeas proceedings.

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<sup>311</sup> Alan Johnson, *Death-row inmate who killed self didn't know of new hope*, COLUMBUS DISPATCH, Aug. 6, 2013.

<sup>312</sup> Associated Press, *Multiple Life Terms for Courthouse Killings in Atlanta*, Dec. 13, 2008.

<sup>313</sup> Pub. L. No. 104-132, 110 Stat. 1214.

Even when the newly developed evidence creates a real question about the defendant's guilt, the federal courts' doors are usually effectively closed to second or later habeas proceedings. AEDPA has a very narrow exception, involving situations in which the factual basis for a federal constitutional claim could not have been discovered before through due diligence *and* the facts on which the claim is based, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."<sup>314</sup> And when the issue is whether constitutional prerequisites to imposing the death penalty all exist, the appellate rulings to date hold that even meeting the daunting AEDPA standard is of no avail.

When it is impossible either to satisfy that provision of AEDPA or a court finds the provision inapplicable, a prisoner may attempt to secure relief by filing a petition to the Supreme Court for an original writ of habeas corpus. That is far more difficult – as in *Davis*, where the Court required "evidence that could not have been obtained at the time of trial [to] clearly establish[] ... innocence."<sup>315</sup> That standard could virtually never be met. Undoubtedly, many people who would not have been convicted if the new evidence had been presented at trial will not be able "clearly" to prove their innocence via evidence that could not have been secured at the time of trial. It is unclear whether the Court would ever apply even this high standard to a claim of "innocence of the death penalty" – such as if evidence that could not have been obtained for trial clearly establishes intellectual disability.

## 8. *Costs of the Capital Punishment System*

The costs of the death penalty system have been playing an increasing role in discourse on capital punishment. The following summarizes some recent studies.

The results of a "rigorous" seven-month Seattle University empirical analysis of Washington State's capital punishment system were released in January 2015. After analyzing 147 aggravated first degree-murder cases filed in the state since 1997, four professors determined that a death penalty prosecution and conviction costs slightly more than \$3 million per case, whereas not attempting to get death and securing a life sentence costs about \$2 million per case.<sup>316</sup>

In November 2014, Nevada's Legislative Auditor released the results of its study – commissioned by the state legislature – into the average costs of murder cases where the death penalty was sought vis-à-vis the average costs of murder cases where it was not sought. The Legislative Auditor determined that the average cost of a tried death penalty case was \$1.03 to \$1.3 million, compared to an average cost of \$775,000 where death was not sought. The Legislative Auditor pointed out that the extra expenses of death penalty trials that did not end up in a death sentence were incurred anyway, and that such cases averaged a cost of \$1.2 million. The study omitted some court and prosecution costs that could not be secured, and thus "understated" its cost estimates.<sup>317</sup>

<sup>314</sup> 28 U.S.C. § 2244(b)(2)(B)(ii).

<sup>315</sup> *In re Davis*, 130 S. Ct. 1, 1 (2009) (mem.).

<sup>316</sup> Jennifer Sullivan, *Seeking death penalty adds \$1M to prosecution cost, study says*, SEATTLE TIMES, Jan. 7, 2015.

<sup>317</sup> STATE OF NEVADA, PERFORMANCE AUDIT: FISCAL COSTS OF THE DEATH PENALTY, 2014, at 11, 12 (2014); Colton Lochhead, *Audit: Death penalty nearly doubles cost of Nevada murder cases*, LAS VEGAS REV.-J., Dec. 2, 2014.

In March 2014, the Idaho Legislature’s Office of Performance Evaluations issued, at legislators’ request, an analysis of the relative costs of sentencing defendants to death vis-à-vis sentencing them to life in prison. Although “[m]ajor limitations in available cost data [precluded] ... quantifying the total financial cost of the death penalty,” the evaluations office “found other ways to provide ... meaningful information.” The analysis concluded that “[s]imply having death as a sentencing option costs money” and that cases where the death penalty is sought take longer to finish than cases where it is not sought. These results were consistent with every national and other state study the Office reviewed. The report said, “Even though every study has its own limitations, the studies we reviewed found that capital cases are more expensive than noncapital cases.”<sup>318</sup>

### 9. *Lack of Substantial Evidence of Deterrence*

In April 2012, the National Research Council, associated with the National Academy of Sciences, issued a report by its Committee on Deterrence and the Death Penalty. It said, “[R]esearch to date is not informative about whether capital punishment decreases, increases, or has an effect on homicide rates. Therefore, these studies should not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Claims that research demonstrates that capital punishment decreases or increases the homicide rate or has no effect on it should not influence policy judgments about capital punishment.”<sup>319</sup>

On March 4, 2015, Ivan Šimonović, UN Assistant Secretary-General for Human Rights, told the UN Human Rights Council “there is no evidence that the death penalty deters any crime.”<sup>320</sup> In an August 2015 *Newsweek* op-ed, Stanford Law Professor John Donohue said there is “not the slightest credible statistical evidence that capital punishment reduces” the murder rate. He cited comparisons between different states and different countries, the 2012 National Academy of Sciences study, and the extreme unlikelihood that a tiny “chance of execution many years after committing a crime will influence the behavior of a sociopathic deviant who would ... be willing to kill if his only penalty were life imprisonment.”<sup>321</sup>

## II. SIGNIFICANT LEGAL DEVELOPMENTS

### A. *Hall v. Florida*, 134 S. Ct. 1986 (2014)

In a 5-4 decision, the Court held that Florida unconstitutionally “create[d] an unacceptable risk that persons with intellectually disability will be executed” by foreclosing an intellectual disability determination “[i]f from test scores, a person is deemed to have an

<sup>318</sup> OFFICE OF PERFORMANCE EVALUATIONS, IDAHO LEGISLATURE, FINANCIAL COSTS OF THE DEATH PENALTY, at iii, v-vi (2014).

<sup>319</sup> COMM. ON LAW & JUSTICE OF THE DIV. OF BEHAVIORAL & SOCIAL SCIENCES & EDUC., REPORT BRIEF, at 2 (2012) (based on COMM. ON DETERRENCE & THE DEATH PENALTY, DETERRENCE AND THE DEATH PENALTY (2012)), [http://sites.nationalacademies.org/dbasse/claj/deterrence\\_and\\_death\\_penalty/](http://sites.nationalacademies.org/dbasse/claj/deterrence_and_death_penalty/) (follow “Report Brief” hyperlink).

<sup>320</sup> ‘No evidence death penalty deters any crime,’ senior UN official tells rights council, UN NEWS CTR., Mar. 4, 2015, <http://www.un.org/apps/news/story.asp?NewsID=50238#.VsFZNtIo6y4>.

<sup>321</sup> John Donohue, Opinion, *Does the Death Penalty Deter Killers?*, NEWSWEEK, Aug. 19, 2015.

IQ above 70.” Before considering “its own” judgment, the Court first took “essential instruction” from what other States had done and the Court’s precedents. The Court said its key precedent, *Atkins*, had a “fundamental premise” based on “clinical definitions of intellectual disability”: “IQ scores represent a range, not a fixed number, ... [a]nd those clinic definitions have long included the [Standard Error of Measurement (‘SEM’)].” Each “test’s SEM is a statistical fact, a reflection of the inherent imprecision of the test itself.” Someone’s IQ score on a particular administration of a test may vary for many reasons, including “the test-taker’s health; practice from earlier tests; the environment or location of the test; the examiner’s demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.”<sup>322</sup>

Florida’s rigid cutoff of an IQ of 70 was, the Court said, not only inconsistent with *Atkins*. It was inconsistent with the practices of most States, with the “vast majority” rejecting “the strict 70 cutoff,” and a “significant majority” considering the SEM, with a “consistency in the trend” towards considering it.<sup>323</sup>

The Court then exercised its independent judgment. In doing so, it considered, much to the dissenters’ dismay, “the views of medical [experts]” – particularly “the medical community’s diagnostic framework.” The Court said, “[T]he professional community’s teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.” The Court agreed with the American Psychiatric Association that in ignoring the SEM and using a strict IQ cutoff of 70, Florida “goes against the unanimous professional consensus.” The Court said its “independent assessment [was] that an individual with an IQ test score ‘between 70 and 75 or lower,’ may show intellectual disability by presenting additional evidence regarding intellectual functioning.”<sup>324</sup> As discussed earlier in the opinion, the additional evidence that most clinicians would consider in such circumstances would include “the defendant’s failure or inability to adapt to his social and cultural environment,” as indicated by “medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.”<sup>325</sup>

### **B. *Jennings v. Stephens*, 135 S. Ct. 793 (2015)**

A death row inmate sought federal habeas relief based on three theories of ineffective assistance of counsel, and won in district court on two of them. When the State appealed, he argued all three theories without cross-appealing or getting a “certificate of appealability.” The Fifth Circuit reversed his victory on two theories and held it lacked jurisdiction on the third – “[i]mplicitly concluding that raising this argument required taking a cross-appeal” and a certificate of appealability.<sup>326</sup>

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<sup>322</sup> *Hall v. Florida*, 134 S. Ct. 1986, 1990, 1995, and 1999 (2014).

<sup>323</sup> *Id.* at 1998.

<sup>324</sup> *Id.* at 2000. The dissent, written by Justice Alito, attacked the Court’s reliance on “positions adopted by private professional associations” – views that have changed over time and were not, the dissent said, consistent as to the extent of an SEM adjustment. It accused the Court of relying on “the evolving standards of professional societies.” *Id.* at 2002 (Alito, J., dissenting).

<sup>325</sup> *Id.* at 1994 (majority opinion).

<sup>326</sup> *Jennings v. Stephens*, 135 S. Ct. 793, 796, and 798 (2015).

The Court reversed, 6-3. The majority opinion said the rules permitting an appellee who does not cross-appeal to defend a decree on the basis of anything in the record – even a basis attacking the lower courts’ reasoning – “are familiar, though this case shows that familiarity and clarity do not go hand-in-hand.”<sup>327</sup>

**C. *Christeson v. Roper*, 135 S. Ct. 891 (2015) (*per curiam*)**

In a 7-2 *per curiam* decision, the Court held the lower federal courts erred in denying a death row inmate’s request that new counsel be permitted to argue that his existing counsel’s egregious failures justified equitable tolling of the statute of limitations. Mark Christeson’s appointed habeas counsel filed his federal habeas petition 117 days after the statute of limitations cut-off, and admittedly did not even meet with him (or apparently otherwise communicate with him) until over six weeks after the deadline. The counsel who sought to be substituted in wished to seek relief under Federal Rule of Civil Procedure 60(b) – a motion necessarily “premised on [existing counsel’s] malfeasance in failing to file timely the habeas petition.” The federal district court disallowed the substitution.<sup>328</sup>

The Court held that the district court had failed to “adequately account for all of the factors” regarding the “interests of justice” standard articulated in *Martel v. Clair*.<sup>329</sup> Its main error was its refusal to recognize the existing counsel’s glaring conflict of interest – in that the type of tolling being sought was available only where there was “serious ... attorney misconduct.” In the district court, the existing counsel called the possible equitable tolling arguments “ludicrous” and defended their conduct. Their “contentions ... were directly and concededly contrary to their client’s interest, and manifestly served their own professional and reputational interests.” After rejecting the district court’s other rationales, the Court said it was not “plain that any ... motion that substitute counsel might file ... would be futile ... [despite] a host of procedural obstacles.” It said Christeson should have the chance to show that the statute of limitations should have been tolled, and held that he “is entitled to the assistance of substitute counsel in doing so.”<sup>330</sup>

**D. *Davis v. Ayala*, 135 S. Ct. 2187 (2015)**

Assuming for purposes of its decision that there had been a federal constitutional violation under *Batson*, the Court, applying the harsh harmless error standard of *Brecht v. Abrahamson*,<sup>331</sup> held that Ayala had not shown actual prejudice. Given the Court’s view that the California Supreme Court had decided the harmless error issue on the merits, the Court said that under AEDPA “Ayala ... must show that the state court’s decision to reject his claim ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’”<sup>332</sup> It held that even though “[t]he pattern of peremptory challenges in this case was sufficient to raise suspicions about the prosecution’s motives and to call for the prosecution to explain its strikes,” the harmless error/AEDPA standard was not met. It stressed in doing so that “the

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<sup>327</sup> *Id.* at 798.

<sup>328</sup> *Christeson v. Roper*, 135 S. Ct. 891, 892-93 (2015) (*per curiam*).

<sup>329</sup> 132 S. Ct. 1276 (2012).

<sup>330</sup> *Christeson*, 135 S. Ct. at 894-96 (citations omitted).

<sup>331</sup> 507 U.S. 619 (1993).

<sup>332</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight.”<sup>333</sup>

Justice Kennedy, while joining completely in the Court’s opinion, wrote a concurrence to express great concern that Ayala had spent “[y]ears on end” in almost complete solitary confinement. Justice Thomas wrote a separate concurrence to express complete disagreement with Justice Kennedy on this point.<sup>334</sup>

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented, stressing that the prosecution had struck every black and Hispanic prospective juror, and that Ayala’s counsel had been excluded from some of the hearings concerning that issue. The dissent said this exclusion prevented Ayala, at the hearing and on appeal, from presenting the other side of the story – a problem aggravated by the loss of juror questionnaires. The key to the dissent was that the majority failed to recognize that Ayala had made a “procedural” *Batson* claim.<sup>335</sup>

**E. *Brumfield v. Cain*, 135 S. Ct. 2269 (2015)**

In a case decided 5-4, the Court held that even under AEDPA’s deference standard, the Louisiana courts had made “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”<sup>336</sup> They prevented Brumfield – whose trial occurred prior to *Atkins* – from having an evidentiary hearing at which he could present evidence in light of *Atkins* after getting funding to enable him to present such evidence.

In the majority opinion, Justice Sotomayor stated that in light of the standard error of measurement, Brumfield’s already-introduced IQ score “of 75 was squarely in the range of potentially intellectual disability.” She added that a screening test to which the State pointed had not included an IQ score and could not reasonably be used to preclude an evidentiary hearing. She also pointed to testimony “sufficient to raise a doubt” regarding whether Brumfield met Louisiana’s criteria for adaptive behavior deficits. The Court said, “An individual who points to evidence that he was at risk of ‘neurological trauma’ at birth, was diagnosed with a learning disability and placed in special education classes, was committed to mental health facilities and given power medication, reads at a fourth-grade level, and simply cannot ‘process information,’ has raised substantial reason to believe that he suffers from adaptive impairments” – even if he also has anti-social personality disorder. Finally, the Court stressed that the Louisiana courts should have considered the fact that “the evidence before it was sought and introduced at a time when Brumfield’s intellectual disability was not at issue.”<sup>337</sup>

**F. *Glossip v. Gross*, 135 S. Ct. 2726 (2015)**

The merits decision and the opinions about the possible unconstitutionality of capital punishment have been discussed above in Parts I.A.8.d and I.A.9.a.

<sup>333</sup> *Id.* at 2208.

<sup>334</sup> *Id.* at 2210 (Kennedy, J., concurring); *id.* (Thomas, J., concurring).

<sup>335</sup> *Id.* at 2210-11, 2216 (Sotomayor, J., dissenting).

<sup>336</sup> *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015) (quoting 28 U.S.C. § 2254(d)(2)).

<sup>337</sup> *Id.* at 2278, 2281-82.

**G. *Hurst v. Florida*, 136 S. Ct. 616 (2016)**

The Court held that Florida’s capital punishment system was unconstitutional because a judge, not the jury, was required to make the factual finding that made the defendant eligible for imposition of capital punishment. The jury had not made even an advisory finding that any one particular aggravating factor existed. Presented with two aggravating factors, it simply recommended, by a 7-5 vote, that the penalty that should be imposed was death. The judge, in contrast, specifically decided that both aggravating factors existed.<sup>338</sup>

The Court’s opinion, written on seven justices’ behalf by Justice Sotomayor, said that the constitutional infirmity with Florida’s system was the same as in the Arizona system held unconstitutional in *Ring v. Arizona*.<sup>339</sup> As the Court had first pointed out 26 years earlier, the jury under the Florida system “does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances.” Under the Florida system, the *Hurst* Court stressed, “The trial court *alone* must find ‘the facts ... [t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’”<sup>340</sup> Accordingly, at least 26 years after it really should have done so, and 14 years after it surely should have done so, the Court finally overruled its holdings that the Florida death penalty system was constitutional in the aspect involved here.

How many people have been executed or may yet be executed on the basis of those now-overruled holdings is not easily determined. But one thing is sure: there is a significant number of such people.

The Court remanded the case to enable the Florida courts to determine whether the constitutional error here “is harmless.”<sup>341</sup>

Justice Breyer concurred because of his disagreement with the Court’s failure – as in *Ring* – to hold it unconstitutional for a judge, rather than the jury, to make the ultimate, discretionary decision on whether or not to impose the death penalty.<sup>342</sup>

Justice Alito, dissenting, said that if any holdings should be re-examined and possibly overruled they should be *Ring* and similar cases – not the Florida cases overruled by the majority.<sup>343</sup>

**H. *Kansas v. Carr*, 136 S. Ct. 633 (2016)**

In a case decided 8-1, the Court first held there is no constitutional requirement to instruct jurors they need not find a mitigating factor to exist beyond a reasonable doubt. The Court said, “[W]e doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination.” The question of whether there is mitigation “is largely a

<sup>338</sup> *Hurst v. Florida*, 136 S. Ct. 616 (2016).

<sup>339</sup> 536 U.S. 584 (2002).

<sup>340</sup> *Hurst*, 136 S. Ct. at 622 (alterations in original).

<sup>341</sup> *Id.* at 624.

<sup>342</sup> *Id.* (Breyer, J., concurring).

<sup>343</sup> *Id.* at 625-26 (Alito, J., dissenting).



judgment call (or perhaps a value call); what one juror might consider mitigating another might not.” And the “ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy – the quality of which, as we know, is not strained.” The Court also rejected the factual premise behind Carr’s constitutional claim – by pointing to four instances in which the jury was instructed about mitigating factors “found to exist” – whereas the jury was also instructed that aggravating circumstances and their outweighing mitigating factors must be proven beyond a reasonable doubt.<sup>344</sup>

The Court also rejected Carr’s contention that it was unconstitutional to have capital sentencing of multiple defendants determined by the same jury at the same sentencing proceeding. The Court said that to preclude this from occurring “would, perversely, *increase* the odds of ‘wanto[n] and freakis[h]’ imposition of death sentences. Better that two defendants who have together committed the same crimes be placed side-by-side to have their fates determined by a single jury.”<sup>345</sup>

Even if one agrees with the Court’s holdings, the majority opinion’s comments about mitigation instructions are worthy of critical examination. For one thing, the opinion ignores the extensive evidence that most such instructions are misunderstood by juries, and often lead them to consider as aggravating things that properly can only be considered as mitigating. Yet, in the majority opinion’s view, there seems to be nothing that – if factually established – can clearly be said to be mitigating rather than aggravating. Similarly, the majority opinion completely assumes away the likelihood that trying multiple defendants together in a capital sentencing phase will make it much more likely that the mitigating evidence offered by each defendant will be rendered useless by the impression that any defendant will come up with something he claims to be mitigating. However, there was not even a concurrence to make such counter observations. Even Justice Sotomayor’s dissent, which said that certiorari should not have been granted, did not squarely deal with these points – saying instead that state courts should not be discouraged from overprotecting federal constitutional rights, lest “the Federal Constitution [be turned] into a ceiling, rather than a floor, for the protection of individual liberties.”<sup>346</sup>

**I. *Brooks v. Alabama*, 136 S. Ct. 708 (2016) (mem.)**

The notable aspects of the concurrence by Justice Sotomayor (joined by Justice Ginsburg) and the dissent by Justice Breyer, with regard to the denial of certiorari, have been discussed above in Part I.A.11.c.

**J. *Noteworthy Lower Court Developments***

**1. *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Defender Ass’n of Philadelphia*, 790 F.3d 457 (3d Cir. 2015)**

The Third Circuit ruled on challenges in seven different cases in many Pennsylvania counties to disqualify the Federal Community Defender Organization for the Eastern

<sup>344</sup> *Kansas v. Carr*, 136 S. Ct. 633, 642-43 (2016).

<sup>345</sup> *Id.* at 646 (alterations in original) (citation omitted).

<sup>346</sup> *Id.* at 649 (Sotomayor, J., dissenting).

District of Pennsylvania’s Capital Habeas Unit’s lawyers from representing death row inmates in state postconviction cases. The bases for the challenges (inspired by the Pennsylvania Supreme Court and in particular its then-Chief Justice Castille) were that the lawyers were misusing federal funds by representing in state postconviction cases people they indisputably could represent in federal habeas corpus proceedings. The Third Circuit held that the challenges were “preempted by federal law.”<sup>347</sup>

After first rejecting the challengers’ efforts to preclude the Federal Community Defender Organization from seeking a federal court ruling on the challenges, the Third Circuit stressed that the federal monies at issue “are paid under the supervision of the [Administrative Office of the United States Courts (the ‘AO’)], a federal agency within the Judicial Conference with regulatory control over” the Organization. The Third Circuit pointed out that the essential goal of the federal law provisions under which the grants are made “is to provide ‘quality legal representation ... in all capital proceedings.’” The Third Circuit said the state courts would be preempted from disqualifying the Organization even if the Organization was improperly using federal grant funds, because “the disqualification proceedings interfere with the regulatory scheme that Congress created.” That would be so, the court said, because the state courts would be impeding the AO in responding properly to any such misuse of federal funds. Indeed, as the court pointed out, the AO’s “usual remedies” such as recovering misused funds, would be “more consistent” with Congress’ goals by minimizing the impact on the Organization’s attorney-client relationships.<sup>348</sup>

In the course of its decision, the Third Circuit discussed the fact that if counsel in state postconviction cases fail “to comply with state procedural rules, file within applicable limitations periods, and fully exhaust their clients’ claims,” their clients will be barred by the AEDPA and otherwise from “meaningful habeas review in federal court.”<sup>349</sup> In his concurrence, Chief Judge McKee compared the “AEDPA’s procedural obstacle course” to “the notoriously vexing Rule Against Perpetuities insofar as both enmesh the unwary (or unseasoned) lawyer in a procedural minefield that can put him or her out of court.” In this context, he said that the attempt to disqualify capable lawyers from the Organization from appearing in their clients’ state postconviction proceedings “are all the more perplexing and regrettable ... [since] inadequate representation at the state post-conviction stage increases the cost of the criminal justice system and creates a very real risk of miscarriages of justice.” Chief Judge McKee said that those trying to disqualify the Organization’s lawyers seem to be concerned that these lawyers are “providing too much defense to the accused.”<sup>350</sup>

## 2. *State v. Keenan*, 38 N.E.3d 870 (Ohio 2015)

Judge Paul Pfeifer of the Ohio Supreme Court wrote the majority decision and cast the deciding vote in 4-3 decision on June 25, 2015 that Thomas M. Keenan could be retried – after his conviction was overturned once it became known after 20 years that the

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<sup>347</sup> *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Defender Ass’n of Phila.*, 790 F.3d 457 (3d Cir. 2015), *cert. denied*, No. 15-494 (U.S. Jan. 25, 2016), and *cert. denied*, No. 15-491 (U.S. Jan. 25, 2016).

<sup>348</sup> *Id.* at 476, 477 (quoting *Martel v. Clair*, 132 S. Ct. 1276, 1285 (2012)).

<sup>349</sup> *Id.* at 472.

<sup>350</sup> *Id.* at 480-82 (McKee, C.J., concurring).

prosecution had hidden crucial evidence.<sup>351</sup> But Judge Pfeifer also wrote a rather unusual concurrence, which included the following:

[T]his case underscores one reason that the death penalty should be abolished. ... It is possible that Keenan could have been executed before it became known that the prosecution had suppressed exculpatory evidence. It would be an unspeakable travesty if the great state of Ohio were to execute a defendant and then determine that it had done so based on deliberate prosecutorial misconduct.

The system worked in this case ... but that is not a guarantee that ... it will always work in time. ... If he had been executed [before the exculpatory evidence emerged], there would have been no way for the state to cleanse itself from the awful reality of having executed a person who had not received his full measure of legal protection. To ensure that that never happens, the General Assembly should abolish the death penalty.<sup>352</sup>

### **3. *State v. Santiago*, 122 A.3d 1 (Conn. 2015)**

As discussed above in Part I.A.9.c, the Connecticut Supreme Court's decision in this case was quite notable.

## **III. RELEVANT ACTIVITIES BY THE AMERICAN BAR ASSOCIATION (THE ABA)**

### **A. *New ABA Policies***

On February 9, 2015, the ABA adopted these two policies.

#### **1. *Jury Unanimity on Death Penalty and on Prerequisites for Its Imposition and Aggravating Factors***

This policy states that a court should not be able to impose a death sentence unless the jury unanimously agrees upon that sentence. It further provides that the jury must unanimously agree (a) upon the existence of all facts that are prerequisites for imposing the death penalty and (b) beyond a reasonable doubt regarding any aggravating factor it uses as a basis for its death penalty decision.

#### **2. *Lethal Injection Transparency***

This policy addresses the recent trend of states' deliberately refusing to disclose various aspects of their lethal injection processes. This policy says that a state must (a) disclose the mix of lethal injection drugs and doses it plans to use, (b) permit the media to view each execution in its entirety, (c) require that records of every execution be prepared and kept, and (d) mandate a thorough, independent investigation when an execution is prolonged or otherwise unusual.

<sup>351</sup> *State v. Keenan*, 38 N.E.3d 870 (Ohio 2015).

<sup>352</sup> *Id.* at 873 (Pfeifer, J., concurring).

## **B. Amicus Briefs**

The ABA filed an amicus curiae brief in *Hurst v. Florida*. The brief argued that, as the Court later held in January 2016, the Florida capital sentencing scheme was inconsistent with *Ring*. Among other things, the brief stressed that Florida did not require a jury majority to determine which aggravating factor(s) existed – or even that it agree that even one particular aggravating factor existed.<sup>353</sup>

On July 31, 2015 the ABA filed an amicus curiae brief urging that certiorari be granted in *Loden v. Fisher*, a Mississippi capital case. The brief said that there are many potential prejudicial effects of a deficient sentencing investigation, and that sometimes these can distort the defendant's decision making. The brief argued that a defendant's waiver of the right to present sentencing phase evidence does not always preclude a holding that a deficient mitigation investigation prejudiced the sentencing outcome.<sup>354</sup> Certiorari was denied on November 2, 2015.

## **C. ABA Statements and Letter**

ABA President Paulette Brown issued a statement on January 12, 2016, the day *Hurst* was issued, calling on the Florida legislature to revise Florida law to comply with the holding, and urging Florida not to execute people until corrective action is taken concerning their unconstitutionally imposed death sentences. (Subsequently, the ABA has urged that Florida preclude a death sentence unless a unanimous jury concludes that the sentence should be death.)

On October 9, 2015, President Brown issued a statement after Oklahoma admitted it used potassium acetate, whose use was not permitted under its execution protocol, when it executed Charles Warner in January 2015. President Brown called for meaningful transparency as to execution drugs and protocols and independent investigations of troubled executions. Oklahoma law requires secrecy as to the identities of people and businesses supplying drugs used in executions.

An ABA letter in September 2015 urged Virginia not to execute Alfredo Prieto because his intellectual disability was decided inconsistently with *Hall*. Virginia used in his case the same type of bright-line IQ cutoff later held unconstitutional in *Hall*. Prieto was nonetheless executed on October 1, 2015.<sup>355</sup>

## **D. Representation Project**

The ABA Death Penalty Representation Project (the "Representation Project") was created in 1986 to address a growing problem with the quality and availability of defense counsel for death row prisoners. In the last 30 years, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state

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<sup>353</sup> Brief of Amicus Curiae American Bar Ass'n in Support of Petitioner, *Hurst v. Florida*, No. 14-7505 (U.S. filed June 4, 2015), 2015 WL 3623139.

<sup>354</sup> Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Loden v. Fisher*, No. 15-20 (U.S. July 31, 2015), 2015 WL 4624363.

<sup>355</sup> Tom Jackman, *Triple murderer Alfredo Prieto is executed in Virginia*, WASH. POST, Oct. 1, 2015.

postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and resentencing proceedings. Volunteer firms have also written amicus briefs on behalf of the ABA and other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation. In dozens of the cases placed with volunteer counsel, inmates have been exonerated or had their death sentences commuted or overturned.

Over time, the Representation Project's work has greatly expanded. It now provides technical assistance, expert testimony, training, and resources to the capital defender community and *pro bono* counsel. Well over 1,000 capital defenders and volunteer attorneys participate in its secure on-line practice area, containing information about all aspects of capital defense.<sup>356</sup> And the Representation Project honors outstanding *pro bono* capital representation at an event each autumn.

The Representation Project organizes coalitions of judges, bar associations, civil law firms, and government lawyers in jurisdictions that use the death penalty to champion meaningful systemic reforms designed to ensure that all capital defendants and death row prisoners have the assistance of effective, well-trained, and adequately resourced lawyers. In particular, it works to secure the widespread implementation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Its 2003 revision of these Guidelines was approved as ABA policy in 2003 (the "ABA Guidelines"). The ABA Guidelines have now been adopted in many death penalty jurisdictions by court rule and state statute – although the extent to which they have been implemented in practice varies. They have also been widely adopted by state bar associations, indigent defense commissions, and judicial conferences.<sup>357</sup> They are the widely accepted standard of care for the capital defense effort and have been cited in more than 500 state and federal cases, including decisions by the Supreme Court.<sup>358</sup>

The Representation Project participates as faculty in state and national training seminars for judges and defense counsel, regarding the elements of capital defense and the importance of an effective capital defense function. It has also worked internationally, having organized training seminars for capital defenders and judges in other countries and having participated as faculty at international conferences.

The Representation Project also provides testimony on behalf of the ABA. A recent example is the February 18, 2016 testimony of Representation Project Director Emily Olson-Gault at a Birmingham, Alabama hearing of the Judicial Conference of the United States' Ad Hoc Committee to Review the Criminal Justice Act (the "CJA"). Ms. Olson-Gault

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<sup>356</sup> For information on the Representation Project, see the ABA's Death Penalty Representation Project website at [http://www.americanbar.org/death\\_penalty](http://www.americanbar.org/death_penalty). An on-line resource contains decades of capital training materials that are searchable by author, subject and date, and is available at <http://www.capstandards.org>.

<sup>357</sup> See Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (updated Feb. 2016), [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/guidelines-fact-sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/guidelines-fact-sheet.authcheckdam.pdf).

<sup>358</sup> See generally American Bar Association, ABA Guidelines, [http://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/aba\\_guidelines.html](http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html).

testified about the CJA's administration to the extent it affects the availability and quality of counsel in capital cases.<sup>359</sup>

She urged proper funding for counsel and non-attorney defense team members at every phase of death penalty cases – “from pre-trial through clemency” – the elimination of fee caps and flat fees, a shift in the CJA's criteria for appointed counsel away from quantitative criteria and towards qualitative criteria (many of which she discussed specifically), and removal of the CJA Guidelines' presumption that state post-conviction counsel continue representation in federal habeas without independent counsel to advise the client of potential conflicts, use of a well-defined mechanism for regularly monitoring and enforcing the ABA Guidelines regarding capital cases. Ms. Olson-Gault stressed that the ABA Guidelines urge that the mechanism be an entity independent of the judiciary, usually a defender organization or an independent authority run by defense attorneys. She said this entity should recruit, appoint, and train defense attorneys for all stages of a capital case; seriously investigate complaints regarding the performance of counsel; and remove attorneys who do not meet qualification and performance standards. Ms. Olson-Gault also discussed the availability and challenges of pro bono death penalty representation. She commended law firms that provide pro bono representation but emphasized that these firms cannot serve as a replacement for a robust indigent defense system.

### ***E. The Due Process Review Project***

In 2001, the ABA established the Death Penalty Due Process Review (referred to herein as the Due Process Project) to conduct research and educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes. The Due Process Project promotes fairness and accuracy in death penalty systems by encouraging legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA's Protocols on the Fair Administration of the Death Penalty; providing technical assistance to state, federal, and international stakeholders; and collaborating with individuals and organizations on new initiatives to reform death penalty processes.

#### ***1. The Assessments Under ABA Auspices of 12 States' Implementation of the Death Penalty***

From 2004-2012, the Due Process Project assessed the extent to which the capital punishment systems in 12 states comported with ABA policies designed to promote fairness and due process. These assessments were not intended as substitutes for comprehensive studies the ABA hopes will be undertaken during moratoriums on executions. Rather, they were intended to provide insights about the extent to which these states were acting in a manner consistent with relevant ABA policies. The assessment reports were prepared by in-state assessment teams and Due Process Project staff for these states: Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and

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<sup>359</sup> Ms. Olson-Gault's written testimony is available at <https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/emilyolson-gaultbirminghamwrittentestimony-done.pdf>.

Virginia. Serious problems were found in every state death penalty system, although the problems were not precisely the same in each state.<sup>360</sup>

These assessments and their recommendations continue to be considered by and cited to by policymakers, the press, and other commentators on the ways in which the death penalty system operates in the evaluated states. Indeed, a major reason Pennsylvania's Governor gave in his February 15, 2015 statement establishing a moratorium on executions was his state's failure to address the systemic flaws in implementing the death penalty as detailed in the 2007 ABA assessment team's recommendations.

## **2. *Serious Mental Illness Initiative***

In 2015, the Due Process Project launched the Serious Mental Illness Initiative. So far, the Initiative has educated legal professionals, policy makers, and the public on the subject of mental illness and the death penalty and has provided technical assistance to state coalitions and lawmakers working for policy reforms consistent with the policies summarized above in Part I.B.6.e.

## **3. *Programs***

The Due Process Project co-sponsored and planned with the University of Texas School of Law's Capital Punishment Center a March 31 to April 2, 2016 conference, entitled *Forty Years after Gregg: A National Conference on the Death Penalty*. The conference brought together capital punishment experts, journalists, advocates, and practitioners who shared their diverse perspectives, reflected on the dynamic history of capital punishment in the United States over the past four decades, and discussed current issues.

On July 29, 2015, the Due Process Project presented a program concerning *A Cloud of Uncertainty: The Growing Lack of Transparency in Lethal Injections and Executions*.<sup>361</sup>

## **F. *The Capital Clemency Resource Initiative ("CCRI")***

The CCRI, another newly launched initiative,<sup>362</sup> seeks to improve the resources and information available to attorneys and governmental decision makers involved in the capital clemency process. By assessing current clemency practices, collecting and creating training materials and other resources, and providing state-specific guidance where feasible, the CCRI seeks to ensure more meaningful processes and reasoned decisions regarding capital clemency.

## **G. *International Reform Efforts***

On March 23, 2015, representatives from the Representation Project and Due Process Project made a presentation to a distinguished group of 23 Japanese capital defense

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<sup>360</sup> Each state assessment report can be found on the ABA's website at [http://www.americanbar.org/groups/crsj/projects/death\\_penalty\\_due\\_process\\_review\\_project/state\\_death\\_penalty\\_assessments.html](http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html).

<sup>361</sup> A video is available at [www.americanbar.org/dueprocess](http://www.americanbar.org/dueprocess) (right side of the Home or Events page).

<sup>362</sup> The CCRI was created as a collaborative project of three ABA entities: the Due Process Project, Representation Project, and Commission on Disability Rights.

lawyers and leaders of the Japanese Federation of Bar Associations, including a former Justice Minister, while they were in the United States. Thereafter, the Federation created its own *Guidelines for Defense Counsel in Death Penalty Cases*. These were distributed to local bar associations throughout Japan in October 2015.<sup>363</sup>

#### IV. THE FUTURE

There is accelerating recognition of major, systemic problems with capital punishment. In recent years, this has led to abolition or discontinuation of capital punishment and to statewide moratoria in many states.

New death sentences dropped substantially further in 2015. If efforts to improve the quality of defense representation in capital cases succeed, there would likely be even fewer new death sentences.

Due to a variety of factors mostly relating to lethal injection, including several botched lethal injections, executions decreased in 2015. This might change, for a variety of reasons. But executions would decrease much further if people in positions to grant relief were to focus on the fact that most of those now facing execution would not be sentenced to death if their cases arose today.

There is ever greater appreciation of serious problems with the death penalty's implementation. Increasingly, the death penalty *in practice* has been attacked by people who have served in the judiciary or law enforcement, taken part in executions, written death penalty laws, or are politically conservative. A growing number of conservatives aptly say that capital punishment is a failed, inefficient, expensive government program that accomplishes nothing. And religious-based support for executions is dropping significantly in the United States.

Given all these developments, it is unsurprising that polls show much lower support for the death penalty than in the past, particularly when the actual alternative – life without parole – is included in the poll question.

Increased attention is being paid to analyses showing that a very small number of counties are responsible for very disproportionate percentages of capital punishment prosecutions and executions. It is vital also to focus on the role that implicit bias and inadequate jury instructions play in causing disparities in capital sentencing decisions – including disparities arising from the differing ways that jurors react to mitigation evidence depending on the defendant's race.

It has been shown repeatedly that providing competent counsel reduces drastically the number of death outcomes. This should – but is not likely to – lead to a systematic re-examination of the quality of representation received by those already on death row. Nor is much apparently going to be done in most places to deal with the reasons why so many innocent people have been sentenced to death.

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<sup>363</sup> *Japan: Bar Association Guidelines for Defense Counsel in Death Penalty Cases*, LIBR. OF CONGRESS: GLOB. LEGAL MONITOR, Nov. 27, 2015.



Unfortunately, the Supreme Court and lower courts have continued to use procedural technicalities and deference to erroneous state court rulings to bar rulings on the merits of meritorious federal constitutional claims. And most clemency authorities have continued to hide behind the fiction that judges or juries already fully considered all facts relevant to a fair determination of whether a person should be executed. Usually, they fail to act as the “fail-safes” against unfairness that clemency authorities are supposed to be.

In this and so many other respects, it is vital that the legal profession and the public be better informed about what is really going on in the capital punishment system. It continues to be true (as reflected by the changed opinions of so many people discussed early in this chapter) that the more that people know about the death penalty system as actually implemented, the more they oppose it. Perhaps Justice Breyer’s *Glossip* dissent will lead to a greater understanding that capital punishment in the United States can only be justified if one believes in arbitrarily and capriciously applied, highly erratic vengeance. Justifications of a theoretical death penalty system that never will exist might be dealt with by debate societies but should be acknowledged to be completely irrelevant to public policy discourse.

Ultimately, our society must decide whether to continue with a system that cannot survive any serious cost/benefit analysis. As more and more people recognize that our capital punishment system is inconsistent with both conservative and liberal principles, and with common sense, the opportunity for its abolition throughout the United States will arrive. It is the responsibility of the ever-increasing number of people who already realize that our death penalty system is like “the emperor’s new clothes” to do everything that has a reasonable chance of accelerating the date of its demise.

