PART VI: CORRECTIONS AND SENTENCING CHAPTER 17

CAPITAL PUNISHMENT

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I. RECENT TRENDS

A. Overview

In 2019 through mid-April 2020, diminished intensity in support for capital punishment and greater opposition to the existing death penalty system were reflected in various ways.

For the first time, when the Gallup poll asked in October 2019 whether people preferred the imposition of capital punishment for serious crimes or, instead, life without parole, the majority (*i.e.*, over 50.0%) said life without parole ("LWOP"). While the LWOP majority has not been reflected in other national polls (although it has in a number of state polls), the *trend* towards much lower and less intense support for the death penalty is consistent with other polls, including Gallup's regular poll question, which asks Yes or No about the death penalty without offering any alternative.

Second, an additional state, New Hampshire, abolished the death penalty in 2019, and Colorado did so in March 2020. These actions increase to 10 the number of states that have abolished capital punishment in the last 15 years. Moreover, two additional states, Ohio and California, began moratoriums on executions – bringing the number of formal or *de facto* moratorium states to four.

These developments, plus greater public awareness of numerous significant problems with the capital punishment system, have also led to the number of new death sentences and the number of executions declining in recent years to much lower levels than in the preceding decades. There have not been significant political repercussions for elected officials outside of the South who have come out against the death penalty *as implemented* (even if they may favor it in theory).

Support for the death penalty is no longer perceived as a magic elixir by candidates in most parts of the country, and opposition to it no longer is generally perceived as generating a political death sentence. As the public has learned more and more about the death penalty system *as implemented*, public officials and political candidates have found it much easier to support abolition, a moratorium, or measures to limit the worst features of capital punishment. For example, Joseph Biden, who as Chair of the Senate Judiciary Committee took a leading role in the enactment of a 1994 law greatly expanding the federal death penalty, now advocates abolishing the federal death penalty and offering states

incentives to abolish the death penalty and replace it with LWOP.[1] As of mid-April 2020, he was the Democratic Party's presumptive nominee for President.

It was not yet apparent what impact(s) the coronavirus pandemic would have on the death penalty – with one exception. There was the beginning of a trend to defer executions until the country got a better handle on the pandemic.[2]

1. Public Opinion Poll Results

On November 25, 2019, Gallup reported the results of its most recent polling on capital punishment, conducted between October 14 and October 31, 2019. It asked this question, as it has done on 13 other occasions since 1985: "If you could choose between the following two approaches, which do you think is the better penalty for murder?" The two choices were: the death penalty and life imprisonment with absolutely no possibility of parole. The results were 36% Death Penalty, 60% LWOP, and 4% Undecided.[3]

In 1985, when Gallup first asked that question, the results were 56% Death Penalty, 34% LWOP, 10% Undecided. The death penalty continued to lead by large margins until August/September 2000, when the margin fell to 2%. In May 2006, having opened up a 12% margin in February 2001, the death penalty trailed slightly, 47% to 48%. In the two next surveys, the death penalty led by 49% to 46% in October 2010, and by 50% to 45% in September 2014. Comparing the October 2019 results and the September 2014 results, Gallup reported that support for LWOP had increased by 19% among Democrats, 16% among Independents, and 10% among Republicans.

Gallup has asked much more frequently a much vaguer question: "Are you in favor of the death penalty for a person convicted of murder?" – which gives no alternative. Through 1960, Yes won with large or enormous margins. When polling on this question resumed in 1965, and through March 1972, the margins were mostly much smaller, and No even won a plurality in May 1966, by 47% to 42%. But beginning in November 1972 (shortly after *Furman v. Georgia*[4] cleared out all death rows), Yes won by large, often extremely large, margins. The margins declined significantly in 2017, 2018, and 2019, to 14%, 15%, and 14%, respectively, and the Yes answer fell to 55-56%, far below the percentages in earlier years.[5]

The *trends* in various polls are significant. As the *Washington Post* reported on November 25, 2019, "polls consistently show that the level of support for the death penalty has declined over recent decades."[6]

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[1] Matt Viser & Sean Sullivan, *Biden Announces Criminal Justice Policy Sharply at Odds with His '94 Crime Law*, WASH. POST, July 23, 2019.
[2] Jess Bravin, *Prisoner Executions Are Put Off Because of Pandemic*, WALL ST. J., Mar. 26, 2020.
[3] Jeffrey M. Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP, Nov. 25, 2019.
[4] *Furman v. Georgia* 408 U.S. 238 (1972).
[5] Jones, *supra* note 3.
[6] Mark Berman, *Most Americans now favor life in prison over the death penalty for convicted murderers*, WASH. POST, Nov. 25, 2019.

2. Ten States Have Ended the Death Penalty

a. New York

In 2004, New York's highest court held unconstitutional a key provision of the death penalty law.[7] After comprehensive hearings, the legislature did not correct the provision.[8] In 2007, New York's highest court vacated the state's last death sentence.[9]

b. New Jersey

New Jersey abolished the death penalty prospectively on December 17, 2007.[10] On the previous day, Governor Jon S. Corzine commuted the death sentences of all eight New Jersey death-sentenced inmates.[11]

c. New Mexico

On March 18, 2009, New Mexico abolished the death penalty prospectively.[12] On June 28, 2019, the New Mexico Supreme Court held that the statute's proportionality requirement mandated vacating the last two death sentences.[13]

d. Illinois

Illinois abolished the death penalty prospectively on March 9, 2011.[14] Governor Patrick Quinn signed the bill and commuted the sentences of everyone on Illinois' death row to LWOP.[15] In the years after Quinn lost his 2014 re-election effort, there was no discernible effort to bring back the death penalty. In the 2018 election, Governor Bruce Rauner unsuccessfully attempted to salvage his re-election campaign by urging reinstatement of capital punishment.

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[7] *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).
[8] 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. Yancey Roy, Gannett News Serv., *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.
[9] *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007).
[10] 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.
[11] Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight*, N.Y. TIMES, Dec. 18, 2017.
[12] Associated Press, *Death Penalty Is Repealed in New Mexico*, Mar. 18, 2009, http://www.nytimes.com/2009/03/19/us/19execute.html.
[13] *Fry v. Lopez; Allen v. LeMaster*, 447 P.3d 1086 (N.M. 2019).
[14] John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011.
[15] Statement from Gov. Pat Quinn on Senate Bill 3539, Mar. 9, 2011, http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265.

e. Connecticut

In April 2012, Connecticut repealed the death penalty prospectively.[16] On May 26, 2016, by a 5-2 vote in *State v. Peeler*,[17] the Connecticut Supreme Court reaffirmed its 2015 holding (by 4-3) in *State v. Santiago*[18] that capital punishment violates the state's constitution. These decisions prevent executions of those not prospectively exempted from the death penalty by the 2012 law.

On December 18, 2018, Connecticut's incoming Governor, Ned Lamont, said he wanted more criminal justice reforms. The *Hartford Courant* reported that one reform already implemented was repeal of the death penalty.[19]

f. Maryland

In March 2013, Maryland repealed the death penalty prospectively.[20] A subsequent effort to seek a reinstatement referendum got too few signatures to be put on the ballot.[21] On January 20, 2015, Governor Martin O'Malley, shortly before leaving office, commuted the death sentences of those still on Maryland's death row.[22] Larry Hogan, a Republican, made no discernible effort to reinstate the death penalty during his first gubernatorial term. It was not an issue in his successful 2018 re-election campaign. He has not advocated reinstatement during his second term.

g. Delaware

On August 2, 2016, the Delaware Supreme Court held, by 4-3 in *Rauf v. State*,[23] that Delaware's capital punishment statute was unconstitutional in light of *Hurst v. Florida*.[24] The court's decision held that the statute unconstitutionally allowed a judge to make findings by a preponderance of the evidence that only a unanimous jury could find if persuaded beyond a reasonable doubt.[25] The State did not seek certiorari from this holding of federal constitutional law.

On December 15, 2016, the Delaware Supreme Court unanimously held, in *Powell v. State*,[26] as a matter of Delaware law that *Rauf*'s holding applies to all cases that were final when *Rauf* was decided – which was true of the cases of all 18 of Delaware's death row inmates. On March 13, 2018, Delaware's final two death row inmates' sentences were changed to LWOP.[27]

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[16] J.C. Reindl, *Senate Votes to Abolish the death penalty*, THE DAY (Conn.), Apr. 5, 2012.
[17] *State v. Peeler*, 140 A.3d 811 (Conn. 2016) (per curiam) (mem.).
[18] *State v. Santiago*, 122 A.3d 1 (Conn. 2015).
[19] Daniela Altimari, *Gov.-elect Ned Lamont signals support for criminal justice overhaul*, HARTFORD COURANT, Dec. 18, 2018.
[20] Maggie Clark, *Maryland Repeals Death Penalty*, STATELINE, May 2, 2013.
[21] John Wagner, *Petition drive to halt Maryland's death penalty repeal falls short*, WASH. POST, May 31, 2013.
[22] 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.
[23] *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam).
[24] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[25] *Rauf*, 145 A.3d at 434.
[26] *Powell v. State*, 153 A.3d 69, 70 (Del. Dec. 15, 2016) (per curiam).
[27] Esteban Parra, *Delaware's last two death row inmates resentenced to life in prison*, NEWS J. (Wilmington), Mar. 13, 2018.

h. Washington

Washington's Supreme Court unanimously held on October 11, 2018 that the state's death penalty was imposed "in an arbitrary and racially biased manner" in violation of the state constitution's prohibition of cruel punishment.[28] The holding in *State v. Gregory* was based on a study showing that if one controlled for non-racial factors a black person was more than three times as likely to be sentenced to death, and on the court's "judicial notice of implicit and overt racial bias against black defendants in this state."[29] The court changed the death sentences of all eight death row inmates to LWOP.

i. New Hampshire

New Hampshire repealed capital punishment prospectively on May 30, 2019, after both houses of the legislature overrode Governor Sununu's veto.[30]

j. Colorado

On May 22, 2013, Colorado Governor John W. Hickenlooper, when granting a temporary reprieve of Nathan J. Dunlap's execution, said that capital punishment is "arbitrary" and not "fairly or equitably imposed," as illustrated by the fact that people whose crimes were as bad or worse than Dunlap's had gotten life sentences.[31] On August 17, 2014, the Governor, while seeking re-election, said he opposed the death penalty, whereas in 2010 he had publicly supported it. He attributed his change of view to the much greater cost of having a death penalty system and its failure to deter "homicides or grisly murders."[32] He was re-elected and continued the moratorium on executions that began with Dunlap's case until he left office in January 2019. The new Governor, Jared Polis, had promised to sign a death penalty repeal bill.[33] The moratorium continued.

On January 30, 2020, the Colorado Senate – which had never voted for a bill to repeal the death penalty – voted 19-15 in favor of a repeal bill whose effective date is July 1, 2020. Three Republican senators cast crucial votes in favor of the legislation.[34] The bill passed the House on February 25, 2020.[35] On March 23, 2020, Governor Polis signed the bill and commuted the death sentences of the three men on death row.[36]

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[28] *State v. Gregory*, 427 P.3d 621, 633 (Wash. 2018) (en banc).
[29] *Id.* at 635.
[30] Holly Ramer, Associated Press, *New Hampshire repeals death penalty as Senate overrides veto*, May 30, 2019, https://abcnews.go.com/US/wireStory/hampshire-repeals-death-penalty-63372855.
[31] Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013), http://www.cofpd.org/docs-dun/governor-executive-order.pdf.
[32] Eli Stokols, *In interview, Hickenlooper offers new anti-death penalty stance, light support for Keystone*, KDVR-TV (Denv.), Aug. 18, 2014, http://kdvr.com/2014/08/18/in-interview-hickenlooper-offers-new-anti-death-penalty-stance-light-support-for-keystone/ (quoting from online video clip).
[33] Saja Hindi, *Death penalty: How likely is it to be imposed with a new Colorado governor?*, FORT COLLINS COLORADOAN, Dec. 16, 2018.
[34] Alex Burness, *Emotional debate on Colorado death penalty repeal culminates in historic vote*, DENV. POST, Jan. 30, 2020.
[35] Ben Warwick, *Death Penalty Repeal Passes House On Voice Vote*, CBSN (Denv.), Feb. 25, 2020.
[36] Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES, Mar. 23, 2020.

k. Post-Abolition Trends/Activities in the States That Have Ended the Death Penalty – Lack of "Predicted Horrible Effects"

An August 14, 2017 program co-sponsored by several ABA entities and the New York City Bar Association's Capital Punishment Committee was titled *Life After the Death Penalty: Implications for Retentionist States*. The program included detailed discussions of how the death penalty came to an end since 2004 in the seven states that had, as of then, either abolished it or ended it via judicial holdings. Among the important points made are that experience with the actual – not theoretical – death penalty system, replete with its many real-life problems and no practical benefits, were crucial to ending it.[37] The program's speakers also discussed a significant post-abolition phenomenon: the virtually complete lack of any movement to revive capital punishment in these states and the non-existence of any political "price" paid by those who voted for abolition. Thus, whatever lesson people may think they learned from Michael Dukakis' horrendous answer to the capital punishment question at the outset of the final 1988 presidential debate has had no relevance in these states. (I have asserted elsewhere that the "lesson" was "mislearned" in the first place – the real lesson being that if you act and speak as though you would be emotionally unaffected by your wife's brutal rape and murder, you will not be elected dog catcher, no less President.[38])

Another important effect of abolition – which has not been as significant as it could and should be – is that without the issue of the death penalty to divide them, prosecutors, police, corrections officials, the defense bar, victims' survivors' groups, and criminal justice reformers have found it much easier to work together productively on a whole variety of criminal justice, re-entry, and victims' survivors' issues.

Perhaps the most important fact about the demise of capital punishment in these states is that *none* of the parade of horribles that death penalty proponents had asserted would transpire if the death penalty were abolished has actually occurred in any of these states. For example, there has not been, post-abolition, an upsurge in police or correction officer or children's murders, or in the cost of the criminal justice system.[39] This *lack of the predicted horrible effects* must become better known – especially because death penalty proponents continue to argue against abolition – or even moratoriums – in states that still have the death penalty by asserting that the parade of horribles will occur.

The lack of horrible effects after abolition is no surprise to those who have studied the various analyses about supposed deterrence purportedly resulting from executions. Professor Daniel S. Nagin's "Deterrence" chapter in the Academy of Justice's report *Reforming Criminal Justice*, released in late 2017, analyzed deterrence studies over the last two decades and earlier analyses back to the 1960s. He concluded that "the certainty of punishment is far more convincing and consistent" as a potential deterrent than "the severity of punishment" and that "[t]he consequences need not be draconian, just sufficiently costly, to deter the prohibited behavior."[40] In 2012, the National Research Council of the National Academy of

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[37] ABA Section of Civil Rights & Social Justice, Life After the Death Penalty: Implications for Retentionist States, Presented at the House of the New York City Bar Ass'n (Aug. 14, 2017) [hereinafter ABA, Life After the Death Penalty], https://deathpenaltyinfo.org/files/pdf/Life-After-Death-Penalty_Transcript.pdf.

[38] Ronald J. Tabak, *Commentary*, 21 FORDHAM URB. L.J. 280, 295 (1994).

[39] ABA, Life After the Death Penalty, *supra* note 37, at 16-33.

[40] Daniel S. Nagin, *Deterrence*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE, at 19, 34, 24 (Eric Luna ed., 2017).

Sciences concluded, based on a thorough analysis by Professor Nagin and John Pepper, that "research to date [on the effect of capital punishment on homicides] is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates," and that such research studies should not be considered with regard to whether capital punishment has an impact on homicides.[41]

A study of "what happened after abolition of the death penalty in New Jersey New Mexico, Illinois, and Maryland" was published in January 2020.[42] The study did not find any general backlash. Instead, "the thought of abolition today seems to be more troubling to political leaders and citizens than the act of abolition. While polls show that a bare majority still favors the death penalty, Americans may be more ready to accept abolition than they have ever been. As a result, political leaders now have considerable room to maneuver and less to fear when they decide that they will 'no longer tinker with the machinery of death.'"[43]

3. Another Four States Have Formal or De Facto Moratoriums on Executions

a. Oregon

Since reinstating capital punishment in 1984, Oregon has executed twice, both in the 1990s while John Kitzhaber was Governor. On November 22, 2011, Kitzhaber, once again Governor, said he would now prevent executions, and noted that the 1990s executions had neither "made us safer" nor "more noble as a society."[44] The Oregon Supreme Court in 2013 upheld the moratorium.[45] During the 2014 election, in which this policy was an issue,[46] Kitzhaber was re-elected. After his resignation for unrelated reasons, Kate Brown, the new Governor, continued the moratorium.[47] She was re-elected in 2016 and 2018 after pledging to continue the moratorium.[48]

b. 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.[49] Wolf defeated Corbett. On February 13, 2015, Governor Wolf announced a moratorium on executions until a bi-partisan

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[41] COMM. ON LAW & JUSTICE OF THE DIV. OF BEHAVIORAL & SOC. SCIS. & EDUC., REPORT BRIEF, at 2 (2012) (based on COMM. ON DETERRENCE & THE DEATH PENALTY, DETERRENCE AND THE DEATH PENALTY (2012)).
[42] Austin Sarat et al., *After Abolition: Acquiescence, Backlash, and the Consequences of Ending the Death Penalty*, 1 HASTINGS J. CRIME & PUNISHMENT 33, 40 (2020).
[43] *Id.* at 77-78 (footnote omitted) (citation omitted).
[44] William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011.
[45] *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013) (en banc).
[46] Laura Gunderson, *Tough Question Tuesday: Kitzhaber on death penalty decision; Richardson says he won't impose personal convictions*, OREGONIAN, Oct. 21, 2014.
[47] Tony Hernandez, *Brown to maintain death penalty moratorium*, OREGONIAN, Oct. 19, 2016.
[48] Oregon enacted legislation in 2019 that reduced the number of death-eligible categories of "aggravated murder" from 19 to 4: cases involving acts of terrorism in which two or more people are killed, premeditated murders of children aged thirteen or younger, prison murders committed by those already incarcerated for aggravated murder, and premeditated murders of police or correctional officers. *See* Noelle Crombie, *Calling Oregon death penalty 'costly and immoral,' governor signs bill limiting its use*, OREGONIAN, Aug. 1, 2019.
[49] Nick Field, *PA-Gov: The Third Gubernatorial Debate*, POLITICSPA.COM, Oct. 8, 2014.

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."[50] 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.[51]

The commission issued its report on June 25, 2018. The report recommended many changes to the capital punishment system, including a publicly funded state capital defender office, a guilty but mentally ill verdict under which the death penalty would be precluded, and regularly gathering data that could be used to determine whether the death penalty was being unfairly, arbitrarily, or discriminatorily implemented.[52] Governor Wolf continued the moratorium after the commission's report was issued.

In November 2018, Governor Wolf was re-elected. His opponent, Scott Wagner, opposed and promised to end the moratorium. The legislature has not enacted the commission's key recommendations. As of early April 2020, the moratorium has continued.

c. Ohio

Ohio Governor Michael DeWine announced shortly after taking office in early 2019 that he would not permit any executions until Ohio comes up with a lethal injection method which is upheld in the courts (and, in particular, the federal courts).[53] He openly worried that if Ohio were to use in executions drugs made by pharmaceutical companies, those companies could cease selling to Ohio the drugs for all uses, including by Medicaid recipients, state troopers, and others.[54]

In December 2019, Governor DeWine, who as a State Senator had voted to reinstate Ohio's death penalty, said "there are a lot of things we do, and a lot of things that we can do, that are more important as far as safety than the capital punishment debate." He stated that the death penalty is not an effective tool to keep communities safe, whereas "[w]hat keeps us safer is locking up repeat violent offenders and throwing away the key."[55]

During that same month, Ohio's House Speaker Larry Householder said: "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?"[56]

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[50] Memorandum from Gov. Tom Wolf, Feb. 13, 2015, at 1, 4, http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration.

[51] *Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015).

[52] JOINT STATE GOV'T COMM'N CAPITAL PUNISHMENT IN PENNSYLVANIA: THE REPORT OF THE TASK FORCE AND ADVISORY COMMITTEE, at 30-31 (2018).

[53] Jessie Balmert, *Gov. Mike DeWine: Ohio won't execute prisoners until method gets court's OK*, CIN. ENQUIRER, Feb. 19, 2019.

[54] Jeremy Pelzer, *Gov. Mike DeWine again delays execution, says Ohio should look at lethal-injection alternatives*, CLEV.COM, July 31, 2019. Another problem was exemplified by Alva Campbell, Jr. Despite his being terminally ill, Ohio tried to execute him in November 2017, unsuccessfully. After that, no further effort was made to execute him before he died in prison in March 2018. *See* Holly Zachariah, *Ohio death row inmate Alva Campbell dies of natural causes*, COLUMBUS DISPATCH, Mar. 3, 2018.

[55] *Justice Updates*, DOMINICAN SISTERS OF PEACE, Jan. 7, 2020, https://oppeace.org/blog/2020/01/07/justice-updates-january-7-2020/.

[56] Editorial, *Will the new year bring an end to Ohio's elusive death penalty?*, COLUMBUS DISPATCH, Dec. 29, 2019.

In a December 28, 2019 op-ed, Cleveland.com editorial board member Thomas Suddes said: "In courtroom after courtroom, what an Ohio death sentence may really mean is imprisonment for life – if you can call that a life – without any possibility of liberty. The question is whether Ohio should admit the reality of its death penalty, or, at a cost of millions of taxpayer dollars in legal fees, keep denying the obvious."[57]

On January 10, 2020, former Ohio Supreme Court Justice Paul Pfeifer, who as a state legislator wrote Ohio's capital punishment law, said that while he highly doubts that Ohio will abolish the death penalty, he suspects that Governor DeWine will find a way to avoid any executions taking place while he is Governor. Justice Pfeifer said, "I don't want to presume to know what our current governor thinks personally. My guess is that he does not welcome the thought he is a devout Catholic. The Catholic Church is opposed to the death penalty . . . . I would think that he does not welcome the thought of having an execution occur on his watch and it wouldn't surprise me that it just does not happen." Indeed, Justice Pfeifer said he thinks that there will be no more executions in Ohio – which he said would be a positive development.[58]

In mid-February 2020, a new group, Ohio Conservatives Concerned About the Death Penalty, held its first news conference. Its members include former Ohio Governor Bob Taft, a Republican.

d. California

On March 13, 2019, California's new Governor, Gavin Newsom, issued an executive order (i) providing reprieves for all California death row inmates, such that they will not be subject to execution for as long as Newsom remains Governor, (ii) closing the execution chamber at San Quentin prison, and (iii) withdrawing the execution protocol that (were it to have been approved by the courts) would have governed the carrying out of executions in California. The executive order includes numerous reasons for the Governor's actions. Among these are capital punishment's being "unfair, unjust, wasteful, protracted" and not enhancing safety; its unfair and unequal application to "people of color, people with mental disabilities, and people who cannot afford costly legal representation"; the risk of executing innocent people; the capital punishment system's high cost; and the fact that 25 California death row inmates have already exhausted all state and federal avenues for relief.[59]

When the California Supreme Court next dealt with a capital punishment case after Governor Newsom's announcement, it unanimously upheld Thomas Potts' conviction and death sentence on March 28, 2019.[60] What made the case newsworthy was the concurrence of Justices Goodwin Liu and Mariano-Florentino Cuéllar, who took the relatively unusual step of stating in a court opinion things that many California Supreme Court justices repeatedly have said in other forums. The concurrence described California's capital punishment system as "expensive and dysfunctional," achieving neither justice nor even remotely timely resolution of cases. It said nothing meaningful had been done about these

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[57] Thomas Suddes, Editorial, *Will Ohio's death penalty survive, and should it?*, CLEV.COM, Dec. 28, 2019.
[58] Karen Kasler, *Creator Of Death Penalty Law Says Ohio Won't Have Another Execution*, WVXU RADIO (Cin.), Jan. 14, 2020.
[59] Exec. Order No. N-09-19, at 1 (Cal. Mar. 13, 2019), https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf.
[60] *People v. Potts*, 436 P.3d 899 (Cal. 2019), *cert. denied*, No. 19-5645 (U.S. Nov. 25, 2019) (mem.).

problems for decades.[61] Moreover, the problems continued after passage in 2016 of a supposedly execution-accelerating proposition, due to the failure to increase funding for death penalty implementation. The current California Chief Justice, Tani Cantil-Sakauye, and her immediate predecessor, Ronald M. George (both appointed by Republican governors), have publicly described the state's death penalty system as broken.[62]

On March 15, 2019, legal scholars Carol S. Steiker and Jordan M. Steiker said Newsom's actions were more likely "a harbinger of further decline and perhaps even abolition of the death penalty" than "just a small roadblock to the continued use of capital punishment." They noted that although California had not had any executions in over a decade, the resumption of executions there had seemed quite possible after the passage of the 2016 proposition and the adoption of a new execution protocol. However, they said, "Newsom's decision brings into focus the extraordinary pathologies of the American death penalty – its arbitrariness, discrimination, extravagant costs, and proneness to error" – in a way that could lead to reconsideration of capital punishment by legislators and executive branch officials and increase the chances of judicial action against the death penalty. The Steikers said it is unlikely that Newsom's announcement will lead to the same type of backlash as followed the U.S. Supreme Court's and California Supreme Court's anti-death penalty decisions in the 1970s.[63]

Why not? The Steikers point to the courts' four-plus decades of strenuous but unsuccessful efforts to end the problems identified in those decisions. Despite these efforts, the death penalty system has continued to be plagued by "wrongful convictions, racial discrimination, and unfairness in capital cases across the country." As the Steikers explained, "We have now lived with more than four decades of extensive judicial and legislative attempts to improve the death penalty's administration along several dimensions: narrowing the death penalty to the 'worst of the worst' offenders, limiting arbitrariness and racial discrimination in choosing who should live and die, and ensuring the accuracy of capital verdicts. Virtually no one thinks these efforts have been successful. The practice of capital punishment has proved resistant to the regulatory efforts of courts and legislatures, with stark evidence of continued wrongful convictions, racial discrimination, and unfairness in capital cases across the country."[64]

4. New Death Sentences

The number of death penalties imposed in the United States in 2019 was estimated to be 34 – the second lowest total since *Furman v. Georgia* in 1972 (2016's 31 was the lowest). After peaking at 315 in 1996, death sentences declined over time to 114 in 2010, then were between 82 and 85 from 2011-2013, declined to 73 in 2014, plunged to 49 in 2015 and 31 in 2016, then rose to 2017's 39 and 2018's 42, before dropping to 34 in 2019.[65]

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[61] *Id.* at 938 (Liu, J., concurring, joined by Cuéllar, J.).

[62] Maura Dolan, *2 California Supreme Court justices say the state's death penalty system doesn't work*, L.A. TIMES, Mar. 28, 2019.

[63] Carol S. Steiker & Jordan M. Steiker, *Will the U.S. Finally End the Death Penalty?*, THE ATLANTIC, Mar. 15, 2019.

[64] *Id.*

[65] DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR END REPORT, at 1, 2 (2019) [hereinafter DPIC 2019 YEAR END REPORT]; DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, at 3 (2019) [hereinafter DPIC FACTS ABOUT THE DEATH PENALTY].

As in other recent years, new death sentences were geographically concentrated. There were new death sentences in only 11 of the 29 states that still had capital punishment, down from 14 in 2017 and 2018. There was also one new federal death sentence.[66]

Half of the 34 new death sentences in 2019 were imposed in Florida, Ohio, and Texas. There were seven in Florida (the same as in 2018), six in Ohio (up from five in 2018), and four in Texas (down from seven in 2018, and less than half the nine per year average from 2009-2014). Half of Ohio's were from Cuyahoga County, whose District Attorney since 2017, Michael O'Malley, has (by DPIC's reckoning) been far more aggressive than his counterparts elsewhere in seeking the death penalty.[67] Mr. O'Malley says that his decisions are based on what the evidence is expected to show.[68]

Georgia, after five years without a new death sentence, was one of three states with one new sentence each (the others being Arizona and Oklahoma) in 2019. The sole new death sentenced person in Georgia was Tiffany Moss, whose judge permitted her to "represent" herself at her trial for allegedly starving her half-daughter to death notwithstanding Moss' documented brain damage.[69] On December 6, 2018, the Georgia Supreme Court refused to reverse the trial court's decision. Ms. Moss had said, despite the trial judge's strenuous urgings to have attorneys represent her, that she would rather rely on divine guidance than on qualified defense counsel. The girl's father, rather than relying on divine guidance, made a deal in which he agreed to testify against Ms. Moss in return for receiving an LWOP sentence.[70]

North Carolina, after two years without a new death sentence, was one of three states to sentence three people to death. Alabama also sentenced three people to death (unchanged from 2018). South Carolina and Pennsylvania both had two new death sentences. Nebraska, Arkansas, and Mississippi each went from two new death sentences in 2018 to zero in 2019, while Louisiana and Tennessee both went from one to zero.[71]

In California, a long-standing leader in imposing new death sentences, the number dropped from eleven in 2017 to five in 2018, and three in 2019. There were similar declines in Maricopa County, Arizona (a total of nine from 2015-2018, down to zero in 2019), and Oklahoma County, Oklahoma and Montgomery County, Alabama (both zero in 2019 after both having a total of four from 2015-2018).[72]

Just 30 counties (under 1% of all U.S. counties) and one federal district accounted for all death sentences imposed in the United States in 2019. In only two counties (Cuyahoga, Ohio and Riverside, California) were more than one death sentence imposed.[73]

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[66] DPIC 2019 YEAR END REPORT, *supra* note 65, at 8, 10.
[67] *Id.* at 10-11; DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2018: YEAR END REPORT, at 4 (2018) [hereinafter DPIC 2018 YEAR END REPORT].
[68] Associated Press, *Study: Ohio county leads country in recent death sentences*, Dec. 17, 2019, https://apnews.com/0290b60b135956f8231e2a828ad11da5.
[69] DPIC 2019 YEAR END REPORT, *supra* note 65, at 11.
[70] Bill Rankin, *Woman accused of starving stepdaughter to represent herself in death penalty trial*, ATLANTA J.-CONST., Dec. 7, 2018.
[71] DPIC 2019 YEAR END REPORT, *supra* note 65, at 11; DPIC 2018 YEAR END REPORT, *supra* note 67, at 8.
[72] *Recent Death Sentences by Name, Race, County, and Year*, DEATH PENALTY INFO. CTR. (last visited Jan. 28, 2020) (follow hyperlinks for years under discussion).
[73] DPIC 2019 YEAR END REPORT, *supra* note 65, at 11.

On January 23, 2020, the Florida Supreme Court held in *State v. Poole*[74] that it had been incorrect as to all but one of the features of the Florida death sentencing regime that it had held in *Hurst v. State*[75] in 2016 must be changed.[76] These changes were indeed made, to some extent through revising the statute. In the years since 2016, the number of death sentences in Florida dropped from an average of 13.75 in the four years before 2016 to seven in 2018 and 2019.[77] Since it is not yet known whether, when, or how the Florida legislature will re-amend the statute, it is too early to say by how much this 2020 decision will increase the number of new death sentences in Florida. It will surely increase the number from what it would have been had the Florida Supreme Court not made an almost 180 degree change in its constitutional analysis.

a. Troublesome New Death Sentences in 2019

Even without knowing of problems that will come to light only after subsequent investigation, serious concerns with many of 2019's 34 new death sentences are already apparent. According to DPIC, of the 34 people sentenced to death in 2019, two, in Alabama, were sentenced to death by judges in cases in which the juries did not unanimously recommend death; three, including Georgia's Tiffany Moss (discussed in Section A.4. above) were permitted under highly dubious circumstances to "represent" themselves; one person waived his right to consular assistance; another person was sentenced to death after forbidding his lawyers from presenting any sentencing phase evidence; and three waived sentences by juries (and one of the three asked the judge to sentence him to death).[78]

5. Executions in 2019 Through Early 2020

a. Decrease from an Already Much-Lower Level Than in Recent Decades

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 was being implemented. In 2008, the year the Court in *Baze v. Reese*[79] 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, 28 in 2015, and 20 in 2016 – the fewest since 1991. Thereafter, executions

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[74] *State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020) (per curiam).
[75] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (per curiam), *receded from by State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020) (per curiam).
[76] In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court held that Florida had given trial judges an unconstitutionally too great a role in capital sentencing, and remanded the case to enable the Florida courts to determine whether the constitutional error "harmless." On remand, the Florida Supreme Court held in *Hurst v. State* that unless a penalty phase jury is waived, a death penalty is constitutional only if a unanimous jury finds beyond a reasonable doubt that every relied-upon aggravating factor has been proven, that these factors suffice to justify consideration of the death penalty, that "the aggravating factors outweigh the mitigating circumstances," and that the death penalty should be imposed. 202 So. 3d at 44. However, in *State v Poole*, the Florida Supreme Court held that the only thing it had gotten correct in the *Hurst* decision on remand was its holding that a jury must unanimously find the existence of one aggravating circumstance beyond a reasonable doubt. *Poole*, 2020 WL 370302, at *15.
[77] DPIC 2019 YEAR END REPORT, *supra* note 65, at 10.
[78] *Id.* at 21.
[79] *Baze v. Rees*, 553 U.S. 35 (2008).

rose to 23 in 2017 and 25 in 2018 before dropping to 22 in 2019. 2019 was the fifth straight year with fewer than 30 executions.[80]

b. Tremendous Concentration Among a Few States

Just seven states – Texas (nine, down from thirteen in 2018), Tennessee (three, the same as in 2018), Alabama and Georgia (both up from two to three), Florida (two, the same as in 2018), and South Dakota and Missouri (one each, the same as, and up from zero in, 2018, respectively) – accounted for all the country's executions in 2019. Nebraska and Ohio, which had executed one person each in 2018, did not execute anyone in 2019.[81] And Oklahoma, once second in the country in executions, had gone five years without an execution as of January 2020 (see Section A.7.c. below).

c. Issues Raised by Executions Occurring or Narrowly Averted in 2019 Through Early 2020

i. Truncation of Review Process: Rushes to Injustice

There continues to be a much more opaque and rushed review process in capital cases than in other cases. In addition to issues specific to lethal injection challenges, there is resistance by prosecutors and courts to disclosure of, or remedies for, the concealment of exculpatory evidence and impeachment material – with the full extent of the concealment often never becoming known. There also are legal restrictions on findings about prejudicial misconduct by jurors; obstruction by prosecutors and courts of efforts to undertake DNA testing that could use the latest available techniques to prevent existing miscarriages of justice from becoming fatal; and expansion of procedural booby-traps that preclude relief even when meritorious, prejudicial constitutional errors are belatedly uncovered. (These problems are discussed in Section C. below.)

ii. As the Number of Executions Drops, a Higher Percentage of Executions Are Constitutionally and Factually Problematic

As the annual total of executions in the United States stays near its three-decade low point, there are significant questions about the guilt of a growing percentage of the death row prisoners who are executed or whose execution dates are in the near future.[82] Moreover, DPIC's year-end report pointed to several cases in which there were serious questions about the guilt of those who were executed or fundamental problems with the fairness of the proceedings.

[a] Domineque Ray

Mr. Ray was executed in Alabama on February 7, 2019, for the rape and murder of a 15-year-old girl. But there was no physical evidence linking him to the crimes. He was implicated by one prosecution witness, Marcus Owden. In 2017, Ray's appeal lawyers

[80] DPIC FACTS ABOUT THE DEATH PENALTY, *supra* note 65, at 1; DPIC 2019 YEAR END REPORT, *supra* note 65, at 1.
[81] DPIC 2019 YEAR END REPORT, *supra* note 65, at 8.
[82] Richard A. Oppel Jr., *Not Just Rodney Reed: Evidence Taints More Death Row Convictions*, N.Y. TIMES, Nov. 19, 2019.

discovered that Owden (who avoided the death penalty by testifying against Ray) had schizophrenic delusions and auditory hallucinations when he accused Ray of the rape and murder and when he testified against him. Ray's appeal lawyers argued that by deliberately suppressing this evidence, the prosecution had violated due process. Without comment, the Supreme Court declined review and denied a stay.[83]

[b] Larry Swearingen

The forensic evidence against Texas prisoner Larry Swearingen was extraordinarily weak. It was finally challenged as Swearingen's execution drew closer. Numerous forensic experts contradicted prosecution trial testimony. The State's "smoking gun" – a piece of pantyhose supposedly matching the pantyhose used to strangle the victim – had not been found during two initial searches of Swearingen's home. It eventually had been "found" only after the victim's body was discovered with a pantyhose ligature around her neck. The lab technician who testified at trial that the two pieces were halves of a single pair of pantyhose had initially found "no physical match" between them.

Four forensic pathologists, three forensic entomologists, and a forensic anthropologist contradicted the medical examiner's testimony on the time of death. Under the medical examiner's timeline, the victim had been killed immediately after her disappearance. All the other experts concluded she had been dead at most two weeks before her body was discovered. Because Swearingen had been arrested three weeks before the body was found and had remained in police custody, it was impossible for him to have committed the killing under the timeline upon which the State relied. Texas nonetheless executed Swearingen on August 21, 2019.[84]

[c] Gary Raw Bowles: Use of Invalid Standard to Deny Him Relief

Gary Ray Bowles, whom Florida executed in 2019, was intellectually disabled. In denying him relief, the Florida courts applied a scientifically-invalid standard that was later declared unconstitutional. His intellectual disability evidence was never reviewed by any court applying the proper constitutional standard. He most likely was not eligible for the death penalty.[85]

[d] Charles Rhines

Charles Rhines was executed by South Dakota without any court reviewing the evidence that jurors had unconstitutionally sentenced him to death because of his sexual orientation. One juror who voted for death said jurors "knew that [Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." A second juror stated in an affidavit that "[o]ne juror made . . . a comment that if he's gay, we'd be sending him where he wants to go if we voted for [LWOP]." A third juror reported that there had been

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[83] Lauren Gill, *Domineque Ray Is Executed in Alabama After Supreme Court Bid Fails*, PROPUBLICA, Feb. 8, 2019.

[84] Tom Jackman, *Did faulty science, and bad testimony, bring Larry Swearingen to the brink of execution?*, WASH. POST, Aug. 17, 2019; Jolie McCullough, *Texas executed Larry Swearingen for a 1998 Texas slaying. His lawyer says bad science got him on death row*, TEX. TRIB., Aug. 21, 2019.

[85] *No Court Has Reviewed the Evidence that Gary Bowles May Be Intellectually Disabled; Florida Plans to Execute Him Anyway*, DEATH PENALTY INFO. CTR., Aug. 22, 2019.

"lots of discussion of homosexuality" and "a lot of disgust."[86] The ABA strongly urged a grant of clemency for Rhines.

[e] Billie Coble

Texas executed Billie Coble despite federal court findings that two prosecution expert witnesses had provided "problematic" and "fabricated" testimony at his trial about his supposed future dangerousness. Coble's first death sentence had been overturned. In his 18 years in prison before his resentencing trial, he "did not have a single disciplinary report." Prosecutors presented psychiatric testimony from Dr. Richard Coons, who based his conclusion of future dangerousness on his assessing the case "'his way' with his own methodology" without ever checking the evidence's accuracy. They also presented testimony from a supposed prison conditions expert – A.P. Merillat – who provided false testimony about the prevalence of prison violence and loopholes in prison rules that he claimed would allow life sentenced prisoners to commit acts of violence. The Fifth Circuit noted that "the State does not dispute that parts of Merillat's testimony were fabricated." Although a finding that the prisoner poses a continuing threat to society is a precondition to a Texas death sentence, the federal courts ruled that the unconstitutional presentation of this evidence was "harmless."[87]

[f] Jeff Cromartie

Georgia executed Jeff Cromartie on November 13, 2019. No stay or hearing occurred even after Cromartie's stepbrother and co-defendant said in an affidavit that the prosecution's star witness had bragged about being the triggerman. Relatives of both the victim, Richard Slysz, and Cromartie had asked for DNA testing. Indeed, Elizabeth Legette, Mr. Slysz's daughter, had written to prosecutors and then the Georgia Supreme Court, saying that she feared Cromartie may not have shot her father. "My father's death was senseless," Legette wrote to prosecutors in August. "Executing another man would also be senseless, especially if he may not have shot my father."[88]

[g] Nathaniel Woods

Alabama executed Nathaniel Woods on March 5, 2020. The execution outraged many people both within and outside Alabama. Much outrage arose because Woods did not kill anyone and played no part in the killings. The actual killer, Kerry Spencer, was apparently asleep when the police officers arrived to serve Woods with an arrest warrant for a misdemeanor. Mr. Spencer continues to insist that Woods had nothing to do with the killings. An additional reason many opposed Woods' execution is that two of the jurors voted against imposing the death penalty.[89]

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[86] *Supreme Court Denies Review in Case Raising Anti-Gay Bias*, EQUAL JUST. INITIATIVE, Apr. 15, 2019 (third alteration in original).

[87] Brian Stull, *Texas Is Planning an Execution Based on Fraudulent Testimony*, ACLU, Feb. 26, 2019.

[88] Joshua Sharpe, *Execution set for Georgia inmate amid DNA fight*, ATLANTA J.-CONST., Oct. 10, 2019; Jason Hanna & Rebekah Riess, *A Georgia man is executed after courts deny his appeals for new DNA testing*, CNN, Nov. 14, 2019.

[89] Katie Shepherd, *'You killed my brother': Sister of Nathaniel Woods confronts Alabama governor over controversial execution*, WASH. POST, Mar. 13, 2020; Christina Maxouris, *Nathaniel Woods' execution doesn't end the controversy over his case,* CNN, Mar. 6, 2020; Rick Rojas, *2 Jurors Voted to Spare Nathaniel Woods's Life. Alabama Executed Him*, N.Y. TIMES, Mar. 5, 2020.

[h] Executions Despite Evidence of Severe Mental Issues/Major Mitigating Factors

According to DPIC, at least nine people executed in 2019 had serious mental illness; eight had evidence of brain injury, developmental brain damage or an IQ consistent with intellectual disability; and 13 had endured during childhood serious trauma, neglect, or abuse. DPIC also said that four of the 22 people executed in 2019 were 21 years old or younger at the time of the crime.[90] These four executions were inconsistent with the policies of the ABA and many others, which say that the death penalty should be excluded for those under age 22 at the time of the crime, in light of the most recent studies regarding brain development.[91]

6. Two People with Strong Innocence Claims Barely Avoided Execution in 2019 and Remain at Risk of Execution in 2020

a. James Dailey

James Dailey's November 7, 2019 scheduled execution was halted by a Florida federal district court on procedural grounds unrelated to the substance of the serious innocence issues. Dailey presented evidence that his co-defendant, Jack Pearcy, had admitted at least four different times – including in a 2017 signed affidavit – that he alone had committed the murder. No physical evidence linked Dailey to the crime, and the only testimony against him had come from Pearcy – who was sentenced to life in prison – and three jailhouse informants to whom police provided information about the murders and had the charges against them reduced. An extensive story based on the reporting of a *New York Times* staff writer and *ProPublica* reporter was published in the *New York Times Magazine* in December 2019.[92] It revealed that one of the jailhouse informant witnesses against Dailey, Paul Skalnik, was a serial perjurer whose testimony had put dozens of defendants in jail, including four on death row. On December 29, 2019, the *Times* devoted most of its editorial page to a denunciation of Florida's continuing efforts to execute Mr. Dailey.[93]

On February 20, 2020, Florida circuit court Judge Pat Siracusa ordered that an evidentiary hearing be held on March 5, 2020, at which Jack Pearcy would testify. Mr. Dailey's counsel expected Mr. Pearcy to say under oath – as he said in an affidavit on December 28, 2019 – that he alone killed the victim and that Dailey was in no way involved. However, he retracted that statement during a deposition a week before the hearing, and then completely refused to testify at the hearing [94]

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[90] DPIC 2019 YEAR END REPORT, *supra* note 65, at 16.

[91] Beth Schwartzapfel, *The Right Age to Die?*, THE MARSHALL PROJECT, Aug. 12, 2018; ABA Death Penalty Due Process Review Project, Res. 111 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf.

[92] Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. TIMES (Magazine), Dec. 4, 2019.

[93] Jesse Wegman, Opinion, *Will Florida Kill an Innocent Man?*, N.Y. TIMES, Dec. 29, 2019.

[94] Jamal Thalji, *Will someone else confess in death row inmate James Dailey's case?* TAMPA BAY TIMES, Feb. 20, 2020; Dan Sullivan, *Inmate's Hopes Met With Silence,* TAMPA BAY TIMES, Mar. 6, 2020.

b. Rodney Reed

Texas death row inmate Rodney Reed came within five days of execution in November 2019 when the Texas Court of Criminal Appeals stayed the execution to enable a lower court to consider whether perjured testimony and withholding of exculpatory evidence had combined to convict an innocent person. Earlier on the day of the stay order, the Texas Board of Pardons and Paroles had unanimously urged Governor Abbott to order a 120-day reprieve. There had been an impressive campaign in support of saving Reed's life by a wide bipartisan coalition of elected officials and well-known and well-respected people. Indeed, three million people had signed a petition seeking a stay.[95]

DPIC summarized the grounds on which Reed's attorneys had sought the stay and the new hearing as follows:

> Reed's attorneys sought DNA testing of evidence from the case, including the belt used to strangle the victim, Stacey Stites. Reed, who is black, said that he and Stites, who was white, were having an affair that they kept secret because their interracial relationship would have caused a scandal in their small Texas town. He presented numerous affidavits pointing to Stites' fiancé, Jimmy Fennell, an Austin-area police officer, as the killer. Moreover, witnesses said they had heard Fennell on several occasions threaten to kill Stites if she cheated on him. Fennell had even said that "he would strangle her with a belt" if she changed her testimony. Fennell was fired from his police job following his arrest and conviction for kidnapping a woman while on duty and later sexually assaulting her. Finally, a prominent expert concluded that Fennell's testimony that Stites had been abducted and killed on her way to work is "medically and scientifically impossible."[96]

7. Continuing Controversies Regarding Lethal Injections

a. Horribly Botched Attempted Execution in Alabama

Probably the worst of several instances of problems in carrying out lethal injections was Alabama's attempt on February 22, 2018 to execute Doyle Lee Hamm. Hamm's lawyer, Columbia Law Professor Bernard E. Harcourt, had urged Alabama not to proceed because Hamm's terminal cranial and lymphatic cancer made it impossible to inject lethal drugs into his veins. But only after attempting numerous times over two and a half hours to execute him did Alabama authorities stop trying that night.[97] On March 26, 2018, attorneys for Mr. Hamm and the State of Alabama entered into a confidential settlement agreement pursuant to which Professor Harcourt and the State jointly moved to dismiss all pending legal actions by Mr. Hamm, and the State agreed to cease any effort to set another execution date.[98]

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[95] DPIC 2019 YEAR END REPORT, *supra* note 65, at 15.
[96] *Id.*
[97] Columbia Law Sch., Press Release, *Alabama's Botched Lethal Injection Amounts to "Torture," Columbia Law Professor Argues*, Feb. 24, 2018, http://www.law.columbia.edu/news/2018/02/botched-execution-alabama-doyle-lee-hamm.
[98] Columbia Law Sch., Press Release, *Bernard Harcourt and the State of Alabama Settle Civil Rights and Habeas Corpus Lawsuits*, Mar. 27, 2018, http://www.law.columbia.edu/news/2018/03/bernard-harcourt-and-state-alabama-settle-civil-rights-and-habeas-corpus-lawsuits.

b. Improper Execution Drug Purchases by Three States

A more systemic problem was reported on February 20, 2018 by *BuzzFeed News*. It exposed Missouri's use in 17 executions between 2014 and 2017 of pentobarbital that it had secretly bought from a pharmacy termed "high risk" (due to many health violations) by the U.S. Food and Drug Administration. Using cash payments, secret meetings, and code names, Missouri used the compounding pharmacy Foundation Care, which "ha[d] been repeatedly found to engage in hazardous pharmaceutical procedures."[99]

The same *BuzzFeed* reporter wrote in late November 2018 that Texas had bought drugs for executions from Greenpark Compounding Pharmacy, whose license was on probation. It had been cited for 48 safety violations in the last eight years. Witnesses to Texas executions said that five of the 13 people Texas executed in 2018 using high power pentobarbital complained of burning or pain after the drug was injected.[100]

In July 2018, Alvogen, Inc. sued Nevada, alleging that the State had "intentionally defrauded" the company's distributor when it purchased midazolam for use in an execution.[101] The trial judge found that Nevada had engaged in "subterfuge" and preliminarily enjoined it from using midazolam in an execution.[102]

c. Oklahoma

Oklahoma was once the second most prolific executioner in the United States. But by January 2020 it had gone five years since its last execution. What led to this?

On April 29, 2014, Oklahoma's effort to execute Clayton Lockett ended in what the warden later described as "a bloody mess." After 16 failed attempts to set an IV line, one of Lockett's veins exploded. Mr. Lockett died less than 45 minutes into the procedure of what was described at the time as a massive heart attack.[103] In its most recent execution, on January 15, 2015, Oklahoma executed Charles Warner with an unauthorized drug, potassium acetate, in place of potassium chloride, the third drug required in Oklahoma's lethal-injection protocol. Potassium acetate is sometimes used by airports to de-ice the wings of planes. Warner's final words were "my body is on fire."[104] Thereafter, Oklahoma sought to execute Richard Glossip in September 2015, but called off the execution when prison officials learned just two hours beforehand that they once again had obtained the wrong drug.[105]

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[99] Chris McDaniel, *Missouri Fought For Years To Hide Where It Got Its Execution Drugs. Now We Know What They Were Hiding*, BUZZFEED NEWS, Feb. 20, 2018.
[100] Chris McDaniel, *Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs*, BUZZFEED NEWS, Nov. 28, 2018.
[101] DPIC 2018 YEAR END REPORT, *supra* note 67, at 9-10.
[102] *Alvogen, Inc. v. State*, No. A-18-777312-B (Nev. Dist. Ct. Sept. 28, 2018), https://deathpenaltyinfo.org/files/pdf/Gonzalez_Dozier_Injunction.pdf.
[103] Katie Fretland, *Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess'*, THE GUARDIAN, Dec. 13, 2014; Matt Pearce et al., *Oklahoma halts double execution after one is botched*, L.A. TIMES, Apr. 29, 2014.
[104] Nolan Clay & Rick Green, *Wrong drug used for January execution, state records show*, THE OKLAHOMAN, Oct. 8, 2015; Mahita Gajanan, *Oklahoma used wrong drug in Charles Warner's execution, autopsy report says*, THE GUARDIAN, Oct. 8, 2014.
[105] Tracy Connor, *Oklahoma Governor Halts Richard Glossip Execution at Last Minute*, NBC NEWS, Sept. 30, 2015.

In 2016, an Oklahoma grand jury issued a withering report on Warner's execution, replete with detailed discussions of "blatantly violate[d]" state execution protocols. These violations affected virtually every stage of the execution process and involved many members of the execution team, including the then-Director of the Department of Corrections and the warden at the prison where the execution took place.[106]

In agreeing to resolve a federal lawsuit challenging the state's execution procedures, Oklahoma agreed not to seek execution dates for at least five months after a new execution protocol was adopted. In 2018, the state purported to adopt plans to use nitrogen gas in executions.[107]

On February 13, 2020, Oklahoma officials said that executions would resume later in the year, with the moratorium on executions ending in 150 days. They said Oklahoma had access to the needed amounts of the drugs used in its previous executions, and that there would be enhanced checks and balances. Lawyers for Oklahoma death row inmates quickly initiated a legal challenge to the State's attempt to resume executions.[108]

d. Supreme Court Rejection of Death Row Inmate's Claim That a Generally Constitutional Execution Method Would Be Unconstitutional in His Unusual Case

On April 1, 2019, the U.S. Supreme Court held that it would be constitutional for Missouri to execute Russell Bucklew, who had asserted that his execution by Missouri's usual method would cause him an unconstitutionally unacceptable level of pain in light of his having an unusual disease. The Court said that Bucklew had failed to show that there was "a feasible and readily implemented alternative" execution method that "would significantly reduce his risk of pain" which the state had lacked a valid reason for not adopting.[109] The Court noted that Bucklew's proffered alternative method, in which nitrogen gas would be used, had never been used to execute anyone – despite becoming part of several states' protocols – and held it was reasonable for Missouri not to adopt such a novel execution method. Yet, the Court gave no indication that there would be a constitutional problem if these other states were to execute people using nitrogen gas.

The Court emphasized that its holding should not mislead people into thinking that it would be hard to point to another viable execution method – which could be a method used in another jurisdiction. The Court said, "[W]e see little likelihood that an inmate [who, unlike the Court's characterization of Bucklew, showed that he was] facing a serious risk of pain will be unable to identify an available alternative."[110] The four dissenting Justices believed

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[106] Nolan Clay, *Oklahoma grand jury issues critical report on execution drug mix-up*, THE OKLAHOMAN, May 19, 2016.

[107] Dylan Goforth, *Death penalty talks begin, but it's unclear when executions will resume*, THE FRONTIER, Jan. 15, 2020.

[108] Graham Lee Brewer & Manny Fernandez, *Oklahoma Botched 2 Executions. It Says It's Ready to Try Again*, N.Y. TIMES, Feb. 13, 2020; Dylan Goforth, *Attorneys for death row inmates file motion, say 150-day stay is still in place*, THE FRONTIER, Feb. 27, 2020.

[109] *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019).

[110] *Id.* at 1128-29. The Court's opinion ended by bemoaning delays in constitutional executions. It did not set forth new law in doing so. In that part of the opinion, the Court discussed the February 7, 2019 lifting of a stay of execution in *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.). But neither it nor Justice Breyer's dissent mentioned

that Bucklew had established more than enough of a basis to avoid summary judgment on his challenge to the established execution methods being used in his case, and explained why in detail.[111] The Steikers described the Court's holding as a straightforward, unequivocal declaration that "the Constitution allows capital punishment and therefore must permit some means for carrying it out."[112]

e. Federal Government's Efforts to Execute People

On July 25, 2019, U.S. Attorney General William P. Barr announced that the federal government planned to resume executions for the first time in sixteen years. He scheduled execution dates between December 2019 and January 2020 for five federal death row inmates. Barr also said he had directed the Federal Bureau of Prisons to adopt an "addendum" to its execution protocol in a manner that would cause the use of pentobarbital in a single-drug procedure.[113] In November 2019, a federal district court enjoined the scheduled executions.[114] After the D.C. Circuit denied the Government's emergency motion for a "stay pending appeal," the Government sought review of the injunction directly from the Supreme Court, which declined to do so. Justice Alito, joined by Justices Gorsuch and Kavanaugh, said in a separate statement, "The Government has shown that it is very likely to prevail when this question is ultimately decided," but "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."[115]

On April 7, 2020, a D.C. Circuit panel reversed the district court and lifted the injunction. However, this did not mean that federal executions could resume quickly. The D.C. Circuit remanded the case to enable the district court to consider arguments it had not adjudicated previously. And counsel for the prisoners said they might first seek review by the D.C. Circuit's full membership.[116]

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that on March 28, 2019, under relatively similar circumstances, the Court had stayed Texas' execution of Patrick Murphy (see discussion in Part II.F. below). Less than two weeks thereafter, there was a remarkable clash on April 12, 2019 concerning supposed manipulation by death row inmates of ways to delay their executions and what four dissenting Justices asserted, in a 3 a.m. dissent, was the majority's unseemly haste in precluding reasonable consideration by the Justices regarding whether to vacate a stay of execution (see discussion in Part II.G. below).

[111] *Bucklew*, 139 S. Ct. at 1136-45 (Breyer, J., dissenting, joined in part by Ginsburg, Sotomayor, and Kagan, JJ.).

[112] Carol S. Steiker & Jordan M. Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 3 ANN. REV. CRIMINOLOGY 299, 310 (2020).

[113] U.S. Dep't of Justice, Press Release, *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, July 25, 2019, https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse.

[114] *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (TSC), 2019 WL 6691814 (D.D.C. Nov. 20, 2019), *stay denied*, 140 S. Ct. 353 (2019) (mem.).

[115] *Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (mem.) (statement of Alito, J., joined by Gorsuch and Kavanaugh, JJ.).

[116] *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-5322, 2020 WL 1684041 (D.C. Cir. Apr. 7, 2020); Mark Berman & Ann E. Marimow, *Trump administration can resume executions, but not just yet, divided appeals court rules*, WASH. POST, Apr. 7, 2020.

f. Tennessee Inmates Executed, at Their Choice, in the Electric Chair Rather Than by Lethal Injection

Under Tennessee law, a death row inmate whose death sentence was imposed prior to 1999 can decide between lethal injection and electrocution as the execution method. The first Tennessee inmate to be electrocuted after opting for electrocution was Daryl Keith Holtin in 2007. Between 2018 and February 20, 2020, Tennessee executed five people who chose electrocution over lethal injection, with only one person being executed by lethal injection. Tennessee's turning point was the execution in 2018 of Billy Ray Irick. An anesthesiologist who reviewed witness descriptions of Irick's execution concluded to "a reasonable degree of medical certainty" that during the execution Irick was "aware and sensate" and "experienced the feeling of choking, drowning in his own fluids, suffocating, being burned alive, and the burning sensation caused by the injection of potassium chloride."[117]

8. Delays in Executions in 2020 Due to Coronavirus; and an Open Letter by Medical Professionals Urging That Drugs That Could Help Fight Coronavirus Not Be Held Back for Use in Executions

On March 16 and March 19, 2020, the Texas Court of Criminal Appeals issued 60-day stays of two executions that had been scheduled for later that month. It cited "the current health crisis and the enormous resources needed to address that emergency." On April 1, 2020, it issued another such stay, as did District Judge Angela Saucier in a fourth case, on April 6, 2020.[118] Defense attorneys sought stays of executions in several states, asserting that the novel coronavirus (Covid-19) pandemic was making it substantially more difficult to undertake the investigations necessary to develop and present evidence in support of clemency. Another consideration was the potential danger of having substantial groups of people assemble for executions. It was not yet clear as of mid-April 2020 what the overall effect of the pandemic would be on executions.

On April 10, 2020, nine "doctors, pharmacists and front-line medical workers" sent an open letter to state prison systems. The letter urged them to turn over drugs such as midazolam – which they are holding for use in executions – to health care professionals who need these drugs urgently for helping patients. Many of these drugs are in very short supply.[119]

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[117] Rick Rojas, *Fearing Lethal Injection, Inmates in Tennessee Opt for the Electric Chair*, N.Y. TIMES, Feb. 20, 2020; Pamela Ortega & Emily Smith, *3 corrections officers say Nicholas Sutton protected them. He was executed Thursday night*, CNN, Feb. 21, 2020; Liliana Segura, *Will Tennessee Kill A Man Who Saved Lives On Death Row?,* THE INTERCEPT, Feb. 16, 2020.

[118] Bravin, *supra* note 2; Danielle Haynes, *Texas delays third execution amid COVID-19 Pandemic,"* UPI, Apr. 1, 2020; Associated Press, *4th Texas execution delayed in midst of virus outbreak*, Apr. 6, 2020, https://apnews.com/e2021b26e914e2edc8df25b609dc77c7.

[119] Asher Stockler, *Health Care Workers Ask States to Hand Over Death Penalty Drugs Needed to Fight COVID-19 Pandemic,* NEWSWEEK, Apr. 10, 2020.

9. Overarching Analyses of Capital Punishment

a. Statement by Four Supreme Court Justices in March 2018

On March 19, 2018, the Supreme Court unanimously denied certiorari in *Hidalgo v. Arizona*,[120] in which the petitioner sought to have the Court consider the constitutionality of a capital punishment system under which there are so many aggravating circumstances that almost all people convicted of first-degree murder could be sentenced to death.

Justice Breyer, in a statement joined by Justices Ginsburg, Kagan, and Sotomayor, noted that the certiorari petition did not address the process by which decisions are made regarding which of the people eligible for imposition of the death penalty are actually sentenced to death. Instead, the petition dealt only with the process by which the state is supposed under Supreme Court precedents to "circumscribe" through legislation "the class of persons *eligible* for the death penalty."[121] Arizona conceded that its statute had not accomplished the required narrowing in one of the two possible ways – *i.e.*, through a circumscribed definition of capital murder. This, the statement said, meant that the constitutionality of Arizona's capital punishment system depended on the state's effort to achieve narrowing in the other possible way – *i.e.*, by setting forth statutory aggravating factors that the jury could use to achieve the constitutionally required narrowing.[122]

The statement found unpersuasive the Arizona Supreme Court's various bases for concluding that the necessary narrowing had been achieved. However, because there had been no evidentiary hearing, no empirical study, and no expert testimony, the statement said that certiorari was properly denied. Instead, it would be far more appropriately granted in the context of a "fully developed record with the kind of empirical evidence that the petitioner points to here."[123]

If a majority of the Court had been prepared to consider seriously the constitutional challenge to the Arizona capital punishment system, certiorari could have been granted and the case remanded for consideration after a fully developed record had been developed. It is reasonable to conclude that a majority of the Court as then constituted was not prepared to make such a holding even if there were a fully developed record supporting the constitutional claim. Now that Justice Brett Kavanaugh has replaced Justice Anthony Kennedy, it is even less likely that the Court would make such a holding.

b. Legal Scholar Frank Baumgartner

In their book released in December 2017, Professor Frank Baumgartner and a group of researchers assessed capital punishment since its reinstatement in the 1970s, using four decades of data. They concluded that the post-*Furman* system not only "flunks the *Furman* test but [also] surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application." After reviewing numerous issues and extensive data, they found that the modern system is as arbitrary, biased, and flawed as the pre-*Furman* system while

[120] *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018) (mem.).
[121] *Id.* at 1054 (statement of Breyer, J., joined by Ginsburg, Kagan, and Sotomayor, JJ.) (emphasis added) (quoting *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).
[122] *Id.* at 1055-56.
[123] *Id.* at 1057.

being much more geographically concentrated in fewer jurisdictions and far more expensive.[124]

After considering every execution in the twenty-first century through 2015, the team concluded that "the death penalty actually targets those who have mental illness" – not directly, but because many less vulnerable defendants are more likely to avoid death sentences through plea bargains, convictions (if at all) of crimes not carrying death as a possible punishment, or through jury decisions not to impose death. This is somewhat ironic, in light of public opinion polls showing majorities opposing execution of people with mental illness.

c. DPIC's Robert Dunham at August 2018 ABA Program

Speaking at an August 2, 2018 ABA program, DPIC Executive Director Robert Dunham said that his analysis showed that capital punishment was being mostly imposed in counties that, while not having the highest murder rates, often "have a combination of overaggressive prosecutors, a history of discriminatory policing practices, inadequate and underfunded defense services, and courts that tolerate all this." He added that all available data show that those being sentenced to death in recent years are no more morally culpable on average than the much greater number of people sentenced to death in the mid-1990s. Dunham also said that as the number of new death sentences has plunged, there has been an increase in the percentage of those newly death-sentenced who are African American or Latino, and executions are even more likely in recent years than earlier to be affected by "an inappropriate race-based conception of what constitutes the 'worst of the worst' killings."[125]

10. Failure to Make Reforms Recommended by State Commissions or ABA Assessment Team

a. Oklahoma: Broad-Based Death Penalty Review Commission

Instead of seeking to make reforms advocated by the State's Broad-Based Death Penalty Review Commission, Oklahoma's Attorney General Mike Hunter and its Corrections Director Joe M. Allbaugh stated on March 14, 2018 that Oklahoma would shift from lethal injection to asphyxiation by nitrogen gas – which had never been attempted anywhere – as its execution method.[126] As noted above (in Section A.7.c.), the State announced in February 2020 that after a 150-day period, it would attempt to resume executions – and there is a legal challenge to its doing so.

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[124] FRANK R. BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY (2017).
[125] ABA Section of Civil Rights & Social Justice, Proceedings of the ABA Annual Conference Session on Has the Death Penalty Become an Anachronism? A Discussion of Changing Laws, Practices and Religion on Our Shared Standards of Decency, at 27, 35, 37 (Aug. 2, 2018) [hereinafter ABA Conference on the Death Penalty] (remarks of Robert Dunham), https://deathpenaltyinfo.org/files/pdf/ABA_Has_The_Death_Penalty_Become_An_Anacronism.pdf.
[126] Mark Berman, *Oklahoma says it will begin using nitrogen for all executions in an unprecedented move*, WASH. POST, Mar. 14, 2018.

b. Study of Tennessee's Death Penalty

The summer 2018 issue of the *Tennessee Journal on Law and Policy* includes the results of a study of Tennessee's system by H.E. Miller, Jr. and Bradley A. MacLean. After reviewing every first-degree murder case in Tennessee since 1977, they concluded that the state's death penalty system is "a cruel lottery entrenching the very problems that [the Supreme Court] sought to eradicate." They found that the best predictors of whether the death sentence would be imposed did not include the facts of the crime, but instead were arbitrary factors such as where the murder occurred, the race of the defendant, the quality of the defense, and the views of the prosecutors and judges working on the case.[127]

c. Pennsylvania

As noted above (in Section A.3.b.), the bi-partisan special commission on capital punishment, appointed by the Pennsylvania State Senate, issued its report on June 25, 2018. But no significant action has been taken to implement the report's recommendations.

d. Ohio

In Ohio (see Section A.3.c. above), detailed analyses by an ABA assessment team as well as by a high-level state government team have not led to any significant reforms.

e. Kentucky

In February 2020, an eminent group of public defense leaders in Kentucky – including the four lawyers to hold the title of Kentucky Public Advocate during the past 28 years and the two who have served as Executive Director of the Louisville-Jefferson County Public Defender Corporation over the course of the past 38 years – issued an analysis of the extent to which any branch of Kentucky's government had taken steps to implement recommendations made in 2011 by the assessment team of the ABA Death Penalty Due Process Review Project (see discussion below in Part III.D.2 of these assessment teams). They concluded that no branch of government had seriously taken action to implement the ABA assessment team's recommendations, with the exception of a DNA testing reform. Accordingly, they said, "Kentucky does not have a system that fairly and reliably assures who should be executed, which has created a real risk of executing the innocent, compromised the credibility of our courts and the outcomes of the judicial process, and robbed the rest of the criminal justice system of funds that could be used productively to protect the safety of Kentuckians and address other societal ills."[128]

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[127] Bradley A. MacLean & H.E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J. ON L. & POL'Y 84, 179-80 (2018).

[128] KY. DEP'T OF PUB. ADVOCACY, A REVIEW AND REPORT ON THE STATUS OF THE RECOMMENDATIONS MADE BY THE KENTUCKY DEATH PENALTY ASSESSMENT TEAM, at 2, 16 (2020).

B. Likely Influences on Public Opinion

1. Trial Prosecutors, Corrections Leaders, Attorneys General, Judges

a. Former County Prosecutor for Ada County, Idaho

On November 3, 2019, Jim Harris, former County Prosecutor for Ada County, Idaho, said that neither Thomas Creech – for whom he had secured a death sentence 37 years earlier – nor anyone else on Idaho's death row should be executed. Harris told a Boise television station:

> When I asked for the death penalty against Tom Creech I definitely did believe he should suffer the death penalty . . . . I don't believe quite frankly that Tom Creech, at least based on the murder that he committed in the penitentiary, should be executed. And I don't say that easily.[129]

Harris said that Creech's death sentence is disproportionately great when considered together with lower sentences that others got for worse murders than Creech's. He also said this about Idaho's death penalty generally:

> It's a waste of time. It's a terrible waste of money that is expended in these death penalty cases and they are never going to happen. So the judges ought to simply bear up and sentence these people for fixed life and leave it at that.

b. Retiring Head of Georgia Bureau of Investigation

On December 31, 2018, Vernon Keenan, on his last day of 16 years as head of the Georgia Bureau of Investigation, predicted the abolition of capital punishment – which he called "outdated" even for heinous crimes. Saying he had never supported capital punishment, Keenan stated that he did not believe it was a deterrent.[130]

c. Former Kansas Secretary of Corrections

Former Kansas Secretary of Corrections Roger Werholtz, in an op-ed published on October 31, 2017 in the *Topeka Capital-Journal*, urged death penalty abolition. He said this would save money that Kansas could use instead to improve its correction system in ways that would enhance corrections officers' and inmates' safety and otherwise help diminish crime. He said Kansas should "acknowledge that the return on our investment in the death penalty has been abysmal," that it does not diminish murders, and "siphons away . . . crime prevention dollars."[131]

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[129] Doug Lock-Smith, *How much does it cost to execute an inmate in Idaho? And who is keeping track of the tab?*, KIVI TV (Boise), Nov. 4, 2019.
[130] Vernon Keenan, *Retiring GBI director predicts demise of death penalty*, WXIA-TV (Atlanta), Dec. 31, 2018.
[131] Roger Werholtz, Opinion, *End the death penalty in Kansas*, TOPEKA CAP.-J., Oct. 31, 2017.

d. Arizona Former Attorney General and Author of Death Penalty Statute Who Later Was a Judge

On November 5, 2017, Terry Goddard, who was Arizona's Attorney General from 2003-2011, stated in an op-ed in the *Arizona Daily Star* that the state's death penalty "has failed . . . in fundamental ways," including its being applicable to virtually every first-degree murder – so that capital punishment is not "only imposed on the worst offenders." In addition, at least nine innocent people had been sentenced to die, and there are "unsettling racial disparities" and "spiraling costs." Goddard concluded that Arizona should abolish capital punishment.[132]

That same month, Rudy Gerber, who at the request of then-State Senator Sandra Day O'Connor had in 1972 drafted Arizona's new capital punishment statute in the wake of *Furman*, said that numerous expansions of death eligible crimes after the law's 1973 enactment had "turn[ed] on its head" the key goal of limiting death eligibility to the "worst of the worst." Gerber (a former judge on the Arizona Court of Appeals) said that this increase over time in death eligibility had led to a surge in death sentences, especially in Maricopa County, and to ineffective representation and racial disparities. For such reasons, Gerber said he had joined with more than 20 other retired judges and prosecutors to urge the U.S. Supreme Court to hold unconstitutional "the overbroad death penalty."[133]

e. Disputes Between Trial Prosecutors and State Attorneys General/Governors on Reopening Cases with Glaring Questions About Guilt

On December 24, 2019, a Missouri appeals court dismissed a case that involved the effort by St. Louis' elected prosecutor, Kim Gardner, to reopen the case of death-row inmate Lamar Johnson. Ms. Gardner, with the support of 34 elected prosecutors throughout the United States, sought to get Mr. Johnson a new trial at which the prosecution could present new evidence that might result in an acquittal. In the 24 years since Mr. Johnson's conviction, the lead prosecution witness recanted and two other men confessed to having committed the crime by themselves.

The appeals court said it had to dismiss the case, but it required that the case be sent to the Missouri Supreme Court, since the controversy raised a new issue involving "questions fundamental to our criminal justice system."[134]

Missouri Attorney General Eric Schmitt asserted that Ms. Gardner lacked the power to seek a new trial and that the courts could not order one so many years after the conviction. The *New York Times* reported that Attorney General Schmidt's contentions "mirror a growing number of cases where state attorneys general and governors have sought to curtail

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[132] Terry Goddard, Opinion, *Arizona's 40-year experiment with the death penalty has failed*, ARIZ. DAILY STAR, Nov. 5, 2017.
[133] Rudy Gerber, Opinion, *Arizona Death Penalty Law Flouts Constitution*, NAT'L L.J., Nov. 14, 2017.
[134] Rachel Rice, *Missouri Supreme Court is asked to determine if Lamar Johnson gets new trial*, ST. LOUIS POST-DISPATCH, Dec. 24, 2019.

the power of a new wave of recently elected prosecutors to re-examine old convictions or curb prosecutions of minor crimes."[135]

This litigation has national significance, since almost 60 prosecutors' offices in the United States have created conviction integrity units, which evaluate possibly erroneous convictions. These units have been involved in almost 400 exonerations in the last 12 years. The 34 prosecutors who filed in support of Ms. Gardner come from St. Louis, Dallas, San Antonio and Milwaukee, as well as offices in such states as Mississippi, Virginia and Alabama. Their filing in the Missouri appeals court said:

> Elected prosecutors should not be expected to await or rely on the actions of others to correct legal wrongs; indeed, they are ethically *required* to proactively address these concerns . . . . Any erosion of this duty impedes the work of prosecutors and undermines the public trust.

The Missouri Supreme Court's decision in this case could have a major impact on prosecutors' attempts across the country to force reconsideration of cases with "glaring questions about the verdict but unclear legal avenues for pursuing exoneration."[136]

2. Many Recent Cases Lead to Growing Public Belief That Innocent People Can Be and May Have Been Executed

Awareness has significantly increased that innocent people can and do get sentenced to death, and that they may be executed despite substantial doubts about their guilt, due to judges, attorneys general, clemency authorities and governors who give far more weight to procedural technicalities than to fairness. When such inmates' lives have been spared, fortuities have often been involved.

Recent cases that have increased the public's awareness included the seeming indifference of key decisionmakers in Florida and Texas about whether either James Dailey or Rodney Reed had murdered anyone. The executions of death row inmates whose guilt now seems highly dubious – such as Cameron T. Willingham in Texas and Troy Davis in Georgia (see Section C.7.g. and 7.h. below) continue to affect public opinion. So do news accounts of others in the news in 2018-2020 due to their innocence being found or being seriously considered (see examples in Section C.5. below).

3. Conservatives

A growing number of conservatives now oppose capital punishment as inconsistent with traditional conservative values. They often argue that the death penalty involves over-extended government, is fiscally irresponsible, and is inconsistent with a culture of life. Examples of articles by such opponents are Arthur Rizer and Mark Hyden, January 10, 2019,

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[135] Richard A. Oppel, Jr., *30 Prosecutors Say Lamar Johnson Deserves a New Trial. Why Won't He Get One?*, N.Y. TIMES, Dec. 25, 2019.
[136] *Id.*

Why Conservatives Should Oppose the Death Penalty and Stephen Beale, August 9, 2018, *The Conservative Case Against the Death Penalty* in the *American Conservative*.[137]

On October 28, 2019, Conservatives Concerned About the Death Penalty released a statement signed by over 250 conservative leaders from around the country. They urged a fresh look at capital punishment as actually implemented. The actual death penalty system, they said, is "a costly and ineffective government program" that "makes too many mistakes" and "has no place in a culture seeking to promote life." The signatories included current and former state legislators, local-, county-, and state-level officers of Republican and Libertarian organizations, law enforcement officials, and other elected officials and candidates.[138]

Wyoming Representative Jared Olsen vowed to keep pushing abolition legislation that (with majority Republican support) passed the House in 2019 but lost in the Senate. He said Wyoming's abolition efforts began with grassroots groups across the political spectrum. He said the death penalty violates small government principles and that it "blows my mind that any American would want to trust the justice system with matters of life and death."[139]

Utah conservative group director Darcy Van Orden urged consideration in 2020 of new abolition legislation. Citing a study showing that Utah has spent $40 million on the death penalty over the last 20 years, she asked: "How can Utah waste those funds when we could be pouring that money into helping victims?" She was optimistic that changes in the composition of the state legislature, combined with repeal proponents' education efforts over the last three years, could lead to repeal of the death penalty in Utah.[140]

4. Greater Understanding of Interrelationship of Death Penalty with Racial Superiority Ideology and Lynchings

On April 26, 2018, the National Memorial for Peace and Justice and the Legacy Museum: From Enslavement to Mass Incarceration opened in Montgomery, Alabama. Conceived of and implemented by the Equal Justice Initiative and its extraordinary executive director Bryan Stevenson, the openings received enormous national attention. And as more visitors and organizations visit the National Memorial and Legacy Museum, their underlying messages – underscored by Mr. Stevenson's numerous public appearances and interviews – were growing quickly.[141] These messages have been further enhanced by the release in December 2019 and January 2020 of the *Just Mercy* movie and the continuing success of the *Just Mercy* book (see Sections B.6.a.-6.d. below).

The key educational message being expressed in these various ways is that we are still feeling the effects of the dreadful legacy of lynchings and other terrorism in rendering

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[137] Arthur Rizer & Marc Hyden, Opinion, *Why Conservatives Should Oppose the Death Penalty*, AM. CONSERVATIVE, Jan. 10, 2019; Stephen Beale, *The Conservative Case Against the Death Penalty*, AM. CONSERVATIVE, Aug. 9, 2018.

[138] Conservatives Concerned About the Death Penalty, Statement of Support to End the Death Penalty (Oct. 28, 2019), http://conservativesconcerned.org/ConservativeStatement/.

[139] *More Than 250 Conservative Leaders Join Call to End Death Penalty*, DEATH PENALTY INFO. CTR., Oct. 29, 2019.

[140] *Id.*

[141] For information and resources regarding the National Memorial for Peace and Justice and the Legacy Museum, see the Equal Justice Initiative's Museum and Memorial website, available at https://museumandmemorial.eji.org/.

the post-slavery constitutional amendments and federal civil rights laws a practical nullity as late as the mid-twentieth century. In this context, capital punishment has played a crucial role, as a seemingly more tasteful version of lynchings and other terrorist acts.

Most Americans have had very little idea of the continuity of white supremacy as an ideology well into the twentieth century and through the present, and of the post-traumatic impact that lynchings still have in many communities of color – notwithstanding the enormous Northern migrations arising from such horrors.

The National Memorial, the Legacy Museum, and Mr. Stevenson emphasize the frequently embarrassing role our legal system has played and to a large extent still plays. Many people believe that after the Supreme Court cleared out America's death rows in 1972 and then in 1976 upheld new statutes, it has ensured careful individualized consideration of the appropriate punishment for those found guilty, with thorough investigation and presentation by defense counsel. But the actual history of the revived death penalty system fails to justify that belief – most egregiously in the Court's abysmal decision in *McCleskey v. Kemp*,[142] in which the Supreme Court refused to grant constitutional relief despite assuming the validity of a sophisticated study. That study showed that, after holding other factors constant, African Americans' odds of receiving the death penalty in Georgia were greater than the odds for white people and showing an even greater disparity where the victim was white as compared to where the victim was African American.

The National Memorial, the Legacy Museum, and Mr. Stevenson (whose efforts in this regard are discussed further in Sections B.6.a.-6.d. below) are bringing national attention to the appalling role that capital punishment still plays in preserving the awful legacy of white supremacy and its other progeny.

5. Denial of Relief to Death Row Inmates Who Would Not Have Been Sentenced to Death If Their Trial Counsel Had Represented Them How They Likely Would Be Represented Now

Problems with the quality or performance of counsel representing capital defendants and death row inmates have been mentioned several times above. Certainly, significant improvements in the quality of defense counsel at the trial level in certain states have played a significant role in the decline in new death sentences in those states. But the refusal of postconviction and habeas courts and of clemency authorities to grant relief on the basis of ineffective trial counsel or waived or undiscovered constitutional errors has led to executions of many people who would not have received capital sentences if their trial counsel had represented them in the manner in which they likely would be represented today.

A January 11, 2019 story in the *Atlanta Journal-Constitution* reported that in new Georgia cases "capital punishment in 2019 seems to be going the way of the guillotine and the gallows: [i]t's disappearing," and attributed this in part to the effective work of the state's capital defender office. It also reported that Georgia would soon set execution dates for death row inmates sentenced years ago. The article noted that on January 7, 2019 Justice Sotomayor, dissenting from the Court's 6-3 refusal to consider Donnie Lance's case, said that Lance's trial lawyers "failed even to look into, much less to put on, a case for sparing Lance's

[142] *McCleskey v. Kemp*, 481 U.S. 279 (1987).

life." Stephen Bright, a renowned capital defense lawyer and a Georgia State, Georgetown, and Yale Law School professor, told the *Journal-Constitution* that people facing execution now "were sentenced some time ago often with lawyers who were not qualified to try a death-penalty case. They are also people who would not be sentenced to death today."[143]

One North Carolina death row inmate, Nathan Bowie, was "represented" in state postconviction by Tom Portwood, a dentist-turned-attorney who had a severe drinking problem and whose failure to do any work outside the courtroom for his client Ronald Frye had led the North Carolina Academy of Trial Lawyers for the first time to urge clemency for a death row inmate. Frye was executed in 2001. Portwood was appointed along with a lawyer with no death penalty experience to represent Mr. Bowie. During the time he "represented" Bowie, Portwood was involved in a car crash and found to have an alcohol level sufficient to kill him. The report issued in October 2018 details numerous egregious failures by Bowie's counsel as well as what appears to have been serious misconduct by the trial prosecutor.[144]

Another feature of North Carolina's death penalty system at the time of Bowie's trial was a requirement that prosecutors who charged a defendant with aggravated first-degree murder had to seek the death penalty. They could only avoid doing so by charging second-degree murder. This was eventually changed.

Thomas Maher, who now heads North Carolina's Indigent Defense Services, says policymakers and courts should ponder this question: "Should we execute scores of inmates for crimes that would not warrant the death penalty if they were tried today?"[145] Others interviewed by *The Intercept* have made the same point.

6. Significant Movies, Books, Television Programs, Radio/Podcasts, Documentary and Press Series

2019 was noteworthy for the variety of movies, books, podcasts, television programs, press series and other media featuring significant considerations of capital punishment. Their impact continued into early 2020.

Large audiences saw HBO's documentary, which premiered in the summer of 2019, entitled *True Justice: Bryan Stevenson's Fight for Equality*.

a. **Just Mercy:** ***The Book's Great Impact***

The book *Just Mercy* had already had a great impact.

As discussed above in discussing Colorado's abolishing the death penalty in 2020 (see Section A.2.j.), the key to the bill's passage was that three Republican Senators changed from opposing the bill to favoring it. One of these Republicans not only became a proponent of the bill, he also became a sponsor. Senator Jack Tate was eating lunch with his "really good friend" Senator Jeni Arndt, after the bill lost narrowly in 2019. To her surprise, he told her he would become a sponsor.

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[143] Bill Rankin, *Death penalty on the wane in Georgia*, ATLANTA J.-CONST., Jan. 11, 2019.
[144] *See* Liliana Segura, *"Relic of Another Era": Most People on North Carolina's Death Row Would Not Be Sentenced to Die Today*, THE INTERCEPT, Oct. 17, 2018.
[145] *Id.*

"He had been on the fence about repealing the death penalty during the 2019 session," Arndt said. "Afterward, while visiting his mother in Nashville, he read the book 'Just Mercy' by Bryan Stevenson . . . . Tate read of the problems with zealous prosecutors, inept defense attorneys and how race is a factor in deciding whether to put someone to death."[146]

b. Just Mercy *and* Clemency: *Combined Impact*

Late December 2019 featured the theatrical release of two significant movies. *Just Mercy* is based on Bryan Stevenson's book of the same name, which as of late January 2020 was #1 on the paperback best seller list of the *New York Times Book Review*, having been on the list for more than three years. *Clemency*, a movie by first time author/director Chinonye Chukwu, won the top prize at the 2019 Sundance Film Festival.

CNN's Brian Lowry discussed the movies' combined impact:

> Two year-end movies offer a solid, complementary one-two punch on the issues of the death penalty and criminal justice involving African-Americans, even though one, "Just Mercy," is based on fact while the other, "Clemency," is a fictionalized story.
>
> Set in the late 1980s, "Just Mercy" stars Michael B. Jordan as Bryan Stevenson, introduced as a Harvard law student working to help inmates in Alabama. Two years later, he's back as a full-blown lawyer, working for a group that seeks to assist those who were denied fair trials or adequate representation.
>
> Despite the smiling faces he encounters within the system – urging him to visit the Harper Lee museum, honoring the author of "To Kill a Mockingbird" – Stevenson's efforts suggest that justice in the Deep South hasn't advanced much since those days. The idealistic young attorney grapples with that as he seeks to free the wrongly convicted Walter McMillian (Jamie Foxx), hoping to win him a new trial for a murder he didn't commit.
>
> . . . [T]here's power in McMillan's plight, and a knockout performance by Tim Blake Nelson – made all the more impressive by closing video of the guy he portrays – as an oily prison informant whose testimony was used to put McMillan away.
>
> Dismissed as a "kid," Jordan brings steely resolve to the role – having to convince his client that he's up to the task – with Stevenson's track record in the years since this early case adding an additional wallop.
>
> . . . "Clemency" also deals with death-row inmates, but the perspective here is unusual – following the process of execution, and attempts to secure mercy from the government, through the weary eyes of an emotionally numbed warden.

[146] Lynn Bartels, *A Change of heart on death penalty*, COLO. POL., Mar. 10, 2020.

> In one of the year's best performances, Alfre Woodard plays Bernadine Williams, who is introduced impassively watching an inmate being put to death. But the implementation of that sentence doesn't go smoothly, which increasingly weighs upon her, especially as another inmate, Anthony Woods (Aldis Hodge), nears a similar fate.
>
> There's really not much more to it than that, the suspense in the film – written and directed by Chinonye Chukwu, who drew inspiration from real cases – coming from whether the governor can be persuaded to stay Anthony's execution, a standard request that's seldom granted.
>
> The fundamental issue, however, is the psychic toll being part of this ordeal exacts on Bernadine, her emotional distance driving a wedge between her and her husband (Wendell Pierce) and causing her to seek refuge in a variety of ways, including a bout of wanton drunkenness.
>
> Much like the western "Unforgiven," "Clemency" wants to bring horror to the death penalty and the taking of a single life, something that's often lost in the violence that's frequently seen on screen.
>
> A grand-prize winner early this year at the Sundance Film Festival, it's a small movie, but one that provides considerable food for thought, while being elevated by a performance from Woodard that, often without uttering a word, betrays an inner conflict that cuts to her very core.[147]

c. Interviews Regarding Just Mercy

Interviews surrounding the release of both movies enhanced their impact – in part by reaching many people who will not see either movie.

Bryan Stevenson said in an interview with WBUR's Tonya Mosley for NPR's *Here & Now*: "I think the great evil of slavery wasn't involuntary servitude. It was this idea that black people aren't as good as white people. And that continues after the 13th Amendment. That's why I've argued slavery doesn't end, it just evolves, and we had 100 years of terrorism and lynching and violence where black people were pulled out of their homes and beaten and murdered and drowned and tortured and lynched. And we've never really talked about that. And even though we pay more attention to the civil rights era, we haven't confronted the fact that this presumption of dangerousness and guilt that gets assigned to black and brown people is still with us."[148]

Mr. Stevenson also was interviewed on ABC's *Nightline* on January 9, 2020. "I hope from watching the movie and thinking more critically, people will kind of see this issue the way I see it," Stevenson said. "I don't think the threshold question of the death penalty is, 'Do people deserve to die for the crimes they've committed?' I think the threshold question is, 'Do we deserve to kill?' . . . Do we deserve to kill . . . if we have a system of justice that treats

[147] Brian Lowry, *'Just Mercy' and 'Clemency' each take a stark look at the criminal-justice system*, CNN, Dec. 24, 2019.
[148] Tonya Mosley, *'Slavery Doesn't End, It Just Evolves': Lawyer Portrayed In 'Just Mercy' Wants Film To Inspire Change*, WBUR RADIO (Bos.), Jan. 10, 2020.

you better if you're rich and guilty than if you're poor and innocent? If we're unreliable, if we tolerate errors, if we have innocent people on death row, if it's compromised by bias and racism . . . then we don't deserve to kill. And I don't think that's a crazy argument." Stevenson praised Foxx's performance, saying, "When Jamie plays Walter, I think . . . he exposed the agony of being wrongly convicted and the pain and anguish of being separated from your family. . . . The trauma of having to live through this horrific intimacy with death and execution. I think if people can see the real clients, the real people, they'll care more about the fact that we continue to tolerate so much injustice."[149]

d. Consensus: You Are More Than the Worst Thing You Ever Did – Except in the View of Most Clemency Authorities

Bryan Stevenson's statement in his book *Just Mercy* that you are more than the worst thing you've ever done has been cited by many as a core truth by which we should all live. In an interview in connection with the *Just Mercy* movie, Stevenson discussed being with his client Herbert Richardson when Richardson was executed: "It was so clear to me that Herbert Richardson was more than the crime he committed. It was so clear to me that his life still had meaning and value . . . . It's not fair that we send people off to war to fight for this country, yet when they come back traumatized and they make mistakes, we act as if their sacrifice is irrelevant. It was important to me that this be part of the story. We are all better than the worst thing we have ever done. Herbert's narrative here reinforces that."[150] That is why it is so crucial that Mr. Richardson's life and death are featured in the book and movie, and not solely the account of the near-execution of Walter McMillian for a crime he did not commit.[151]

Tennessee's Governor Bill Lee took the opposite view when he denied clemency to Nicholas Sutton on February 19, 2020. Sutton was executed the following day. Sutton's clemency petition said he had saved the lives of many corrections officers on different occasions. One of the corrections officers, Tony Eden, said that Sutton saved his life during a prison riot in 1985. Eden stated that he had been surrounded by five armed inmates, who tried to take him hostage. But Sutton and another inmate "confronted them, physically removed [Eden] . . . and escorted [him] to the safety of the trap gate in another building." Eden said, "I owe my life to Nick Sutton." Seven current and former prison guards supported granting Sutton clemency, as did several family members of victims and five members of Sutton's trial jury.[152]

e. Interviews Regarding Clemency

Writer/director Chinonye Chukwu was interviewed by Michel Martin on PBS' *Amanpour & Co.*, on December 18, 2019. Ms. Chukwu said that the movie had its initial

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[149] Candace Smith & Allie Yang, *'Do we deserve to kill?' Attorney and exonerated death row inmate talk about the real story behind 'Just Mercy'*, ABC NEWS, Jan. 9, 2020 (alterations in original).

[150] Bryan Alexander, *Here's why 'Just Mercy' needed that harrowing electrocution scene*, USA TODAY, Jan. 11, 2020.

[151] Writing in the *New York Times Magazine* just before the publication in 1993 of *Dead Man Walking*, Sue Halpern praised Sister Helen Prejean's "undistorted portraits . . . of the men whose deaths have been scheduled by the state. She doesn't suppose their innocence, doesn't appeal to the possibility that somehow they are there by mistake. She embraces their guilt, and from that embrace argues that 'people are more than the worst thing they have ever done in their lives.'" Sue Halpern, *Sister Sympathy*, N.Y. TIMES (Magazine), May 9, 1993.

[152] Ortega & Smith, *supra* note 117; Segura, *supra* note 117.

genesis in the protests over Georgia's execution of Troy Davis on September 21, 2011. She noticed then that among those protesting were:

> a handful of retired wardens and directors of corrections, and the wardens got together and wrote a letter to the Governor urging clemency. Not just on the grounds of his potential innocence, but they spoke about the consequences killing him would have on the prison staff. The morning after the execution, I thought, What must it be like for the persons whose livelihoods were tied to the taking of human life? What are the emotional and psychological consequences that the warden spoke to? And that was the seed that was planted.
>
> I think it's a way for me to widen the reach of this film . . . to tell the story from the perspective of a perpetrator of the system. A way for me to not just preach to the choir but to . . . really kind of get people who might be for capital punishment or who might have no regard for people who are incarcerated. It's for me to tell the story from the perspective of someone who they think might be more in line with their views. . . . I do believe regardless of what you think you will feel something upon watching this film, and I think that that feeling is the potential start of some change. . . . I hope this will inspire people not to define people by their worst possible acts.[153]

A few days later, Alfre Woodard spoke with ABC News' Deborah Roberts on *Nightline*:

> Roberts: It's a searing look at the death penalty, as seen through the eyes of the people tasked with carrying out the gravest punishment in our society.
>
> Woodard: The point of telling that story is for us to ask whether we should be doing it anyway, the ritualistic murder. It works best, I think, to have a person who actually takes us into that be the person that has the struggle. . . . The horror is that it is so uneventful, just like, here, lie down. You have no history now. Family, he's gone. That is, that is a horror. My hope is that it increases the conversation. The reason that things are moving. There is movement in terms of criminal justice reform.
>
> Roberts: Are you hopeful? Or are you more pessimistic?
>
> Woodard: I am a great-granddaughter of Alec Woodard. He was enslaved in Georgia. And I am the product of hope. Hope is in my DNA. We wouldn't be sitting here if there wasn't hope. You can't get hope out of us. You're going to have to take us all out to extinguish the hope.[154]

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[153] *Amanpour & Co.: Chinonye Chukwu and Alfre Woodard Discuss "Clemency"* (PBS television broadcast Dec. 18, 2019), https://www.pbs.org/wnet/amanpour-and-company/video/chinonye-chukwu-and-alfre-woodard-discuss-clemency/.

[154] *ABC News: Alfre Woodard on new film, 'Clemency,' and her history of criminal justice advocacy* (ABC television broadcast Dec. 21, 2019), https://abcnews.go.com/Nightline/video/alfre-woodard-film-clemency-history-criminal-justice-advocacy-67866473.

f. John Grisham's novel The Guardians

John Grisham's novel *The Guardians* reached #1 on the *New York Times* bestseller list for fiction and was #2 on the list as of late January 2020. A Law.com writer said: "[The novel] explores why the innocent are sometimes found guilty, such as by planted evidence, fabricated testimony and jailhouse snitches. [Grisham] places particularly sharp focus on prosecutors' use of scientific evidence with dubious reliability." In the case in the novel, as in a real-life case, "prosecutors used purported experts in bloodstain-pattern analysis to testify that the blood was indicative of a close-range shooting. However, the experts had virtually no training on the subject." In the actual case, "the Texas Forensic Science Commission – created by the Texas Legislature – concluded that the blood-spatter analysis used to convict . . . was 'not accurate or scientifically supported.' The commission also concluded that the expert who testified . . . was 'entirely wrong.' That expert has himself stated in an affidavit that his conclusions were wrong."[155]

A character in the novel ended up on death row after a purported expert in bite mark analysis testified that the character's teeth were the source of three nicks on his victim's arm. Grisham drew upon the Mississippi case of Kennedy Brewer, a man sentenced to death for rape and murder. "Brewer was convicted based on bite mark evidence and then exonerated – after seven years on death row – when the real killer was identified through DNA." The novel also focuses on jailhouse informants.

g. Last Week Tonight *Takes a Satirical Look at Lethal Injection*

Occasionally, the Emmy award winning HBO series *Last Week Tonight* devotes its extended "main segment" to capital punishment. It did so with regard to lethal injection on May 6, 2019.

Host John Oliver said that people's discomfort at talking about lethal injection was the program's reason for discussing it. He first noted that he opposes capital punishment irrespective of whether lethal injection is a "humane" way of implementing it – and gave several reasons for his opposition.

He proceeded to discuss in depth the development of lethal injection, and pointed out that medical personnel generally are not involved, given medical legal ethics' precluding any doctors' involvement in state-imposed killing. Next, he discussed examples of botched legal injections and said that lethal injection has been the source of more problematic executions than any other method.

He finished with this: "The hard truth here is: There is no perfect way for the government to kill people . . . . The fundamental fact to understand about lethal injection is: It is a show . . . . It is designed not to minimize the pain of people being executed but to maximize the comfort of those who want to support the death penalty without confronting the reality of it, which is that it is violent, and it's brutal and it's never going to be anything other than that."[156]

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[155] Randy Maniloff, Commentary, *A Conversation With John Grisham: 'In Popular Fiction, You Better Stay Off the Soapbox'*, LAW.COM, Oct. 30, 2019.

[156] Peter Bailey-Wells, *John Oliver examines lethal injections and the death penalty on 'Last Week Tonight'*, BOS. GLOBE, May 6, 2019.

h. Series in The Intercept *Reports on Capital Punishment, As Implemented in the United States*

In December 2019, *The Intercept*, after extensive research, ran a four-part series on the actual implementation of capital punishment in the United States.[157] Its reporters began by trying to track what happened to every person sentenced to death since the Supreme Court handed down *Gregg v. Georgia*[158] on July 2, 1976. They concluded that most states' databases with regard to people sentenced to death were "abysmal" and that most of the rich detail gathered by the Federal Bureau of Justice Statistics is off limits to reporters and the public. *The Intercept* then pieced together as much information as it could on its own.

Based on the data it did gather, *The Intercept* concluded that capital punishment is an ineffectual policy – based on the seemingly arbitrary dispositions of cases. It encouraged others to use its database as a starting point.

i. Podcasts

Several podcasts (as well as websites and much more) now focus on criminal justice issues. These have focused attention on some of the now best-known controversial cases in which death row inmates have been attempting to overcome all of the obstacles to securing relief – even where the immediate relief being sought is permission to undertake DNA tests.

American Public Media conducted a study in association with its podcast series, *In the Dark*, concerning jury selection in Mississippi's Fifth Circuit Court District from 1992 to 2017, a period throughout which Doug Evans has been the only District Attorney. The study encompassed 225 trials and over 6,700 jurors. It showed that Evans' office struck prospective black jurors at nearly four and a half times the rate it struck white prospective jurors.[159]

This study, unusual for any news organization, was highly relevant to understanding what became the Supreme Court's holding in *Flowers* (see Section C.8.c.iv. below).

7. The Catholic Church

a. Change in the Catechism

On August 2, 2018, Pope Francis announced that the Catholic Church had revised its Catechism – the Church's official compilation of teachings – to oppose capital punishment unambiguously. The Pope said the Church would strive to end capital punishment everywhere. As previously worded, the Catechism said the death penalty could be used "if this is the only possible way of effectively defending human lives against the unjust aggressor," but that situations where executing "the offender is an absolute necessity 'are very rare, if not practically nonexistent.'"[160]

On October 11, 2017, Pope Francis foreshadowed his August 2, 2018 announcement, stating that the Church would be reflecting:

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[157] Liliana Segura & Jordan Smith, *The Condemned* (pts. 1-4), THE INTERCEPT, Dec. 3, 2019.
[158] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[159] Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APM REP., June 12, 2018.
[160] Linda Bordoni, *Pope Francis: 'death penalty inadmissable'*, VATICAN NEWS, Aug. 2, 2018.

> [T]he change in the awareness of the Christian people which rejects an attitude of complacency before a punishment deeply injurious of human dignity. . . . [The death penalty] is per se contrary to the Gospel, because it entails the willful suppression of a human life that never ceases to be sacred in the eyes of its Creator and of which – ultimately – only God is the true judge and guarantor. . . . God is a Father who always awaits the return of his children who, knowing that they have made mistakes, ask for forgiveness and begin a new life. No one ought to be deprived not only of life, but also of the chance for a moral and existential redemption that in turn can benefit the community.[161]

The Pope stressed that historically "the imposition of the death penalty was dictated by a mentality more legalistic than Christian. Concern for preserving power and material wealth . . . prevented a deeper understanding of the Gospel. . . . The word of God cannot be moth-balled like some old blanket in an attempt to keep insects at bay! No. The word of God is a dynamic and living reality that develops and grows because it is aimed at a fulfilment that none can halt."[162]

As amended in 2018, Section 2267 of the *Catechism of the Catholic Church* now provides:

> Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.
>
> Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.
>
> Consequently, the Church teaches, in the light of the Gospel, that "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person," and she works with determination for its abolition worldwide."

b. Contrasts with Justice Scalia's Views

Very different views were expressed by the late Justice Antonin Scalia, whom President Trump repeatedly has said exemplifies an ideal Supreme Court justice.

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[161] *Pope Francis: The dynamic word of God cannot be moth-balled*, VATICAN RADIO, Oct. 11, 2017, http://en.radiovaticana.va/news/2017/10/11/pope_francis_the_dynamic_word_of_god_cannot_be_moth-balled/1342352 (containing English language translation of Pope Francis' prepared remarks).

[162] Pope Francis I, Address of His Holiness Pope Francis to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization (Oct. 11, 2017), http://www.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.html.

One contrast is between Justice Scalia's views on Constitutional interpretation and the Pope's discussion of how Church doctrine can change. Justice Scalia said the Constitution is not a "living document" whose interpretation can evolve as society's consensus changes under new circumstances. Opposing consideration of "the evolving standards of decency that mark the progress of a maturing society," he called the Constitution "dead – or, as I prefer to call it – enduring" with its meaning frozen in the 1790s. This view made it easy for Scalia to hold capital punishment constitutional since when the Constitution was adopted it was permitted "not merely for murder, by the way, but for all felonies, including, for example, horse thieving, as anyone can verify by watching a western movie." He said that if standards of decency evolve, Congress and legislatures can "restrict or abolish the death penalty as they wish," but courts cannot.[163] Pope Francis said that Church doctrines must be revised in light of the Church's enhanced understanding of capital punishment's actual impacts.

On January 25, 2002, Justice Scalia said the death penalty is consistent with morality: "[b]eing a Roman Catholic and being unable to jump out of my skin, I cannot discuss that issue without reference to Christian tradition and the church's magisterium." He said "[f]ew doubted the morality of the death penalty" when and even before there was general belief "in the divine right of kings." He stated: "St. Paul['s] *core* . . . message is that government, however you want to limit that concept, derives its moral authority from God. It is the minister of God with powers to revenge, to execute wrath, including even wrath by the sword, which is unmistakably a reference to the death penalty." Justice Scalia said this consensus of Western (including secular) thought was "upset . . . by the emergence of democracy. It is easy to see the hand of almighty God behind rulers whose forebears, deep in the mists of history, were mythically anointed by God or who at least obtained their thrones in awful and unpredictable battle whose outcome was determined by the Lord of Hosts, that is, the Lord of Armies. It is much more difficult to see the hand of God or any higher moral authority behind the fools and rogues – as the losers would have it – whom we ourselves elect to do our own will."

Justice Scalia said the West's leadership view of the death penalty as immoral was not due to its "Christian tradition":

> [T]he more Christian a country is, the *less* likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe and has least support in the church-going United States. I attribute that to the fact that for the believing Christian, death is no big deal. Intentionally killing an innocent person is a big deal, a grave sin which causes one to lose his soul, but losing this physical life in exchange for the next? The Christian attitude is reflected in the words [a] play has Thomas More saying to the headsman: "Friend, be not afraid of your office. You send me to God. . . . He will not refuse one who is so blithe to go to Him." For the nonbeliever, on the other hand, to deprive a man of his life is to end his existence – what a horrible act! . . . [Abolition's] current predominance is the handiwork of Napoleon, Hegel and Freud rather than of St. Thomas and St. Augustine.[164]

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[163] Justice Antonin Scalia, Remarks at the University of Chicago Divinity School Conference: A Call for Reckoning: Religion and the Death Penalty (Jan. 25, 2002), http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/.

[164] *Id.*

At an August 2, 2018 ABA program, Chicago's Cardinal Blase J. Cupich commented on this last portion of Justice Scalia's remarks, stating:

> I think that his understanding of salvation has great limitations. It is an atomistic view of salvation, that is, as individuals. . . . [W]hat the Second Vatican Council has brought to our attention is that God saves a people; God doesn't just save by individuals. So, how is it that we integrate human beings into society, especially those who are on the margins? That's the question we should be posing here.
>
> Yes, it's true that we all who are of the Christian faith believe in an afterlife, the immortal gift of life that God gives us. As we live our life here today, our task is not just thinking about me in terms of my own personal salvation, but how is it that I am cooperating with God to create a people where everyone feels that they are included. So I think he misses that point and he has a narrow view of what salvation means in the Christian tradition.[165]

8. 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.[166]

On April 21, 2020, Amnesty International reported that in 2019 the number of confirmed executions – in countries other than China and a few other nations for which it cannot make reasonable estimates – had decreased about 5% since 2018 levels – to its lowest level in a decade, with particularly dramatic drops in Egypt, Japan, and Singapore, and a second year of much lower than normal executions in Iran. There were substantial increases in executions in Iraq, Saudi Arabia, South Sudan, and Yemen.[167] For the eleventh consecutive year, the United States was the only country in the Americas to execute anyone.[168]

As of December 31, 2019, 142 countries had abolished capital punishment "in law or practice" and 106 had abolished it for all crimes, while there were 56 retentionist countries.[169]

A total of 20 countries executed people in 2019, the same as in 2018, as compared with 23 in 2017 and 31 in 1999.[170] The United States was between ninth and twelfth depending on totals that Amnesty International could not verify for certain countries.[171]

On December 17, 2018, the U.N. General Assembly voted to call for a worldwide moratorium on executions and to urge countries retaining the death penalty to seek to ensure

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[165] ABA Conference on the Death Penalty, *supra* note 125, at 47-48 (remarks of Cardinal Cupich).
[166] AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2009, at 11, 18 (2010).
[167] AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2019, at 7-8 (2020).
[168] *Id.* at 14.
[169] *Id.* at 53.
[170] *Id.* at 9; AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2018, at 8-9 (2019).
[171] Amnesty Int'l, *supra* note 167, at 9.

that it is not implemented in an arbitrary or discriminatory fashion. After correcting for Pakistan's erroneous inclusion in the yes total, the results were 120 in favor, 36 against, and 32 abstaining. The 120 countries voting in favor were the most ever to vote for such a resolution. The previous record, in 2016, was 117 in favor. Amnesty International said, "For the first time, Dominica, Libya, [and] Malaysia changed their vote to support the resolution, while Antigua and Barbuda, Guyana and South Sudan moved from opposition to abstention."[172]

Capital punishment has not been reinstated in Turkey, despite President Erdoğan's repeated statements that it might do so and an August 2018 report of an agreement to reinstate it for terrorists and killers of women and children. This reinstatement could be done only by constitutional amendment.[173]

On January 6, 2020, the *Washington Post* reported that after unexpectedly being elected in 2018, Malaysia's Prime Minister Mahathir Mohamed's government imposed an immediate moratorium on executions and promised to abolish capital punishment. Capital punishment, a remnant of British rule, has been the mandatory penalty for numerous offenses. There are 1,300 death row inmates, including at least one who was convicted of killing someone who turned out indisputably to be alive! Any change in Malaysia's system would have impacts elsewhere, in part because nearly half of death row inmates there are foreign nationals. More than 100 are female, according to Amnesty International.[174]

On March 20, 2020, India carried out its first state executions since 2015. It executed four men convicted of the gang rape and murder of a 23-year-old woman, a physiotherapy intern, on a private bus that she and her male companion had boarded after seeing a movie. The December 2012 crime had caused an uproar and changes in India's law regarding sexual assault.[175]

Two unusual developments in Japanese death penalty cases were reported in the international press within a week of each other in March 2020.

First, on March 16, 2020, the Yokohama District Court convicted Satoshi Uematsu of killing by knife 19 people with disabilities and injuring 24 other residents and two caregivers in July 2016. He was sentenced to death by hanging after repeatedly justifying his actions as helping the world by removing burdens on society. This was the largest mass killing in Japan since World War II. Mr. Uematsu formerly had worked at the residential facility at which the people with disabilities lived.[176]

Second, CNN reported about Iwao Hakamada, who had been released in 2016 after almost 50 years on Japan's death row, when a court ordered that he be given a retrial about

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[172] Amnesty Int'l, Press Release, *Death penalty: Global abolition closer than ever as record number of countries vote to end executions*, Dec. 17, 2018, https://www.amnesty.org/en/latest/news/2018/12/global-abolition-closer-than-ever-as-record-number-of-countries-vote-to-end-executions/.

[173] *Turkish leaders agree to bring back death penalty*, AHVAL NEWS, Aug. 28, 2018, https://ahvalnews.com/death-penalty/turkish-leaders-agree-bring-back-death-penalty.

[174] Preeti Jha, *Malaysia reconsiders capital punishment*, WASH. POST, Jan. 6, 2020.

[175] David Welna, *4 Men Hanged In India For 2012 Gang Rape And Murder That Sparked Outrage*, NPR, Mar. 20, 2020.

[176] Mari Yamaguchi, Associated Press, *Worker at Japan care home sentenced to hang for mass killing*, Mar. 16, 2020, https://apnews.com/e460315717f2dd366d061dd02c10e3d2.

his guilt and perhaps his sentence. The key evidence against him had been his blood splattered black trousers and his allegedly coerced confession. DNA testing on the blood on the trousers showed that the blood did not come from either Mr. Hakamada or any of the victims. In yet another unusual twist, the Tokyo High Court held that he would not get a resentencing. So, he might remain free after almost 50 years in jail; he might be jailed for the rest of his life; or he might be executed.[177]

The United States' insistence on possibly executing people convicted of certain crimes sometimes prevents it from convicting them of those crimes. A recent decision by the Supreme Court of the United Kingdom illustrates how this can happen. In March 2020, the United States sought to try Shafee El Sheikh and Alexanda Kotey for killing two U.K. and two U.S. citizens. Lord Kerr concluded that the U.K. government had improperly provided the U.S. prosecutors with information that could be used to secure the death penalty without seeking assurances that the information would not be used to seek the death penalty.[178]

C. Important Issues

The following are among the issues concerning capital punishment that have received attention recently, or deserve attention.

1. Ability to Raise and Secure Well-Considered Rulings on the Merits of Meritorious Federal Constitutional Claims

a. AEDPA (Overview)

Any analysis of capital punishment *as applied* must consider various barriers that preclude the federal courts from ruling on the merits of meritorious federal constitutional claims. Many are set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[179] 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 ratchet[ed] 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 AEDPA 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

[177] Emiko Jozuka & Yoko Wakatsuki, *This Japanese man spent almost five decades on death row. He could go back*, CNN, Mar. 21, 2020.
[178] *Elgizouli v. Sec'y of State for the Home Dep't* [2020] UKSC 10 (appeal taken from EWHC).
[179] Pub. L. 104-132, 110 Stat. 1214 (1996).

> 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.[180]

b. AEDPA's Interpretation by the Supreme Court

In a non-capital decision in 2016, the Supreme Court considered an assertion that a state court decision could be reviewed on the merits because it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[181] The Court said: "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."[182] "The state court decision must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'"[183]

c. Possible Opt-Ins to Even More Prosecution Friendly Provisions

In 2006, Congress enacted a law that could make it easier for a state to be found to have "opted-in" to "special Habeas Corpus Procedures in Capital Cases."[184] In an opt-in state, 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.[185]

Opponents of this change (including the ABA) say the Attorney General may be a biased decisionmaker, given the Justice Department's close relationships with state attorneys general and its frequent amicus briefs supporting state-imposed death sentences.

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[180] 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).

[181] 28 U.S.C. § 2254(d)(1).

[182] *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))).

[183] *Id.* (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

[184] Pub. L. No. 109-177, 120 Stat. 192 (2006).

[185] 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)).

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.

In 2016, the Ninth Circuit reversed, for lack of standing, a challenge to the Justice Department's regulations on implementing "opt-in." Rehearing and certiorari were denied.[186]

On April 13, 2020, Attorney General William P. Barr filed, for publication in the *Federal Register* on April 14, 2020, his certification dated April 6, 2020, of Arizona's post-conviction capital punishment system, effective May 19, 1998.[187]

2. Finality Over Facts/Fairness

On October 2, 2019, in a divided ruling with three judges dissenting, the Texas Court of Criminal Appeals rejected a Tarrant County trial court's recommendation that Paul David Storey's death sentence be overturned because Fort Worth prosecutors had lied to the jury by asserting that the victim's family wanted Storey to be sentenced to death. The court said the claim was procedurally barred.[188] Three judges dissented, pointing out that the victim's parents had been death penalty opponents for many years and that the prosecutors had known this before trial. The dissenters said the prosecution's argument to the contrary was "patently false."[189]

3. Prosecutorial or Other Law Enforcement Serious Forensic Errors or Misconduct

a. Serious Forensic Errors

i. Overview

On January 13, 2019, the *Los Angeles Times* ran an op-ed by Pulitzer Prize winning journalist Edward Humes, who summarized recent years' developments in "the real world of forensics" as follows:

> [In] the real world of forensics, . . . the wizardry lionized by the "CSI" television empire turns out to have serious flaws. The science of bite-mark comparisons, ballistic comparisons, fingerprint matching, blood-spatter analysis, arson investigation and other common forensic techniques has been tainted by systematic error, cognitive bias (sometimes called "tunnel vision") and little or no research or data to support it. There is, in short, very little science behind

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[186] *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241 (9th Cir. 2016). The ABA filed an amicus brief in support of granting certiorari. The brief argued, *inter alia*, that the Ninth Circuit had failed to recognize that the Justice Department's Final Rule did not come anywhere close to ensuring that an opt-in state would provide effective counsel for state postconviction proceedings. Motion to File Brief Amicus Curiae and Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-4, *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. 16-880 (U.S. filed Feb. 13, 2017), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/HCRC-v-DOJ_ABA-Amicus-Brief-FINAL.authcheckdam.pdf.

[187] Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20,705 (Apr. 14, 2020).

[188] *Ex parte Storey*, 584 S.W.3d 437 (Tex. Crim. App. 2019) (per curiam), *petition for cert. docketed sub nom. Storey v. Texas*, No. 19-7099 (U.S. Dec. 31, 2019).

[189] *Id.* at 443 (Yeary, J., dissenting, joined by Slaughter, J.).

> some of the forensic "sciences" used in court to imprison and sometimes execute people.
>
> The rigorously researched and peer-reviewed newcomer to forensics, DNA matching, has thrown into sharp relief the lack of scientific rigor in many other forensic disciplines. According to data gathered by the National Registry of Exonerations, of the 2,363 inmates exonerated of murder or other serious felonies since 1989 (most commonly through DNA), 553 were convicted with flawed or misleading forensic evidence – nearly one out of four.
>
> Forensic science's shortcomings have left the justice system alternately in a quiet panic or massive denial. The issue was first brought into the spotlight by a highly critical report from the National Academy of Sciences in 2009, which found a dearth of scientific backing for most forensics methods other than DNA. It cited evidence that "faulty forensic science analyses may have contributed to wrongful convictions of innocent people." That report was followed by an even more blistering presidential commission report in 2016, which found serious errors and junk science in a host of commonly used forensic methods tying suspects to crimes.
>
> Even the seeming infallibility of fingerprint evidence took a big hit. Multiple experts at the FBI's vaunted Latent Print Unit incorrectly matched a Portland, Ore., attorney to prints found at the scene of the 2004 Madrid train station bombing. The prints actually belonged to an Algerian terrorist. A form of cognitive bias – finding what you expect to find – has been blamed because the FBI examiners had received extraneous information about the lawyer converting to Islam, and they were also told that a respected senior agent had already declared a match.
>
> . . . [Many cases show] the profound difficulty the justice system has in separating good science from bad. The National Academy of Sciences has suggested raising the bar for expert testimony by requiring hard data and error rates for all forensic disciplines.
>
> A commission formed by President Obama to study solutions to flawed forensics was disbanded by the Trump administration. It may be time for the states, individually or in partnership, to undertake this effort. The stakes are too high to maintain the status quo.[190]

NBC News reported on January 23, 2019 that many judges and people in law enforcement are reluctant to disapprove of continuing use of forensic methods that the scientific community now feels are generally invalid.[191]

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[190] Edward Humes, Opinion, *Bad forensic science is putting innocent people in prison*, L.A. TIMES, Jan. 13, 2019.
[191] Jon Schuppe, *'We are going backward': How the justice system ignores science in the pursuit of convictions*, NBC NEWS, Jan. 23, 2019.

ii. Recent Cases Regarding Bite Marks

On January 14, 2019, the Texas Court of Criminal Appeals stayed the execution of Blaine Milam and remanded for consideration of developments in the science relating to bite mark evidence (plus changes in the Supreme Court's dealing with intellectual disability). A month earlier, in December 2018, the Texas Court of Criminal Appeals vacated Steven Chaney's murder conviction and said he was innocent, because he had been convicted "based on bite-mark science that 'has since been undermined or completely invalidated.'"[192]

b. Prosecutorial or Other Law Enforcement or Judicial Misconduct

i. Lack of Law Enforcement Credibility

In late 2016, the credibility of medical examiner testimony in many cases in one of Arizona's leading death penalty counties, Maricopa, was significantly undermined. KPNX reported that the county medical examiner's former lab director and chief toxicologist had – unbeknownst to Arizona defense counsel – been convicted of a felony for having stolen a gun that had been an exhibit in a case where he had previously worked.[193]

University of Denver professors Scott Phillips and Jamie Richardson released a study in 2016 arising from their review of over 1,500 cases in which convicted prisoners were ultimately exonerated. They determined that those who prosecuted the most serious offenses, including death penalty cases, were "most apt" – as compared with prosecutors in less serious cases – "to participate in the production of erroneous evidence . . . from false confession to untruthful snitches, government misconduct and bad science." In particular, they found that false confessions were substantially greater in murder cases and notably more in death penalty cases than in less heinous murder cases.[194]

ii. Harris County, Texas Judges' Postconviction "Factfindings" Rubberstamped Prosecutors' Submissions

Since the resumption of executions after *Gregg v. Georgia*, more people convicted in Harris County, Texas have been executed than those convicted in any other county in the country. A study of Harris County, Texas' capital punishment postconviction proceedings published in the May 2018 issue of the *Houston Law Review* provides a partial explanation for why this is so.

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[192] Jolie McCullough, *Texas court stops first execution of 2019, citing changes in intellectual disability law and bite-mark science*, TEX. TRIB., Jan. 14, 2019. On April 12, 2016, the Texas Forensic Science Commission approved its final report on a case concerning bitemark comparisons. It relied greatly on a Bitemark Investigation Panel that reviewed the extant scientific literature and data, and sought input from the American Board of Forensic Odontologists and others in the field. The Commission's "two threshold observations based upon its review" were: "1) there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition; and 2) there is no scientific basis for assigning probability or statistical weight to an association, regardless of whether such probability or weight is expressed numerically (*e.g.*, 'one in a million'). Though these claims were once thought to be acceptable and have been admitted into evidence in criminal cases in and outside of Texas, it is now clear they lack any credible supporting data." TEX. FORENSIC SCI. COMM'N, FIFTH ANNUAL REPORT, at 14-15 (2016).

[193] Wendy Halloran & Elizabeth Wiley, *Lab director's criminal record uncovered; what does it mean?*, KPNX-12NEWS (Phoenix), Nov. 19, 2016.

[194] Scott Phillips & Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*, 45 HOFSTRA L. REV. 417, 448 (2016).

The study found that judges' factfindings were "a sham" in these cases because the judges would simply "rubberstamp" the submissions of county prosecutors. Researchers reviewed fact finding orders in 191 Harris County capital postconviction proceedings in which factual issues were contested. They discovered that in 96% of the cases, and with regard to 96% of the 21,275 factual findings, county prosecutors' proposed findings of fact were adopted verbatim. Indeed, in a very high percentage of the cases, judges did not bother to change the heading before signing the document submitted by the prosecution.[195] The article criticized the postconviction judges for their usual unwillingness to hold evidentiary hearings regarding contested issues of fact, as well as their "wholesale adoption of proposed state fact-finding" instead of carrying out their duties to engage in "independent state court decision-making."[196]

The disputed facts are often potentially very significant. They frequently turn on fact witness and expert affidavits regarding evidence that might have been, but was not, introduced at the trial. These may relate "to the accuracy of the conviction, including forensic, alibi, or eyewitness testimony; or . . . might highlight important [penalty-phase] mitigating evidence regarding the inmate's psychiatric or psychological impairments, abused background, or redeeming qualities."

The study's leaders said the "inadequate development of facts" caused by this "one-sided consideration of contested factual issues" "prevent[ed] Harris County post-conviction courts from enforcing federal constitutional norms." When the cases then proceeded to federal habeas corpus proceedings, "even rubber-stamped findings receive[d] deference." So, there was never a "meaningful consideration of the inmate's constitutional claims." This, the authors said, "undermines the legitimacy of Harris County executions."[197]

c. Reliance on Erroneous "Confessions" to Crimes

In the *New Yorker*'s June 19, 2017 issue, Rachel Aviv wrote about *Remembering the Murder You Didn't Commit*, with the subheading *DNA Evidence Exonerated Six Killers. So Why Do Some of Them Recall the Crime So Clearly?* Her article described the phenomenon of the "malleability of memory: an implausible notion . . . grows into a firmly held belief" that is wrong. In 2009, a Nebraska Assistant Attorney General said that the six people who had been convicted (five of them via plea deals) for the murder of a woman in 1989 were innocent "beyond all doubt." Some had been sentenced to life terms. In describing what had happened, Aviv highlighted the role of a charismatic psychologist Wayne Price, who simultaneously was a reserve deputy with the sheriff's office. Aviv said that Price "seemed to lose sight of the vulnerabilities of his former patients." She described how people can become convinced of their guilt of crimes they never committed, including the finding of a *Psychology Today* study published in 2015 that found that 70% of those interviewed in a "highly suggestive and repetitive" way would come to believe they had committed a crime. The study said they ended up with "rich false memories," whereby "imagined memory elements regarding what

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[195] Jordan M. Steiker, James W. Marcus & Thea J. Posel, *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUS. L. REV. 889, 900-01 (2018).
[196] *Id.* at 893.
[197] *Id.* at 893, 895.

something *could* have been like can turn into elements of what it *would* have been like, which can become elements of what it *was* like."[198]

4. Limits, Either Due to Unavailability of, or Because Courts Will Not Allow Access to or Testing of, DNA

Although much of the public believes that the existence of improved means for testing DNA has virtually or completely eliminated the danger of executing innocent people, that is far from accurate. The main reason is that material that contains testable DNA that would be probative of guilt or innocence never existed in the vast majority of cases, and it is often not found in testable condition even when it originally existed.

Moreover, prosecutors often fail to produce or oppose testing of materials from which probative DNA testing might be done, and courts often refuse to order that these materials be produced. And the further past the trial a death row inmate gets, the less likely courts are to permit access to or DNA testing of materials that have never previously been subjected to the currently most sophisticated DNA testing methods. Often, courts seem unconcerned that there was no prior DNA testing, or that the testing that was done involved different physical evidence, or that the earlier testing used much less sophisticated methods and ended up being inconclusive.

As of late 2018, Florida courts had denied 19 death row inmates – eight of whom had been executed – any access to DNA testing. And these courts had precluded nine others from testing additional evidence or from using more sophisticated DNA testing after less sophisticated testing was inconclusive.[199]

A case illustrating the problems that can be left unresolved that such testing might resolve is that of Florida's Tommy Zeigler. His case was the subject of a six-part series by a Pulitzer-prize winning investigative journalist, Leonora LaPeter Anton, in the *Tampa Bay Times* in November 2018.[200] Zeigler has been on death row for 43 years, after a jury convicted him of killing his wife, her parents, and Zeigler's handyman in Zeigler's furniture store on the basis of blood-spatter evidence that, as Ms. Anton noted in a January 3, 2019 story, critics now say is more speculative than scientific. Zeigler was himself shot at that time. The trial judge overrode the jury's recommendation of a life sentence.

The series examined in depth numerous questions about Zeigler's guilt. Zeigler was permitted limited DNA testing in 2001 that seemed to support his assertion that his furniture store was robbed on the fateful occasion. But the courts precluded further DNA testing despite (a) his lawyers' offer to pay for more advanced DNA testing and (b) their proffering evidence casting serious doubt on the veracity of some important prosecution witnesses and showing how unlikely it is that Zeigler could have shot himself in the stomach as a way to seem innocent.

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[198] Rachel Aviv, *Remembering the Murder You Didn't Commit*, NEW YORKER, June 19, 2017.
[199] Leonora LaPeter Anton, *Blood and truth: The lingering case of Tommy Zeigler and how Florida fights DNA testing* (pt. 1), TAMPA BAY TIMES, Nov. 25, 2018.
[200] Leonora LaPeter Anton, *Blood and truth: The lingering case of Tommy Zeigler and how Florida fights DNA testing* (pts. 1-6), TAMPA BAY TIMES, Nov. 25-30, 2018.

On January 3, 2019, Ms. Anton reported that the Ninth Judicial Circuit's state's attorney's office, which had denied all of Zeigler's prior requests, was having the director of its new conviction integrity unit consider Zeigler's case.[201] Then, on October 19, 2019, Ms. Anton reported that State Attorney Aramis Ayala had rejected Zeigler's latest request for advanced DNA analysis even though her conviction integrity unit had urged her in April 2019 to grant it – as Florida's "moral obligation" because his trial had been "less than fair." Representative Jamie Grant, chair of the Florida House's Criminal Justice Subcommittee, reacted by saying one of his priorities in the 2020 legislative session would be a DNA testing law for inmates that would cover a case like Zeigler's. Grant followed through, and the Florida House unanimously passed his bill on March 10, 2020; but the bill died in the Senate after the Senate Judiciary Committee voted on March 14 to delay its consideration indefinitely.[202]

Ms. Anton has also discussed the fact that in the cases of other Florida death row inmates, such as Henry Sireci, convictions and death sentences were secured through the use of hair comparisons. Yet, in 2013, "the FBI and American Society of Crime Laboratory Directors acknowledged that previous hair comparison analysis was invalid."[203]

5. People in the News in 2018-2020 Due to Innocence Findings or Considerations, After Years on Death Row

a. Christopher Williams

In December 2019, the Philadelphia District Attorney's Conviction Integrity Unit decided to drop charges against Christopher Williams, who had been on Pennsylvania's death row since 1993. He had secured in 2013 the right to a new trial, due to his trial counsel's failure to investigate crime-scene evidence and to have medical and forensic witnesses present available medical and forensic evidence showing that the only witness linking Williams to the murder had testified to something that was physically impossible.[204]

b. Charles Ray Finch

In June 2019, Charles Ray Finch was exonerated in North Carolina, following a federal court ruling that he had proven his "actual innocence." Finch had been convicted in 1976 as a result of false eyewitness testimony. At the time, North Carolina law carried a mandatory death sentence, and the statute was declared unconstitutional shortly after Finch's conviction. That court decision likely saved Finch's life, because after more than 25 years of appeals, he had no legal remedies left. Then, Finch obtained the assistance of the Wrongful Conviction Clinic at Duke Law School, which worked for another 15 years to secure his freedom. The clinic's students and volunteers discovered that police had pressured witnesses to testify against Finch and that a key witness had undisclosed alcoholism and cognitive problems that included difficulty with short-term memory. They also uncovered

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[201] Leonora LaPeter Anton, *State's attorney's office reviewing 1975 murder case recently featured in Times series*, TAMPA BAY TIMES, Jan. 3, 2019 (updated Jan. 9).
[202] Leonora LaPeter Anton, *State attorney rejects death row inmate's DNA appeal*, TAMPA BAY TIMES, Oct. 19, 2019; Lenora LaPeter Anton, *Legislature fails to support bill that would have helped inmates like Tommy Ziegler*, TAMPA BAY TIMES, Oct. 17,2019.
[203] Anton, *supra* note 201; *see also* Humes, *supra* note 190.
[204] Samantha Melamed, *A brutal triple murder, an eager informant, hidden evidence, and now, exoneration*, PHILA. INQUIRER, Jan. 8, 2020.

evidence that police had manipulated eyewitness identification lineups by dressing Finch in the same type of clothing the perpetrator had been described as wearing and that the police then lied about their misconduct.[205]

c. Clifford Williams, Jr.

In 1976, a Florida trial judge sentenced Clifford Williams, Jr. to death, overriding the jury's recommendation of a life sentence. Four years later, the Florida Supreme Court changed his sentence to a life sentence. On March 28, 2019, a Duval County judge dismissed all charges against both Williams and his nephew, and they were released after more than four decades in prison. The exonerations resulted from the creation in 2018 by new District Attorney Melissa Nelson of Florida's first Conviction Integrity Review Unit. The Unit's director had issued a report in February 2019 saying that the physical scientific evidence, far from inculpating either defendant, was inconsistent with the testimony of a key prosecution witness and that a man who had been near the crime scene had confessed committing the murders to several people.[206]

d. Genesis Hill

A federal district court overturned the conviction of Genesis Hill, who was sentenced to death in Ohio in 1991 for killing his six-month-old daughter, Domika, based upon a questionable shaken-baby diagnosis. A principal reason for the federal court's decision was the substantially changed expert opinion of the deputy coroner who had performed the autopsy. Her revised opinion – in which she now relied on new scientific literature – was that the child's death was far more consistent with the child's being crushed in an accidental fall than with direct blows to the head. The expert now found credible Hill's account of having fallen off of a retaining wall while holding his daughter. Hill later accepted a sentence of life, with parole eligibility after he has spent 30 years in jail. Common Pleas Judge Lisa Allen imposed that sentence on June 27, 2019.[207]

e. Alfred Dewayne Brown

On June 8, 2015, Harris County District Attorney Devon Anderson dismissed the capital murder case against Alfred Dewayne Brown due to insufficient evidence to corroborate his co-defendant's testimony.[208] In 2014, the Texas Court of Criminal Appeals had overturned Brown's conviction and death sentence because the prosecution had failed to produce a telephone record that may have supported his alibi.[209] Numerous other troubling aspects of his prosecution and the underlying police investigation were discussed in Pulitzer Prize-winning columns by the *Houston Chronicle*'s Lia Falkenberg.[210] But in April 2016,

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[205] Rose Wong, *Free after 43 years: How Duke's Wrongful Convictions Clinic freed an innocent man*, THE CHRON. (Duke Univ.), June 20, 2019.
[206] Andrew Pantazi, *Jacksonville men freed 43 years after wrongful murder conviction, a first for a Florida conviction review unit*, FLA. TIMES-UNION, Mar. 28, 2019.
[207] Kevin Grasha, *From death row to possible parole: Genesis Hill gets new sentence*, CIN. ENQUIRER, June 27, 2019.
[208] Brian Rogers, *DA drops charges against Alfred Brown*, HOUS. CHRON., June 8, 2015.
[209] *Ex parte Brown*, No. WR-68,876-01, 2014 WL 5745499 (Tex. Crim. App. Nov. 5, 2014) (per curiam); Jessica Glenza, *Texas court overturns man's death sentence due to withheld evidence*, THE GUARDIAN, Nov. 5, 2014.
[210] *E.g.*, Lisa Falkenberg, *Evidence mounts that wrong man on death row for killing HPD officer*, HOUS. CHRON., Apr. 20, 2015.

Texas Comptroller Glenn Hegar denied Brown's compensation application because Brown had never been formally determined to be "actually innocent."[211]

On March 2, 2018, the Harris County District Attorney's office released evidence showing the trial prosecutor, Dan Rizzo, had known at the time and withheld from the defense telephone records supporting Brown's innocence claim. The prosecutor had intimidated a witness whose original account was consistent with the phone records into falsely changing her account and implicating Brown.[212]

On March 1, 2019, John Raley, whom District Attorney Kim Ogg had appointed as special prosecutor to investigate Brown's case, announced that "there is no evidence sufficient for a reasonable juror to find that he is guilty beyond a reasonable doubt, which is the legal definition of innocence, and Alfred Dewayne Brown is innocent." District Attorney Ogg accepted Raley's conclusion. Accordingly, her office filed in court an amended motion to dismiss, with Raley's report as the sole exhibit. The granting of this motion would enable Mr. Brown to receive compensation from the State. Ogg also said she would follow up on Raley's recommendation that there be further investigation of Rizzo.[213]

However, the State Comptroller Glenn Hegar, supported by the State Attorney General Ken Paxton and at the urging of the Houston police union, rejected Brown's effort to receive a damage award from the State.[214]

f. Orlando Maisonet

Orlando Maisonet spent 28 years on Pennsylvania's death row after being convicted and sentenced to death at separate trials for two murders. After one of these convictions was vacated, Maisonet was acquitted at a 2005 retrial. In February 2019, Philadelphia Common Pleas Judge J. Scott O'Keefe vacated Maisonet's conviction in the other murder, due to prosecutorial misconduct and ineffective defense counsel. The District Attorney's office, although not conceding prosecutorial misconduct, supported the motion to vacate.[215]

The parties then agreed upon a final disposition. On May 9, 2019, Judge O'Keefe granted Maisonet's motion to reconsider, and permitted Maisonet's release. The victim's sister, Gloria Figueroa, told the judge, just prior to the resentencing, that she thought Maisonet was completely innocent.[216]

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[211] Brian Rogers, *Comptroller: Former death row inmate not eligible for exoneration funds*, HOUS. CHRON., Apr. 7, 2016.

[212] St. John Barned-Smith & Keri Blakinger, *DA: Former prosecutor withheld key email in death row case*, HOUS. CHRON., Mar. 3, 2018; Margaret Downing, *DA Ogg Finds Email Evidence That Prosecutor Did Know About Phone Records in Alfred Brown Case*, HOUS. PRESS, Mar. 2, 2018.

[213] Jolie McCullough, *Prosecutor declares freed Texas death row inmate Alfred Dewayne Brown innocent, paving way for state compensation*, TEX. TRIB., Mar. 1, 2019; Office of Dist. Attorney Kim Ogg, Press Release, *Special Prosecutor's Report:* State of Texas v. Alfred Dewayne Brown, Mar. 1, 2019, https://app.dao.hctx.net/special-prosecutors-report-state-texas-v-alfred-dewayne-brown.

[214] Angela Morris, *The Persecution of Alfred Brown: Texas AG, Police Conspired to Punish Innocent Man*, LAW.COM, Oct. 29, 2019.

[215] Samantha Melamed, *Philly judge cites prosecutorial misconduct, vacates conviction of man who spent 28 years on death row*, PHILA. INQUIRER, Feb. 19, 2019.

[216] Samantha Melamed, *Philly man freed from 28 years on death row after finding of prosecutor's misconduct*, PHILA. INQUIRER, May 9, 2019.

g. Johnny Lee Gates

In a decision dated January 10, 2019, Georgia Superior Court Senior Judge John D. Allen granted the extraordinary motion for a new trial by Johnny Lee Gates, who served more than 26 years on Georgia's death row before a mistrial in a trial regarding his intellectual disability led to his sentence being changed by stipulation to LWOP.[217] In 2015, interns for the Georgia Innocence Project found in the District Attorney's office two items that state documents said had been destroyed in 1979. DNA experts for both sides agreed that Gates' DNA was not found on these two "key items . . . used by the perpetrator to bind the victim's hands."[218] The judge rejected the prosecution's speculation that Gates' DNA may have degraded and was no longer on the items or might have fallen off the items or otherwise been lost. Judge Allen said that the DNA results on these two items were even more troubling because "the State itself destroyed the bulk of the remaining evidence" – including other exculpatory evidence – in 1979, when the case was still on direct appeal.[219] Accordingly, Gates was granted a new trial. The prosecution appealed to the Georgia Supreme Court, which unanimously affirmed on March 13, 2020. On May 15, 2020, Mr. Gates was released from prison after being sentenced to time served after entry of an *Alford* plea.[220]

h. Clemente Aguirre-Jarquin

On October 27, 2016, the Florida Supreme Court unanimously vacated the conviction of death row inmate Clemente Aguirre-Jarquin. Newly discovered confessions and DNA evidence strongly suggested that the real killer was the prosecution's chief witness. At trial, the jury had voted 7-5 for the death penalty for one murder and 9-3 for the death penalty for the other murder. The prosecutor's office said it would seek a retrial.[221]

Mr. Aguirre-Jarquin was exonerated on November 5, 2018 after jury selection for his re-trial began. Samantha Williams, the principal prosecution witness, was mentally ill. She had confessed to at least five people that she had killed the victims. No DNA found at the crime scene and tested matched Mr. Aguirre-Jarquin, but most blood stains matched the victims, and Ms. Williams' DNA was found on eight blood stains in four rooms.[222]

i. Robert Will

On September 26, 2018, U.S. District Judge Keith P. Ellison denied relief to Texas death-row inmate Robert Will, despite believing that Will was denied a fair trial and could be innocent. The judge said that were it not for constraints imposed by the AEDPA, he "would almost certainly have granted" a new trial to Mr. Will, but that he had been left unable to deal with "the troubling possibility of [Will's] actual innocence." Judge Ellison urged the Fifth Circuit to address Will's claims, saying that his "technical ruling" should not "obscure the

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[217] *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct. Jan. 10, 2019), https://deathpenaltyinfo.org/files/pdf/GatesJohnnyLeeNewTrialDecision2019-01-10.pdf.
[218] *Id.* at 16.
[219] *Id.* at 25.
[220] *State v. Gates*, No. S19A1130, 2020 WL 1227513 (Ga. Mar. 13, 2020); Bill Rankin, *Georgia man freed after 43 years for crime he denies committing.* ATLANTA JOURNAL-CONSTITUTION, May 15, 2020.
[221] *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016) (per curiam); Rene Stutzman, *Court overturns death sentence, conviction in double homicide*, ORLANDO SENTINEL, Oct. 27, 2016.
[222] Michael Williams, *Prosecutors drop case against exonerated death-row inmate Clemente Aguirre-Jarquin*, ORLANDO SENTINEL, Nov. 5, 2018.

extraordinarily significant issues that the Court of Appeals – unlike this Court – can properly consider."[223]

j. Barry Lee Jones

On July 31, 2018, U.S. District Judge Timothy M. Burgess vacated Arizona death-row inmate Barry Lee Jones' conviction for killing four-year-old Rachel Gray, and ordered the state to immediately retry or release Jones, who had spent 23 years on Arizona's death row. Judge Burgess found that if trial counsel had been competent, "there is a reasonable probability that his jury would not have convicted him of *any* of the crimes."[224] Judge Burgess said a "rush to judgment" by police investigators had led to a conviction based largely on questionable eyewitness testimony from two eight-year-olds, plus unreliable forensic testimony. A medical examiner who testified against Jones later gave contradictory testimony about the timing of the victim's fatal injury that would have ruled out Jones as a suspect. Police failed to investigate evidence pointing to other suspects, and Jones' defense team failed to examine alternative theories of the crime. And there was no evidence that the alleged rape occurred at the time of the fatal abdominal injury. Judge Burgess found that the trial lawyer and the appointed state postconviction lawyer were ineffective, and that neither did professionally appropriate investigations. Andrew Sowards, a defense investigator, said the judge "saw the state's investigation for what it was, which was shoddy, the defense investigation for what it was, which was nonexistent, and he said, 'That's not fair.' And that's how it's supposed to work."[225] On November 29, 2019, the Ninth Circuit ordered Jones' release unless the state decides to retry him.[226]

k. William T. Montgomery

On March 26, 2018, Ohio Governor John Kasich, agreeing with the Ohio Parole Board's 6-4 recommendation, gave executive clemency to William T. Montgomery, who was scheduled to be executed on April 11 for two 1986 murders. In 2007, an Ohio federal district court had thrown out his conviction and a Sixth Circuit panel had affirmed, but the *en banc* Sixth Circuit had reversed, with five judges dissenting.[227]

At trial, the prosecution asserted that Montgomery murdered first Debra Ogle and then her roommate, and thereafter dumped Ms. Ogle's body in the woods where it was found four days later. Yet, many witnesses said they saw Ogle alive four days after her alleged murder – something the prosecution never told the defense. An independent review of the autopsy report showed her body probably had been found only hours after her death and did not show various indicia that would have been present if she had died four days earlier. The co-defendant had provided a story consistent with the prosecution's theory only after giving

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[223] *Will v. Davis*, No. H-07-CV-1000, 2018 WL 4621170, at *1, *2 (S.D. Tex. Sept. 26, 2018), *appeal filed*, No. 18-70030 (5th Cir. Oct. 25, 2018).

[224] *Jones v. Ryan*, 327 F. Supp. 3d 1157, 1218 (D. Ariz. 2018), *aff'd in part, vacated in part on other grounds sub nom. Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019).

[225] Liliana Segura, *After 23 Years on Death Row, Barry Jones Sees His Conviction Overturned: Arizona Must Retry or Release Him Immediately*, THE INTERCEPT, Aug. 1, 2018.

[226] *Jones v. Shinn*, 943 F.3d 1211, 1236 (9th Cir. 2019).

[227] Jim Provance, *Governor commutes death sentence of convicted murderer*, THE BLADE (Toledo), Mar. 26, 2018; Jim Provance, *Parole board recommends clemency for William T. Montgomery*, THE BLADE (Toledo), Mar. 16, 2018.

five different accounts. The co-defendant got a sentence of a term of years with parole eligibility. The parole board was also troubled by three jurors' affidavits.[228]

l. Vicente Benavides Figueroa

On March 12, 2018, the California Supreme Court vacated Vicente Benavides Figueroa's conviction for murdering his girlfriend's toddler after raping and anally sodomizing her. He had been sentenced to death in 1993. The court said the forensic evidence was "extensive," "pervasive," "impactful," and "false."[229] It found that medical evidence showed there was neither rape nor sodomy and may not have been a murder. Instead, the toddler may have died from complications from having been struck by a car.[230] "After reviewing the medical records and photographs that I should have been provided in 1993," a state trial expert withdrew his assessment of rape. The defense presented evidence from Dr. Astrid Heger, a leading expert on child abuse, who said the other state expert at trial had given testimony "so unlikely to the point of being absurd. No such mechanism of injury has ever been reported in any literature of child abuse or child assault."[231] She added that the internal injuries the child sustained were commonly seen in victims of automobile accidents. Prosecutors admitted that the forensic evidence they used to convict Benavides Figueroa was false, but unsuccessfully asked the state court to sustain a conviction for second-degree murder.[232] After the court's decision, Kern County District Attorney Lisa Green said a retrial was improbable.[233] An April 27, 2018 editorial said that records had emerged seven years after trial showing no sexual assault and casting doubt on whether the toddler had been murdered.[234]

6. 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

a. Walter Ogrod

In a brief filed on February 28, 2020, the Philadelphia County District Attorney's office advised the Philadelphia County Court of Common Pleas that Walter Ogrod was likely innocent, that the prosecution had denied him due process, that the "evidence" used to convict him and sentence him to death had been "false, unreliable and incomplete," and that prosecutorial and police misconduct had included the use of junk science, lying jailhouse "informants," and the failure to turn over exculpatory evidence. The District Attorney's office and the defense entered into a joint statement of facts that they say entitle Ogrod to relief.[235]

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[228] Phyllis L. Crocker, Opinion, *Next Ohio execution raises too much doubt*, THE BLADE (Toledo), Mar. 10, 2018.
[229] *In re Figueroa*, 412 P.3d 356, 367 (Cal. 2018).
[230] *Id.* at 360-62, 367.
[231] Chloe Carlson, *BREAKING NEWS: Death penalty reversed; "false evidence" used in trial, court rules*, KGET-TV (Bakersfield), Mar. 12, 2018.
[232] *Figueroa*, 412 P.3d at 359.
[233] Carlson, *supra* note 231.
[234] Editorial, *The latest California death row exoneration shows why we need to end the death penalty*, L.A. TIMES, Apr. 27, 2018.
[235] Commonwealth's Answer to Petition for Postconviction Relief, *Commonwealth v. Ogrod*, No. CP-51-CR-0532781-1992 (Pa. Ct. Com. Pl. filed Feb. 28, 2020), https://files.deathpenaltyinfo.org/documents/PhilaDA-Answer-to-Walter-Ogrod-Amended-PCRA-Petition-2020-02-28.pdf.

If Ogrod secures relief, he should be particularly grateful to Tom Lowenstein for his 2017 book, *The Trials of Walter Ogrod*.[236]

b. Kevin Keith

In 2010, Ohio Governor Ted Strickland granted clemency to Kevin Keith that changed his death sentence to LWOP for crimes (including three murders) in 1994. Governor Strickland was troubled principally by the use of otherwise unexplained circumstantial evidence to link Keith to the crimes – *i.e.*, "certain eyewitness testimony with certain forensic evidence about which important questions have been raised."[237] In late October 2016, Keith filed a motion for a new trial, asserting that the Ohio Bureau of Investigation analyst who testified for the prosecution at trial had been suspected by her superiors of having shaded her testimony to improperly favor the prosecution and allegedly was "mentally unstable." Lee Price, Ohio's Attorney General at the time of the trial, reportedly said after reviewing the new evidence presented by Keith's counsel that if he had had this evidence and had it been his decision to make, he would not have permitted her to testify.[238] Keith's motion was denied, and on June 26, 2017, the Court of Appeals for the Third Appellate District affirmed.[239]

c. Sherwood Brown

On October 26, 2017, the Mississippi Supreme Court ordered a new trial for Sherwood Brown, who had been convicted and sentenced to death in 1995 for the sexual assault and murder of a 13-year-old girl, and convicted and sentenced to life for killing her mother and grandmother. These convictions and sentences were premised largely on claims that blood on Brown's shoe was from the victims and that a surviving victim's saliva had material from Brown, and on bitemark "expert" testimony that Brown's wrist had a bitemark matching the girl's bite pattern.[240]

The court issued its October 2017 order without requiring an evidentiary hearing on the DNA results. It described its decision as "extraordinary and extremely rare in the context of a petition for leave to pursue post-conviction collateral relief."[241] The motion to reconsider was denied in early 2018.

d. Tyrone Noling

In 2012, Andrew Cohen wrote about Tyrone Noling, convicted and sentenced to death in 1996 for the murder of an elderly couple in 1990. Initially, there was neither physical

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[236] THOMAS LOWENSTEIN, THE TRIALS OF WALTER OGROD (2017).
[237] *Governor Removes Ohio Man From Death Row, Reduces Sentence*, INNOCENCE PROJECT, Sept. 2, 2010.
[238] Motion for New Trial Based on Newly Discovered Evidence and/or Post-conviction Relief Under Ohio Rev. Code § 2953.23 at 3, *State v. Keith*, Case No. 94 CR 0042 (Ohio Ct. Com. Pl. filed Oct. 28, 2016), http://www.otse.org/wp-content/uploads/2016/11/Mtn.-for-New-Trial-Based-on-New-Evidence.pdf; *see also* Peter Krouse, *Former death-row inmate Kevin Keith seeks new trial, cites testimony of "mentally unstable" BCI agent*, CLEV.COM, Dec. 27, 2016.
[239] *State v. Keith*, No. 3-17-01, 2017 WL 2729625 (Ohio Ct. App. June 26, 2017), *cert. denied*, 138 S. Ct. 2575 (2018) (mem.).
[240] Therese Apel, *Death row inmate's triple killing conviction overturned*, CLARION-LEDGER (Jackson), Oct. 26, 2017.
[241] *Brown v. State*, No. 2017-DR-00206-SCT, slip op. at 2 (Miss. Oct. 26, 2017) (en banc), https://deathpenaltyinfo.org/files/pdf/2017.10.26_SherwoodBrownEnBancOrder.pdf.

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 pointed to, *inter alia*, the prosecution's preventing DNA testing of a cigarette butt that might be tied to Daniel Wilson, possibly 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.[242]

On May 2, 2013, the Ohio Supreme Court held that a judge must reconsider whether to allow DNA testing.[243] But new DNA tests on a cigarette butt found in the driveway at the victims' home[244] did not produce "hits." Noling's lawyers then sought DNA testing of other items by a private lab.

On March 6, 2018, the Ohio Supreme Court held that while Noling could have the full DNA profile from the cigarette butt, his counsel could not have DNA testing done on shell casings from a handgun the killer would probably have touched while handling it and jewelry boxes that the killer probably handled. The court deferred to the state's lab's view that too many people had touched these things to make DNA testing possible.[245]

e. Julius Jones

The Last Defense, an ABC documentary series, devoted three episodes in July 2018 to the case of Oklahoma death row inmate Julius Jones. The series raised serious questions about the handling of Jones' case and about his guilt.[246]

In October 2019, Jones applied for clemency, after having lost in all courts. Soon thereafter, Kim Kardashian West sent out a tweet that urged people to write the Oklahoma Pardon and Parole Board, and the Governor, in Jones' support.[247]

f. 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

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[242] Andrew Cohen, *Is Ohio Keeping Another Innocent Man on Death Row?*, THE ATLANTIC, Jan. 31, 2012.
[243] *State v. Noling*, 992 N.E.2d 1095 (Ohio 2013).
[244] Ed Meyer, *Death row inmate Noling wins new DNA tests of cigarette evidence in 1990 double murder*, BEACON J. (Ohio), Dec. 19, 2013.
[245] *State v. Noling*, 101 N.E.3d 435 (Ohio 2018).
[246] Patrick B. McGuigan & Darla Shelden, *ABC's "The Last Defense" examines Oklahoma death row inmate Julius Jones' case*, CITY SENTINEL (Okla. City), July 6, 2018.
[247] Chris Casteel, *Horn, Prater differ over death row inmate's clemency petition*, THE OKLAHOMAN, Dec. 12, 2019; Sydney Schwichtenberg, *Former OU student Julius Jones continues fight to prove innocence after 20 years on death row,* OU DAILY (Univ. of Okla.), Dec. 1, 2019.

stressed the government's failure to disclose some evidence and its tampering with other evidence.[248]

Mr. Cooper filed a clemency petition with Governor Jerry Brown in March 2016. On March 14, 2016, ABA President Paulette Brown wrote to the Governor urging an executive reprieve to permit a "thorough" investigation into Cooper's guilt or innocence. President Brown expressed particular concerns about "evidence of racial bias, police misconduct, evidence tampering, suppression of exculpatory information, lack of quality defense counsel, and a hamstrung court system."[249] On December 24, 2018, shortly before leaving office, Governor Brown said he would order new DNA testing of four pieces of evidence.[250] On February 22, 2019, Brown's successor, Governor Gavin Newsom, issued an executive order expanding the scope of the new DNA testing, to include additional evidence.[251]

7. Significant Doubts About Past Executions

a. Carlos DeLuna

A lengthy article in the May 2012 *Columbia Human Rights Law Review* (later expanded into a book) concluded that Texas executed Carlos DeLuna in 1989 for a murder committed by Carlos Hernandez.[252] 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 actually saw his "spitting image," Hernandez. The authors said law enforcement's investigation was fatally flawed by many mistakes and omissions, including not following up on clues. Whereas DeLuna's court-appointed lawyer ineptly said it was unlikely anyone named Hernandez was involved and the lead prosecutor said Hernandez was a "phantom" made up by DeLuna, Hernandez did exist, had a history of using a knife in attacking people, and was once jailed for killing a woman using the same knife used in this case's killing.[253]

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 whose murder he had been indicted but not tried. One of the reporters said that whereas crime scene photos showed tremendous amounts of blood, DeLuna, when arrested nearby soon after the crime, did not have on him any blood, the victim's hair, or fibers. His fingerprints were not found at the crime scene.

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[248] *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.

[249] Letter from Paulette Brown to Hon. Edmund "Jerry" Brown, Mar. 14, 2016, http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016mar14_kevincooper_l.authcheckdam.pdf.

[250] Kathleen Ronayne & Don Thompson, *Governor Brown Orders New DNA Testing in 35-Year-Old Kevin Cooper Murder Case*, NBC4 NEWS (L.A.), Dec. 24, 2018.

[251] Alejandra Reyes-Velarde, *Gov. Newsom orders additional DNA testing in case of death row inmate Kevin Cooper*, L.A. TIMES, Feb. 22, 2019.

[252] 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).

[253] 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.37ab293d08346aa6f7c1d1bfbdd5758f.491.

Andrew Cohen said the crimes' only eyewitness "identified DeLuna [when he] was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene."[254]

b. Ruben Cantu

Texas executed Ruben Cantu in 1993 for a 1984 murder. 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 and raised serious questions about Cantu's guilt. Millsap was stunned by Olsen's findings. He felt he had over-relied on a purported eyewitness identification and later said that if he could redo things, he would not seek the death penalty for Cantu. Olsen's story led then-District Attorney Susan Reed to re-examine the case in 2007. Reed concluded that Cantu was guilty. Millsap now advocates the death penalty's abolition due to systemic imperfections. Lise Olsen "feels little vindication for her work," since "Ruben Cantu is dead. There is no victory in this story."[255] Cantu, because he was only 17 at the time of the crime, could not constitutionally receive the death penalty today.

c. 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 was insufficient 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. The Governor's office's lawyers never told Bush about 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* called this "a highly questionable execution – a case that may not have resulted in a conviction were it tried with modern forensic science."[256]

d, e, f. John Hardy Rose, Desmond Carter, Joseph Timothy Keel

In 2010, former FBI agents completed an audit of North Carolina's State Bureau of Investigation (the "SBI") at State Attorney General Roy Cooper's request. They found that SBI agents repeatedly helped prosecutors secure convictions, and 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

[254] Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, THE ATLANTIC, May 14, 2012.
[255] Stephanie Gallman, *From seeking the death penalty to fighting it*, CNN, Aug. 7, 2015.
[256] Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEX. OBSERVER, Nov. 11, 2010.

were executed and four cases 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.[257]

Counsel for John Hardy Rose, executed on November 30, 2001, said that if they had known about the undisclosed negative results from a test for blood, Rose's 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 who assumed that 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."[258]

g. Cameron T. Willingham

Controversy over Texas' 2004 execution of Cameron T. Willingham for arson/murder continues. 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.[259] 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."[260]

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."[261] Texas Attorney General Greg Abbott ruled in July 2011 that the Commission could not investigate evidence collected or tested prior to 2005.[262] So, on

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[257] Associated Press, *Outside Review Finds Flaws in 190 SBI Prosecutions*, Aug. 19, 2010, http://www.wral.com/news/state/story/8153666/.
[258] Joseph Neff & Mandy Locke, *For executed men, audit's too late*, NEWS & OBSERVER, Aug. 19, 2010.
[259] James C. McKinley, Jr., *Controversy Builds in Texas Over an Execution*, N.Y. TIMES, Oct. 20, 2009.
[260] Steve Mills, *Cameron Todd Willingham case: Expert Says Fire for Which Father Was Executed Was Not Arson*, CHI. TRIB., Aug. 25, 2009.
[261] Erin Mulvaney, *National experts criticize state's study of fatal '91 fire*, DALL. MORNING NEWS, Jan. 8, 2011; *see also* Michael Graczyk, Associated Press, *Texas panel re-examines arson execution case*, Jan. 8, 2011, http://www.nbcdfw.com/news/local/Texas-Panel-Re-Examines-Arson-Execution-Case-113129784.html; 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.
[262] Claire Cardona, *Forensic Science Panel Recommends Arson Probe*, TEX. TRIB., Oct. 28, 2011.

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.[263]

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 that the prosecutor in the case paid favors to" Johnny Webb, the jailhouse informant who testified that Willingham had confessed to him.[264]

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.[265]

h. Troy Davis

Georgia's execution of Troy Davis on September 21, 2011 was the most controversial in the United States in many years. On August 17, 2009, the Supreme Court transferred his 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."[266] The district judge found that Davis had not met that extremely high burden.[267] And he questioned the credibility of several witnesses who had, in whole or part, recanted trial testimony before the hearing.[268]

i. Thomas Arthur

Alabama death row inmate Thomas Arthur was convicted and sentenced to death for a 1982 murder. In 2012, Andrew Cohen noted many similarities between the problems with Arthur's case and those in Tyrone Noling's case (discussed in Section C.6.d. above). He said

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[263] Chuck Lindell, *Willingham inquiry ends, but effects linger*, AUSTIN AM.-STATESMAN, Oct. 28, 2011.
[264] Jason Heid, *Innocence Project Asks Governor Perry to Pardon Cameron Todd Willingham*, D MAG. FRONT/BURNER BLOG, Sept. 27, 2013.
[265] Maurice Possley, *A dad was executed for deaths of his 3 girls. Now a letter casts more doubts*, WASH. POST, Mar. 9, 2015.
[266] *In re Davis*, 557 U.S. 952, 952 (2009) (mem.).
[267] Greg Bluestein, Associated Press, *Ga. execution leaves debate over guilt unresolved*, Sept. 22, 2011, https://www.highbeam.com/doc/1A1-1d250a317f5743e7a54e67be56571e86.html.
[268] *In re Davis*, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

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."[269]

The prosecution based its case on the testimony of the victim's wife. Years after being convicted of the murder and sentenced to life, she implicated Arthur, in return for the prosecution's recommending her early release. Her revised testimony led to Arthur's third conviction – the first two having been reversed. In 2008, Bobby Ray Gilbert confessed under oath to having committed the killing. He said he came forward because the Supreme Court had recently precluded the death penalty for people (like him) who were not yet 18 at the time of the crime. Later, he "took the Fifth Amendment" at a hearing. Arthur's counsel said he did so after prison officials punished him for confessing. The trial judge ruled against Arthur.

Arthur's counsel then sought "more advanced DNA testing on the wig" that Gilbert's statement said Arthur used during the killing. Arthur's counsel, saying all agreed the perpetrator wore this wig during the crime, offered to pay for the additional DNA testing. The State said this would be no better than prior testing and that the wig had no additional DNA that could be tested.[270] On January 6, 2014, the Eleventh Circuit held that Arthur had not shown an "extraordinary circumstance" permitting him to seek federal court relief again.[271] Mr. Arthur was executed by lethal injection on May 26, 2017.[272]

j. Sedley Alley

Sedley Alley was executed in 2006 on charges that he had raped and murdered Suzanne M. Collins. In 2019, his daughter asked the state courts to conduct posthumous DNA testing that she and her Innocence Project lawyers argued could prove his innocence. On November 18, 2019, the trial court dismissed her request.

Alley had consistently said he had been coerced into confessing to the crime, and his supposed confession was inconsistent with the physical evidence in the case. The Tennessee Supreme Court had denied Alley's request for DNA testing prior to execution, but in an opinion in another case after Alley had been executed, the court acknowledged that it had wrongly denied his request. Innocence Project co-founder Barry Scheck said, "This case has all the tell-tale signs of a wrongful conviction – a confession that has been demonstrated to be false by objective forensic evidence, mistaken eyewitness identification, and, most disturbing, the refusal to test DNA evidence that could have exonerated Mr. Alley or removed the doubts about his guilt." In dismissing the request for DNA testing, Judge Paula Skahan said that Alley's estate did not have standing under Tennessee law to request the testing.[273]

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[269] Andrew Cohen, *Another Death Row Debacle: The Case Against Thomas Arthur*, THE ATLANTIC, Feb. 27, 2012.
[270] Radley Balko, Opinion, *The outrageous conviction of Montez Spradley*, WASH. POST, Sept. 21, 2015.
[271] *Arthur v. Thomas*, 739 F.3d 611, 631-33 (11th Cir. 2014).
[272] Kent Faulk, *Alabama executes Tommy Arthur*, AL.COM, May 26, 2017.
[273] Deanna Paul, *A DNA test could exonerate a man 13 years after his execution. The state refuses to do it.*, WASH. POST, Nov. 21, 2019.

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

a. Georgia Study

A new study, to be published in 2020, by researchers at the University of Denver found that the odds of being executed are 17 times greater for defendants convicted of killing white victims than for defendants whose victims are black.[274]

b. Study Finding Racial Disparities Begin with Investigation and Arrests

In October 2018, Columbia Law School Professor Jeffrey Fagan and NYU Professor Amanda Geller reported the results of their analyses of every homicide recorded in the FBI's Supplementary Homicide Reports from 1976 to 2009. They found that suspects were arrested significantly more often when victims were white than when they were African American. These disparities at the arrest stage helped lead to racial disparities in capital punishment by the race of the victim.[275]

c. **Batson *and* Swain *Violations***

i. North Carolina

In a June 2018 article in *The Champion*, Duke Law School Professor James E. Coleman, Jr. wrote:

> The North Carolina state appellate courts have done nothing to prevent prosecutors from striking minority jurors based on race. In 30 years, and in over 100 cases raising the *Batson* issue, the courts of appeals in North Carolina have never reversed a case because of discrimination against a minority juror. Remarkably, North Carolina is the only state in the American South with such a stark record of indifference to racial bias in jury selection.[276]

ii. ***Foster v. Chatman***, 136 S. Ct. 1737 (2016)

On May 23, 2016, the Supreme Court dealt with blatant evidence of intentional violations of *Batson v. Kentucky*[277] by the Georgia prosecutors – District Attorney Stephen Lanier and Assistant District Attorney Douglas Pullen – who handled the 1987 trial of Timothy Foster. The evidence was the prosecution's trial file – which Foster's state postconviction counsel secured via the Georgia Open Records Act. Materials in the file concerning *voir dire* included, among other race-based notations, the jury venire list, on which "the names of black prospective jurors were highlighted in bright green" – which a legend said represented "Blacks"; "notes with 'N' (for 'no') appearing next to the names of all

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[274] Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. (forthcoming 2020), https://ssrn.com/abstract=3440828 (working paper version).
[275] Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 23 BERKELEY J. CRIM. L. 261 (2018).
[276] James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, THE CHAMPION, June 2018, at 28.
[277] *Batson v. Kentucky*, 476 U.S. 79 (1986).

prospective black jurors"; a list titled "[D]efinite NO's," containing six names, including all of the qualified black prospective jurors; a document containing these annotations regarding the Church of Christ: "*NO*. No *Black* Church"; and an investigator's draft affidavit saying, "If it comes down to picking one of the black jurors, [this one] might be okay."[278] Chief Justice Roberts wrote the majority opinion, for six members of the Court. Justice Alito wrote a concurrence, and Justice Thomas dissented.

Infuriated by the State's indignant refusal to admit what its file made obvious, and by seeking an apology, the Court said there clearly had been "a concerted effort to keep blacks off of the jury. . . . [P]rosecutors were motivated in substantial part by race when they struck [two jurors] . . . . Two peremptory strikes on the basis of race are two more than the Constitution allows."[279]

iii. Swain *Violations in Muscogee County, Georgia Cases of Johnny Lee Gates and Six Other African American Capital Defendants*

One of the two prosecutors found to have violated *Batson* in *Foster*, Douglas Pullen, was also involved in what Senior Judge John D. Allen found on January 10, 2019 had been systematic, intentional discrimination against potential African American jurors by Muscogee County, Georgia prosecutors in all seven capital trials with African American defendants from 1975-1979.[280] Although neither prosecutor was named in the opinion, trial transcripts show that Pullen, then-Assistant District Attorney, and District Attorney William Smith were the prosecutors at the trial of Johnny Lee Gates (whose case Judge Allen was considering). Judge Allen said that one or both of these prosecutors were involved in all seven cases. Judge Allen held that the *Swain* claim of Johnny Lee Gates (to whom he granted a new trial due to innocence issues (discussed in Section C.5.g. above)) had been procedurally defaulted.

But Judge Allen was so troubled by what he found in the prosecutors' notes and other evidence, including their closing arguments, that he devoted ten pages of his decision to detailing what the prosecutors had done – and included several of the prosecutors' notes in the decision. He found the evidence of racial discriminatory intent was "overwhelming." Among many other things, the prosecutors' notes describe potential African American jurors as "slow," "old+ignorant," "cocky," "con artist," "hostile," and "fat." The prosecutors also regularly ranked African Americans (including all four in Gates' case) as "1" on a scale of 1 to 5 (with 1 being the worst) with no explanation, whereas they ranked only 1 of the 43 white prospective jurors in Gates' case as "1" – explaining that he opposed capital punishment. As noted above (in Section C.5.g.), Gates was sentenced to death, although after a mistrial in 2003 at a trial regarding his intellectual disability, his sentence became LWOP.[281]

Although not mentioned in Judge Allen's opinion, of the other six capital defendants whose jury selections he analyzed, Jerome Bowden was executed in 1986, Joseph Mulligan was executed in 1987, and William Hance was executed in 1994. The Georgia Supreme Court,

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[278] *Foster v. Chatman*, 136 S. Ct. 1737, 1744 (2016).
[279] *Id.* at 1755.
[280] *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct. Jan. 10, 2019), https://deathpenaltyinfo.org/files/pdf/GatesJohnnyLeeNewTrialDecision2019-01-10.pdf.
[281] Bill Rankin, *Georgia judge orders new trial in 1976 case that sent man to death row*, ATLANTA J.-CONST., Jan. 17, 2019.

in its March 13, 2020 opinion, found it unnecessary to reach this issue but stated that "the record supports the trial court's very troubling findings regarding the selection of jurors in Gates' 1977 trial and the other capital murder trials held in the Chattahoochee Judicial Circuit between 1975 and 1979."[282]

iv. Curtis Flowers

In a 7-2 decision, the Supreme Court overturned the conviction of Curtis Giovanni Flowers, a Mississippi death row prisoner who has been tried six times for a notorious 1996 quadruple murder in Winona, Mississippi.[283] Three of the first five trials ended in convictions that were overturned on appeal and two trials resulted in hung juries. The lead prosecutor for all six trials was Doug Evans, the District Attorney in Mississippi's Fifth Circuit Court District.

The defense argued that in the sixth trial, the prosecution violated *Batson v. Kentucky* by discriminating on the basis of race in jury selection. The Mississippi Supreme Court denied all relief. In 2016, the Supreme Court granted certiorari, and vacated and remanded "for further consideration in light of the decision in *Foster*." On remand, the Mississippi Supreme Court again affirmed, with three justices dissenting.[284] In 2018, the Court granted certiorari to review "[w]hether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky* in this case."[285]

On June 21, 2019, the Court overturned Flowers' conviction, concluding that District Attorney Evans unconstitutionally discriminated in jury selection. In reaching that conclusion, the Court relied in part on evidence of his misconduct and exclusion of black jurors in Flowers' previous trials. Justice Brett M. Kavanaugh, writing for the majority, focused on Evans' consistent exclusion of black potential jurors in Flowers' six trials. He said: "The numbers speak loudly. Over the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike. The State tried to strike all 36." The Court noted that Evans had been found to have discriminated in jury selection in two of the earlier trials. In the sixth trial, he accepted the first qualified African American potential juror and then struck the other five.[286]

Justice Kavanaugh found it noteworthy that "[t]he State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions." Thus, he did not ask follow-up questions to white jurors on subjects on which he asked a series of questions of black jurors. "The difference in the State's approaches to black and white prospective jurors was stark."[287]

The Court also found that Evans treated similar potential jurors differently. For example, he struck a black juror with ties to Flowers' family and defense witnesses while accepting white jurors with the same characteristics.

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[282] *State v. Gates*, No. S19A1130, 2020 WL 1227513, at *18 n.22 (Ga. Mar. 13, 2020).
[283] *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).
[284] *Id.* at 2237-38.
[285] *Flowers v. Mississippi*, 139 S. Ct. 451, 451 (2018) (mem.) (citation omitted).
[286] *Flowers*, 139 S. Ct. at 2245-46.
[287] *Id.* at 2246-47.

Justice Kavanaugh concluded that "all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not motivated in substantial part by discriminatory intent."[288] As a result, the Court overturned Flowers' conviction.

Justice Samuel Alito wrote a concurring opinion emphasizing the extraordinary nature of the case, given Evans' egregious history of racial discrimination. Justice Clarence Thomas wrote a dissent joined by Justice Neil Gorsuch in which he challenged the majority's characterization of the record. In a portion of the dissent not joined by Justice Gorsuch, Justice Thomas said that criminal defendants should not be entitled to relief when prosecutors discriminate against jurors on the basis of race.[289] On January 6, 2020, Evans withdrew from the case and said another prosecutor would decide whether to seek the death penalty.[290]

d. Cases Involving Reliance on Defendant's Race as Reason for Death Penalty

i. ***Buck v. Davis***, 137 S. Ct. 759 (2017)

Chief Justice Roberts, writing for the Court, held that Texas death row inmate Duane Buck had received unconstitutionally ineffective assistance of counsel. The ineffectiveness consisted of the defense's presenting an "expert" witness, Dr. Walter Quijano, who – although saying that Buck would not be likely to act dangerously in the future – testified that the fact that Buck was black meant that he was likely to be more dangerous in the future than were he not black. At Buck's sentencing phase, the State relied on the "expert's" testimony as showing that there was no assurance that Buck would not pose a future danger. During its two days of deliberations, the jury asked in one of its four notes for "the psychology reports" in the record – one of which was Dr. Quijano's.[291]

The Court held that there was a reasonable probability that one or more jurors would have had a reasonable doubt about Buck's future dangerousness if Dr. Quijano had not testified. The Court reasoned as follows: The key issue at the sentencing proceeding was future dangerousness – so, the jury had to do some speculating as to the future. A factor against a finding of future dangerousness was that if Buck were to serve life in prison, he would be very unlikely to be in a romantic heterosexual relationship – the context of his previously violent crimes. "But," the Court said, "one thing would never change: the color of Buck's skin. Buck would always be black. And according to Dr. Quijano, that immutable characteristic carried with it an '[i]ncreased probability' of future violence." This was "hard statistical evidence – from an expert – to guide an otherwise speculative inquiry." The Court described this evidence as "potent" because it "appealed to a powerful racial stereotype – that of black men as 'violence prone.'"[292]

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[288] *Id.* at 2251.
[289] *Id.* at 2267-74 (Thomas, J., dissenting, joined in part by Gorsuch, J.).
[290] Parker Yesko, *Evans quits the case*, APM REP., Jan. 6, 2020.
[291] *Buck v. Davis*, 137 S. Ct. 759, 768-70 (2017).
[292] *Id.* at 776 (alteration in original) (citation omitted).

The Court addressed a final procedural point: In order to get relief under Rule 60(b)(6), Buck had to demonstrate that "extraordinary circumstances" existed. In holding that such circumstances indeed did exist as to Buck's guilt-innocence phase claims, the Court said:

> [O]ur holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.[293]

This was even more troubling, the Court said, "because it concerned race," as to which discrimination is particularly egregious in the criminal justice system. Consideration of race in that context "injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'"[294] This and other language in the Chief Justice's majority decision is inconsistent with the logic and wording of the Court's *McCleskey* holding 20 years earlier.

ii. ***Tharpe v. Sellers***, 138 S. Ct. 545 (2018) *(per curiam)*; ***Tharpe v. Ford***, 139 S. Ct. 911 (2019) *(mem.)*

Georgia death row inmate Keith Tharpe attempted to get a stay of execution despite not having raised his claim when Georgia procedure said he should have raised it. His claim was supported by a never-recanted sworn affidavit by a now-deceased juror from his trial, Barney Gattie. The Supreme Court said that the Eleventh Circuit should have focused on the real basis for the state court's default holding: the state court's belief that Gattie's own vote for death had not been affected by Tharpe's race. The Court said Gattie's "remarkable affidavit . . . presents a strong factual basis" for concluding that Gattie's vote *was* affected by Tharpe's race. Indeed, the affidavit can hardly be read any other way. Among other things in the affidavit, Gattie referred to Tharpe using what is sometimes referred to as the "N" word; questioned whether African Americans "even have souls"; and said that some jurors had voted for the death penalty in order to make Tharpe an example to blacks who kill other blacks. The Court held that reasonable jurists could debate whether the state court ruling had been shown to be wrong by clear and convincing evidence. The Court remanded for further consideration of whether to issue a certificate of appealability.[295] In August 2018, the Eleventh Circuit declined to consider the merits of Tharpe's claim, holding that consideration of the claim was precluded by Tharpe's failure to raise the claim in state courts.[296]

On March 18, 2019, the Court denied certiorari. Justice Sotomayor, although concurring in the certiorari denial, wrote separately "because I am profoundly troubled by the underlying facts of this case." She said that "we should not look away from the magnitude of the potential injustice that procedural barriers are shielding from judicial review." She stated that "Gattie's sentiments – and the fact that they went unexposed for so long, evading

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[293] *Id.* at 778.
[294] *Id.* (alterations in original) (citation omitted).
[295] *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam).
[296] *Tharpe v. Warden*, 898 F.3d 1342 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 911 (2019) (mem.).

review on the merits – amount to an arresting demonstration that racism can and does seep into the jury system."[297]

Mr. Tharpe died in prison on January 24, 2020, likely from complications from cancer.[298]

e. Biasing Effects of Death Qualification

Professors Mona Lynch and Craig Haney performed two surveys of Solano County, California jurors, done 18 months apart, to explore whether and, if so, how differences between people of different races affect how capital juries are selected. They found that the process of death qualification, in which potential jurors who would automatically vote either against or in favor of the death penalty, results in unrepresentative juries from which African Americans are disproportionately excluded and biases the selected juries in favor of conviction and death sentences.[299] As death penalty support has dropped over time, the gap between the views of whites and the views of African Americans and women has grown, as has the distorting impact of death qualification. The authors also noted that the death qualification process gave prosecutors a facially race-neutral reason for disproportionately excluding African-American jurors.

Moreover, a majority of white jurors – and particularly white male jurors – disregarded most mitigating evidence, and many of them thought that some of the mitigating factors should be weighted in favor of imposing the death penalty. White respondents also "were significantly more receptive to aggravating evidence and were more inclined to weigh these specific items in favor of a death sentence compared to African American respondents." The process, they said, "creat[es] a jury whose members are unusually hostile to mitigation," which may "functionally undermine" the fair consideration of a capital defendant's case in mitigation. "This risk," the authors wrote, "is particularly high in cases involving African American defendants, especially where white men dominate the jury." They said the combined impact is that, "[i]n a county in California where support for and opposition to capital punishment are beginning to approach parity, death qualification still has the potential to produce jury pools that are significantly more likely to favor the death penalty."[300]

9. 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 among the people convicted of "a narrow category of the most serious crimes" who have such extreme "culpability" that they are "the most deserving of execution."[301] In holding capital punishment categorically unconstitutional for those below age 18 at the time of the crime, as well as for people with what is now called intellectual disability, the Court said:

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[297] *Tharpe v. Ford*, 139 S. Ct. 911, 912, 913 (2019) (mem.) (Sotomayor, J., concurring).
[298] Marlon A. Walker, *Inmate who appealed death sentence over juror's racist views dies*, ATLANTA J.-CONST., Jan. 25, 2020.
[299] Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148 (2018).
[300] *Id.* at 165, 168, 169.
[301] *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

> [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.[302]

However, the Court has thus far not ensured that this constitutional bar applies to everyone with intellectual disability, nor has it applied this bar 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." Moreover, by permitting the execution whose guilt is pursuant to the felony murder rule, the Court is permitting executions of people with relatively low levels of culpability.

a. Intellectual Disability (Formerly Called Mental Retardation)

Despite *Atkins*' categorical bar to executing people with intellectual disability (formerly referred to as mental retardation), some people with intellectual disability have been, and likely will continue to be, executed.

In 2017, the Court began to act against a particularly egregious violation of *Atkins:* Texas' unique and anomalous way of determining intellectual disability claims, which the medical community did not support. On March 28, 2017, in *Moore v. Texas*,[303] the Court held Texas' standard unconstitutional and remanded the case to the Texas Court of Criminal Appeals for a new determination as to whether Moore was intellectually disabled. On November 1, 2017, Harris County prosecutors filed a brief acknowledging that Moore came within the established intellectual disability standard and accordingly could not be executed.[304] Nevertheless, the Texas Court of Criminal Appeals held again that Moore did not have intellectual disability.[305]

On February 19, 2019, the Court granted certiorari and summarily reversed. The Court said the Texas Court of Criminal Appeals had in "too many instances" repeated "with small variations . . . the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion." Indeed, the Court stated, despite the Texas Court of Criminal Appeals' saying it was abandoning the evidentiary factors upon which it had long relied in denying intellectual disability claims, "it seems to have used many of those factors in reaching its conclusion." The Court concluded that after removing the old factors from the

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[302] *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.

[303] *Moore v. Texas*, 137 S. Ct. 1039 (2017) (discussing *Atkins* and *Hall v. Florida*, 572 U.S. 701 (2014)).

[304] Respondent's Brief at 27-28, *Moore v. State*, No. 0314483 (Tex. Crim. App. filed Nov. 1, 2017), https://deathpenaltyinfo.org/files/pdf/ExParteMooreCCAStatesBrief.pdf. On that same day, members of the Texas Capital Punishment Assessment Team formed under the auspices of the ABA's Death Penalty Due Process Review Project filed an amicus brief urging that Moore be found intellectually disabled. Brief of Amici Curiae Members of the Texas Capital Punishment Assessment Team at 13-14, *Ex parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2017), https://deathpenaltyinfo.org/files/pdf/ExParteMooreCCAAmicusBriefTXDPAssessmentTeam.pdf.

[305] *Ex parte Moore*, 548 S.W.3d 552, 573 (Tex. Crim. App. 2018), *rev'd sub nom. Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam).

lower court's opinion, there was not enough to reach a different conclusion than that reached by the trial court. Accordingly, the Court found that, "on the basis of the trial court record, Moore has shown he is a person with intellectual disability."[306]

Chief Justice Roberts, who had dissented from the Court's 2017 *Moore* decision, stated in a concurrence that he still felt the Court's 2017 articulation of how to decide intellectual disability claims "lacked clarity." But while that could present a problem in other cases, he said, it did not present a problem in deciding *this* case. He stated that "it is easy to see that the Texas Court of Criminal Appeals misapplied" the 2017 holding in Moore's case. Accordingly, the lower court's decision did not "pass muster."[307] The Chief Justice joined in the Court's *per curiam* opinion – as apparently, *sub silentio*, did Justice Kavanaugh. The other three dissenters from the Court's 2017 decision dissented, asserting that the Court had engaged improperly in "a foray into factfinding."[308]

In *Shoop v. Hill*,[309] the Court vacated the Sixth Circuit's grant of habeas relief to Danny Hill. An Ohio court had sentenced Hill to death in 1986 for the murder of Raymond Fife. After a series of appeals, Hill sought habeas relief in federal court on the basis of intellectual disability. He lost in district court but won in the Sixth Circuit, which held that Ohio courts had unreasonably applied Supreme Court precedent in denying his intellectual disability claim.

In a *per curiam* decision, the Court concluded that the Sixth Circuit had improperly relied on *Moore v. Texas* in deciding whether Hill's case satisfied the 28 U.S.C. § 2254(d)(1) standard for federal habeas relief. Section 2254(d)(1) permits habeas relief to be granted if the state court's resolution of an issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[310] When the Ohio appellate court considered Hill's intellectual disability claim in 2008, *Atkins v. Virginia* was the only Supreme Court decision dealing with the circumstances in which an individual with an intellectual disability is constitutionally ineligible for the death penalty. Although the Sixth Circuit looked to *Atkins*, it did so impermissibly in light of the Court's *later* decisions in *Hall v. Florida* and *Moore v. Texas*, whose reasoning was not "clearly established" by the time of *Atkins*.

The Court remanded the case for reconsideration "based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time."[311] The Court made no mention of the Sixth Circuit's determination that the Ohio courts had unreasonably determined facts by finding that Hill's adaptive deficits did not manifest before age 18.

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[306] *Moore v. Texas*, 139 S. Ct. 666, 670, 671, 672 (2019) (per curiam).
[307] *Id.* at 672 (Roberts, C.J., concurring).
[308] *Id.* at 674 (Alito, J., dissenting, joined by Thomas and Gorsuch, JJ.).
[309] *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam).
[310] *Id.* at 506 (citation omitted).
[311] *Id.* at 509.

b. Substantial Number of People with Severe Mental Illness Executed or Still Facing Execution

i. Twenty-first Century Executions Disproportionately Involve People with Mental Illness, and Often Are Effectively "Assisted Suicides"

On April 3, 2017, Professor Frank Baumgartner and the University of North Carolina's Betsy Neill wrote in the *Washington Post* about their analysis of the case records of those executed between 2000 and 2015 in the United States. Whereas 18% of the general population has ever been diagnosed with a mental illness, 43% of those executed had received that diagnosis. Executed inmates had notably higher rates of diagnosed schizophrenia, posttraumatic stress disorder, and bipolar disorder. Those death row inmates who waived their appeals and "volunteered" to be executed had much higher rates of diagnosed mental illness than others who were executed, and, in particular, 26% of volunteers had been diagnosed with depression, 37% had been documented to have suicidal tendencies, and 32% had tried to commit suicide. Baumgartner and Neill wrote, "If suicidal tendencies are evidence of mental illness, then death penalty states actively assist suicide." They also found that the mental illness risk factor of childhood trauma was extremely more likely in those executed than in the general population.[312]

At an August 2, 2018 ABA program, Meredith Martin Rountree elaborated on the pernicious effects of permitting people to "volunteer" for execution. She said approximately 10% of those executed since *Gregg* have been "volunteers." This means that anything unconstitutional about their convictions or death sentences was most likely never reviewed. That, in turn, lessens confidence that capital punishment is applied so uniformly that only the worst of the worst are executed.[313]

ii. Most Ohio Death Row Inmates Facing Execution Have Mental, Emotional, or Cognitive Impairments or Limitations

On August 30, 2017, Harvard's Fair Punishment Project reported that most of those with a scheduled execution in Ohio in the next three years had mental, emotional, or cognitive impairments or limitations. Instead of being among the "worst of the worst," they "are among the most impaired and traumatized among us." The Project found that at least 17 of the 26 had serious childhood trauma, at least 11 showed evidence of "intellectual disability, borderline intellectual disability, or a cognitive impairment, including brain injury," and at least six apparently "suffer from a mental illness."[314] The Project's Legal Director, Jessica Brand, said that "people who are the most impaired received some poor representation at some time in their cases and then are facing the most severe penalty possible" – which she termed a "horrible trifecta."[315]

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[312] Frank R. Baumgartner & Betsy Neill, *Does the death penalty target people who are mentally ill? We checked.*, WASH. POST, Apr. 3, 2017.
[313] ABA Conference on the Death Penalty, *supra* note 125, at 23 (remarks of Meredith Martin Rountree).
[314] FAIR PUNISHMENT PROJECT, PRISONERS ON OHIO'S EXECUTION LIST DEFINED BY INTELLECTUAL IMPAIRMENT, MENTAL ILLNESS, TRAUMA, AND YOUNG AGE (2017).
[315] Karen Kasler, *Harvard Report Finds Majority of Ohio Death Row Inmates Likely Have Mental Impairments*, WKSU RADIO (Kent State Univ.), Aug. 30, 2017.

DPIC found that more than 60% of these inmates slated for execution were sentenced prior to Ohio's adding LWOP as an alternative to the death penalty. In these cases, each jury's choice was between capital punishment and a sentence under which release from prison was possible. After LWOP became a sentencing alternative, Ohio death sentences declined by over two-thirds in the next decade. As DPIC wrote, there is a good chance many of those scheduled to be executed in the next three years might have received LWOP if that had been an option, in cases with mitigating "evidence of intellectual disability, mental illness, or behavioral problems arising from chronic abuse and trauma."[316]

Due to Ohio's present moratorium on executions, most of those discussed in these analyses have not been executed.

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

In many cases, sentencers *have* considered serious mental illness – but as aggravating. This is often due to jurors' implicit biases, compounded by misleading or otherwise inadequate jury instructions.[317] Following trial, procedural obstacles or unreasonable burdens often doom efforts to seek relief. Moreover, in clemency proceedings, serious mental illness is usually deemed unimportant.

d. Renewed Efforts to Preclude Executions of People with Mental Illness in Particular Situations

i. Policies Supported by Leading Professional Organizations

The ABA, American Psychiatric Association, and American Psychological Association all have three policies on mental disability and capital punishment.[318] The first would implement *Atkins* to comport with the AAIDD and American Psychiatric Association positions. It 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 often do 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 makes execution disproportionate to culpability.[319]

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[316] *REPORT: Most of the 26 Prisoners Facing Execution in Ohio Through 2020 Severely Abused, Impaired, or Mentally Ill*, DEATH PENALTY INFO. CTR. (last visited Jan. 30, 2018).

[317] Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 583-586; Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 L. & SOC. INQUIRY 377, 378, 401-403 (2015); 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, 564, 567, 571, 573 (2014); John Robert Barner, *Life or death decision making: Qualitative analysis of death penalty jurors*, 13 QUALITATIVE SOC. WORK 842, 846, 855 (2014).

[318] *Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006).

[319] For detailed discussion of the first and second policies, 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).

The third policy deals with a death-sentenced prisoner whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly impaired by a mental disorder or disability; or 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 whose understanding of the nature and purpose of the punishment is so impaired as to render him incompetent for execution.[320] 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.[321]

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

There has been increased support in recent years for the second policy of the three leading professional organizations. 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.[322] This has not yet led to the enactment of legislation in Ohio, but efforts there continue.

In December 2016, the ABA Death Penalty Due Process Review Project's Severe Mental Illness Initiative issued a thorough report, *Severe Mental Illness and the Death Penalty*, regarding how mental illness is now dealt with vis-à-vis the death penalty, what "severe mental illness" refers to, ways to reform present laws, and why people with severe mental illness should be exempt from capital punishment.[323] Former Ohio Governor Bob Taft and former Indiana Governor Joseph E. Kernan, in a March 28, 2017 op-ed, urged enactment of legislation that would preclude capital punishment for people with serious mental illness.[324] A month earlier, former Tennessee Attorney General W.J. Michael Cody reached the same conclusion in an op-ed in the *Commercial Appeal*.[325]

In a January 2, 2018 op-ed in the *Commercial Appeal*, Marine Corps Lieutenant General John Castellaw urged Tennessee to enact a bill that would exclude capital punishment "for those with severe mental illness, including those people with illnesses [such as PTSD] connected with their military service." General Castellaw particularly assailed Georgia for having executed Andrew Brannan in 2015. Brannan, decorated for his Vietnam service later received service-related diagnoses for PTSD and bipolar disorder. Despite his stellar history and his lacking *any* criminal record, Brannan was executed for killing a deputy sheriff after a traffic stop to which Brannan had reacted erratically and during which he had urged the deputy sheriff to kill him. General Castellaw said "we can do better by staying

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[320] For detailed discussion of the third policy, see *Recommendations and Report*, *supra* note 318, and Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

[321] *Ryan v. Gonzales*, 568 U.S. 57, 76-77 (2013).

[322] JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY, FINAL REPORT & RECOMMENDATIONS, at 6 (2014).

[323] ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016).

[324] Bob Taft & Joe Kernan, Opinion, *End inhumane capital punishment for mentally ill*, THE BLADE (Toledo), Mar. 28, 2017.

[325] W.J. Michael Cody, Opinion, *Exclude mentally ill defendants from death penalty*, COM. APPEAL, Feb. 12, 2017.

tough on crime but becoming smarter on sentencing those whose actions are impacted by severe mental illness."[326]

On January 17, 2019, Virginia's State Senate passed a bill that would preclude capital punishment in the circumstances set forth in the second prong of the joint policy adopted by the ABA and the two APAs. The bill passed by a vote of 23-17, with four Republicans and all Democrats (including some strong death penalty supporters) voting in favor.[327] There was no vote in the House of Delegates. The Ohio House of Representatives passed a similar bill in June 2019, but the Senate did not vote on it.[328]

e. Competency to Be Executed

In *Madison v. Alabama*,[329] the Court clarified the constitutional standards regarding a prisoner's competency to be executed. Alabama planned to execute Vernon Madison, an aging prisoner whose multiple severe strokes caused brain damage, vascular dementia, and retrograde amnesia, and had slurred speech and was legally blind, incontinent, and unable to walk independently. Alabama argued that he was competent because his cognitive impairments were not caused by psychosis. Justice Elena Kagan, writing for the Court, said competency determinations are governed by whether a prisoner has a rational understanding of what an execution is and why he is being executed, not by what physical or mental health condition impairs his understanding.[330] As discussed below (in Part II.H.), the case was remanded.

f. Death Penalty Upheld for People Who Neither Killed Nor Intended That Anyone Be Killed

In *When the State Kills Those Who Didn't Kill*, published by the ACLU on July 11, 2019, Ashoka Mukpo explores the phenomenon of death sentences for people who did not kill anyone. Mukpo explains that felony murder laws "make[] all participants in a major felony liable for any deaths that happen while they're carrying out their crime, even if they didn't set out to kill anyone or even play a direct role in the death itself." Felony murder laws, the article suggests, interact with other flaws in the administration of capital punishment to compound systemic problems of arbitrariness and prosecutorial misconduct.[331]

Mukpo looks at the issue through the lens of the case of Charles Burton, who was sentenced to death in Talladega County, Alabama for his role in a robbery of an Auto Zone store in which a co-perpetrator shot a customer to death while Burton was outside in the parking lot waiting for the others to return to the getaway car. Burton is the only one of the six robbers who faces execution.

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[326] John Castellaw, Opinion, *Exclude mentally ill vets from death penalty*, COM. APPEAL, Jan. 2, 2018.
[327] Laura Vozzella, *Bill to ban death penalty for severely mentally ill clears GOP-controlled Va. Senate*, WASH. POST, Jan. 17, 2019.
[328] Laura Hancock, *Ohio House passes bill banning executions of people with 'serious mental illness' during crime*, CLEV.COM, June 5, 2019.
[329] *Madison v. Alabama*, 139 S. Ct. 718 (2019).
[330] *Id.* at 726-27.
[331] Ashoka Mukpo, *When the State Kills Those Who Didn't Kill*, ACLU, July 11, 2019.

Two Supreme Court decisions address the constitutionality of using felony murder laws to sentence a defendant to death, but critics say the cases have produced a complex and muddled set of standards. In the later of the two cases, *Tison v. Arizona*,[332] the Court ruled that the sons' death sentences did not violate the Constitution because each had played a "major" role in the carjacking and prison escape, and, although they neither killed nor intended that a killing take place, their conduct exhibited "reckless disregard for human life." Eight states, including California, Florida, and Texas – which have the nation's three largest death rows – use the standard established in *Tison* in their felony murder laws.[333]

10. 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

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 these proceedings have become much further away from being fail-safes than before *Furman*. The death penalty became much more politicized, and securing clemency became much more difficult.

a. Usual Failures of Innocence-Based Efforts, but One Partial and One Complete Success Recently

Usually, innocence-based postconviction and clemency efforts fail. 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 the AEDPA has made it far more difficult to grant relief on meritorious constitutional claims.[334]

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.

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,

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[332] *Tison v. Arizona*, 481 U.S. 137, 157 (1987).
[333] Mukpo, *supra* note 331.
[334] Pub. L. No. 104-132, 110 Stat. 1214.

but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[335] And when the issue is whether all constitutional prerequisites *to imposing the death penalty* exist, the appellate rulings to date hold that even meeting the daunting AEDPA standard is of no avail.

When it is either impossible 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 to seek – as in *In re Davis*, where the Court required "evidence that could not have been obtained at the time of trial [to] clearly establish . . . innocence."[336] That standard can virtually never be met. Many who would not have been convicted if the new evidence had been presented cannot "clearly" prove their innocence via evidence that could not have been secured for the trial. As to a claim of "innocence of the death penalty," for example where evidence that could not have been obtained for trial clearly establishes intellectual disability, the Court has not squarely said whether it might consider the claim even if the formidable *Davis* hurdle were met.

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.

As discussed above (in Section C.5.k.), on March 26, 2018, Ohio Governor John Kasich gave executive clemency to William T. Montgomery, who was scheduled to be executed on April 11 for two 1986 murders.[337] Phyllis Crocker, Dean of the University of Detroit Mercy School of Law, said: "At best, Montgomery was convicted on a false set of facts and at worst, he may be actually innocent. In death penalty cases there must be no doubt whatsoever. There is too much doubt to allow this execution."[338]

In most cases where serious doubt about guilt does or should exist, governors, pardons and paroles boards and other clemency bodies usually *deny* relief. When 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.

b. Clemency Grants

i. Rare Clemency Grants Based on Severe Mental Illness or Other Mitigating or Equitable Factors

On February 8, 2018, Ohio Governor John Kasich granted a reprieve to Raymond Tibbetts to allow time to consider defense counsel's failure to present mitigation that a juror said could have made a real difference. Then, on July 20, 2018, Kasich commuted Tibbetts'

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[335] 28 U.S.C. § 2244(b)(2)(B)(ii).
[336] *In re Davis*, 557 U.S. 952, 952 (2009) (mem.).
[337] Provance, *Governor commutes death sentence*, *supra* note 227; Provance, *Parole board recommends clemency*, *supra* note 227.
[338] Phyllis L. Crocker, Opinion, *Next Ohio execution raises too much doubt*, THE BLADE (Toledo), Mar. 10, 2018.

death sentence due to his having been abused as a child and because a juror had been misled about the use to which mitigation could be put.[339]

On February 22, 2018, less than an hour before his scheduled execution, Texas death row inmate Thomas "Bart" Whitaker learned that Governor Greg Abbott had commuted his sentence to life in prison. Governor Abbott, who followed the unanimous recommendation of the state paroles board, cited the facts that the actual triggerman had not gotten the death sentence, that the sole living victim of the crime favored commutation, and that Whitaker had waived any effort to seek parole.[340]

ii. Clemency Denial and Adverse Court Rulings Are the Norm Notwithstanding Strong Reasons to Spare the Death Row Inmate's Life

The cases discussed in the preceding two paragraphs are anomalous.

More typical is the case of Jeffery Wood. In a letter made public in December 2017, Kerr County, Texas District Attorney Lucy Wilke supported clemency for Wood, whose conviction and death sentence she had secured almost two decades earlier. Although he had been the getaway driver, was not present when the murder occurred and denied knowing that his fellow robber would kill anyone, Wood was convicted and sentenced to death under the "law of parties," making him legally responsible for his fellow robber's actions. District Attorney Wilke pointed to Wood's non-participation in the killing, his IQ of 80, the highly dubious "expert" testimony that he would be dangerous in the future, and his history of non-violence. Signing the same letter were Chief of Police David Knight and District Court Judge N. Keith Williams, who was presiding over a challenge to the use of the "expert" testimony about future dangerousness.[341]

After the paroles board refused to consider clemency, the district court on March 20, 2018 approved a new set of findings and recommended that relief be granted. One of the new findings was that government trial "expert" Dr. James Grigson (a.k.a. "Dr. Death") had given false and misleading testimony about Wood's supposed future dangerousness.[342] But on November 21, 2018 the Texas Court of Criminal Appeals (with two judges dissenting) reversed the district court and upheld Wood's death sentence.[343] The Supreme Court denied Wood's certiorari petition on October 7, 2019.[344]

Tennessee executed Lee Hall on December 5, 2019 without providing him judicial review of the same legal claim on the basis of which Tennessee courts had vacated the

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[339] Jackie Borchardt, *Ohio governor delays execution of Raymond Tibbetts due to juror's concerns*, CLEV.COM, Feb. 8, 2018; DPIC 2018 YEAR END REPORT, *supra* note 67, at 7.

[340] Jolie McCullough, *Minutes before execution, Texas Gov. Greg Abbott commutes the sentence of Thomas Whitaker*, TEX. TRIB., Feb. 22, 2018.

[341] Letter from Lucy Wilke to Texas Board of Pardons and Paroles, Aug. 3, 2017, https://static.texastribune.org/media/documents/WoodJefferyLeeLtrfromDAsoffice.pdf?_ga=2.235713986.217083783.1512681080-1988673696.1491600194.

[342] Keri Blakinger, *Court findings offer hope for death row inmate in case tainted by 'Dr. Death'*, HOUS. CHRON., Mar. 20, 2018.

[343] Hannah Wiley, T*exas Court of Criminal Appeals rules against death row inmate Jeff Wood*, TEX. TRIB., Nov. 21, 2018.

[344] *Wood v. Texas*, 140 S. Ct. 147 (2019) (mem.).

conviction of a former death-row prisoner just weeks before. Governor Bill Lee had denied clemency, saying he was relying on extensive judicial review "over the course of almost 30 years" and the most recent Tennessee Supreme Court rulings.[345] In those rulings, the court declined to consider evidence that a juror had failed to disclose that she had hated Hall because he reminded her of her ex-husband, who had abused her over six years. Yet, less than two weeks earlier, the Tennessee courts had granted a new trial to Hubert Glenn Sexton, in accordance with Tennessee Supreme Court precedent, because a juror in his 2001 death penalty trial had similarly failed to disclose her history of domestic abuse. The Tennessee Supreme Court said there was a procedural difference between the two cases.[346]

Justice Sharon G. Lee dissented, writing: "Finality is well and good, but should not trump fairness and justice. The State should not electrocute Mr. Hall before giving him the opportunity for meaningful appellate review of the important constitutional issues asserted in his filings."[347]

On December 4, 2019, Hall filed a petition seeking a stay, which the Supreme Court denied. Hall, who had become blind while on death row due to glaucoma that was not properly treated, was executed the next day.[348]

c. Potential Equitable Argument for Clemency

On October 5, 2018, Tennessee Governor Bill Haslam denied clemency to Edmund Zagorski. Six trial jurors had stated in declarations that they would never have voted to sentence Zagorski to death if LWOP had been an option.[349]

LWOP 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 available, it is likely that many people would have received LWOP instead of death 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 death for people 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.[350]

Now that LWOP is – and is believed by many jurors to be – an alternative in which there is no chance of parole, many juries have voted for LWOP instead of the death penalty. This may happen most often when jurors have lingering doubt about guilt, or believe the defendant should be severely punished but not executed. As discussed early in this chapter, a major reason far fewer death sentences are now being *sought* than in the past is that there is far greater awareness that LWOP really exists and really means "without possibility of parole."

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[345] Caitlyn Shelton, *Tennessee executes death row inmate Lee Hall*, FOX17 (Nashville), Dec. 5, 2019.
[346] *State v. Hall*, No. E1997-00344-SC-DDT-DD (Tenn. Dec. 3, 2019) (per curiam), https://www.tncourts.gov/sites/default/files/docs/hall_per_curiam_order_j._lee_dissenting_0.pdf.
[347] *Id.* at 2 (Lee., J., dissenting), https://www.tncourts.gov/sites/default/files/docs/hall_order_dissent_j._lee.pdf.
[348] *Chattanooga man Lee Hall dies in the electric chair for the 1991 murder of his estranged girlfriend*, CHATTANOOGA FREE PRESS, Dec. 5, 2019.
[349] Steven Hale, *Haslam Denies Clemency for Edmund Zagorski*, NASHVILLE SCENE, Oct. 5, 2018.
[350] Hannah Gorman, *The Jury System on Trial: Do Jurors Execute Justice?*, 15 AMICUS J. 13 (2006).

The fact that LWOP is now, but was not at trial, an available alternative to the death penalty is one of numerous reasons to believe that if death row inmates' cases had arisen in recent years, many would not have received the death sentence. Yet, this is usually ignored in clemency proceedings.[351] Fortunately, the Georgia paroles board viewed things differently on January 16, 2020, when presented with strong evidence that the jury that sentenced Jimmy Fletcher Meders to death believed that the only alternative was a "life" sentence under which Meders could be paroled within a few years Hours before his scheduled execution, it granted him clemency and commuted his death sentence to LWOP. The paroles board cited Meders' lack of a criminal record prior to committing his offense, his commission of only one minor infraction in over 30 years on death row, the jury's explicit desire during deliberations to impose an LWOP sentence which was legally unavailable at the time, and every living, able juror's continued support for such a sentence.[352]

The Supreme Court has repeatedly limited the categories of cases in which capital punishment may be implemented, by pointing 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 if sought would almost surely not 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.

11. Costs of the Capital Punishment System

As is apparent throughout this chapter, the costs of the death penalty system are increasingly part of discourse on capital punishment.

a. Oklahoma

A study prepared for the Oklahoma Commission by two criminal justice professors and a law professor from the University of Seattle found, consistent with every prior credible study they examined regarding other states, that when capital punishment is sought in Oklahoma, "significantly more time, effort, and costs [are incurred] on average, as compared

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[351] It *was* considered by Cuyahoga County Chief Prosecutor Timothy McGinty, who wrote the Ohio Parole Board in 1913 to ask it to recommend changing Billy Slagle's death sentence to LWOP. McGinty pointed to changes in Ohio law and in how he and his team now assessed 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." But on July 16, 2013, the Parole Board voted 6-4 not to recommend clemency, and Governor Kasich denied clemency. Slagle was found hanged in his cell on August 3, 2013, three days before his execution date. He did not know about a recent revelation that the prosecutor's office had been ready in 1988 to enter into a plea deal averting imposition of the death penalty.

[352] Ga. State Bd. of Pardons & Paroles, Press Release, *Parole Board Grants Clemency to Jimmy Fletcher Meders*, Jan. 16, 2020, https://pap.georgia.gov/press-releases/2020-01-16/parole-board-grants-clemency-jimmy-fletcher-meders. It was common knowledge in legal circles in the 1980s that Georgia juries were often voting to impose death sentences *not* due to any belief that the defendant deserved the death penalty but because of jurors' incorrect belief that the alternative was to have the defendant be paroled in seven years. Even though the Georgia Supreme Court knew this (as Judge Weltner openly acknowledged), it did nothing to correct this misimpression and affirmed the death sentences. *See* Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 78-80 (1989); J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 337 n.51 (1993).

to when the death penalty is not sought in first degree murder cases." The study, which is Appendix IB to the Commission's report issued in 2017, found that on average, costs in Oklahoma capital cases are 3.2 times greater than in Oklahoma non-capital cases.[353]

b. Utah

The Utah Commission on Criminal and Juvenile Justice issued a study in February 2018 that found that the capital punishment system is more expensive than a system without capital punishment.[354]

II. SIGNIFICANT SUPREME COURT DEVELOPMENTS NOT DISCUSSED ABOVE

A. Ayestas v. Davis, 138 S. Ct. 1080 (2018)

The Court unanimously held that, under the Supreme Court holdings in *Martinez v. Ryan*[355] and *Trevino v. Thaler*,[356] a Texas death row inmate was entitled to develop and assert in a federal habeas corpus proceeding a claim that he had been denied his constitutional right to the effective assistance of counsel by his trial counsel's failure to investigate and then present in the trial's penalty phase substantial evidence regarding his mental health problems and the effects of drug and alcohol abuse. The Court said that Ayestas' state habeas counsel's failure to deal effectively with trial counsel's failures entitled Ayestas to develop and present these claims in the federal habeas proceeding.[357]

Federal habeas counsel sought, but was denied by the federal district court, investigative funding under 18 U.S.C. § 3599(f). The Court said that the district court had used an improper test in denying these funds. The proper inquiry is "whether a reasonable attorney would regard the services as sufficiently important" in light of factors the Court proceeded to discuss. The Court stressed that in exercising its discretion to determine whether the funding being sought was "reasonably necessary," a court should consider the potential merit of the claim the petitioner seeks to make, the likelihood that the requested services will "generate useful and admissible evidence," and the chance that the petitioner can overcome any procedural barriers.[358]

The Court unanimously rejected what the ABA Death Penalty Representation Project described as "the Fifth Circuit's circular requirement that defendants must show, as a precondition for [receiving] funding under 18 U.S.C. § 3599(f), a 'substantial need' for the funding by introducing the very evidence that they [needed] the funding to obtain."

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[353] Samantha Vincent, *Costly death penalty cases strain state resources, report says*, TULSA WORLD, Apr. 29, 2017; Peter Collins et al., *An Analysis of the Economic Costs of Capital Punishment in Oklahoma*, *in* OKLA. DEATH PENALTY REVIEW COMM'N, THE REPORT OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION, app. IB (2017).

[354] UTAH COMM'N ON CRIMINAL & JUVENILE JUSTICE, DEATH PENALTY WORKING GROUP REPORT (2018).

[355] *Martinez v. Ryan*, 566 U.S. 1 (2012).

[356] *Trevino v. Thaler*, 569 U.S. 413 (2013).

[357] *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

[358] *Id.* at 1093, 1094.

On July 31, 2019, on remand, the Fifth Circuit again denied funding to Mr. Ayestas, holding that even using the correct legal standard, his claim of state habeas counsel's ineffectiveness would surely fail. Its rationale was that in 1998, when the state habeas petition was filed, prevailing professional norms did not require inclusion of a claim that trial counsel was ineffective for failing to investigate and present mitigation evidence concerning mental illness and substance abuse.[359]

On October 29, 2019, Ayestas' legal team filed a certiorari petition with the Supreme Court asking the Court to intervene in his case again. The petition was docketed the next day.[360]

B. ***Wilson v. Sellers***, 138 S. Ct. 1188 (2018)

The Supreme Court addressed what deference federal courts should give to state court decisions where the decision of the highest state court to adjudicate the case does not include any reasoning. The Court held that in such instances, the federal courts should consider a reasoned lower state court decision that preceded the higher state court's summary dismissal and make a rebuttable presumption that the higher state court had adopted the lower state court's reasoning. The majority said that to rebut the presumption, the State had to show that the higher court relied or likely relied on other bases for the lower state court's decision – such as an argument the State made in the highest state court regarding another basis for affirming or that was obvious from the record.[361]

C. ***McCoy v. Louisiana***, 138 S. Ct. 1500 (2018)

Defendant McCoy strenuously complained to the trial judge about his counsel's concessions of his guilt – which the defendant denied in his own testimony – and to counsel's attempt in the penalty phase to persuade the jury to be merciful in view of McCoy's mental and emotional issues.[362]

By a 6-3 vote, the Court held that a defendant is entitled to insist that his counsel not concede his guilt, even where counsel is experienced and strongly feels that conceding guilt is the best way to avert a death sentence. The Court stressed that a defendant is entitled to determine the objectives of the defense, even if the objectives are to avoid a life sentence as not being "worth living" and to gamble on a "minuscule" chance that the jury will find him not guilty.[363]

D. ***Trevino v. Davis***, 138 S. Ct. 1793 (2018) (Sotomayor, J., dissenting from denial of writ of certiorari)

On June 4, 2018, Justice Sotomayor, joined by Justice Ginsburg, dissented from the denial of Carlos Trevino's certiorari petition. Following the Court's remand of Mr. Trevino's case, the Fifth Circuit rejected his ineffective assistance of counsel claim, in which he asserted that his counsel should have uncovered and presented evidence of his fetal alcohol spectrum

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[359] *Ayestas v. Davis*, 933 F.3d 384 (5th Cir. 2019), *petition for cert. docketed*, No. 19-569 (U.S. Oct. 30, 2019).
[360] *Ayestas v. Davis*, No. 19-569 (U.S. Oct. 30, 2019).
[361] *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).
[362] *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).
[363] *Id.* at 1508.

disorder and of his functioning at the intellectual level of someone with intellectual disability due to developmental delays and cognitive impairments. The Fifth Circuit, by a 2-1 vote, held that it was not ineffective to not present such evidence, because it could have been a "double-edged sword" by providing the jury a basis to find that if not executed he could be dangerous in the future.[364]

Justice Sotomayor said the new evidence of fetal alcohol spectrum disorder would likely have been helpful to the defendant, by contextualizing his behavior.

E. ***Dunn v. Ray***, 139 S. Ct. 661 (2019) (*mem.*)

On February 7, 2019, the Court vacated the Eleventh Circuit's stay of Alabama death row inmate Domineque Ray's execution, "[b]ecause Ray [had] waited until January 28, 2019 to seek relief" from an execution date that had been scheduled on November 6, 2018.[365]

Justice Kagan dissented, in an opinion in which Justices Ginsburg, Breyer and Sotomayor joined. Justice Kagan pointed out that the Eleventh Circuit had found "a substantial likelihood" that the prison was violating the First Amendment by denying Ray's request to have clergy of his faith, Islam, to be with him in the execution chamber, whereas the prison "regularly allows a Christian chaplain to be present in the execution chamber." Justice Kagan said that the prison's policy, under which a death row inmate of any faith other than Christianity, "whether [it be] Islam, Judaism, or any other," will be executed without "a minister of his own faith by his side," violates the First Amendment's "core principle of denominational neutrality." Justice Kagan said that the State had offered no evidence to support its assertion that the prison's policy was necessary to ensure prison security. Justice Kagan agreed with the Eleventh Circuit that Ray had raised his constitutional claim in a timely manner. It was only on January 23, five days before Ray filed his complaint, that the warden had denied Ray's "request to have his imam by his side" during his execution. Justice Kagan said that the statute did not provide Ray with notice that his request would be denied and seemed to mean that such a request would be granted. "[T]he prison refused to give Ray a copy of its own practices and procedures" – which would have given him notice on the basis of which he could have raised a First Amendment claim. Instead of giving deference to the Eleventh Circuit, which desired full consideration of Ray's claim, the Court "itself rejects the claim [albeit not the merits of the claim] – with little briefing and no argument – just so the State can meet its preferred execution date."[366]

F. ***Murphy v. Collier***, 139 S. Ct. 1111 (2019) (*mem.*)

On March 28, 2019, the Court, which had been widely criticized for denying a stay to Mr. Ray, granted a stay under quite similar circumstances to Texas death row inmate Patrick Murphy. Murphy, a Buddhist, had been helped for six years by his spiritual advisor, Rev. Hui-Yong Shih. However, Texas said that allowing Rev. Shih to be present with Mr. Murphy in the execution chamber would present a security risk. Yet, Christian and Islamic clergy have been permitted to be present in the execution chamber with death row inmates of their faiths.

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[364] *Trevino v. Davis*, 138 S. Ct. 1793 (2018) (Sotomayor, J., dissenting from denial of writ of certiorari).
[365] *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (mem.).
[366] *Id.* at 661, 662 (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.).

The Court ordered that Mr. Murphy's execution be stayed "unless the State permits Murphy's Buddhist spiritual advisor . . . to accompany Murphy in the execution chamber."[367] Justice Kavanaugh, writing separately, stated that "government discrimination against religion – in particular, discrimination against religious persons, religious organizations, and religious speech – violates the Constitution."[368]

George Mason University Law Professor Ilya Somin provided the following pure speculation about the Court's different decision in Murphy's case than in Ray's case. Professor Somin theorized that the Justices "belatedly realized they had made a mistake; and not just any mistake, but one that inflicted real damage on their and the Court's reputations. Presented with a chance to 'correct' their error and signal that they will not tolerate religious discrimination in death penalty administration, they were willing to bend over backwards to seize the opportunity, and not let it slip away."[369] Bending over backwards in a different direction, Texas quickly announced that only prison security staff could go with an inmate to the execution chamber – not a spiritual advisor of any faith.[370]

G. ***Dunn v. Price***, 139 S. Ct. 1312 (2019); ***Price v. Dunn***, 139 S. Ct. 1794 (2019) (*mem.*)

The discordancy between the Court's five most conservative Justices and its four other Justices regarding applications to stay, or to vacate stays of, impending executions deteriorated, at least in tone, on the night of Thursday, April 11, 2019 and the very early morning hours of Friday, April 12, 2019. The five-Justice majority turned down Justice Breyer's request to wait a few more hours until the Court's regular Friday morning conference, at which they could have discussed in person Alabama's application to vacate the stays by federal circuit and district courts of Christopher L. Price's execution. The majority's short unsigned opinion said that Mr. Price had waited too long before challenging Alabama's three-drug protocol and before urging that nitrogen gas be used. In his dissent, issued at about 3 a.m., Justice Breyer said that Alabama's application had been dealt with arbitrarily, with unwarranted haste. This chain of events did not lead immediately to Mr. Price's execution, which Alabama postponed sometime during the night.[371]

On May 30, 2019, the parties were again before the Court, this time with agreement that nitrogen hypoxia could be used. Instead, Price sought a stay to enable the district court to hold an already scheduled hearing to consider whether midazolam was inadequate to prevent horrendous pain from the other two drugs to be used. Justice Breyer, noting the district court's finding that Price had acted as fast as possible since prior to the setting of an execution date, adhered to his earlier view that the Court's earlier decision was incorrect.

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[367] *Murphy v. Collier*, 139 S. Ct. 1111, 1111 (2019) (mem.).
[368] *Id.* (Kavanaugh, J., concurring).
[369] Ilya Somin, *Supreme Court Stays Execution in Death Penalty/Religious Liberty Case*, REASON.COM: VOLOKH CONSPIRACY, Mar. 29, 2019.
[370] *Texas Bans All Clergy From Death-Row Executions After Supreme Court Ruling*, DAILY BEAST, Apr. 4, 2019.
[371] Adam Liptak, *3 A.M. Dissent As Court Splits Over Execution*, N.Y. TIMES, Apr. 12, 2019 (discussing *Price v. Dunn*, 139 S. Ct. 1542 (2019) (mem.) (order denying application for stay of execution and petition for writ of certiorari), and *Dunn v. Price*, 139 S. Ct. 1312 (2019) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.)).

Again, Justice Breyer wrote in dissent from a 5-4 ruling not to grant stay of execution.[372] Mr. Price was executed later on May 30, 2019.[373]

H. ***Dunn v. Madison***, 138 S. Ct. 9 (2017) *(per curiam);* ***Madison v. Alabama***, 139 S. Ct. 718 (2019)

In 2017, the Court reversed the Eleventh Circuit holding that Madison was incompetent to be executed and that the Alabama court's contrary decision had been unreasonable. Applying the AEDPA, the Court said that Madison's claim could not be granted because there was no clearly established law holding that a death row inmate's inability to recall committing the crime could make him incompetent to be executed.[374] The Eleventh Circuit had noted Madison's loss of memory, trouble communicating, "profound disorientation and confusion," inability to walk on his own, legal blindness, slurred speech, and two strokes in recent years.[375] Three concurring Justices said that the constitutional issue raised by Madison could be decided in a case where the claim's consideration was not barred by the AEDPA.[376]

The parties returned to the Court thereafter, after Madison had lost on claims in the state courts. On February 27, 2019, the Court held that a person is not rendered incompetent to be executed solely because he no longer remembers committing the crime, since he may still understand why the State wishes to execute him. However, the Court held, the combination of memory loss and a mental disorder such as dementia may result in a death row inmate's becoming incompetent to be executed because he does not understand why the State is seeking to execute him. The Court remanded for consideration of Madison's competency to be executed by the Alabama courts.[377]

I. ***Lance v. Sellers,*** 139 S. Ct. 511 (2019) (*mem.*)

On January 7, 2019, the Court denied Donnie Cleveland Lance's petition for certiorari. Justice Sotomayor wrote a dissenting opinion in which Justices Ginsburg and Kagan joined. Lance was sentenced to death for the murder of his ex-wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood Jr. Lance's trial lawyer, a solo practitioner, sought appointment of a second lawyer to handle any potential penalty phase. The court refused, and also denied funds to retain expert witnesses to challenge the prosecution's various experts. Counsel failed to do any investigation for the penalty phase, for which he completely failed to prepare. After foregoing any penalty-phase opening statement, he presented neither witnesses nor any mitigating evidence. His terse closing argument requested empathy for his client's family and to reject vengeance.[378]

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[372] *Price v. Dunn*, 139 S. Ct. 1794 (2019) (mem.) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.).
[373] Ivana Hrynkiw, *Christopher Price executed in Alabama on Thursday*, AL.COM, May 30, 2019.
[374] *Dunn v. Madison*, 138 S. Ct. 9, 11-12 (2017) (per curiam).
[375] *Madison v. Comm'r*, 851 F.3d 1173, 1179 (11th Cir.), *rev'd sub nom. Dunn v. Madison*, 138 S. Ct. 9 (2017) (per curiam).
[376] *Dunn*, 138 S. Ct. at 12 (Ginsburg, J., concurring, joined by Breyer and Sotomayor, JJ.).
[377] *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019).
[378] *Lance v. Sellers*, 139 S. Ct. 511, 512-13 (2019) (mem.) (Sotomayor, J., dissenting, joined by Ginsburg and Kagan, JJ.).

Lance's postconviction attorneys presented evidence of Lance's significant history of head trauma that damaged the frontal lobe of his brain. At a Georgia trial court hearing, four mental health experts agreed that Lance's frontal lobe was damaged, that his IQ was on the borderline for intellectual disability, and that he suffered from clinical dementia. While the three defense experts agreed that Lance's brain damage impacted his ability to control his impulses, the State's expert disagreed about the extent of his impairment. The Georgia trial court held that counsel's deficient performance kept the jury from seeing significant mental health evidence that could have resulted in a non-death verdict. The Georgia Supreme Court reversed, holding that though counsel's performance was deficient, Lance was not prejudiced because there was no reasonable probability that the jury would have issued a different verdict.[379]

In federal habeas corpus proceedings, the district court and court of appeals declined to disturb the Georgia Supreme Court's finding on the prejudice prong. Certiorari was denied. In dissent, Justice Sotomayor argued that habeas relief was appropriate because the Georgia Supreme Court unreasonably applied Supreme Court precedent when it "mischaracterized or omitted key facts and improperly weighed the evidence." She said that while the death penalty could be imposed in light of aggravating circumstance evidence, there was "significant neuropsychological evidence that adequate counsel could have introduced as a potential counterweight . . . bears no relation to the few naked pleas for mercy actually put before the jury."[380]

J. ***McKinney v. Arizona***, No. 18-1109, 2020 WL 889190 (U.S. Feb. 25, 2020)

On February 25, 2020, the Supreme Court dealt with a case in which a federal appeals court vacated a death penalty, pursuant to *Eddings v. Oklahoma*,[381] because the judge who imposed it had not considered, in mitigation, evidence that the defendant had suffered post-traumatic stress disorder. Thereafter, the Arizona Supreme Court, rather than remanding the case to a trial-level court at which a jury could have weighed aggravating and mitigating circumstances, reweighed those circumstances itself and concluded that capital punishment was justified.[382]

The Court held, 5-4, that the Arizona Supreme Court could constitutionally make that decision because the litigation came to that court from a federal habeas corpus proceeding. The Court held that its *Ring* and *Hurst* decisions entitling a defendant to jury decision-making on basic factors in capital cases is not applicable in a case in which the conviction, death sentence, and direct appeal had all occurred prior to the Court's handing down those decisions. Moreover, the Court held that nothing in its prior decisions about a state appellate court's reweighing aggravating and mitigating factors precluded such reweighing in this situation.[383]

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[379] *Id.* at 513-14.
[380] *Id.* at 514, 516.
[381] *Eddings v. Oklahoma*, 455 U.S. 104 (1982).
[382] *McKinney v. Arizona*, No. 18-1109, 2020 WL 889190, at *2 (U.S. Feb. 25, 2020).
[383] *Id.* at *3-4.

*K. **Kahler v. Kansas***, No. 18-6135, 2020 WL 1325817 (U.S. Mar. 23, 2020)

Justice Kagan wrote the majority opinion in this 6-3 case. For the Court, she rejected Mr. Kahler's argument that Nebraska was required by the First Amendment to instruct the jury that it could convict him of capital murder only if it considered his defense that he did not at the time of the crime have the ability to tell right from wrong. Justice Kagan said that it was sufficient for constitutional purposes that Mr. Kahler could try to show that he lacked the requisite intent to commit the crime. Justice Kagan stated that there are substantial uncertainties about human minds and that "perennial gaps in knowledge intersect with differing opinions about how far, and in what ways, mental illness should excuse criminal conduct." She said that the states could determine how to weigh these things. Moreover, in a death penalty case, the defendant's mental illness could be considered in the penalty phase of the trial.[384]

Dissenting, Justice Breyer said that the insanity defense on which Kahler had attempted to rely was so fundamental to our jurisprudence that defendants were constitutionally entitled to have juries consider it. In particular, he said: "Few doctrines are as deeply rooted in our common-law heritage as the insanity defense. . . . A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime. This principle remained embedded in the law even as social mores shifted and medical understandings of mental illness evolved."[385]

III. ABA ACTIVITIES NOT DISCUSSED ABOVE

A. ABA Amicus Briefs

The ABA filed an amicus brief in *Ayestas v. Davis*, asking the Supreme Court to reverse – as it did – the Fifth Circuit's holding that before a postconviction counsel can be granted funding for investigation and experts, counsel must establish a "substantial need" for the funding. The ABA brief stated that the Fifth Circuit had created a "Catch 22"-like situation, since in the absence of funding, counsel would almost always find it impossible to show what the investigators and experts whom counsel lacked the funds to hire would have discovered and concluded.[386]

The ABA also filed an amicus brief in *McCoy v. Louisiana*. The ABA brief argued that counsel must respect a mentally competent client's right to make fundamental decisions regarding his or her case, including the decision on whether to concede or contest guilt.[387]

In November 2018, the ABA filed an amicus brief in *Moore v. Texas*. The ABA brief supported granting a writ of certiorari and summarily reversing the Texas Court of Criminal Appeals, which on remand in light of the Court's 2017 holding in *Moore v. Texas* again denied Moore's claim of intellectual disability. The ABA brief said the Texas Court of Criminal

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[384] *Kahler v. Kansas*, No. 18-6135, 2020 WL 1325817, at *5, *11-12 (U.S. Mar. 23, 2020).
[385] *Id.* at *13 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.).
[386] Brief for the ABA as Amicus Curiae in Support of Petitioner at 28, *Ayestas v. Davis*, No. 16-6795 (U.S. filed June 16, 2017), 2017 WL 2682002, at *28.
[387] Brief of the ABA as Amicus Curiae in Support of Petitioner at 3-4, *McCoy v. Louisiana*, No. 16-8255 (U.S. filed Nov. 20, 2017), 2017 WL 5714609, at *4.

Appeals, by relying on many of the same criteria as in its original decision – criteria rejected in the Court's holding – had fundamentally failed to comply with the Court's mandate.[388] The Court agreed.

On October 3, 2019, the ABA filed an amicus brief in the Nevada Supreme Court in *Vanisi v. Gittere*, stating that the application of capital punishment to people who at the time of the crime suffered from severe mental illness is unconstitutional under both the U.S. and Nevada constitutions.[389]

On February 27, 2020, the ABA filed an amicus brief in support of the Court's granting certiorari in *Kemp v. Payne*. The ABA expressed great concern that the federal district and circuit courts had not found constitutionally ineffective assistance of counsel even though they recognized that Kemp probably would not have been sentenced to death if his trial lawyers had used a mitigation specialist or otherwise done a more extensive investigation into Kemp's background and thereby learned more about his childhood abuse and that he had fetal alcohol spectrum abuse and post-traumatic stress disorder. The brief said that if the lower courts had assessed counsel's performance against the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (discussed below in Section B.), they would have held that counsel's performance had been deficient.[390]

The next day, February 28, 2020, the ABA filed an amicus brief in the Idaho Supreme Court in support of a law professor who has sued seeking public records concerning execution protocols. The brief, in *Cover v. Idaho Board of Correction,* says it is unconstitutional for Idaho to refuse to disclose information concerning the chemicals it plans to use in executions. It states: "The idea that secrecy is justified in order to continue current execution protocols because public outcry and economic pressures have made it difficult or impossible to obtain drugs is anathema to constitutional policies and jurisprudence." The brief also states that "Secrecy measures around execution protocols undermine public confidence in the justice system because shielding these procedures from the public suggests that they cannot withstand public scrutiny."[391]

B. 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 34 years, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and re-sentencing proceedings. Volunteer firms have also written amicus briefs on behalf of the ABA

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[388] Brief of the ABA as Amicus Curiae in Support of Petition for Writ of Certiorari at 7-8, *Moore v. Texas*, No. 18-443 (U.S. filed Nov. 8, 2018), 2018 WL 5876932, at *7-8.

[389] Brief for Amicus Curiae the ABA in Support of Appellant and Reversal at 4-5, *Vanisi v. Gittere*, No. 78209 (Nev. filed Oct. 3, 2019), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/vanisi-amicus-brief-aba.pdf.

[390] Brief for Amicus Curiae ABA in Support of Petitioner at 4, 6-7, 9, *Kemp v. Payne*, No. 19-7476 (U.S. filed Feb. 27, 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/02/amicus-kemp-v-payne.pdf.

[391] Amicus Curiae Brief at 9, 18, *Cover v. Idaho Bd. of Corr.*, No. 47004 (Idaho filed Feb. 28, 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/03/aba_motion_for_leave_to_file_amicus.pdf.

or 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 cases placed with volunteer counsel, inmates have been exonerated or had their death sentences commuted or overturned.[392] The Representation Project also helped prepare statements issued by the ABA in 2019 urging the granting of clemency for two death row inmates with substantial claims of factual innocence: Rodney Reed and James Dailey (whose cases are discussed above in Parts I.A.6.b. and I.A.6.a., respectively).

In the summer of 2019, when Tennessee death row prisoner Andrew Thomas was resentenced, he was the 100th death row inmate to have received a finalized sentence less than death after being helped by the Representation Project and its pro bono partners. "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."[393]

On July 20, 2018, Representation Project-recruited counsel from Crowell & Moring secured a federal district court decision vacating the conviction of former Florida death row inmate Crosley Green and ordering a new trial. Crowell & Moring had earlier secured commutation of Green's death sentence. Judge Roy B. Dalton, Jr. held that the prosecution had violated the Constitution by withholding from Green's trial counsel evidence that the police officers who arrived first at the crime scene had concluded that the account of the prosecution's key witness was not credible and that the witness, not Green, had committed the murder.[394]

The Representation Project plays a vital role with regard to ABA amicus briefs and Presidential statements and letters concerning the subjects of its expertise. Moreover, it provides technical assistance, expert testimony, training, and resources to the capital defender community and pro bono counsel.[395] Each autumn, the Representation Project honors outstanding pro bono performance in capital cases.

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. The 2003 revision of these Guidelines was approved as ABA policy in 2003 (the "ABA Guidelines").[396] The ABA Guidelines have now been adopted in many death penalty jurisdictions by court rule and

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[392] For information and resources regarding the Representation Project, see the ABA's Death Penalty Representation Project website, available at https://www.americanbar.org/groups/committees/death_penalty_representation.html.

[393] *Project Achieves Major Milestone: 100 Prisoners Off Death Row*, ABA, Aug. 26, 2019.

[394] John A. Torres, *Crosley Green: Wins a new trial after judge holds that prosecutor withheld evidence*, FLA. TODAY, July 20, 2018.

[395] An online resource containing decades of capital training materials that are searchable by author, subject, and date is available at http://www.capstandards.org.

[396] ABA, ABA Guidelines (revised Feb. 2003), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.authcheckdam.pdf.

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.[397] 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.

In 2017-2018, the Representation Project worked with the Idaho Public Defense Commission and several Idaho capital defense practitioners to draft new standards for appointment of capital defense counsel (trial, appellate, and postconviction) based on the ABA Guidelines. The new standards were presented to the Idaho legislature in early 2018 and were approved with the close of the legislative session on May 1, 2018.[398] The old standards continued to govern the appointment of counsel until April 30, 2019, at which point the new standards took full effect.

In 2018-2019, the Representation Project submitted supplementary comments opposing Arizona's application to opt-in to the more draconian-than-usual alternative provisions of the AEDPA (see Part I.C.1.c. above).

The Representation Project also has provided testimony on behalf of the ABA.

One example was Ms. Olson-Gault's submission of written testimony to, and her appearance on, September 7, 2018 before the Judiciary Committee for the Nebraska Unicameral Legislature to answer questions about an interim study to examine statutory adoption of the ABA Guidelines in Nebraska.[399]

A second example is Ms. Olson-Gault's November 13, 2017 testimony as a subject matter expert on the ABA Guidelines, in a Guantanamo Military Proceeding involving the alleged key actor in the 2000 bombing of the U.S.S. Cole.[400] The defendant's civilian capital defense attorneys had resigned due to concern over preservation of the attorney-client privilege, leaving only one defense attorney, a junior military officer with no previous death penalty experience or training. This lawyer sought reconsideration of the judge's denial of a stay until qualified counsel could be found – a decision premised on the judge's view that qualified counsel is unnecessary for pretrial proceedings. The court requested Ms. Olson-Gault to testify as an expert on the ABA Guidelines and their relevance in military commission proceedings. Ms. Olson-Gault testified that the ABA Guidelines require that the defense effort in every part of the proceedings be led by qualified capital counsel. She supported her testimony with discussions of lower federal court decisions concerning the ABA Guidelines and of legislative history indicative of Congressional intent that military commissions take guidance from the ABA Guidelines in appointing capital case counsel.

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[397] ABA Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (updated Aug. 2016), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/guidelines-fact-sheet.authcheckdam.pdf.

[398] Emily Olson-Gault, *Idaho Adopts New Capital Defense Standards Based on ABA Guidelines*, ABA, Oct. 11, 2018.

[399] ABA DEATH PENALTY REPRESENTATION PROJECT, 2018 YEAR-END REPORT & NEWSLETTER, at 14 (2018) [hereinafter ABA 2018 YEAR-END REPORT & NEWSLETTER].

[400] ABA DEATH PENALTY REPRESENTATION PROJECT, 2017 YEAR-END REPORT & NEWSLETTER, at 12 (2017).

Thereafter, the court issued findings that found her testimony to be credible. And it recognized based on her testimony about the legislative history that military commissions must take into account the ABA Guidelines. It specifically pointed to Congress' directive in the National Defense Authorization Act for 2010 that explicitly required the Secretary of Defense to consider the ABA Guidelines when creating the rules for appointment of capital case defense counsel.[401]

A third example is Ms. Olson-Gault's testimony at a 2016 hearing conducted by the Committee to Review the Criminal Justice Act Program. She testified about many of the problems with representation in capital cases and the Project's work to address them.[402] The Committee's June 2018 report quotes Ms. Olson-Gault's testimony about the difficulty of finding pro bono counsel to fill the gap left by the lack of qualified attorneys and funding. In her remarks to the Committee, she made clear that pro bono representation cannot serve as a substitute for a well-functioning system of indigent defense.[403]

In the summer of 2018, the *Hofstra Law Review* published a symposium entitled *Effective Capital Defense Representation*, *the ABA Guidelines*, *and the Twilight of the Death Penalty*, marking the 15th anniversary of the publication of the ABA Guidelines.[404] One of the symposium's articles, by Ms. Olson-Gault, discussed available resources for demonstrating that the ABA Guidelines reflect existing professional norms.[405] Another article, by Laura Schaefer, a Representation Project Staff Attorney and ABA capital clemency initiative counsel, discussed arguments that counsel can make in seeking sufficient funding for proper representation in clemency proceedings.[406]

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 organized training seminars for capital defenders and judges in other countries and participated as faculty at international conferences.

On March 28, 2019, Ms. Olson-Gault hosted a session at the Pro Bono Institute's annual conference concerning emerging legal issues, new tools and partnerships, societal and scientific developments, the status of pro bono opportunities, and how to get involved in pro bono death penalty representation.

C. The ABA's Capital Clemency Resource Initiative ("CCRI")

The CCRI, a recent ABA initiative, seeks to improve resources and information available to attorneys and governmental decisionmakers involved in the capital clemency process. By assessing current clemency practices, collecting and creating training materials

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[401] *Id.*
[402] 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.
[403] ABA 2018 YEAR-END REPORT & NEWSLETTER, *supra* note 399, at 4.
[404] Symposium, *Effective Capital Defense Representation, the ABA Guidelines, and the Twilight of the Death Penalty*, 46 HOFSTRA L. REV. 1097 (2018).
[405] Emily Olson-Gault, *Reclaiming* Van Hook*: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279 (2018).
[406] Laura Schaefer, *The Ethical Argument for Funding in Clemency: The "Mercy" Function and the ABA Guidelines*, 46 HOFSTRA L. REV. 1257 (2018).

and other resources, and providing state-specific guidance where feasible, the CCRI seeks to ensure more meaningful processes and reasoned decisions regarding capital clemency.[407]

In October 2019, the CCRI published a 28-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 decisionmakers and history of clemency decisions.[408] With the addition of Texas, the CCRI website now hosts comprehensive memoranda regarding death penalty clemency procedures in 14 capital jurisdictions.[409] The corresponding state clemency websites have all been newly updated in 2019 with the most recent information regarding new decisionmakers, 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 will undertake the development of resource and educational materials designed specifically for capital clemency decisionmakers such as governors, gubernatorial staff, and members of paroles and pardons boards.

D. The Due Process Review Project

In 2001, the ABA established the Death Penalty Due Process Review Project (the "Due Process Project") to conduct research and educate the public and decisionmakers on the operation of capital jurisdictions' death penalty laws and 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 death penalty systems in 12 states comported with ABA policies designed to promote fairness and due process. The assessment reports were prepared by in-state assessment teams and Due Process Project staff for Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. Serious problems were found in every state's system.[410] To the extent these problems continue to fester, there are strong reasons for imposing moratoriums and otherwise curtailing the death penalty's use.[411]

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[407] For information and resources regarding the CCRI, see the ABA's Capital Clemency Resource Initiative ("CCRI") website, available at https://www.americanbar.org/groups/committees/death_penalty_representation/training_reform/capital-clemency-resource-initiative.html.

[408] CCRI, Texas: Capital Clemency Information Memorandum, Oct. 2019, https://www.capitalclemency.org/resource/texas-capital-clemency-memo/.

[409] *State Information*, ABA, https://www.capitalclemency.org/state-clemency-information/ (last visited Jan. 28, 2020).

[410] Each state assessment report can be found on the ABA's State Death Penalty Assessments website, available at http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html.

[411] *See* Motion for New Trial Based on Newly Discovered Evidence and/or Post-conviction Relief Under Ohio Rev. Code § 2953.23, *supra* note 238, at 3; *see also* Krouse, *supra* note 238.

2. The Assessments' Continuing Impact

These assessments and their recommendations are still relied on and cited to by policymakers, the press, and other commentators. For example, a major reason Pennsylvania's Governor began a moratorium was his concern about the fairness of that state's implementation of the death penalty – in light of the serious concerns expressed by the ABA's Pennsylvania assessment team.

3. Amicus Brief; Future Activities

The Project's steering committee has been working on securing funding to enable the Project to undertake new initiatives. Meanwhile, steering committee members played a leading role in the preparation and submission by the ABA of an amicus brief to the Idaho Supreme Court supporting the grant of certiorari in *Cover v. Idaho Board of Correction* (discussed above in Section A.).

E. Programs

During the ABA's annual meeting in New York, the Section of Civil Rights and Social Justice, along with other ABA entities, co-sponsored with the New York City Bar Association a program (discussed above in Part I.A.2.k.) on August 14, 2017, concerning key lessons to be learned from what has *not* happened since many states abolished or otherwise completely stopped using the death penalty.[412]

And on August 2, 2018, during the ABA's annual meeting in Chicago, various ABA entities presented the program (discussed above in Parts I.A.9.c., I.B.7.b., and I.C.9.b.i.), featuring Chicago's Cardinal Blase Cupich, Karen Gottlieb, Meredith Martin Rountree, and Robert Dunham.[413]

IV. THE FUTURE

There is ever-increasing recognition of major systemic problems with capital punishment. In recent years, this has led to abolition or discontinuation of capital punishment in ten states and to statewide moratoriums in four additional states. And Alabama has made it harder to secure new death sentences there – although a similar development in Florida was greatly undercut by a Florida Supreme Court decision in January 2020.

New death sentences, while increasing in 2017 and 2018, dropped in 2019 and were even further below the yearly totals from before 2015.

The slight increases in executions in 2017 and 2018, followed by a decline in 2019, could be followed by movements in either direction. Much will depend on the outcomes of legal challenges to execution methods and to clemency processes and decisions, and to whether other governors follow Ohio Governor DeWine's example by not permitting

[412] ABA, Life After the Death Penalty, *supra* note 37.
[413] ABA Conference on the Death Penalty, *supra* note 125.

executions. Governor Newsom's March 13, 2019 announcement of a moratorium on executions eliminates – at least for as long as he is Governor (and assuming his executive order is not overturned in court) – the possibility that there could be a substantial number of executions in California, which has the nation's largest death row. And the Florida Supreme Court's January 23, 2020 decision could increase both new death sentences and executions there.

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. Indeed, a growing number of conservatives say that capital punishment is a failed, inefficient, expensive government program that accomplishes nothing. Religious-based support for executions has dropped significantly and should further decrease in view of Pope Francis' changing the Catechism to be unequivocally against capital punishment. Opinion polls continue to show much lower support for the death penalty than in the past, even when the actual alternative – LWOP – is not presented as a choice.

Increased attention is being paid to analyses showing that a very small number of jurisdictions are responsible for very disproportionate percentages of new death sentences and executions. It is also crucial to focus on the roles that race and inadequate jury instructions play in capital sentencing decisions.

It has been shown repeatedly that 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 that those now on death row endured. 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.

Unfortunately, the Supreme Court and lower courts continue to use procedural technicalities and deference to erroneous state court rulings to preclude ruling on the merits of many meritorious federal constitutional claims. Most clemency authorities seem likely to keep hiding behind the fiction that somewhere along the way, judges or juries already have fully considered all facts relevant to a fair determination of whether a person should be executed.

Reality belies that fiction. All too often, key evidence relating to guilt or sentence – or to deliberate racial discrimination or other prosecutorial misconduct – has been – prior to clemency proceedings – hidden by prosecutors, never found by defense counsel, rendered meaningless by confusing and misleading jury instructions, or barred from meaningful consideration by various procedural technicalities. And when such crucial evidence *is* finally raised in clemency proceedings, most clemency authorities fail to fulfill their duty to be "fail-safes" against unfairness. Moreover, the Supreme Court, as now comprised, may retreat from some of the Court's substantive holdings in capital cases.

In these and many other respects, it is vital that the legal profession and the public be better informed about how capital punishment really "works." The more that people know about the death penalty *as actually implemented*, the more they oppose it. The *actual* capital punishment in the United States can be justified only if one believes in arbitrarily and

capriciously applied, highly erratic vengeance. More and more people are realizing that the typical pro death penalty arguments, which focus on a theoretical but non-existent capital punishment system, are completely irrelevant.

Ultimately, our society must decide whether to continue with a penalty implemented in ways that cannot survive any serious cost/benefit analysis. As more and more people recognize that capital punishment in this country is inconsistent with both conservative and liberal principles, and with common sense, the opportunity for its abolition in many more states will arrive. Those who *already* realize that our actual death penalty is like "the emperor's new clothes" should do everything with a reasonable chance of accelerating its demise.