Dear Friends and Supporters:

As we close out 2019, the Death Penalty Representation Project reflects on another year of extraordinary accomplishments and progress, even amid troubling attempts to step back due process protections for persons facing the death penalty. In a series of bitterly divided opinions, the U.S. Supreme Court took affirmative steps to allow executions to proceed where it determined that prisoners had not brought otherwise meritorious claims quickly enough. The Court also doubled down on its previous decisions denying a path to relief for prisoners who face torturous pain from lethal injection drugs. And, in news that spurred a media firestorm, the U.S. Attorney General announced a new lethal injection protocol and set execution dates for five federal death row prisoners, the first in 16 years.

In the midst of these alarming developments, momentous victories have provided hope and cause for celebration. The capital defense community and its pro bono partners rose to the challenge posed by the possible resumption of federal executions, winning an injunction against the executions and then holding off an aggressive legal campaign to set aside the injunction. At the state level, several death row prisoners from around the country also achieved extraordinary victories in their cases this year. In Texas, the high criminal court converted an intellectually disabled prisoner’s death sentence to life imprisonment following multiple U.S. Supreme Court victories; in another case, it stepped in at nearly the last moment to block the execution of a man with significant, unreviewed evidence of innocence. Both prisoners received fierce advocacy from pro bono attorneys and capital defenders. And in a Mississippi case, already tried six separate times, the U.S. Supreme Court stepped in to reverse a capital conviction and sentence in light of evidence of racial discrimination in jury selection.

Outside of the courts, the recognition of clemency’s indispensable role in the criminal justice system continued to grow, with governors in California, Kentucky, and Ohio exercising their powers to halt executions. In addition, the clemency campaigns of two prisoners—one in Texas and one in Florida—received broad national attention from celebrities, advocates, and politicians who were deeply disturbed by the possibility that the states were about to execute innocent men.

The Project also celebrated its own victory this year, in the form of a milestone achievement: 100 capital cases finalized with a sentence less than death following assistance by the Project’s pro bono partners. Since 1998, attorneys volunteering on capital cases through the Project have represented more than 350 individuals facing the death penalty, each matter placed with counsel representing its own victory for fairness and due process.

While we are proud of the decades of work that this milestone represents, there is much more to be done. We remain steadfast in our dedication to ensuring quality representation for each person facing the ultimate punishment, and we need your help. If you are a lawyer and have been thinking about volunteering, please allow us the chance to show you how you can use the civil litigation skills you already have to make a difference. Lawyers and non-lawyers alike can also get involved by following us on social media, signing up for our newsletter, and helping us educate about the need for reform. And anyone can be a critical part of our work by making a financial contribution. Our continued success is dependent on the generosity of our donors, and every dollar you give goes directly to ensuring that each person facing the death penalty has a committed advocate by their side.

Please consider getting involved and becoming an essential part of our fight to protect fairness and due process for the most vulnerable among us.

With thanks,

Emily Olson-Gault
Director, ABA Death Penalty Representation Project

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- Awards Event Recap (p. 23)
You can make a difference!

Volunteer

The Project directly addresses the lack of qualified, adequately resourced defense counsel for death row prisoners by recruiting volunteer attorneys to provide pro bono death penalty representation. We have both large and small projects available and will work with you to find an opportunity that is a good fit for you and your practice. No past criminal or death penalty experience is required, and we will provide training materials and assign you a strategic advisor who has expertise in capital defense and can assist you throughout your case. For more information, please visit our website at www.americanbar.org/deathpenalty and click “Get Involved.”

Learn

Learn about the problems with death penalty representation and the ways that the Project and its partners are fostering change by signing up for the Project’s newsletters and following us on social media. You can sign up for our quarterly electronic newsletter at http://eepurl.com/bv09ij or by sending a message to deathpenaltyproject@americanbar.org. You can also follow us on Twitter at twitter.com/deathpenaltyrep.

Donate

The Project works in every active death penalty jurisdiction in the United States to recruit counsel, provide strategic assistance and litigation support, train lawyers, and engage in policy reform. This work is entirely dependent on the generosity of our donors, and it is needed now more than ever before. Your contribution ensures that we can continue our fight to guarantee due process and access to counsel for every person facing a death sentence. The Project is part of the ABA Fund for Justice & Education, a 501(c)(3) nonprofit organization, and your donation is tax deductible to the fullest extent allowed by law. To donate online, please visit ambar.org/dprpdonate or you can mail a check* directly to:

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*When mailing a check to the ABA Fund for Justice & Education, please indicate the Death Penalty Representation Project as the recipient of your gift to ensure your contribution goes directly to support the Project’s work!
2019 Year in Review

The past year has seen several examples of the judiciary's power to ensure due process protections in capital proceedings, with federal courts blocking the federal government’s attempt to resume executions and dealing it a significant setback in a military prosecution. At the state level and across political parties, the executive branch played a significant role, with the Ohio, Kentucky, and California governors exercising their clemency powers to halt executions. And while the year brought some hard-fought victories, such as sentencing relief for an intellectually disabled Texas death row prisoner following two U.S. Supreme Court wins, it also saw fights lost and 22 executions carried out.

Courts Halt Federal Government Attempt to Resume Executions

On July 25, 2019, U.S. Attorney General William Barr announced the federal government’s intention to restart executions after a sixteen-year hiatus by scheduling five federal capital prisoners to be executed between December 2019 and January 2020. At the same time, Attorney General Barr also announced that he had directed the Bureau of Prisons (BOP) to adopt an “addendum” to its execution protocol that altered the specific drugs to be used in the executions. In November, a federal court issued an injunction halting the scheduled executions, and on December 6, 2019, three days before the first execution was scheduled to take place, the U.S. Supreme Court refused the Government’s request to overturn the lower courts’ decisions and allow the executions to proceed.

There have only been three federal executions carried out since 1977, the last of which took place in 2003. Since 2005, litigation challenging the federal government’s execution protocol has been pending in the U.S. District Court for the District of Columbia. Although none of the five men scheduled for execution via the July 25 order were initially parties to this litigation, four sought and were granted leave to intervene in the proceedings this fall.

The origins of the litigation date back to 1993, during Attorney General William Barr’s first tenure at the U.S. Department of Justice (DOJ). At that time, the DOJ promulgated and adopted a federal rule specifying a uniform method and place for federal executions. In 1994, however, Congress passed the Federal Death Penalty Act (FDPA), superseding the 1993 DOJ rule, which stated instead that federal executions were to be implemented “in the manner prescribed by the law of the State in which the sentence is imposed.” Bills were subsequently introduced to amend the FDPA and to clarify this language to allow the DOJ and BOP to specify a uniform procedure for carrying out federal executions, but these bills were not passed. This left the 1993 rule and the 1994 law in conflict over how federal executions were to be carried out.

After litigation challenging the federal government protocol commenced in 2005, the Government produced various documents outlining the execution process that the BOP would use. These documents cited the 1993 DOJ rule for authority, rather than the provisions contained within the FDPA. In 2011, the DOJ announced that because of manufacturers’ embargoes on selling their products for use in executions, it did not have the drugs required to carry out its most recently specified execution plan, issued in 2008. The BOP indicated to the court that it planned to amend the execution protocol again, and the court stayed the litigation. No new plan was announced until Attorney General Barr’s sudden announcement in July 2019 that executions would resume using pentobarbital in a single-drug lethal injection procedure.
Several of the prisoners scheduled for execution brought swift challenges to the new protocol. On November 20, 2019, the district court granted a preliminary injunction against the Government. The court held that the prisoners had demonstrated a substantial likelihood of success on their claim that the newly announced protocol was inconsistent with the FDPA, the governing statute. The prisoners argued that under the FDPA, the “manner” in which the executions were to be carried out should be the same as that of the state in which the prisoners were convicted. The court rejected arguments from the DOJ that the Government’s protocol need only take the same form of execution—lethal injection. Siding with the prisoners on this issue, the court looked to documents showing Congress’s recognition that the FDPA would require the federal government to carry out executions according to the procedure specified by the state in which the condemned prisoner was convicted and sentenced.

Because the court found that the plaintiffs were likely to succeed on the merits of this claim, the opinion did not reach other claims that were also raised, such as whether the BOP had the power to adopt a new execution protocol without allowing the public to weigh in on the proposed change through notice-and-comment rulemaking. In addition, the prisoners also alleged that the adoption of the addendum on the same day that the execution dates were announced allowed no opportunity to sufficiently examine the new proposed method of execution for constitutional defects under the Eighth Amendment and that the rushed manner of announcing the dates and the new protocol violated the prisoners’ due process rights under the Fourteenth Amendment.

On December 2, 2019, the D.C. Circuit Court of Appeals denied the Government an emergency motion for a “stay pending appeal” of the district court ruling enjoining the executions. The Government then sought review of the injunction directly from the U.S. Supreme Court, which declined to overturn the lower court’s decision. Justice Alito, joined by Justices Gorsuch and Kavanaugh, issued a separate statement, saying that “[t]he Government has shown that it is very likely to prevail when this question is ultimately decided.” Despite indicating apparent agreement with the Government on the merits of the case, however, the Justices noted that “it would be preferable for the District Court’s decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out.”

Without setting a specific deadline, the Court’s denial of the Government’s application noted its expectation that the lower courts would resolve the merits of the challenge with “appropriate dispatch.”

No Executions for Foreseeable Future in California as Governor Imposes Moratorium

On March 13, 2019, California Governor Gavin Newsom exercised his authority under the state’s constitution to impose a moratorium on all executions in the state for the remainder of his term in office. Although California’s last execution was in 2006, it remains home to the largest death row in the country with 737 condemned men and women—nearly a third of the total prisoners on death row in the United States. Announcing his decision, Governor Newsom stated that California’s death penalty was “by any measure, a failure,” and that although he believed the state “needed to do more” and “better” for victims of violent crime, the death penalty was not something the state could advance “in an effort to try to soften the blow of what happened.” Governor Newsom explained that the decision to impose a moratorium on carrying out capital punishment so early in his term was for him personally the culmination of a 40-year journey of thinking through the consequences and morality of the death penalty but that the decision was also motivated by voters’ narrow passage of Proposition 66 in 2016, which made the prospect of the state restarting executions more likely.
On October 30, 2019, Ohio Governor Mike DeWine issued reprieves to death row prisoners James Galen Hanna and Kareem Jackson, ensuring that the state would not hold any executions in 2019. Earlier in the month, Governor DeWine delayed Cleveland Jackson’s execution date by nearly two years after a state disciplinary complaint revealed that Jackson had been effectively abandoned by counsel. These reprieves capped a long line of clemency actions taken by the governor throughout the year and to seek new death sentences despite Governor Newsom’s moratorium. In September, the state supreme court rejected appeals brought by death-noticed defendants to preclude the state from seeking the death penalty against them in light of the moratorium on executions. According to Pew Research, the state’s death row has grown by 100 prisoners since the last execution was carried out in 2006.

At the same time Governor Newsom announced the moratorium, he also directed San Quentin State Prison to decommission its execution chamber. Governor Newsom also stated during the March press conference that he was considering his options for commuting the sentences of those on death row to life in prison but that such commutations were not straightforward given a California law that a majority of the state supreme court needs to approve any executive commutation of sentence for prisoners who were also “twice convicted of a felony.” The state supreme court issued an administrative directive in 2018 stating that it understood its clemency responsibility under the state constitution as only serving as a check to ensure the governor did not abuse his authority. Later that year, however, the court rejected an unprecedented ten pardon and commutation requests from former governor Jerry Brown without explanation. In light of this, Governor Newsom’s independent ability to commute the sentences of those currently on death row to life in prison remains unclear.

Ohio Holds No Executions in 2019, Passes Death Penalty Reforms

On October 30, 2019, Ohio Governor Mike DeWine issued reprieves to death row prisoners James Galen Hanna and Kareem Jackson, ensuring that the state would not hold any executions in 2019. Earlier in the month, Governor DeWine delayed Cleveland Jackson’s execution date by nearly two years after a state disciplinary complaint revealed that Jackson had been effectively abandoned by counsel. These reprieves capped a long line of clemency actions taken by the governor throughout the year and aligned with efforts by policymakers to increase fairness and transparency in capital cases.

Governor DeWine issued the first reprieve of his term in January 2019, after a federal judge found that Ohio’s three-drug protocol could feel like a “combination of waterboarding and chemical fire.” Although the judge stated that under U.S. Supreme Court precedent, he would have to allow the execution to move forward anyway, Governor DeWine was spurred to action by the findings. Following the federal judge’s ruling, Governor
DeWine delayed Warren Keith Henness’s execution from February 13 to September 12, 2019. Just three weeks later, on February 19, 2019, Governor DeWine announced his intention to suspend all executions in the state until problems with the drugs could be resolved. In a press conference regarding his decision, he stated that “Ohio is not going to execute someone under my watch when a federal judge has found it to be cruel and unusual punishment.” Although the federal judge’s decision was later overturned by the Sixth Circuit Court of Appeals, Governor DeWine remained steadfast in his resolve that a new execution protocol was needed. In July, the governor suggested that executions might remain on hold indefinitely, given that the state was having difficulty finding drugs without jeopardizing relationships with drug companies.

Governor DeWine continued his string of clemency grants in the fall, issuing a reprieve of execution to Cleveland Jackson on September 30th, three days after Disciplinary Counsel for the Ohio Supreme Court Board of Professional Conduct filed a complaint against Mr. Jackson’s attorneys. The 24-page complaint alleged that Mr. Jackson’s attorneys failed to meet with their client over the course of four years, repeatedly missed deadlines relating to Mr. Jackson’s case, and refused to cooperate with subsequent counsel to protect Mr. Jackson’s legal interests, ultimately failing to provide Mr. Jackson with competent legal representation or perform reasonably diligently in his case. Although Governor DeWine had already indicated that all executions in the state would be on hold until new execution drugs were found, he specifically noted that the troubling allegations raised in the disciplinary complaint served as the basis for his granting a nearly two-year reprieve of execution to Cleveland Jackson. “While a certified disciplinary complaint is only an allegation, this is a serious allegation raising significant questions that need to be resolved in the disciplinary process,” Governor DeWine said. “It is prudent to issue a reprieve in this matter until the disciplinary process is resolved.” Governor John Kasich had previously issued Cleveland Jackson a reprieve, when new attorneys came onto his case after the counsel who were the subject of the disciplinary complaint moved to withdraw.

While its ability to carry out the death penalty remains in limbo, Ohio lawmakers and policy advocates have considered other changes to the capital punishment system. In January 2019, a former member of the state’s parole board and former state senator, Shirley Smith, criticized the board for a lack of transparency in operations and a lack of “humanity” in how it reviews cases. Although this criticism applied to both the board’s handling of capital and non-capital cases, the board has since undertaken reform of how it handles death penalty cases specifically. In the past, the board received much of the relevant information about the prisoner on the day of the hearing. Starting in January 2020, the board will begin receiving more information in advance, including the prisoner’s clemency application, as well as any reports of child abuse, and/or mental health and substance abuse. Governor DeWine has also called for greater transparency in clemency hearings and has appointed three new members to the board.

In addition to changes to its clemency case review procedure, Ohio lawmakers advanced a bill to exempt individuals with serious mental illness from the death penalty. The proposed law defines serious mental illness as schizophrenia, bipolar disorder, or delusional disorder that significantly impairs the defendant’s capacity to “exercise rational judgment” at the time of the crime. On June 5, 2019, the bill was approved in the House by a vote of 76-17. It has now moved forward to the Senate Judiciary Committee for approval. If Ohio signs the bill into law, it will become the first state in the country to exempt the seriously mentally ill from capital punishment.

Finally, in late December 2019, Ohio lawmakers suggested that repeal of the state’s death penalty might be under consideration. House Speaker Larry Householder told reporters “We may have a law in place that allows for a death penalty that we can’t carry out. And the question is: Are the costs that are associated with that and retrials and all these things, at the end of the day, is it worth that?”
Earlier this year, the prosecution in the military death penalty case of alleged mastermind of the 2000 U.S.S. Cole bombing, Abd al-Rahim al-Nashiri, was dealt a stunning setback by the U.S. Court of Appeals for the D.C. Circuit, which vacated more than four years of rulings in the case issued by former presiding judge Colonel Vance Spath. A few months later, the prosecution unsuccessfully attempted to reinstate many of these rulings under a new judge but instead received further rebuke from the court. The federal government has been seeking a death sentence against Mr. al-Nashiri since 2011 through the Court of Military Commission Review system but is still mired in pretrial proceedings, almost 10 years later.

Col. Spath was appointed to preside over Mr. al-Nashiri’s trial in the fall of 2014. In late summer of 2017, three members of Mr. al-Nashiri’s defense team quit, citing the government’s monitoring of attorney-client communications. This move left only one attorney, Lieutenant Alaric Piette, to defend Mr. al-Nashiri—even though Lt. Piette possessed none of the necessary training or experience to serve as lead counsel in a capital case. Over the course of the next several months, Col. Spath unsuccessfully sought to compel the defense team to return to the case, while Lt. Piette participated in the ongoing pretrial proceedings only to say at every juncture that he objected to the case moving forward without the assistance of “learned counsel.” On February 16, 2018, Col. Spath abated the proceedings in the case. That summer rumors began to circulate that Col. Spath had been seeking an immigration judgeship while still presiding over Mr. al-Nashiri’s case. These rumors were confirmed in September 2018, when the DOJ published a list of new immigration judges that included Col. Spath.

The D.C. Circuit granted a writ of mandamus to consider Col. Spath’s potential conflict of interest in the Mr. al-Nashiri case, and in April 2019, it issued a decision vacating Col. Spath’s rulings from the prior four years. Although the Government objected to the additional delay that the court’s order would cause, as it would effectively undo all progress that had been made in the case thus far, the court concluded that doing so was justified and necessary to ensure the overall integrity of the proceedings. The court wrote, “Any institution that wields the government’s power to deny life and liberty must do so fairly, as the public’s ultimate objective is not in securing a conviction but in achieving a just outcome.”

The difficulties in Mr. al-Nashiri’s prosecution did not end with the D.C. Circuit’s decision, however. On November 7, 2019, the new presiding judge, Colonel Lanny Acosta, issued a strong condemnation of the prosecution’s proposal for sharing information with the defense. After Col. Acosta took over the case, the prosecution sought reconsideration and reaffirmation of more than 30,000 pages of motions that had been granted by Col. Spath but vacated by the D.C. Circuit—primarily those motions seeking the court’s approval to provide discovery to the defense as “summaries and substitutions in lieu of the underlying classified documents.”

Much of the “substitution” and “summary” information that the Government was providing the defense concerned the CIA’s Rendition, Detention, and Interrogation program and related to Mr. al-Nashiri’s treatment while in secret CIA detention. Through a Freedom of Information Act request, however, the defense and Col. Acosta were able to obtain many of the unredacted versions of the same information that the Government had been summarizing rather than disclosing to the defense directly. According to Col. Acosta, a review of this information indicated that the process by which the Government was “summarizing” the information to provide the defense had “produced deletions that could fairly be characterized as self-serving and calculated to avoid embarrassment,” which ultimately
“undermines any contention the redactions are narrowly tailored to a legitimate need to protect national security.” Further, the judge found that “many of the summaries are so significantly altered that they seem insufficient to meet the requirement that they place the defense in substantially the same position as would discovery of the underlying documents.”

As a result, the judge denied the Government’s motion to reproduce the tens of thousands of pages that had been accepted as fulfilling the Government’s discovery obligations during Col. Spath’s tenure, instead ordering that the underlying documents be provided through traditional discovery. The onus is now on the Government to assert and justify specific privilege as to each of the original documents that it wishes to withhold, increasing the likelihood that Mr. al-Nashiri’s pretrial proceedings will continue for many months, and perhaps years, to come.

Notable New Films: Just Mercy and Clemency

Two important films about capital punishment arrive in theaters this winter. One based on a true story and one fictional, both grapple with the death penalty’s far-reaching psychological toll and the potential for error and injustice in its administration.

Just Mercy, adapted from the novel of the same name, is based on the true story of capital defender and civil rights activist Bryan Stevenson. As the film opens in the late 1980s, Mr. Stevenson (Michael B. Jordan) is a recent graduate of Harvard Law School and is traveling from his home in Delaware to Alabama to provide free representation to indigent prisoners on death row. He quickly encounters resistance from prosecutors, police, and local community members as he takes on the case of Walter McMillian (Jamie Foxx), a black man who was wrongfully convicted and sentenced to death for the murder of a young white woman. The film follows Mr. Stevenson’s struggle with the realities of a deeply flawed criminal justice system and explores the transformational effect of his advocacy on the lives of his clients and their families. Just Mercy opens nationwide on January 10, 2020.

Clemency is the fictional story of Bernadine Williams (Alfre Woodard), a prison warden in an unspecified death-penalty state, as she grapples with the emotional and psychological toll of facilitating and overseeing executions of prisoners on death row. The film quietly traces the devastating effect that presiding over more than a decade of executions has had on her marriage and mental health as she prepares the prison for another scheduled execution—this time, of a man who may be innocent of the murder for which he was sentenced to death. The prisoner, Anthony Woods (Aldis Hodge), refuses to participate in preparations for his own execution, hoping for a reprieve despite his own lawyer’s fear that mercy will be unavailing. Clemency premiered at the Sundance Film Festival in early 2019, where it won U.S. Dramatic Grand Jury Prize. It was released in theaters on December 27, 2019.
Texas Court of Criminal Appeals Grants Life Sentence to Bobby Moore

Capping off a legal saga that included two U.S. Supreme Court remands and the wholesale rejection of Texas’s judiciary-created scheme for evaluating intellectual disability claims, the Texas high criminal court finally issued a decision that will take Bobby Moore off of death row. On November 6, 2019, the Texas Court of Criminal Appeals (TCCA) acknowledged that “the Supreme Court has resolved [Moore’s] claim in his favor. There is nothing left for us to do but to implement the Supreme Court’s holding. Accordingly, we reform Applicant’s sentence of death to a sentence of life imprisonment.”

The TCCA order referred to the U.S. Supreme Court’s second remand of the case, a per curiam decision issued February 19, 2019, in which it definitively held, “Moore has shown he is a person with intellectual disability.” The Court had first remanded Mr. Moore’s claim in 2017, in a ruling overturning the TCCA precedent that had set out a number of non-clinical criteria for Atkins v. Virginia intellectual disability determinations. In that decision, the Court emphasized that, while states may choose their own standards for Atkins determinations, they cannot diverge from scientific knowledge, as criteria rooted in unscientific stereotypes creates an impermissible risk of executing someone with intellectual disability. Though the Harris County District Attorney had agreed that Mr. Moore is intellectually disabled, the TCCA on remand again denied relief. Granting review a second time, the U.S. Supreme Court noted the TCCA’s nominal application of its instructions. Chief Justice Roberts, who authored the dissent from the Court’s first Moore reversal, wrote separately in concurrence, “[I]t is easy to see that the Texas Court of Criminal Appeals misapplied [Moore] here.”

Despite this rare pronouncement of a petitioner’s intellectual disability by the U.S. Supreme Court, the TCCA did not take action for nearly nine months. Now that his death sentence has officially been overturned, Mr. Moore, like others before him who have received Atkins relief, will no longer be subject to the solitary confinement of Texas’s death row, nor will he face execution.

The Project extends its warmest congratulations to Mr. Moore’s pro bono team, led by Cliff Sloan at Skadden Arps, and everyone else who contributed over the years to this hard-won result.

Charles Rhines Executed by South Dakota, Despite Evidence of Jurors’ Anti-Gay Bias

South Dakota executed death row prisoner Charles Rhines on November 4, 2019, following unsuccessful litigation on multiple fronts. A South Dakota judge issued an execution warrant for Mr. Rhines in June 2019, on the heels of the U.S. Supreme Court’s refusal to grant certiorari review of his claim that his jurors had sentenced him to death based on his sexual orientation. From 2016 to 2019, Mr. Rhines had attempted to obtain judicial review of that claim, armed with sworn statements from multiple jurors confirming this basis for their decision. However, state and federal courts repeatedly refused to grant him a hearing to determine whether his death sentence was constitutional in light of the new evidence.

For the past year, Mr. Rhines’ legal teams raised a series of challenges. Pro bono counsel from the law firms of Ballard Spahr and Greenberg Traurig were granted a hearing in the state trial court on South Dakota’s execution method. Mr. Rhines’ team of federal defenders, meanwhile, challenged the decision of prison officials to refuse mental health experts access to evaluate Mr. Rhines for his clemency proceedings. Mr. Rhines’ attorneys contended that the experts were crucial to developing claims supporting his
appeal for mercy, including his trauma following a sexual assault while in the military as a teenager. Both state and federal courts refused to order access for the experts, with the federal district court claiming it did not have jurisdiction to control the state clemency process. The U.S. Supreme Court subsequently denied certiorari. Justice Sotomayor issued a statement respecting the denial, cautioning that “[b]y closing the prison doors in this context, a State risks rendering this fundamental process an empty ritual.”

In the days before Mr. Rhines’ execution, when all other legal avenues had been exhausted, Mr. Rhines’ legal team also filed an original habeas petition in the U.S. Supreme Court, attempting to raise the juror bias claim. The petition outlined the new evidence showing that jurors had decided that life in prison among other men would not serve as a punishment for Mr. Rhines because he was gay. Lower courts had repeatedly rejected the claim that using Mr. Rhines’ sexual orientation as a factor in sentencing him to death violated his due process and Eighth Amendment rights. Mr. Rhines asked the Court to exercise its jurisdiction to transfer the petition to the lower courts for a hearing, which it declined to do.

Mr. Rhines was the eighteenth person to be executed in 2019.

Kentucky Governor Matt Bevin Grants Clemency to Two Death Row Prisoners

During his final days in office, Kentucky Governor Matt Bevin issued more than 400 clemency decisions in cases spanning the criminal justice spectrum, including commuting the sentences of two death row prisoners, Gregory Wilson and Leif Halvorsen. Mr. Wilson was sentenced to death in 1987. At trial, the court had difficulty securing an attorney for Mr. Wilson, even posting a sign outside the courtroom door begging for assistance. The attorneys who eventually represented Mr. Wilson did so despite having no capital case experience. One of the two attorneys had never even tried a felony, and the other had no office and listed the number of a local tavern on his business cards. At trial, the attorneys questioned no witnesses and essentially mounted no defense. Despite these shocking facts, courts repeatedly upheld Mr. Wilson’s conviction and death sentence on appeal, while his co-defendant, who admitted to killing the victim herself, was eventually released from prison. Governor Bevin’s order noted that “to say that [Mr. Wilson’s] legal defense was inadequate would be the understatement of the year.” His words echoed a federal judge who previously reviewed the case and said that Mr. Wilson’s case was “one of the worst examples” he had ever seen of “the unfairness and abysmal lawyering that pervade capital trials.”

Leif Halvorsen was convicted and sentenced to death for his role in a drug-fueled shooting rampage committed with a co-defendant in 1983. According to his clemency petition, Mr. Halvorsen’s life began to unravel after his marriage ended. Despite seeking treatment for drug addiction, Mr. Halvorsen continually relapsed, eventually culminating in the shooting deaths of the victims while under the influence of multiple substances. In the three decades since his conviction and death sentence, however, Mr. Halvorsen transformed his life in prison. While in prison he has earned two college degrees and serves as an advisor to young prison inmates who need guidance. He has repeatedly voiced remorse and deep regret for his crime. Prison officials, faith leaders, and others joined in support of his clemency petition. In commuting his sentence, Governor Bevin wrote that “Leif has a powerful voice that needs to be heard by more people.” Attorneys for both prisoners celebrated the outcomes, especially praising Governor Bevin for commuting both Mr. Wilson’s and Mr. Halvorsen’s sentences to life with the possibility of parole.
One of the most contentious issues in death penalty litigation is the length of time prisoners’ legal appeals typically take to conclude. Increasingly, the courts have the impression that death row prisoners file “frivolous” legal claims solely to delay the inevitable execution of sentence. Although these two issues are not interchangeable—the amount of time capital cases typically take to be resolved is as much due to delays in adjudication as it is to the filing of the claims themselves—general impatience over the length of time these cases can take has begun to shape the way death row prisoners’ legal claims are substantively analyzed.

Litigation of Claims in Cases with a Pending Execution Warrant

In 2019, capital jurisprudence has evolved to make it even more difficult for prisoners under execution warrant to receive in-depth review of their legal claims. Over the course of four decisions issued by the U.S. Supreme Court during the spring of 2019—Dunn v. Ray, Murphy v. Collier, Bucklew v. Precythe, and Dunn v. Price—the Court grappled with the question of how proximity to a prisoner’s execution date should preclude consideration of substantive claims of constitutional error.

The first of these cases that the Court decided, setting the stage for those that followed, was Dunn v. Ray. Domineque Ray, a devout Muslim, was set for execution in Alabama on February 7, 2019. After being notified in November 2018 that an execution date had been set, he requested that his imam be present under a state statute that allows the “spiritual advisor of the condemned” to be “present at an execution.” On January 23rd, the prison denied the request, citing prison policy that only authorized personnel could be in the execution chamber and that the only authorized spiritual advisor was the Christian chaplain. Mr. Ray filed his appeal on January 28, 2019, which lost in district court on the grounds that he had waited too long to bring the challenge. The district court’s decision was then overturned by the U.S. Court of Appeals for the Eleventh Circuit, in a lengthy opinion concluding that the state policy likely violated the First Amendment and that the claim was not untimely. The State appealed this decision to the U.S. Supreme Court, which overturned the Eleventh Circuit opinion, allowing the execution to proceed within minutes of the decision. As the sole justification for its reversal, the Court’s brief order noted that Mr. Ray “waited until January 28, 2019 to seek relief” from his February 7th execution and that “[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.” Writing in dissent, Justice Kagan, joined by three other members of the Court, found that Mr. Ray’s request was timely. Based on the statutory language specifically allowing a prisoner’s spiritual advisor to be present for the execution, the dissent found that Mr. Ray had no reason to suspect that his request would be denied prior to the notification by the prison on January 23rd, which formed the basis for his subsequent appeal. The dissent found that Mr. Ray put forth a “powerful claim that his religious rights will be violated at the moment the State puts him to death.” Arguing that the majority’s decision was made simply so that the “[s]tate [… could] meet its preferred execution date,” and “[g]iven the gravity of the issue presented,” the dissent concluded that the majority’s decision was “profoundly wrong.”

A little over a month later, Patrick Murphy, a Buddhist death row prisoner in Texas, raised a
similar claim concerning access to a spiritual advisor in the execution chamber. In this case, the Court granted the stay, with Justice Kavanaugh as the deciding vote. Attempting to distinguish Murphy and Ray, Justice Kavanaugh reasoned that Mr. Murphy’s claim was brought “a full month” prior to his execution date, as opposed to two weeks prior, as in the case of Mr. Ray.

In April the Court issued its opinion in Bucklew v. Precythe, which dealt with a question seemingly unrelated to litigation delays—namely, an as-applied challenge to a method of lethal injection—only to again return to the disagreement over the ruling in Ray. Responding to Justice Breyer’s dissent in Bucklew, which argued that “ending delays” in death penalty cases at the expense of constitutional protections would force the Court to pay “too high a price,” the majority again stressed that “last-minute stays should be the extreme exception, not the norm.”

After the Bucklew decision, the Court dealt with the question of delay once more, overturning a circuit court stay based on timeliness concerns to allow Alabama prisoner Christopher Price’s execution to move forward. Justice Breyer issued a lengthy dissent, again taking the majority to task for short-circuiting review of potentially meritorious claims solely in favor of expediency. Justice Breyer wrote, “to proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system.”

The disagreement back and forth between the justices has made clear that any perceived delay in seeking a stay of execution may weigh strongly against the prisoner. Even with full awareness of this risk, filing a legal claim far in advance of an execution date is often not so simple in practice. Lawyers have an ethical and professional obligation when representing a client under execution warrant to bring any and all possible legal challenges that may result in a stay. In addition, many of the issues that are being challenged in so-called “eleventh hour” filings are only ripe once an execution date has been set. For example, challenges to a state’s method of execution under the Eighth Amendment are typically not cognizable in court until the prisoner is in fact facing execution.

Innocence Claims Under Warrant

This increased judicial scrutiny of claims brought while execution warrants are pending may also have the effect of providing states, which have the power to set execution dates, with an unintended litigation advantage. Under the U.S. Supreme Court’s most recent line of capital cases, a state’s decision to set an execution date may significantly alter the framework under which the prisoner’s legal claims are resolved, increasing the difficulty of obtaining substantive relief and decreasing the chances that any court will even hear the merits of the claim. This fact is especially concerning in the context of cases raising innocence claims, where the prisoner’s execution might result in the ultimate injustice.

This year in Florida, Georgia, and Texas, execution dates were set for prisoners with compelling claims of innocence, even though legal proceedings for each were underway in the courts. In Ray Jefferson Cromartie’s case, attorneys were fighting for DNA testing in an effort to demonstrate that Mr. Cromartie was not the shooter of the gun used in the robbery/murder for which he had been sentenced to death. On the day of Mr. Cromartie’s execution, the Eleventh Circuit denied Mr. Cromartie a stay of execution. The court devoted considerable space in its opinion to pointing out that defense counsel were likely in possession of the evidence casting doubt on Mr. Cromartie’s guilt for years prior to raising the claim. This evidence involved various statements over several years exonerating Mr. Cromartie as the shooter and pointing instead to a co-defendant who himself admitted responsibility. Mr. Cromartie was subsequently executed.

In Florida and Texas, James Dailey and Rodney Reed similarly faced execution despite compelling evidence of innocence amassed over decades that they repeatedly sought consideration of in the courts. Mr. Dailey was convicted and sentenced to death based solely on co-defendant and informant testimony, all of which
has been called into question in the years since his conviction. Mr. Dailey’s co-defendant signed an affidavit exonerating Mr. Dailey and admitting to being the sole perpetrator of the murder. In Mr. Reed’s case, by the time the Texas Court of Criminal Appeals last ruled against him in July 2019, attorneys had undermined every piece of forensic evidence used to convict him and developed significant evidence of an alternate suspect. Nevertheless, despite the fact that both prisoners were pressing innocence claims that had not yet been fully exhausted in the judicial process, both states set execution dates. In Mr. Dailey’s case, the state set an execution date even before the state supreme court had decided his actual innocence petition. In Mr. Reed’s case, the state set an execution date the day after he lost a subsequent habeas petition in state court seeking to show innocence, even though that loss would typically have been appealed.

In October 2019, Mr. Dailey’s execution was stayed after a federal court found that new attorneys to his case were entitled to more time to investigate and possibly present a new petition on his behalf. The stay expires December 30, 2019, and does not itself give Mr. Dailey leave to file a subsequent federal habeas petition.

"To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate."

- Justice Stephen Breyer

"Of course, the dissent got its way by default. Petitioner’s strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously."

- Justice Clarence Thomas

"Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve . . . Last-minute stays should be the extreme exception, not the norm . . ."

- Justice Neil Gorsuch

"There are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness."

- Justice Sonia Sotomayor

"To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate."

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Instead, it merely provides counsel with more time to investigate whether grounds for leave to file a subsequent habeas petition exist. But if the court finds that no grounds to file a subsequent writ are shown, the state will have the option to reissue an execution warrant for Mr. Dailey—once again significantly altering the legal landscape in which he will then have to litigate his innocence.

In Mr. Reed’s case, following an unprecedented advocacy campaign seeking to spare him from execution, the state parole board issued a non-binding unanimous recommendation for a 120-day reprieve. That very same day, the highest criminal court in Texas remanded his case to the trial court for full consideration of his claims of prosecutorial misconduct, false evidence, and actual innocence, all of which will now be evaluated during an evidentiary hearing that is expected to last several days and involve numerous witnesses. While Mr. Dailey and Mr. Reed have, for the time being, been spared, the Supreme Court’s recent jurisprudence concerning the evaluation of legal claims while an execution warrant is pending has added significant procedural challenges for capital prisoners and their counsel seeking to present serious claims of constitutional error.

"Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date. . . . Given the gravity of the issue presented here, I think [the Majority's] decision profoundly wrong."

- Justice Elena Kagan
Dunn v. Ray, dissenting

"Because inexcusably late stay applications present a recurring and important problem and because religious liberty claims like Murphy’s may come before the Court in future cases, I write now to explain why, in my judgment, the Court’s decision in this case was seriously wrong."

- Justice Samuel Alito
Murphy v. Collier, dissenting

CAPITAL CASES AT THE COURT
FEBRUARY - MAY, 2019

2/7/19: Dunn v. Ray, the Court overturns a stay of execution granted on religious liberty grounds. Mr. Ray is executed.

3/28/19: Murphy v. Collier, the Court grants a request for stay of execution on religious liberty grounds. The execution is stopped.

4/1/19: Bucklew v. Precythe, Court upholds denial of an Eighth Amendment lethal injection challenge. Mr. Bucklew is scheduled for execution.

4/12/19: Dunn v. Price, the Court overturns a lower court stay of execution based on an Eighth Amendment lethal injection challenge. The execution warrant expires while the Court is debating, but the five-member majority issues its decision anyway over Justice Breyer’s request to wait.

5/13/19: Price v. Dunn, the Court affirms denial of habeas relief, clearing the path for another execution warrant to be set for Mr. Price.
Seventh Trial Remains Possible for Curtis Flowers After Winning Racial Bias Claim at Supreme Court

Curtis Flowers’ capital conviction and sentence was overturned on June 21, 2019, following a finding that his previous trial was marred by impermissible racial bias in jury selection. This decision arose out of the sixth attempt by the state to prosecute Mr. Flowers for the same crime. The first three convictions were reversed by the Mississippi Supreme Court due to repeated instances of prosecutorial misconduct and violations of Batson v. Kentucky, the case that outlawed racial discrimination in jury selection. The fourth and fifth trials resulted in mistrials. The sixth conviction, however, was upheld by the Mississippi Supreme Court, even after Mr. Flowers argued that the State had again violated Batson, this time by using peremptory strikes to remove five of six black prospective jurors.

The U.S. Supreme Court, in a decision authored by Justice Kavanaugh, held that the Mississippi high court had erred in deciding that the State’s peremptory strikes of black prospective jurors were not substantially motivated by purposeful racial discrimination. In reaching this decision, the Court applied Batson to the “extraordinary facts of this case.” The Court looked at the history of racial discrimination in peremptory strikes across the six trials as well as the number of potential black jurors that were struck at the sixth trial, the dramatically disparate questioning of potential white and black jurors at the sixth trial, and the strike of a black juror who was similarly situated to white jurors who served on the jury at the sixth trial. Justice Thomas, joined in part by Justice Gorsuch, wrote a lengthy dissent stating that the majority’s decision was “manifestly incorrect” and opining that the Court ignored the State’s race-neutral reasons for its use of peremptory strikes. He also suggested that the Court had agreed to review Mr. Flowers’ case simply due to the significant media attention it had garnered. In a part of the dissent not joined by Justice Gorsuch, Justice Thomas went on to question the precedent in Batson generally, calling its rule “suspect” and arguing that defendants should not have standing to bring Batson claims.

In September, following the Court’s ruling, the Mississippi Supreme Court sent the case back to the trial court for further proceedings. In public statements and trial court filings, Mr. Flowers’ attorneys have argued that the State should dismiss the charges rather than proceed with a seventh trial, citing the lack of physical evidence connecting Mr. Flowers to the crime and the thin basis of the case against Mr. Flowers generally. Mr. Flowers was first moved from the state’s death row to the county jail pending any retrial and then was granted his request to be released on bail in the interim.

Mr. Flowers’ prosecutor, Doug Evans, ran unopposed and was automatically re-elected in November to an eighth four-year term as District Attorney for Mississippi’s Fifth Circuit Court District, which encompasses several counties. Mr. Evans has been the district’s elected chief prosecutor since 1991. Following the U.S. Supreme Court decision, Mr. Evans told a local Mississippi newspaper that “[Mr. Flowers] will have to be retried,” but his office has not yet announced official plans to try Mr. Flowers a seventh time. In November, a federal class action lawsuit was filed against Mr. Evans. The named plaintiffs include four black would-be jurors in Mr. Evans’ district and the local NAACP branch, who are asking the judge to issue an injunction to prevent systematic racial discrimination in jury selection.
Carlos Ayestas Again Seeks Supreme Court Intervention, Following New Fifth Circuit Denial

The legal team representing Texas death row prisoner Carlos Ayestas, including pro bono attorneys from O’Melveny & Myers, filed a certiorari petition with the U.S. Supreme Court on October 29, 2019, asking the Court to intervene in his case a second time. In 2018, the Court unanimously held that the U.S. Court of Appeals for the Fifth Circuit had been using an overly demanding interpretation of a federal statute to deny investigation and expert funding to indigent death row prisoners. Though the governing law, 18 U.S.C. § 3599(f), instructs courts to grant “reasonably necessary” funding for the services needed to support federal habeas corpus petitions, the Fifth Circuit instead analyzed Mr. Ayestas’s request for funds under its own, more demanding “substantial need” standard and subsequently denied funding. This prevented Mr. Ayestas’s team from doing the needed legwork to uncover the facts underlying his claim that his trial and post-conviction counsel had not sufficiently investigated his life history and mental health.

Back in the Fifth Circuit after the Supreme Court remanded for re-analysis of Mr. Ayestas’s claim, Mr. Ayestas was handed another loss. The Fifth Circuit held earlier this year that even under the correct standard, there was no reasonable need for the funds because the claim of state habeas counsel ineffectiveness would fail regardless. The appellate court reasoned that state habeas counsel’s failure to adequately investigate Mr. Ayestas’s background was not deficient performance. The court denied that professional norms or Supreme Court precedent made clear post-conviction counsel’s mitigation investigation duties in 1998, the time of state habeas counsel’s representation. In reaching this conclusion, the Fifth Circuit referenced only the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, rather than the current edition. Published only a few years after Mr. Ayestas’s state habeas proceedings, the current Guidelines edition discusses in detail the need to conduct a thorough mitigation investigation at every stage of a capital case and restates norms of capital representation that were well-established prior to Mr. Ayestas’s 1997 trial. The Fifth Circuit also referenced Bobby v. Van Hook, a 2009 Supreme Court opinion specifying only that the Sixth Circuit erroneously used the 2003 ABA Guidelines to evaluate counsel’s performance without considering whether they applied in 1985. Though Van Hook did not depart from the Supreme Court’s body of ineffectiveness-of-counsel jurisprudence, some lower courts have misapplied it to dismiss the Guidelines’ applicability without examining the underlying norms that existed in the year in question, as the Fifth Circuit did here.

Mr. Ayestas’s new certiorari petition pointed out the differing approaches of the various appellate courts in applying professional norms to resolving ineffectiveness claims. Unlike in the Fifth Circuit, decisions in the Third, Sixth and Ninth Circuits have “recognized that prevailing professional norms in the 1980s and 1990s required counsel to conduct a mitigation investigation examining a capital defendant’s background, including his mental health and social history.” The filing also cited to Supreme Court cases predating Mr. Ayestas’s state habeas petition, in which the Court emphasized the importance of mitigation investigation to capital defense, particularly in the realm of mental health investigations.

With an extension granted, the State’s response is due on January 13th, 2020.
SCOTUS Fall 2019: Pending Cases

This fall, the Supreme Court heard one death penalty case and two non-capital cases that all broadly implicate how criminal defendants are sentenced. Two of the cases have implications for how new rules of constitutional law are applied to older cases, and two examine the role of juries in sentencing. The Court also heard arguments in a capital case that explores whether a state can abolish insanity as a defense.

*McKinney v. Arizona, No. 18-1109*

This term, the Court heard arguments in a case examining whether courts must apply current law to a case that has been remanded after a grant of habeas relief. The U.S. Court of Appeals for the Ninth Circuit, considering Arizona death row prisoner James McKinney’s habeas petition, vacated Mr. McKinney’s death sentence due to the Arizona courts’ history of systematically failing to consider non-statutory mitigating evidence, in violation of *Eddings v. Oklahoma*. After finding that the courts had therefore not considered mitigating evidence of post-traumatic stress disorder from Mr. McKinney’s horrific childhood, the Ninth Circuit ordered the lower courts to correct this constitutional error. In response, the State asked the Arizona Supreme Court to conduct a “new independent review” of Mr. McKinney’s sentence. Mr. McKinney opposed, arguing that he was entitled to return to trial court for a full resentencing. The parties agreed that if the Ninth Circuit’s order required resentencing, or if the order reopened direct appeal proceedings, those proceedings would have to follow current law—which requires a sentence imposed by a jury rather than a judge pursuant to the U.S. Supreme Court’s 2002 decision in *Ring v. Arizona*. The State argued, however, that the error identified by the Ninth Circuit could be corrected by the state court in a post-conviction appellate proceeding. Post-conviction proceedings typically do not receive the benefit of changes in the law, and *Ring* was decided after Mr. McKinney’s original direct appeal ended. The Arizona Supreme Court granted the State’s motion and affirmed Mr. McKinney’s death sentence, also finding that *Ring* did not apply. Mr. McKinney argued that this new order bore all the hallmarks of a direct appeal, including the same method of analysis and use of the same docket number from the first time the case was heard on direct appeal.

The U.S. Supreme Court has granted certiorari on two interrelated issues raised by the Arizona Supreme Court’s actions: whether the court should have applied the current law in resentencing proceedings, rather than the law in place when the sentence first became final, and whether *Eddings* error can be corrected through appellate review, as was done here, or whether it requires resentencing in the trial court. The circuits are split on both issues. Argument took place on December 11.

*Mathena v. Malvo, No. 18-217*

On October 16, 2019, the Court heard arguments in *Mathena v. Malvo*, another case that has important implications for how and when prisoners can receive the benefit of new Supreme Court decisions. The case arose from a dispute about the sentence of life imprisonment without parole given to Lee Boyd Malvo, who was 17 at the time of his crimes. Under the Virginia law that governed Mr. Malvo’s 2004 capital trial, the jury could recommend either death or life without parole. In the years following, the U.S. Supreme Court first banned the juvenile death penalty and then in *Miller v. Alabama* banned mandatory juvenile life without parole sentences. *Miller* specified that such sentences should be given rarely and only after taking into account certain considerations about the defendant’s age and the crime. A few years later, in *Montgomery v. Louisiana*, the Court further held that the *Miller* prohibition should be applied retroactively to sentences that were in place before that decision. Accordingly, the U.S. Court of Appeals for the Fourth Circuit remanded Mr. Malvo’s case for resentencing in 2018. Opposing this remand, the State argued that the *Miller* decision was only about mandatory life without parole sentences and that Mr. Malvo’s life sentence was not mandatory when it was imposed.
The State reasoned that because Virginia law did not explicitly require that Mr. Malvo be sentenced to life without parole at his original trial, he should not benefit from the rule announced in *Miller*. At oral argument, the justices and advocates examined *Miller*’s reach, as well as whether Mr. Malvo’s life sentence was actually discretionary, and whether the judge or jury had the opportunity to consider the sentencing factors mandated by *Miller*.

**Ramos v. Louisiana, No. 18-5924**

On October 7, 2019, the Court heard arguments in *Ramos v. Louisiana*, which examined whether the Sixth Amendment requires unanimous jury verdicts in states’ criminal trials. Only two states, Louisiana and Oregon, lack this requirement. The last time the Court took up this question, in 1972 in *Apodaca v. Oregon*, it left in place an inconsistent system in which federal and state criminal trials are subject to different unanimity rules. In a fractured decision with no majority opinion, *Apodaca* announced the rule that the Sixth Amendment requires unanimous verdicts in federal felony trials, but not in state trials. These opposing applications of the Sixth Amendment’s jury trial right stand in contrast to the other constitutional amendments found in the Bill of Rights, which have been applied to the states through the Fourteenth Amendment in the same way as they apply to the federal government. The justices’ questions centered on the *stare decisis* doctrine and whether a ruling in Mr. Ramos’s favor would require overruling the Court’s prior precedent, and whether such a ruling would necessarily further change the trial landscape by also requiring juries of no fewer than 12 people.

**Kahler v. Kansas, No. 18-6135**

James Kahler has been on Kansas’s death row since 2009, when he was convicted of killing four of his family members. Though Mr. Kahler’s trial featured expert testimony about his mental illness at the time of the shooting, he was unable to plead not guilty by reason of insanity, as Kansas is one of five states that has abolished the insanity defense. In most states, Mr. Kahler could have used insanity as an affirmative defense—that is, even if he committed the crime, he did not know right from wrong due to his mental illness and therefore was not culpable. Under Kansas law, however, whether Mr. Kahler had the moral capacity for the crime was irrelevant. For defendants like Mr. Kahler, the only option is to argue that they lacked the required mental state for the crime—here, the intent to kill. Mr. Kahler’s advocates have argued that a mentally ill defendant could form the intent to commit a crime but still lack the capacity to judge between right and wrong, allowing the criminally insane to nonetheless be convicted.

The U.S. Supreme Court took up the question of whether Kansas’s insanity defense abolition was constitutional. At oral arguments, Justice Alito voiced concern about the broad implications of Mr. Kahler’s proposed rule, under which a defendant could not be convicted if, due to his mental disorder, he believed his actions were moral. Justice Alito cited the statistic that “one in five people in the United States has some mental disorder.” Justice Gorsuch similarly wondered if an insanity defense would need to be available for all felonies, or even more widely to encompass misdemeanors. Justice Kavanaugh pushed back against the contention that Kansas had abolished the insanity defense at all, calling that a “misnomer” and emphasizing that, even without a separate insanity defense, juries can consider mental status in deciding criminal intent.

Justices Sotomayor and Breyer, meanwhile, expressed concerns about the limited scope of the inquiry under current Kansas law. They questioned Kansas’s solicitor general about defendants not encompassed by the current rule, such as someone who believes they are commanded by voices or claims that a dog told them to commit murder. Both of these mentally ill hypothetical defendants would have intended to kill, and therefore would have the necessary criminal intent for a conviction as the law stands. Justice Kagan echoed these questions by noting that, historically, conviction of a mentally ill defendant required more than simply showing that he possessed the intent to kill.
Project Achieves Major Milestone: 100 Prisoners Off Death Row

This summer, the ABA Death Penalty Representation Project celebrated a major milestone, with the resentencing of Tennessee death row prisoner Andrew Thomas marking 100 capital cases now finalized with a sentence less than death following assistance by the Project and its pro bono partners.

Since 1986, the Project has worked to address the counsel crisis facing death row prisoners. Three years after the Project’s founding, in 1989, the U.S. Supreme Court declared that the Sixth Amendment provides no guarantee of counsel to capital prisoners in post-conviction or habeas proceedings. This left many prisoners on death row without meaningful access to the courts to raise significant constitutional claims about errors with their conviction or sentence, such as problems with representation, jury selection, or prosecutorial misconduct. Not having state or federally mandated offices or attorneys equipped to handle these vital appeals—especially since many death penalty states routinely underfunded trial counsel systems, as well—meant that countless death row prisoners were being executed unaided by the zealous representation that is crucial to fairness, accuracy, and reliability in death penalty prosecutions.

For more than thirty years, the Project’s volunteers have stepped in to fill this critical need, donating their time, skills, and resources to ensuring that every person facing a death sentence has a committed advocate to fight on his behalf. The Project’s case placement records, which start in 1998, show that today, 100 capital prisoners represented by Project volunteers have won relief from their death sentences. The majority of those have been resentenced to life or a term of years, after lawyers proved that a death sentence would be unconstitutional; five death sentences were commuted to life terms after grants of executive clemency; and 15 of those 100 prisoners were released from prison altogether after their attorneys demonstrated that they were wrongfully convicted of crimes they did not commit. Not one of these victories came easily, in a system that is designed to leave death sentences in place even in the face of overwhelming evidence that execution would be unjust. Every life saved by the Project’s volunteer lawyers is a testament to the dedication, compassion, creativity, and countless hours of work devoted by these skilled advocates.

In total, records show that more than 350 prisoners have been assisted by the Project and its volunteers since 1998, nearly half of which have cases that are still in progress in the courts. The Project counts every case placed with pro bono counsel as a victory, regardless of the eventual outcome. Without the assistance of counsel, a prisoner has no voice in the legal system to tell his story and seek help from the courts. In the absence of a constitutional guarantee of counsel, volunteer attorneys represent access to justice for their clients and integrity in the criminal justice system. This is true whatever the outcome of the case. Whether because of the underlying facts, or inherited procedural obstacles, or other systemic barriers, some cases will almost inevitably end with an execution no matter how extraordinary the efforts of counsel might be. But this does not lessen the value of what these volunteers have contributed to their clients and to the legal system. These remarkable lawyers give their clients the chance to tell their stories and the knowledge that they have advocates fighting to protect their rights and dignity to the very end, while also setting the building blocks for eventual change by exposing flaws in the system and the need for reform.

While even the most skilled post-conviction attorneys will have cases that ultimately cannot be won, there would be no hope at all without their efforts. Without the assistance of pro bono counsel and other dedicated advocates, it is
virtually guaranteed that these 100 individuals would have been wrongfully executed. The fact that their lawyers were able to defy all odds and overcome monumental legal and procedural hurdles to save their clients’ lives is a remarkable example of the power of pro bono representation.

We offer our deepest gratitude and appreciation to the scores of volunteer attorneys who have, and continue to, bring dignity, humanity, and justice to the men and women on death row.

This article was first printed in the Project’s 2019 Summer Newsletter. To learn more about Success Stories from our volunteer attorneys, visit ambar.org/dprp-success-stories.

Capital Clemency Resource Initiative Update

In 2019, the Project’s Capital Clemency Resource Initiative (CCRI) continued to produce resources for attorneys, scholars, journalists, and members of the public interested in clemency in death penalty cases. Via its unique resource website capitalclemency.org, in October 2019 the CCRI published a 25-page memorandum regarding the capital clemency process in Texas. This document provides in-depth information regarding the various procedural mechanisms for seeking clemency in Texas, as well as information regarding the state’s current clemency decision makers and history of clemencies and controversial executions. With the addition of Texas, the website now hosts similarly comprehensive memoranda regarding death penalty clemency procedures in 14 capital jurisdictions. The corresponding state clemency websites have all been newly updated in 2019 with the most recent information regarding new decision makers, death penalty cases, and clemency and other relevant decisions. The CCRI expects to add at least five more state memoranda in the first part of 2020. Also in 2020, the CCRI is excited to undertake the development of resource and educational materials designed specifically for capital clemency decision makers such as governors, gubernatorial staff, and members of parole and pardons boards.

[Map showing state clemency information memos available on capitalclemency.org]
Project Assists in ABA Clemency Advocacy for Two Death Row Prisoners

In November 2019, the ABA, with help from the Project and its Capital Clemency Resource Initiative, submitted a letter to the Texas Board of Pardons and Parole regarding the case of death row prisoner Rodney Reed. Mr. Reed was sentenced to death for the rape and murder of a young woman, but forensic evidence developed in post-conviction proceedings indicates he did not commit the crime. Significant other evidence of innocence has also been developed in the years since his conviction. The letter urged the Texas Board, which is the only entity in the state empowered to recommend a commutation of death sentence, to use its power to do so in this troubling case. Aided by the CCRI’s research into and expertise in how discrete state clemency systems function, the letter also called upon the Board to use its investigatory authority to hold a hearing to allow consideration of evidence that had not been reviewed on the merits in any court. The Board unanimously recommended a 120-day reprieve of execution for Mr. Reed, shortly before the Texas Court of Criminal Appeals halted the execution and remanded the case for an evidentiary hearing on numerous grounds, including actual innocence.

In October 2019, the ABA submitted a letter in support of clemency for Florida death row prisoner James Dailey. Mr. Dailey, a Vietnam War veteran, was sentenced to death for the murder of a teenage girl in Tallahassee in 1985. His co-defendant, Jack Pearcy, who initially implicated Mr. Dailey in the crime, later refused to testify against him at trial and subsequently admitted on four separate occasions that Mr. Dailey had not actually been involved in the killing. Nevertheless, after failing to secure a death verdict for Mr. Pearcy, prosecutors relied on the testimony of three jailhouse informants to secure Mr. Dailey’s conviction and death sentence—including from one informant described by law enforcement in other jurisdictions as a “known con artist.” Aside from this highly suspect testimony and Mr. Pearcy’s later-recanted statements, no other evidence implicated Mr. Dailey in the crime. Based on the dearth of evidence suggesting Mr. Dailey’s guilt and the lack of available process in the courts for a claim of actual innocence, the ABA called upon Florida Governor Ron DeSantis to withdraw Mr. Dailey’s execution warrant and reopen clemency proceedings in the case. A federal court subsequently granted Mr. Dailey a stay to allow newly appointed counsel time to pursue a federal habeas petition. Meanwhile, in response to the clemency advocacy efforts on behalf of Mr. Dailey, clemency board members suggested interest in reviewing his case and in taking a more active role in capital cases generally before execution dates are set.

In both letters, the ABA emphasized that clemency acts as a “fail-safe” in the criminal justice system, noting that the U.S. Supreme Court has identified clemency as the proper forum to resolve claims of innocence brought during late-stage appeals, and that the clemency process is “specifically empowered—and uniquely positioned—to correct injustice where the courts cannot.”
ABA Death Penalty Representation Project

There is no federal constitutional right to counsel for prisoners on death row. The Project works to ensure access to qualified counsel at every stage of a capital proceeding.

PRO BONO RECRUITMENT

100 CASES FINALIZED
WITH A SENTENCE OF LESS THAN DEATH AND MORE THAN 350 DEATH ROW PRISONERS ASSISTED

60% more cases
placed with volunteer counsel in 2019

19 LAW FIRMS
AND HUNDREDS OF VOLUNTEER ATTORNEYS COMMITTED THEIR TIME AND SKILLS IN 2019 TO ASSISTING PRISONERS IN NEED

LEVERAGING PARTNERSHIPS TO MAKE A DIFFERENCE

The Project's small four-person staff consists of three attorneys and an administrative specialist. To maximize our impact, we work with criminal justice organizations, law firms, and other ABA entities. These partnerships allow us to provide training and technical assistance nationwide to thousands of pro bono attorneys and capital defenders and to engage in systemic advocacy to ensure due process and access to counsel in capital cases.
On September 19, 2019, the Project presented awards to volunteer law firms Skadden and White & Case, and to Kelley J. Henry, Assistant Federal Defender for the Middle District of Tennessee, at its annual Volunteer Recognition & Awards Dinner. ABA President-Elect Patricia Lee Refo presented a special Leadership Award on behalf of the Project to longtime supporter Ronald J. Tabak. Philadelphia District Attorney Larry Krasner provided keynote remarks, describing his journey from public defender to prosecutor.

More pictures of the event and video of the speeches can be found at ambar.org/2019awards and by navigating to the “Event Media” link.
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Thank you to the many lawyers and law firms that have volunteered their time, expertise, and resources to ensuring that no person faces the death penalty without an advocate at their side.
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*Project Staff at the 2019 Awards Dinner*