

CHAPTER 18

CAPITAL PUNISHMENT

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I. OVERVIEW OF STATE DEATH PENALTIES

As the spring of 2023 began, the death penalty in the United States was at a series of inflection points. In the country as a whole, support for capital punishment remained at the low levels to which it had decreased in this century. For example, Gallup's crime survey showed support for the death penalty in the United States in 2022 was within a single percentage point of the 2021 and 2020 percentages, which were the lowest in 50 years.¹ Similarly, the numbers of new state death sentences (21) and executions (18) in 2022 continued at much lower levels than in the decades after 1976.²

Only a small number of jurisdictions within states were the sources of new death sentences and of executions. Indeed, the Death Penalty Information Center ("DPIC") found that as of January 1, 2021, merely 34 counties (out of the country's 3,000+) had sentenced to death half of those then on state death rows in the United States and only 2% of the country's counties had sentenced to death 60.8% of those on state death rows in the United States. 82.8% of U.S. counties had not been involved in the capital cases of anyone on a state death row as of January 1, 2021. Meanwhile, prosecutors in 2% of U.S. counties had prosecuted half of those executed by U.S. states in that same time frame, while 84% of all counties had not had anyone executed in more than 50 years.³

A. Executions by States Since 1977

Texas (with 583 executions) and Oklahoma (with 120 executions) are the two states with the largest numbers of post-*Gregg* executions. These two states are responsible for 703 of the 1,551 executions by states since 1977 (through April 14, 2023), according to this author's analysis on April 15, 2023, of DPIC's execution database. Thus, Texas was responsible for 37.6% of these executions and Oklahoma was responsible for 7.7%.

Virginia had the third largest number of post-*Gregg* executions, 113, before it abolished the death penalty in 2021. If one adds its total to those of Texas and Oklahoma, the three-state total, at 52.6%, exceeded half of all state executions.

Those with the next highest post-*Gregg* executions are Florida (101), Missouri (95), Georgia (76), Alabama (70), Ohio (56), North Carolina (43), South Carolina (43), Arizona (40), Arkansas (31), Louisiana (28), Mississippi (23), Indiana (20), Delaware (16), Tennessee (13), California (13), Illinois (12), Nevada (12), Utah (7), Washington (5), South Dakota (5),

¹ Megan Brennan, *Steady 55% of Americans Support Death Penalty for Murderers*, GALLUP, Nov. 14, 2022.

² Death Penalty Info. Ctr., *The Death Penalty in 2022: Year End Report*, at 1, 11-12 (2022).

³ *Id.* at 10.

Maryland (5), Nebraska (4), Kentucky (3), Montana (3), Pennsylvania (3), Idaho (3), Oregon (2), Wyoming (1), Colorado (1), Connecticut (1), and New Mexico (1).⁴

B. Enacting Bipartisan Legislation Becomes More Difficult

It has become considerably more difficult in the last decade to enact legislation on a bipartisan basis. Accordingly, major changes in a state's death penalty law now are much more likely to be enacted where one party controls the governor's office and the legislature. Otherwise, governors often attempt to affect their states' death penalty's operations through executive actions. In some instances, such as Ohio's and (to a lesser extent) Kentucky's forbidding executions of certain severely mentally ill people, laws were enacted in 2021 and 2022 with bipartisan support.

In Florida, where the same party controls the governorship and both houses of the legislature, laws were enacted in 2023 that drastically revised the capital punishment law in ways that (if upheld by the courts) would make it much easier to impose death sentences and to execute people who could not have been sentenced to death under the Constitution as construed by the U.S. Supreme Court prior to its dramatic changes after three Trump appointed justices became members of the Court.

In Florida, a sizeable number of people are becoming skeptical of political figures who posture as being as angry as the most furious victims' survivors, yet do nothing meaningful to prevent more such killings.

II. THE FEDERAL DEATH PENALTY IN 2022-2023

At the federal level, the number of executions remained at zero in 2022 and early 2023, as it had been for decades before the flurry of 13 federal executions from July 2020 through January 2021. The number of federal death sentences being sought has dropped greatly from the levels authorized by the Trump Administration to the extremely low levels authorized by the Biden Administration. In all but seven of at least 32 cases in which the Trump Administration had authorized seeking the death penalty but had not yet proceeded to trial when Trump left office, Attorney General Merrick Garland removed the authorization to seek the death penalty. Attorney General Garland has not authorized seeking the federal death penalty in any case in which the crime occurred after President Biden took office. But while he has not permitted executions to be pursued in the cases of anyone on the federal death row when President Trump left office, he has permitted federal prosecutors to oppose these death row inmates' appeals, Section 2255, and other proceedings. According to counsel for the inmates, the federal prosecutors have been just as vigorous in opposing relief for these inmates as the prosecutors were in opposing relief for inmates whom the Trump Administration sought to execute. None of these inmates has been pardoned or been given clemency by President Biden.⁵ There was, however, one special case. On March 14, 2023, in a case that was in an unusual posture when Trump left office, federal prosecutors in North Dakota told reporters that at Attorney General Garland's explicit direction they no longer

⁴ Death Penalty Info. Ctr., *Executions by State and Year (2023)*.

⁵ Michael Tarm & Alanna Durkin Richer, *Biden's Justice Dept. keeps hard line in death row cases*, AP NEWS, Mar. 26, 2023.

would seek the federal death penalty for Alfonso Rodriguez Jr. for the kidnapping and murder of college student Dru Sjodin in 2003. A federal judge had reversed Rodriguez's death sentence because of the coroner's misleading trial testimony and trial counsel's failure either to outline an insanity defense or to present strong evidence of post-traumatic stress disorder.⁶

The first case to go to trial, out of the seven in which Attorney General Garland did not withdraw the Trump Administration's authorization to seek the death penalty, was *United States v. Saipov*. Virtually the same jury that had convicted Saipov (one juror left shortly after penalty phase deliberations began due to a family emergency and was replaced by an alternate) of using a rental car to run over and kill eight people on a bike path in an apparent effort to impress ISIS was asked to return the death sentence. On March 13, 2023, the judge announced that he would impose a sentence of life without parole ("LWOP"), since the jury had been unable to reach a unanimous verdict on whether to impose capital punishment.⁷

Over a month later, on April 24, 2023, jury selection began in Pittsburgh, Pennsylvania, in one of the six remaining cases in which the Trump Administration had authorized seeking the death penalty. The defendant, Robert Bowers, was accused of shooting to death 11 people in a Jewish synagogue. During the four-and-a-half-year pretrial period, he repeatedly offered to plead guilty in return for an LWOP sentence. But his counsel could never find out who in the Justice Department was responsible for deciding whether to reverse the Trump Administration's decision to seek the death penalty. Nor was his counsel able to learn specifics about the obscure process by which decisions are made on whether to seek capital punishment. The prosecutors told U.S. District Judge Robert Colville on April 3, 2023, that the government's goal "is the pursuit of justice, not punishment."⁸

The Biden Administration has stated that during its moratorium on executing federal death row inmates, it is reviewing the federal government's protocols regarding capital punishment. In September 2022, the Justice Department issued a public notice seeking comment about changes to protocols drafted during the Trump Administration, including one permitting execution methods other than lethal injection, such as firing squads. Some critics of the Trump-issued protocols have requested that the Biden Administration rescind all of them, including one authorizing the use of state facilities and staff in federal executions and another authorizing the use of a single drug, pentobarbital, to replace a three-drug cocktail deployed in the 2000s.⁹

⁶ Jim Salter & Michael Tarm, *US no longer seeking death for man convicted in Sjodin case*, AP NEWS, Mar. 14, 2023.

⁷ Corinne Ramey & Sadie Gurman, *Manhattan Bike-Path Terrorist Avoids Death Penalty, Will Serve Life*, WALL ST. J., Mar. 14, 2023; Sadie Gurman, Aruna Viswanatha & Corinne Ramey, *Garland Raises Bar for Federal Use of Death Penalty*, WALL ST. J., Feb. 18, 2023.

⁸ Mark Scoloro, *Death Penalty looms over Pittsburgh synagogue massacre trial*, ABC NEWS, Apr. 13, 2023.

⁹ Michael Tarm & Alanna Durkin Richer, *What's the Status of the US Death Penalty?* AP NEWS, Mar. 13, 2023.

III. SUPREME COURT OF THE UNITED STATES

The remainder of this chapter focuses principally on capital punishment developments "on the ground" in various states.

Perspectives of Two Wise Legal Foes of Capital Punishment Who Believe It Is Doomed to Fail – But Not When or How

To help put all this into perspective, I quote here recent observations by two of the most incisive experts on capital punishment, Carol Steiker and Jordan Steiker:

At the same time capital punishment is withering in practice, the prospects for constitutional abolition via judicial decree have also decreased substantially, as the U.S. Supreme Court has shown marked hostility toward constitutional regulation of the death penalty. This new hostility replaces a jurisprudence that was increasingly hospitable to extensive regulation – even judicial abolition – of American capital punishment. The Court's recent decisions threaten to jettison the jurisprudential commitment to "evolving standards of decency" as the touchstone for interpreting the Eighth Amendment in favor of a more limited originalist approach to gauging "cruel and unusual" punishments. The Court also appears eager to discourage end-stage litigation and to remove obstacles to both state and federal executions. The simultaneous decline of public support for the death penalty and judicial regulation of the death penalty has produced "abolition in waiting" – a marginalized practice that will remain on the books until changes in the composition of the Court permit reassessment of the death penalty's constitutionality.¹⁰

The 2016 election demolished any thought of judicial abolition. President Trump made three Court appointments, replacing two Justices (Kennedy and Ginsburg) who were essential to the Court's new searching scrutiny of the death penalty (as well as Justice Scalia), and the new Justices (Gorsuch, Kavanaugh, and Barrett) appear hostile to significant constitutional regulation of the death penalty. On the ground, though, the death penalty continues its free fall.¹¹

The question, then, is what to expect going forward with a Court committed to deregulation of the death penalty at the same time that the death penalty enjoys decreasing political and popular support. We contend that the Court's deregulatory posture will facilitate executions in those jurisdictions inclined to perform them, as the Court will likely not only decline to issue stays but also override stays from lower courts and state courts where the stays rest on federal grounds. This dynamic will facilitate executions in those jurisdictions determined to carry them out, exacerbating the already pronounced geographic concentration of executions in a few active death

¹⁰ Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J.C.R. & SOC. JUST. 1, 1 (2023).

¹¹ *Id.* at 5-6 (footnotes omitted).

penalty states, such as Texas. Beyond that, the Court will likely increase the bite of restrictions contained in the Anti-Terrorism and Effective Death Penalty Act,¹² which, among other things, mandates deference not only to state findings of fact but also to state adjudications of legal claims. Additionally, it is possible that the Court might revisit some of the constitutional protections available in capital proceedings, though we think this is less likely or at least will happen less frequently, because denying relief in capital cases is achievable without such revision given the strong AEDPA barriers to relief in federal court.¹³

We do not expect that the Court's new permissiveness will stem the movement away from capital punishment on the ground. The national trend away from the death penalty in virtually every jurisdiction, particularly away from *death sentences*, shows no signs of reversal and appears to be determined by multiple, reinforcing factors, including: cost, the changing political dynamics of large urban areas, the decreasing power of the death penalty as a wedge issue, and the growing isolation of the United States in its retention. It is striking that the declines in the death penalty are as staggering in red states as in blue states, with Texas's new death sentences falling below five a year and some red states, including Utah, Kansas, and Montana, contemplating abolition.¹⁴ We thus anticipate a continued withering of the American death penalty, strengthening the case for judicial abolition (as it becomes increasingly difficult to argue that the penalty meaningfully serves any purpose of punishment, such as deterrence), even though the current Court would certainly reject such a claim. In the end, we imagine that the American death penalty will linger in purgatory, with abolition in waiting, until the Court's composition changes in ways that make judicial abolition possible.¹⁵

Justice Ketanji Brown Jackson's Three Dissents Regarding Executions

In 2022, Justice Ketanji Brown Jackson joined the Court after Justice Breyer retired. In November 2022, Justice Jackson wrote her first opinions since joining the Court. These were both dissents from the Court's refusing to stay executions. In a third case, on April 3, 2023, she dissented against allowing a co-defendant to make a plea deal that enabled him to testify against a defendant who had no opportunity for his counsel to cross-examine the witness.

The first Jackson dissent involved the Court's decision to deny review sought by a man whom Ohio had sentenced to death. Mr. Chinn was convicted and sentenced to death, at least in part due to testimony by the government's key witness. Defense counsel could not properly cross-examine him because the State had not produced to defense counsel evidence that could have impeached him. But a lower court concluded that the evidence would not

¹² Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214.

¹³ Steiker & Steiker, *supra* note 10, at 6 (footnotes omitted).

¹⁴ *Id.* at 7 (citing Kan. Legis. Rsch. Dep't, Death Penalty in Kansas, at 8 (Jan. 27, 2021) (assessing the continued feasibility of the imposition of the death penalty in Kansas); Seaborn Larson, *Bill to Abolish Death Penalty in Montana Tabled*, INDEP. REC. (Helena), Feb. 23, 2021 (discussing an ultimately unsuccessful legislative attempt to abolish the death penalty in Montana)).

¹⁵ *Id.* at 6-7 (footnotes omitted).

have made a difference, and a majority of the Supreme Court declined to reconsider that ruling. "Because Chinn's life is on the line, and given the substantial likelihood that the suppressed records would have changed the outcome at trial," Justice Jackson wrote, she would have revived Chinn's claim. Justice Sotomayor joined her dissent.¹⁶

The second dissent by Justice Jackson (joined by Justice Sotomayor) came in the case of Kevin Johnson, an African American whom Missouri convicted of killing a white police officer in 2005. Under a recently enacted state law, a special prosecutor reviewed the validity of Johnson's conviction and found evidence of egregious racism by Johnson's original prosecutor (whose own father, a white police officer, had been killed by an African American man). According to a Missouri Supreme Court filing from the special prosecutor, the original prosecutor "consistently made race-influenced decisions in his handling of capital homicides," including seeking the death sentence against Black defendants but not white ones.¹⁷ Despite these developments, the Missouri courts did not give Johnson a hearing as required under state law.

With his execution imminent, Johnson sought an emergency stay from the Supreme Court. The Court quickly rejected his request, in a terse order.¹⁸ Justices Jackson and Sotomayor noted that they disagreed with the Court's order but said nothing more at the time. Later that day, Missouri executed Mr. Johnson. The following day, Justice Jackson (joined by Justice Sotomayor) filed a four-page dissent explaining her reasoning. She wrote that Missouri's failure to give Johnson the hearing that state law required was "so fundamentally flawed, and so at odds with basic due process principles," that it likely violated Johnson's federal constitutional rights.¹⁹ Justice Jackson was under no obligation to voice her dissent. In death penalty appeals and other emergency matters on the Court's shadow docket, the justices typically do not explain themselves. The majority tends to rule in brief, one-line orders that use legal jargon to grant or deny relief, and dissenting justices tend to note their disagreement without further elaboration (if they even publicize their dissents at all). The last time any justice issued a post-hoc dissent from an order was in 2019.²⁰

In Justice Jackson's third death penalty dissent, on April 3, 2023, she objected to the Court's denial of certiorari with regard to the Louisiana Supreme Court's decision to allow the jury to hear a co-defendant's confession, where that statement, not subject to cross-examination, would support an inference that this defendant killed or tried to kill. Justices Kagan and Sotomayor joined in the dissent.²¹

Supreme Court Holds That Statute of Limitations Does Not Bar Texas Death Row Inmate's Effort to Secure DNA Evidence

On April 19, 2023, the Court reversed the Fifth Circuit's holding that Texas death row inmate Rodney Reed was barred by the statute of limitations from pursuing his effort to get

¹⁶ *Chinn v. Shoop*, 143 S. Ct. 28, 29 (2022) (mem.) (Jackson, J., dissenting, joined by Sotomayor, J.).

¹⁷ Special Prosecutor's Motion for a Stay of Execution and Suggestions in Support at 1, *State v. Johnson*, No. SC89168 (Mo. Nov. 16, 2022).

¹⁸ *Johnson v. Missouri*, 143 S. Ct. 477 (2022) (mem.).

¹⁹ *Johnson v. Missouri*, 143 S. Ct. 417, 418 (2022) (mem.) (Jackson, J., dissenting, joined by Sotomayor, J.).

²⁰ *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.) (Alito, J., dissenting, joined by Thomas and Gorsuch, JJ.).

²¹ *Brown v. Louisiana*, 143 S. Ct. 886 (2023) (mem.) (Jackson, J., dissenting, joined by Sotomayor and Kagan, JJ.).

access to and have tested DNA evidence that could exonerate him. The Court held that the statute of limitations had not begun to run until the Texas Court of Criminal Appeals denied his motion for rehearing.²²

Justice Kavanaugh wrote the opinion of the Court, in which the Chief Justice and Justices Kagan, Sotomayor, Barrett, and Jackson joined. Justice Thomas wrote one dissent, and Justice Alito wrote another dissent, in which Justice Gorsuch joined.

IV. NOTABLE ACTIVITIES IN VARIOUS STATES

The Two Death Penalty States That Have Executed the Most People

As shown in Part I above, the states that still have capital punishment that have executed the most people are Texas and Oklahoma.

Texas

The major change in Texas in recent years is the tremendous decrease in new death sentences even as the State continues what amounts to a "scorched earth" policy on appeals, postconviction and habeas cases and in clemency proceedings – as exemplified by its fierce opposition to anything that might result in DNA testing in Rodney Reed's case. Public opinion in Texas has substantially changed, making the differential in support for the death penalty and for LWOP the least on record in Texas. Some elections of district attorneys have reflected these changes. In 2022, incumbent reform district attorneys John Cruzot (Dallas) and Joe Gonzales (San Antonio) were re-elected, as was Brian Middleton (Fort Bend), who ran unopposed, and Kerry Higgins won the election in Hays County.

Here are relevant data regarding Texas' newly death sentenced prisoners and those death row prisoners who were executed, by year.

<u>Year</u>	<u>Newly Death Sentenced</u>	<u>Executions</u>	<u>Year</u>	<u>Newly Death Sentenced</u>	<u>Executions</u>
1977	16	0	2000	34	40
1978	33	0	2001	26	17
1979	17	0	2002	37	33
1980	26	0	2003	29	24
1981	26	0	2004	23	23
1982	28	1	2005	14	19
1983	33	0	2006	11	24
1984	21	3	2007	14	26
1985	36	6	2008	9	18
1986	41	10	2009	8	24
1987	36	6	2010	8	17
1988	34	3	2011	8	13
1989	29	4	2012	9	15
1990	24	4	2013	9	16

²² *Reed v. Goertz*, No. 21-442, 2023 WL 2992697 (U.S. Apr. 19, 2023).

1991	26	5	2014	11	10
1992	31	12	2015	2	13
1993	27	17	2016	4	7
1994	43	14	2017	4	7
1995	40	19	2018	7	13
1996	33	3	2019	4	9
1997	32	37	2020	2	3
1998	39	20	2021	3	3
1999	48	35	2022	2	5

A particularly gruesome outcome occurred after the Texas Court of Criminal Appeals ("CCA") ruled against Terrence Andrus despite the Supreme Court's clarity when remanding to the CCA that it believed there was a reasonable probability that at least one juror would have found the very strong mitigation evidence to outweigh the evidence of Andrus' moral culpability).²³ With his legal remedies seemingly hitting dead ends, Mr. Andrus committed suicide on January 21, 2023, by hanging himself at the prison. He was 34 years old.²⁴

Texas' tenacious effort to execute Melissa Lucio for the death of her two-year-old child has been extremely controversial, not just in Texas but also nationally and internationally. It is one of many cases in which seemingly ironclad convictions of mothers for the deaths of their children have been challenged by sophisticated expert analyses that conclude that no crime was committed. In many instances, the child's death did not result from a crime but from a horribly tragic accident.

On April 25, 2022, the Texas Court of Criminal Appeals stopped Ms. Lucio's scheduled April 27, 2022 execution and ordered that four of her claims be reviewed. In particular, it ordered a Cameron County trial judge to hold a hearing to consider evidence that Ms. Lucio is innocent.²⁵ Ms. Lucio's current counsel submitted (among other things) affidavits from distinguished forensic experts who said that Ms. Lucio's child walked unsteadily due to a medical problem that likely led to her fatal fall down a steep set of stairs in the family's new home.

Among Ms. Lucio's most vocal supporters are State Representatives Jeff Leach, a Republican, and Joe Moody, a Democrat. In a legislative hearing, Leach, Moody, and other House members from both parties pressured Cameron County District Attorney Luis Saenz to ask the state district judge to withdraw the death warrant.²⁶ The House passed a bill by Representative Moody to require courts to withdraw an execution date at the request of the district attorney.²⁷

²³ *Andrus v. Texas*, 142 S. Ct. 1866, 1866 (2022) (mem.) (Sotomayor, J., dissenting, joined by Breyer and Kagan, JJ.) (citation omitted).

²⁴ *Terrence Andrus Better Than What the Supreme Court Gave Him*, Jan 25, 2023 (Yvette Borja, BallsandStrikes.org).

²⁵ *Ex parte Lucio*, No. WR-72,702-05, 2022 WL 1211313 (Tex. Crim. App. Apr. 25, 2022) (per curiam).

²⁶ Hayden Sparks, *State Lawmakers Confront District Attorney as Melissa Lucio's Controversial Execution Approaches*, THE TEXAN, Apr. 13, 2022.

²⁷ *Relating to the Withdrawal of an Execution Date on the Motion of the Attorney Representing the State*, H.B. 180, 88th Leg. (Tex. 2023).

On April 19, 2023, the Texas House gave a second approval by voice vote to a bill by Representative Leach to limit capital murder prosecutions and the application of the death penalty in cases where the defendant is accused under the “law of parties.” “Capital punishment should be utilized only when there is absolute confidence in the crime & the perpetrator – under the existing law of parties, we can’t do that & it’s time to make that change,” Leach write on social media. The legislation requires that a defendant be a “major participant” in a capital murder and act with “reckless indifference to human life” in order to be convicted. HB 1736 passed the House Criminal Jurisprudence Committee unanimously. In order to become law, the bill must pass the House again upon third reading and receive the approval of the Senate.²⁸

Representative Leach is a skeptic of the death penalty, although he has stopped short of reversing his support for capital punishment. Earlier, in March 2023, the House also passed a bill to bar the execution of prisoners with severe mental illnesses.²⁹

Another highly controversial Texas death penalty case whose outcome is not yet clear is Andre Thomas' case. He was scheduled to be executed on April 5, 2023, for killing his youngest child, a 13-month-old daughter. In 2004 he stabbed her to death and cut out her heart – which he also did to his estranged wife and son. He clearly had severe mental illness, which manifested itself in different ways at different times. He frequently expressed deep remorse for his crimes. In February 2023, Thomas' lawyers were joined by many dozens of faith leaders and mental health professionals in seeking clemency or a reprieve from Governor Greg Abbott and the Texas Board of Pardons and Paroles because he had become incompetent to be executed.

On March 5, 2023, Grayson County District Judge Jim Fallon withdrew the April 5 execution date and gave the defense until July 5 to submit their threshold showing asserting that Mr. Thomas is mentally incompetent to be executed. Maurie Levin, an attorney for Thomas, said the judge's order gives Thomas' team "the time necessary to make the threshold showing that his lifelong, profound mental illness, characterized by fixed auditory and visual hallucinations, distorts everything he says, thinks, and does and he is not competent for execution."³⁰

Also, on April 19, 2023, a Collin County judge withdrew Ivan Cantu's April 26, 2023 execution date. In seeking an adjournment, Mr. Cantu's lawyers cited (among other things) "substantial new evidence" that the State's key witness had committed perjury.³¹

²⁸ Hayden Sparks, *Texas House Initially Approves Bill Limiting Death Penalty in 'Law of Parties' Cases*, THE TEXAN, Apr. 20, 2023.

²⁹ Brad Johnson, *"Severe Mental Illness" Death Penalty Exemption Passes Initial Texas House Vote*, THE TEXAN, Mar. 29, 2023.

³⁰ Stephen Simpson, *Texas death row inmate Andre Thomas' execution date was postponed to allow his legal team reasonable time to prove his incompetence*, TEX. TRIB., Mar. 7, 2023.

³¹ Hojun Choi, *Execution date for Ivan Cantu withdrawn by Collin County judge, court documents show*, DALL. MORNING NEWS, Apr. 19, 2023.

Oklahoma Historical Context: DPIC's October 14, 2022 Report Regarding Oklahoma's Death Penalty System

On October 14, 2022, DPIC issued a report by Tiana Herring entitled *Deeply Rooted: How Racial History Informs Oklahoma's Death Penalty*. The report included an analysis of Oklahoma's 414 imposed death penalties and 117 executions since 1972. This history is replete with insights that, when considered together, help explain how Oklahoma reached the dubious status of having the nation's #1 per capita execution rate.³²

Although the analysts did not attempt to isolate the independent significance of the race and gender of the defendant and the race and gender of the victim, it is nonetheless noteworthy that when considering only raw data, the odds of having the death penalty sought and imposed were much lower if the defendant were white than if the defendant were African American; and that the odds of having the death penalty imposed were much higher if the victim were white than if the victim were African American. The unadjusted raw data set forth in the study tended to contradict Oklahoma's assertions that it had a color-blind capital punishment system.

The following are two of the report's key findings: Oklahoma, except when explicitly ordered by the U.S. Supreme Court to comply, has often failed to comply with Supreme Court holdings that provide for greater equality rights for Native Americans.³³ And those on its death row whom Oklahoma has chosen to execute in the last two years have disproportionately been people who for economic, mental health or racial reasons or due to brain damage are among Oklahoma's most vulnerable least morally culpable people.³⁴

Recent Context: Six Years, Two Months, Nine Days Between Planned Executions

Oklahoma executed far fewer people in the last eight-and-a-quarter years than had been its customary but uncritically accepted practice. More attention began to be paid beginning with the troubled execution of Charles F. Warner on January 15, 2015, and even more so after Governor Mary Fallin stopped Oklahoma's planned execution of Richard Glossip on September 30, 2015. It did not suffice, in Governor Fallin's view, that the Supreme Court had held by a bare 5-4 majority that Oklahoma's lethal injection system was constitutional.³⁵

Oklahoma did not again try to execute anyone until December 9, 2021, when it executed Bigler Jobe Stouffer.³⁶ What had happened in the intervening six years, two months and nine days – or, more precisely what had not occurred – is significant. There were during that time frame two apparently positive developments for Mr. Stouffer: the issuance in 2017 of the report and recommendations of the bipartisan Oklahoma Death Penalty

³² TIANA HERRING, *DEEPLY ROOTED: HOW RACIAL HISTORY INFORMS OKLAHOMA'S DEATH PENALTY* 27-29 (2022).

³³ *Id.* at 12-13.

³⁴ *Id.* at 47-48.

³⁵ Patrick B. McGuigan, *Death penalty controversy rages, Richard Glossip's life spared by Charles Warner drug debacle*, Okla. City Sentinel, Oct. 9, 2015.

³⁶ Nolan Clay & Jessie Christopher Smith, *Bigler Stouffer executed in Oklahoma without problems of previous lethal injections*, The Oklahoman, Dec. 9, 2021.

Review Commission,³⁷ and then the Tenth Circuit's October 2022 approval of Oklahoma's long-delayed revised version of its execution protocol.³⁸ These might make one might feel somewhat more positive about the Oklahoma system.

Other positive news included this 2022 election result: Vicki Behenna, former head of the Oklahoma Innocence Project, was elected District Attorney of Oklahoma County, which has a long history of prosecutorial misconduct and has had more wrongfully convicted death row prisoners exonerated than all but three other counties in the country.³⁹

Worrisome Problems Begin to Surface

Just beneath the surface, there were some worrisome problems. First, the recommendations made by the bipartisan commission had been almost completely ignored. Second, Attorney General Gentner Drummond, after being sworn in on January 9, 2023, attended the January 12, 2023 execution of Scott Eizembar and then wrote a motion dated January 17, 2023, stating (in part) that the lethal injections that comport to comply with the new protocol are not free from potential problems. Third, Mr. Drummond, who inherited an accelerated schedule in which a total of 25 people were to be executed in 2023 and 2024, wrote in the same motion that implementing the scheduled pace of executions would create major problems for those responsible for executions.⁴⁰

On January 24, 2023, the Oklahoma Court of Criminal Appeals reset the State's execution schedule in light of Drummond's motion, which said that the previously approved schedule would have been so grueling as to be "unsustainable in the long run."

Mr. Glossip's case had already raised many doubts about the fairness and accuracy of Oklahoma's death penalty. He had come close to execution several times and had barely lost in a 5-4 decision in the Supreme Court.

Developments Concerning Richard Glossip's Case, Through May 2023 Stay by the Supreme Court

Oklahoma AG Drummond Joined with Glossip's Counsel to Seek A Stay and A Hearing in the Second Half of 2024

On January 26, 2023, Attorney General Drummond announced that he had appointed an independent prosecutor, Richard Duncan (a former district attorney in Oklahoma), to review the evidence and present independent findings.

On March 29, 2023, Drummond and Glossip's counsel jointly moved for a delay of Glossip's execution to at least August 2024 so that the Oklahoma Court of Criminal Appeals could review materials finalized in the interim.⁴¹

³⁷ Okla. Death Penalty Rev. Comm'n, The Report of the Oklahoma Death Penalty Review Commission (Mar. 2017).

³⁸ *Coddington v. Crow*, Nos. 22-6100, -6112, 2022 WL 10860283 (10th Cir. Oct. 19, 2022) (per curiam).

³⁹ Nolan Clay, *Vicki Behenna wins election as Oklahoma County's next DA*, THE OKLAHOMAN, Nov. 9, 2022.

⁴⁰ Sean Murphy, *New Oklahoma AG seeks to slow pace of lethal injections*, AP NEWS, Jan. 18, 2023.

⁴¹ Sean Murphy, *New delay sought for Glossip execution*, AP NEWS, Mar. 29, 2023.

Public Release of Independent Report to AG Drummond

Then, on April 6, 2023, Attorney General Drummond released the independent report that he had just received from Mr. Duncan and asked the Oklahoma Court of Criminal Appeals to vacate Glossip's conviction and order a new trial. He said that the State's key witness had provided materially false testimony. Although Drummond said he still thought Glossip was guilty, he urged that Glossip not be executed on the basis of false testimony. The only witness who said Glossip was culpable was the actual killer, who had been given a life sentence rather than death in return for implicating Glossip.⁴²

Involvement by Representative Kevin McDugle and Other OK Legislators

Mr. Glossip's case had already raised many doubts about the fairness and accuracy of Oklahoma's death penalty. He had come close to execution several times and had barely lost in a 5-4 decision in the Supreme Court.

Among those troubled by how this case had been handled was State Representative Kevin McDugle, a self-described strong death penalty supporter, who led a bipartisan group of about 35 legislators who retained the Reed Smith law firm in February 2022 to undertake *pro bono* a thorough review of the facts in Glossip's case. Both in its initial report and after it reviewed additional evidence in March 2023, Reed Smith said that "no reasonable juror hearing the complete record would have convicted Richard Glossip of first-degree murder."⁴³ Yet, in November 2022, the Oklahoma Court of Criminal Appeals denied two motions that Glossip's counsel had made based on the Reed Smith findings.⁴⁴

These decisions led Mr. McDugle to write an op-ed that *The Oklahoman* published on November 30, 2022, entitled *On Richard Glossip: Oklahoma would rather kill than admit wrongdoing*.⁴⁵ Mr. McDugle was contemplating an effort to amend the law to permit appeals from the Court of Criminal Appeals to the Oklahoma Supreme Court.⁴⁶ He was also concerned by the fact that none of the 18 recommendations of the special death penalty commission had been implemented.⁴⁷

Many state officials in Oklahoma, including the vast majority of the largely Republican legislature, believed in Glossip's innocence even before District Attorney Duncan's report was issued. Many of them pointed to the lack of physical or witness evidence linking Glossip to the murder.⁴⁸

April 20, 2023 Decision by Oklahoma Court of Criminal Appeals

⁴² Liliana Segura & Jordan Smith, *Oklahoma Attorney General Asks Court to Overturn Richard Glossip's Conviction*, THE INTERCEPT, Apr. 6, 2023.

⁴³ *Reed Smith Glossip investigation releases new findings from evidence withheld by the State for 25 years*, REED SMITH, Mar. 27, 2023.

⁴⁴ Steve Almasy & Rebekah Riess, *Appeals court denies death row inmate Richard Glossip's request for hearing on new evidence*, CNN, Nov. 10, 2022.

⁴⁵ Kevin W. McDugle, Opinion, *On Richard Glossip: Oklahoma would rather kill than admit wrongdoing*, THE OKLAHOMAN, Nov. 30, 2022.

⁴⁶ Jack Karp, *Could This Case Upend The Death Penalty In Oklahoma?* LAW360, Jan. 20, 2023.

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⁴⁸ Josh Marcus, *Oklahoma denies death row inmate Richard Glossip's appeal for new trial, despite backing from attorney general*, THE INDEP., Apr. 20, 2023.

Then, in a unanimous decision on April 20, 2023, the Oklahoma Court of Criminal Appeals denied Glossip's fifth post-conviction petition, motions for discovery and for evidentiary hearing, and the joint motion by Glossip and the Attorney General for a stay of execution. The Court of Criminal Appeals said that the matters raised in the motions before it either should have been but were not raised earlier, or *were* raised earlier but were insufficient to be a basis for relief.

Highly Unusual Hearing before Oklahoma Board of Pardons and Paroles

On April 26, 2023, the Oklahoma Board of Pardons and Paroles held a hearing concerning whether to recommend to Oklahoma's Governor Kevin Stitt that he grant clemency to Mr. Glossip. If the Governor were to grant Glossip clemency, then he would avoid his scheduled May 18 execution for the killing of Barry Van Treese in 1997, and quite possibly would never be executed.

In order for the Board to recommend that Mr. Glossip receive clemency, three members of the five-member Board of Pardons and Parole would have had to vote for clemency. However, one of the five members recused himself because his wife had done work as a prosecutor with regard to Glossip's case. The remaining four members split 2 to 2.

The outcome left many of those involved, and many members of the press, stunned. It was unclear what could be done by any court, the Governor, or anyone else to restore faith in the criminal justice system. Interviewed that evening on CNN, Representative Kevin McDugle reiterated his vow to seek abolition of the death penalty if Mr. Glossip were executed.

May 5, 2023 Stay of Execution by the Supreme Court

On May 5, 2023, the Supreme Court granted a stay of Glossip's execution pending the disposition of the two sides' certiorari petitions. The Court added that if it were to grant one of the certiorari petitions, the stay would end once the Court's mandate issued. *Glossip v. Oklahoma*, No. 22A941, Order (May 5, 2023).

Three States with Execution Moratoriums as 2022 Began

Oregon

After a referendum restored the death penalty in 1984, Oregon has executed two people, both in the 1990s while John Kitzhaber was Governor. On November 22, 2011, Kitzhaber, who was again Governor, said he would prevent executions while Governor, pointing out that the 1990s executions had neither "made us safer" nor "more noble as a society."⁴⁹ The Oregon Supreme Court in 2013 upheld the moratorium.⁵⁰

During the 2014 election, in which the moratorium policy was an issue, Kitzhaber was re-elected. After Kitzhaber resigned for unrelated reasons, Kate Brown, the new Governor,

⁴⁹ William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011.

⁵⁰ *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013) (en banc).

said in February 2015 that she would continue the moratorium. She did, and she was elected in the 2016 special election, and re-elected in 2018 to a full four-year term. In 2019, a bill was enacted that significantly limited the crimes for which capital punishment could be imposed.⁵¹ Oregon's Department of Corrections closed the State's death row facility in 2020. It said it would integrate most of those with death sentences into the general prison population.

In 2021, the Oregon Supreme Court reversed David Ray Bartol's death sentence, holding that it was invalid under the Oregon constitution because it was a "disproportionate punishment."⁵² Many legal experts believed that Oregon's remaining 17 death sentences probably would be held unconstitutional if challenged in light of the 2021 holding.⁵³

Governor Brown was ineligible to run for re-election in 2022. During the gubernatorial election, the Democratic nominee, Tina Koteks, said she opposed the death penalty and would continue the moratorium if elected. She was elected.

On December 13, 2022, Governor Brown announced that she would exercise her clemency powers to commute the death sentences of the State's 17 death row inmates effective December 14, 2022. She said she was doing so because the death penalty is immoral; it is irreversible and does not allow for correction; and it wastes taxpayers' money. She said she viewed her action as essentially completing the job that the legislature had begun through the 2019 law.⁵⁴ There was some backlash against the commutations from Republicans, who were in the minority in the legislature.⁵⁵

Pennsylvania

In 2015, Pennsylvania's newly elected Governor, Tom Wolf, imposed a moratorium on executions. In doing so, he pointed to the fact that a distinguished study commission would be making a report setting forth necessary reforms. He said that the moratorium might be lifted depending on what became of the proposed reforms. Death penalty proponents asserted that once the commission issued its report, Governor Wolf was obligated to end the moratorium, regardless of what became of its recommendations. The proponents' challenge was rejected in court.⁵⁶ The moratorium continued during Governor Wolf's eight years in office.

Governor Josh Shapiro began serving as Governor on January 17, 2023. On February 16, 2023, he announced that he would not issue any execution warrants while Governor and

⁵¹ *Oregon Governor Signs Bill Narrowing Use of the Death Penalty*, DEATH PENALTY INFO. CTR., Aug. 2, 2019.

⁵² *State v. Bartol*, 496 P.3d 1013 (Or. 2021) (en banc).

⁵³ Blair Stenvick, *New Oregon Supreme Court Ruling Will Likely Clear State's Death Sentences*, PORTLAND MERCURY, Oct. 7, 2021.

⁵⁴ Andrew Selsky, *Oregon governor commutes all 17 of state's death sentences*, AP NEWS, Dec. 13, 2022.

⁵⁵ Rachel Treisman, *Oregon Gov. Kate Brown explains why she commuted all of her state's death sentences*, NPR (Morning Edition), Dec. 15, 2022.

⁵⁶ Nicole C. Brambila, *State high court upholds Gov. Wolf's moratorium on executions*, READING EAGLE (Pa.), Dec. 21, 2015.

urged the Pennsylvania legislature to abolish the death penalty.⁵⁷ In explaining his actions, Governor Shapiro said:

My approach to capital punishment has evolved over time. For more than a decade, including when I assumed office as Attorney General, I believed that the death penalty should be reserved for the most heinous crimes – but that it was, indeed, a just punishment for those crimes. However, when the first capital cases came to my desk in the AG's office, I found myself repeatedly unwilling to seek the death penalty. . . .

In 2018, a gunman walked into the Tree of Life synagogue in Pittsburgh's Squirrel Hill neighborhood and murdered 11 Jewish people as they worshipped, in the deadliest act of antisemitism in our nation's history. It's hard to imagine a more heinous crime than murdering 11 people as they pray. And candidly, my first reaction was that the killer deserved to be put to death. Over time, however, my belief on this topic has evolved. I've spoken to victims, to families, to advocates, and to community leaders. . . . They told me, that even after all the pain and anguish, they did not want the killer put to death. He should spend the rest of his life in prison, they said, but the state should not take his life as punishment for him taking the lives of their loved ones. That moved me. And that's stayed with me.

As Attorney General, I had the privilege of seeing our criminal justice system up close as the chief law enforcement officer. Through that experience, two critical truths became clear to me about the capital sentencing system in our Commonwealth: The system is fallible, and the outcome is irreversible. I have painstakingly considered every aspect of Pennsylvania's capital sentencing system, reflected on my own conscience, and weighed the tremendous responsibilities I have as Governor. And I am here today in this Church to tell you I will not issue any execution warrants during my term as Governor. When an execution warrant comes to my desk, I will sign a reprieve each and every time. But I want to go further. . . . I believe [it] misses the mark [to think that our capital sentencing system is flawed, but fixable]. . . . [We should] work together in outlawing the death penalty or refusing to impose it

California

California's Governor Gavin Newsom declared in 2019 a moratorium on executions for all California death row inmates. He was subjected to a recall election, in part because of his views and actions on the death penalty.

On November 17, 2021, the California Committee on Revision of the Penal Code (which the California legislature created within the Law Revision Commission) issued a unanimous 39-page Death Penalty Report. It recommended repealing the death penalty and

⁵⁷ Pa. Gov. John Shapiro, Press Release, *Governor Shapiro Announces He Will Not Issue Any Execution Warrants During His Term, Calls on General Assembly to Abolish the Death Penalty* (Feb. 16, 2023), <https://www.governor.pa.gov/newsroom/governor-shapiro-announces-he-will-not-issue-any-execution-warrants-during-his-term-calls-on-general-assembly-to-abolish-the-death-penalty>.

dismantling death row because "the death penalty as created and enforced in California has not and cannot ensure justice and fairness for all Californians."⁵⁸ It also proposed some less-sweeping measures given that repealing the death penalty is difficult under state law. With regard to racial disparities, it said that the California Racial Justice Act of 2020 should be made retroactive to redress racial bias and racially discriminatory practices.⁵⁹

In 2023, following his landslide victories in the recall election and in his regular re-election, Governor Newsom ordered the mandatory transfer of the 671 condemned inmates into general population prisons after a 45-day comment period and a public hearing. Under the plan, all 671 death row inmates would be moved to several other high security prisons.⁶⁰

The Governor's plan made it no more likely that a prisoner would get released – on parole or otherwise. A notorious example of one who did not get paroled is Sirhan Sirhan, sentenced to death for killing Senator Robert F. Kennedy in June 1968. On January 13, 2022, a year before he proposed his death penalty plan, Governor Newsom denied parole to Sirhan Sirhan. His decision overrode the recommendation of a two-person panel of parole commissioners. Governor Newsom stated that even after the passage of 43 years, Mr. Sirhan, aged 77, would pose an undue risk to public safety.⁶¹

States in Which the Interplay Between Governors and Other State Actors Has Determined the Extent, and Existence, of the Death Penalty

Ohio

Michael DeWine, a Republican who was an author of Ohio's death penalty statute, has refused to permit any executions in Ohio since becoming Governor in 2019. In explaining why in a 2020 interview, Governor DeWine said that he is now much more skeptical that the death penalty deters the commission of capital crimes and believes that gun control would be a far superior approach. He has also stated that he would not allow executions by lethal injection unless he could be sure that the lethal drugs being injected came into the country lawfully. He also threatened to veto any law that does not provide one or more alternatives to lethal injection.⁶²

Governor DeWine has consistently adhered to this position before and after being re-elected in November 2022.

Governor DeWine's position – even though he steadfastly refuses to state his personal views on the death penalty – seems consistent with the views of a majority of Ohioans. In polling results issued in January 2021, a majority in Ohio supported replacing capital punishment with a system in which LWOP is the most severe punishment. Abolition was

⁵⁸ CAL. COMM. ON REVISION OF THE PENAL CODE, DEATH PENALTY REPORT 4 (2021).

⁵⁹ *Id.* at 6-7.

⁶⁰ Eric Westervelt, *California says it will dismantle death row. The move brings cheers and anger.*, NPR, Jan. 13, 2023.

⁶¹ Shawn Hubler, *Sirhan Sirhan Is Denied Parole as Newsom Rejects Board's Recommendation*, N.Y. TIMES, Jan. 13, 2022.

⁶² Julie Carr Smyth et al., *Ohio Governor: Lethal injection no longer execution option*, AP NEWS, Dec. 8, 2020.

supported by majorities of both Democrats and Republicans.⁶³ Conservative support for abolition had grown significantly, which led in early 2020 to the formation of Ohio Conservatives Concerned About the Death Penalty.⁶⁴

On March 28, 2023, abolition legislation was announced by Republican and Democratic sponsors in Ohio's Senate and House.⁶⁵ Republican and Democratic support were both greater than in 2021, and Republican support was much greater than in earlier years. Among the sponsors were people who formerly supported capital punishment. In 2021, several of them gave numerous reasons for changing their minds. Republican Senator Steve Huffman, a physician, said that after decades of reflection he now felt that LWOP was a sufficiently severe punishment and that "[l]ife is precious." Republican Senator Niraj Antani said that having been a "Republican outlier" when he first supported abolition, he was now confident that many Republicans would see abolition as a "pro-life issue" and an anti-big government issue. Republican Representative Jean Schmidt said that although two decades earlier she had fought hard to keep capital punishment, she had changed her mind after meeting with men who had been erroneously sentenced to death.⁶⁶

In early March 2021, former Governor Robert Taft and former Attorneys General Jim Petro and Lee Fisher – two Republicans and one Democrat – said in a joint op-ed that in practice capital punishment is "broken, costly and unjust." Accordingly, they said, "We urge the Ohio legislature to repeal what we helped wrought."⁶⁷

Governor DeWine said in early 2021 that his views on the death penalty had definitely evolved, he expected that the legislature would eventually consider it, and "I'll certainly weigh in as they move a bill forward."⁶⁸ On February 18, 2022, Governor DeWine once again shifted execution dates, this time from 2022 to 2025. His office said this was done "due to ongoing problems involving the willingness of pharmaceutical suppliers to provide drugs to the Ohio Department of Rehabilitation and Correction . . . without endangering other Ohioans."⁶⁹

On March 8, 2022, reporter Marin Cogan made Ohio her prime example in writing in *Vox*, *Why Some Republicans Are Turning Against the Death Penalty: A New – and Surprising – Bipartisan Coalition Is Taking Shape Around One of the Country's Most Controversial Issues*. Ms. Cogan noted that "a survey of 44 Ohio state lawmakers from the final week of February [2022] showed that 46 percent of Republican lawmakers felt that the [S]tate should eliminate the death penalty, while 38 percent of Democrats said the same (and half of the

⁶³ Marty Schladen, *Poll: Big majority in Ohio support getting rid of the death penalty*, OHIO CAP. J., Jan. 28, 2021.

⁶⁴ Vince Grzegorek, *Bipartisan Bill Might Finally Abolish the Death Penalty in Ohio*, CLEVELAND SCENE, Feb. 18, 2021.

⁶⁵ Samantha Hendrickson, *Ohio senators introduce bipartisan bill to end death penalty*, AP NEWS, Mar. 28, 2023.

⁶⁶ Marty Schladen, *Chances for Ohio death penalty repeal appear to be growing*, OHIO CAP. J., Feb. 19, 2021.

⁶⁷ Lee Fisher, Robert Taft & Jim Pietro, *Opinion, Former governor, attorneys general: Ohio death penalty broken, costly and unjust. It must be repealed*, Columbus Dispatch, Mar. 9, 2021.

⁶⁸ Schladen, *supra* note 68.

⁶⁹ Eric Lagatta, *Ohio Gov. Mike DeWine delays three executions, citing problems obtaining lethal drugs*, Columbus Dispatch, Feb. 20, 2022 (alteration in original).

Democrats polled were undecided)." Cogan quoted legislators from both sides of the aisle who said that abolishing the death penalty was only a matter of time.⁷⁰

Ohio Attorney General Dave Yost issued a statement on March 28, 2023, in light of the introduction of death row repeal legislation. His "bottom line: Ohio's death penalty is a farce and a broken promise of justice – and it must be fixed. . . . If Ohio chooses to end capital punishment, let it own the decision in the full light of day. I will stand on the other side, with the families of the slain."⁷¹

Attorney General Yost's office's annual report on capital punishment, released in late March 2023, said Ohio could be unnecessarily spending hundreds of millions of dollars to keep prisoners on death row. The report said, "Ohio's residents and their elected leaders should make one of two decisions: Either overhaul the capital punishment system to make it effective, or end it." There have been no Ohio executions since 2018 due to drug companies' issues with selling lethal injection drugs to Ohio. The report said that if, as has been estimated in some other states, each death penalty case costs between \$1 million and \$3 million more than a case ending in life imprisonment, Ohio's 128 death row inmates may cost the State between \$128 million and \$384 million. "That's a stunning amount of money to spend on a program that . . . satisfies nobody."⁷² The report repeatedly excoriates *other* Ohio political leaders for inaction that is "a testament to government impotence."⁷³

So, Ohio's citizens get to keep the status quo of a death penalty in which no one will be executed as long as the popular Governor remains in office. And the Attorney General gets to keep denouncing the status quo while doing nothing to resolve the standoff – such as the obvious compromise: replace capital punishment with LWOP.

Arizona

Attempts to Execute Since 2014

Arizona Governor Doug Ducey was ineligible to run for re-election in 2022 and Attorney General Mark Brnovich chose not to run for re-election, opting instead to run for a U.S. Senate seat. He lost in the Republican primary.

The last Arizona execution prior to Ducey and Brnovich becoming Governor and Attorney General took place on July 23, 2014. It took almost two hours to execute Joseph Wood III, who gasped and snorted hundreds of times.⁷⁴ This led to a delay of many years before any effort was made to seek permission to execute anyone.

On April 6, 2021, Attorney General Brnovich announced that he was going to ask the Arizona Supreme Court to issue execution warrants for Frank Atwood and Clarence Dixon.

⁷⁰ Marin Cogan, *Why some Republicans are turning against the death penalty*, VOX, Mar. 8, 2022.

⁷¹ Ohio Att'y Gen. Dave Yost, Press Release, *AG Yost's Statement on Death Penalty Debate* (Mar. 28, 2023), <https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2023/AG-Yost-s-Statement-on-Death-Penalty-Debate>.

⁷² OFFICE OF THE OHIO ATT'Y GEN., ANNUAL REPORT: 2022 CAPITAL CRIMES, at 4 (Mar. 2023).

⁷³ *Id.* at 6.

⁷⁴ Mark Berman, *Arizona execution lasts nearly two hours; lawyer says Joseph Wood was 'gasping and struggling to breathe'*, WASH. POST, July 23, 2014.

Dixon's counsel objected that Dixon was severely mentally ill, had significant physical problems, and could be mentally incompetent to be executed.⁷⁵ The Arizona Supreme Court granted Brnovich's motions, but later rejected the State's effort to expedite the briefing schedules and execution dates further so that each lethal injection would take place before the expiration of the shelf lives of the drugs Arizona planned to use in the executions. The Court was concerned by the fact that the State, which had originally misstated to the Court the actual shelf life of the drugs, had miscalculated those dates.⁷⁶

Arizona executed Clarence Dixon on May 11, 2022. A Fox News media witness said the execution team had difficulty inserting the IV line and that Mr. Dixon seemed to be in pain and to grimace throughout the execution. He added that after about 25 minutes, the execution team cut into Mr. Dixon's groin to place the IV there. An Associated Press reporter said that the team had to "wipe up a fair amount of blood" from the groin, and a television reporter said Mr. Dixon had gasped as the drugs were administered and lost consciousness soon. An expert witness said that this had been a botched execution.⁷⁷

The Arizona Supreme Court scheduled Frank Atwood's execution for June 8, 2022. *Arizona Republic* reporter Jimmy Jenkins said he had had the "surreal" experience of seeing Mr. Atwood show the prison officials where to find a vein that would be suitable for the IV line. Mr. Atwood had to be pushed in a wheelchair to get to the execution chamber.⁷⁸

The State thereafter succeeded in getting the Arizona Supreme Court to issue an execution warrant for 76-year-old Murray Hooper for a 1980 crime. The case was never assessed on the basis of currently available forensic technology, and his counsel was told about possible prosecutorial misconduct too late to investigate it and present evidence about it.⁷⁹ Mr. Hooper was executed on November 16, 2022.⁸⁰

The New Governor's Ordering an Independent Review to Be Done by an Independent Review Commissioner

In light of Arizona's many years of problems with carrying out executions properly, Governor Katie Hobbs, who took office on January 2, 2023, after a close election whose results were contested by her opponent, ordered on January 20, 2023, a review of Arizona's execution processes and protocols, to be conducted by an Independent Review Commissioner.⁸¹

On February 24, 2023, Governor Hobbs announced the appointment of retired United States Magistrate Judge David Duncan to be the Independent Review Commissioner. He was

⁷⁵ *Arizona AG Asks Court to Set Execution Dates, Sparking Broad Backlash*, DEATH PENALTY INFO. CTR., Apr. 12, 2021.

⁷⁶ *Arizona Supreme Court Rejects Prosecution Attempt to Expedite Executions Based on Its Own Error on Shelf Life of Execution Drugs*, DEATH PENALTY INFO. CTR., July 12, 2021.

⁷⁷ Jimmy Jenkins & Chelsea Curtis, *Arizona executes Clarence Dixon for 1978 murder of Deana Bowdoin*, AZ CENTRAL, May 11, 2022.

⁷⁸ Jimmy Jenkins, *Behind the black curtain; Republic reporter describes "surreal Frank Atwood execution"*, ARIZ. REPUBLIC, June 8, 2022.

⁷⁹ Liliana Segura, *Facing Execution in Arizona, Murray Hooper Still Says He's Innocent*, THE INTERCEPT, NOV. 15, 2022.

⁸⁰ *Arizona death row updates: Murray Hooper executed*, AZ CENTRAL, Nov. 16, 2022.

⁸¹ Jacques Billeaud, *Arizona executions on hold amid review ordered by governor*, AP NEWS, Jan. 20, 2023.

instructed to issue a final report with recommendations to the Governor and Attorney General.⁸² The Commissioner's review was to discuss:

1. The State's procurement of lethal injection drugs, including but not limited to the source of the drugs, the cost to the State, and any considerations about the drugs such as composition and expiration;
2. The State's procurement of gas chamber chemicals, including but not limited to the source of the chemicals, the cost to the State, and the composition of the chemicals;
3. ADCRR procedures and protocols for conducting an execution by gas chamber and by lethal injection, including but not limited to setting lines for a lethal injection, transparency and media access, access to legal counsel for the inmate, and contingency planning; and
4. Staffing considerations, including but not limited to training, staffing plans to conduct executions, and staff background and experience for administering an execution.⁸³

Impending Crisis if Arizona's New Governor Adhered to Her View That She Could Not Responsibly Order That an Execution Be Carried Out on the Date Set by the Arizona Supreme Court

The Arizona Supreme Court issued a warrant for the April 6, 2023 execution of Aaron Gunches despite the fact that the new Attorney General, Kris Mayes, had not sought, and said she would not seek, the issuance of a warrant under these circumstances.⁸⁴

U.S. Supreme Court Remands Six Arizona Cases in Which Juries Were Permitted to Believe That a Life-sentenced Person Would Have a Possibility of Parole

In *Simmons v. South Carolina*, where a defendant's future dangerousness was at issue, and the jury's only options were the death penalty and LWOP, the Court held it was unconstitutional to prevent the jury from learning there would be no parole possibility if the defendant were sentenced to life.⁸⁵ But when Arizona capital defendants sought to rely on *Simmons* in postconviction or habeas challenges, the Arizona Supreme Court held that *Simmons* could not be used in challenging Arizona death sentences because these defendants might still receive clemency. The Supreme Court rejected that purported distinction when it decided *Lynch v. Arizona*.⁸⁶

Thereafter, the Arizona Supreme Court rejected *Simmons* claims on procedural grounds, holding that *Simmons* was so well established by the time of these defendants' trials

⁸² Jacques Billeaud, *Arizona governor won't proceed with execution set by court*, AP NEWS, Mar. 3, 2023.

⁸³ Exec. Order 5, Establishing a Death Penalty Independent Review Commissioner (Ariz. Jan. 20, 2023), <https://azgovernor.gov/office-arizona-governor/executive-order/5>.

⁸⁴ Kenneth Wong, *Arizona Supreme Court will not extend death warrant for Aaron Gunches*, FOX 10 (Phoenix), Apr. 6, 2023.

⁸⁵ *Simmons v. South Carolina*, 512 U.S. 154 (1994).

⁸⁶ *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam).

that the defendants should have raised their objections at trial. The U.S. Supreme Court disagreed on February 22, 2023, in *Cruz v. Arizona*.⁸⁷ It remanded six cases on March 6, 2023, for consideration of the merits of their *Simmons* claims.⁸⁸ By then, the Arizona Supreme Court had already agreed to reconsider three additional *Simmons* cases. Many other Arizona death row inmates may also benefit from the *Cruz* decision.⁸⁹

End of Possible Crisis Over Possible Execution

On March 23, 2023, the Arizona Supreme Court held that Arizona law did not require Governor Hobbs to proceed with Aaron Gunches' execution. The Governor issued a statement praising the ruling.⁹⁰

Tennessee

Oscar Franklin Smith, whose execution Tennessee had scheduled for April 21, 2022, received a temporary reprieve after Governor Bill Lee learned that corrections officials had failed to test execution drugs for bacterial endotoxins. On May 2, 2022, Governor Lee announced that Tennessee would not carry out any of the five executions it had scheduled for 2022 and that the State was retaining former U.S. Attorney Ed Stanton to review independently the State's execution process.⁹¹

On August 4, 2022, Steve Mulroy (a law professor who is a former federal civil rights prosecutor) was elected to replace longtime Shelby County (Memphis) prosecutor Amy Weirich. Weirich's office was the subject of intense criticism of alleged bias and misconduct. She tried to win re-election by claiming to be tougher on crime than Mulroy.⁹²

Then on January 21, 2023, BBC News reported that Tennessee's Department of Corrections had fired its top lawyer and its Inspector General after an independent report found that lethal injection drugs had not been properly tested for contaminants.⁹³

Alabama

Under an Alabama law enacted in 2018, death row inmate Alan Eugene Miller, whom Alabama had until midnight on September 26, 2022, to execute under its execution warrant, had the right to select either the nitrogen hypoxia method or lethal injection. He chose the nitrogen hypoxia method, but Alabama said it had not received the form on which he made that choice. Although the State supposedly had prepared to execute him by lethal injection, it realized at 11:30 p.m. on September 26, 2022, that it could not access Miller's veins by

⁸⁷ *Cruz v. Arizona*, 143 S. Ct. 650 (2023).

⁸⁸ *Burns v. Arizona*, No. 21-847, 2023 WL 2357300 (U.S. Mar. 6, 2023) (mem.).

⁸⁹ *Court sends 6 death row cases back to Arizona courts after Cruz ruling*, ARIZ. REPUBLIC, Mar. 6, 2023.

⁹⁰ Jacques Billeaud, *Court: Arizona governor not required to carry out execution*, AP NEWS, Mar. 23, 2023.

⁹¹ Office of the Governor, Press Release, *Gov. Lee Calls for Independent Review Following Smith Reprieve* (May 2, 2022), <https://www.tn.gov/governor/news/2022/5/2/gov-lee-calls-for-independent-review-following-smith-reprieve.html>.

⁹² Julia Baker & Alicia Davidson, *Steve Mulroy defeats Amy Weirich in District Attorney race*, DAILY MEMPHIAN, Aug. 5, 2022.

⁹³ Madeline Halpert, *Tennessee fires officials after damning death penalty report*, BBC NEWS, Jan. 21, 2023.

midnight. Accordingly, his execution was cancelled in keeping with Alabama's protocols.⁹⁴ On November 17, 2022, Alabama called off Kenneth Smith's execution because officials could not set an IV line despite an hour of effort after waiting two hours because of an Eleventh Circuit stay of execution – of which Alabama did not notify Smith.⁹⁵

On November 21, 2022, Alabama Governor Kay Ivey stopped all executions and ordered a "top-to-bottom review" of Alabama's execution process. She said she was troubled not only by the stopping of two executions in progress but also by the three-hour delay on July 28, 2022, in setting up an IV before executing Joe Nathan James over the objections of the victim's family. That was the longest botched lethal injection execution in American history.⁹⁶ Then, on December 5, 2022, Alabama Attorney General Steve Marshall denied that there was a moratorium on executions and urged the quick completion of the review of Alabama's execution process.⁹⁷

On December 12, 2022, Governor Ivey sent the Alabama Supreme Court a letter asking that the Department of Corrections have more than a single day within which to complete an execution and that the execution protocol be amended so that an execution could begin before 6 p.m. Central Time.⁹⁸ The Alabama Supreme Court changed its rules on January 12, 2023, most notably by abolishing the previous one-day time frame to carry out a death sentence and by ending automatic plain error review in capital cases.⁹⁹

Bryan Stevenson, the founder and leader of the Equal Justice Initiative, said that "the combination of these two [changes to the] rules increases the likelihood that we're going to see more wrongful convictions, more unjust sentences and more cruelty and potential torture." He stressed that almost 40% of reversals in Alabama death penalty cases took place due to the court's reviewing the transcript for often obvious errors, and that repealing plain error review is "shocking."¹⁰⁰

In early February 2023, more than 170 local faith leaders from many different faith traditions wrote to Governor Ivey urging that the review of the execution process be undertaken, as in other states, by a process that is independent, not rushed, and transparent.¹⁰¹

On February 23, 2023, Governor Ivey announced that executions would resume. As of May 24 2023, they have not resumed.

On May 24, 2023, *The Washington Post* published a remarkable joint op-ed by two former Alabama Governors, Robert Bentley, a Republican who served from 2011-17, and Don

⁹⁴ Evan Mealins, *Alabama won't lethally inject death row inmate – but may use fatal dose of nitro-gen instead*, MONTGOMERY ADVERTISER, Nov. 29, 2022.

⁹⁵ Nicholas Bogel-Burroughs, *Alabama Again Cancels an Execution Over Delays Inserting IV Lines*, N.Y. TIMES, Nov. 17, 2022.

⁹⁶ *Alabama Governor Halts Executions After Latest in Series of Execution Failures*, Death Penalty Info. Ctr., Nov. 23, 2022.

⁹⁷ Kim Chandler, *Marshall: Execution review should happen quickly*, AP NEWS, Dec. 5, 2022.

⁹⁸ Mike Cason, *Gov. Kay Ivey asks Alabama Supreme Court to change rule on setting execution dates*, AL.COM, Dec. 12, 2022.

⁹⁹ Kim Chandler, *Alabama extends time for executions, ends automatic review*, AP NEWS, Jan. 18, 2023.

¹⁰⁰ *Id.*

¹⁰¹ Kim Chandler, *Faith leaders urge independent review of Alabama executions*, AP NEWS, Feb. 7, 2023

Siegelman, a Democrat, who served from 1999 to 2003. They said that if they had known then what they know now about prosecutorial misconduct and other flaws that make Alabama's death penalty system "legally and morally troubling," they would have commuted the death sentences of – at least – all prisoners sentenced by a non-unanimous jury or by a judge who overrode the jury regarding sentencing. Judicial overrides are no longer possible in new cases, under a law signed by Governor Ivey in 2017. But executions in earlier judicial override cases are still possible, such as the case of Rocky Myers, whose jury recommended LWOP but whose judge then overrode the jury and sentenced him to death. He may be executed even though he was never connected to the murder scene. Execution is also possible for Toferest Johnson, whose jury did not vote unanimously for death and whose conviction was based on the testimony of someone whom the defense was not told was paid a \$5,000 reward. The former Governors urged that an independent review unit be created to examine all convictions in death penalty cases. Such a commission could have led Governor Siegelman to grant clemency to Freddie Wright, whom Siegelman now believes was wrongfully charged, prosecuted and convicted" and executed "for a murder he most likely did not commit." Governor Siegelman is "personally haunted" by his failure to grant Wright clemency. The Governors' op-ed concludes: "We missed our chance to confront the death penalty and have lived to regret it, but it is not too late for today's elected officials to do the morally right thing."¹⁰²

South Carolina

South Carolina has not executed anyone since May 6, 2011, but that is not for lack of trying. In 2021, the legislature enacted a law providing that electrocution would be South Carolina's default manner of execution if there are insufficient drugs to carry out lethal injections. And state law also provides for execution by firing squad, if a death row inmate so chooses.

South Carolina made the bare assertion -- without offering any supporting documents -- that it could not get the necessary drugs from pharmaceutical companies and that it had similarly failed in its efforts with compounding pharmacies. On the eve of the trial in the civil lawsuits, the *Greenville News* analyzed South Carolina's administration of the death penalty.¹⁰³ It found patterns of discrimination, geographic arbitrariness, and high error rates. Prosecutorial misconduct was at least partially responsible for 29 of 81 death penalty case reversals. There were major differences between prosecutors in their decisions to seek, and their success in securing, death sentences. Just four prosecutors were responsible for sending 14 of 35 current prisoners to death row. Donnie Myers got 39 death sentences imposed against 28 defendants over four decades.

The *Greenville News'* raw comparisons showed what appeared likely to be significant disparities in death sentencing in light of the victim's race (with white lives seeming to "matter" more) and defendant's race (with African Americans seeming to be over-represented). Analysis by the *News'* Kathryn Casteel found that all but three of the State's

¹⁰² Robert Bentley and Don Siegelman, *We Oversaw Executions as Governor. We regret it.* THE WASHINGTON POST, May 24, 2023.

¹⁰³ Kathryn Casteel, *In South Carolina, the death penalty's history of racism continues, evidence shows,* GREENVILLE NEWS, Aug. 1, 2020; Kathryn Casteel, *SC death penalty cases are in court for years. Many are reversed.,* GREENVILLE NEWS, Aug. 1, 2020.

death sentences had been imposed *before* South Carolina created an office devoted to capital defense. Indeed, John Blume, a pre-eminent capital defense lawyer, said he believes that eventually the numbers who end up eligible for execution will "become so small" that someone will ask, "Why are we doing this?"

As noted above, South Carolina in 2021 became the first state to depart from using lethal injection as its primary execution method. It became the only state in which electrocution plays that role. Firing squad and lethal injection are authorized by statute as secondary methods of execution. For many years, South Carolina could not execute anyone once the expiration date on its lethal injection drugs was reached and it could not thereafter acquire any more. Since state law entitles a death row inmate to choose between the electric chair and lethal injection, inmates had been choosing lethal injection. Because the State could not honor that choice, it was not able to execute anyone.¹⁰⁴

Lame Duck Governors Reveal Their Opposition to the Death Penalty

Louisiana

Louisiana's Governor John Bel Edwards, a Democrat, steadfastly refused to state his position on the death penalty until April 10, 2023, during his eighth and final year in office, given Louisiana's term limit of two four-year terms. It had not been a particularly "hot" political issue, since Louisiana had not executed anyone since 2010 – five years before Edwards was first elected Governor.

In his final State of the State address, Governor Edwards made a passionate request for the legislature to end capital punishment. He urged lawmakers, who were newly energized in their "pro-life" beliefs by the overturning of *Roe v. Wade*, "to look at the death penalty in Louisiana in 2023 with fresh eyes and an open mind." He said that Louisiana, with one execution in 20 years, found capital punishment to be "difficult to administer," "extremely expensive," in the context of a "far from perfect" criminal justice system that "doesn't deter crime," and "is wholly inconsistent with Louisiana's pro-life values as it quite literally promotes a culture of death."¹⁰⁵

Nevada

In 2021, a bill to abolish the death penalty passed by a 26-16 vote in the Nevada Assembly. Governor Steve Sisolak, a Democrat, expressed support for limiting the use of the death penalty, but said he opposed the bill to abolish capital punishment. The abolition bill was then blocked in the Democratic-controlled state Senate. Governor Sisolak said, "I've been clear on my position that capital punishment should be sought and used less often, but I believe there are severe situations" in which it should be available. The stalling of the abolition bill in the Senate was perhaps affected by the fact that two influential Democratic senators (the majority leader and the Judiciary Committee chair) worked as prosecutors for

¹⁰⁴ Khaleda Rahman, *South Carolina Senators Vote to Add Firing Squad to Execution Methods*, AP NEWS, Mar. 3, 2021.

¹⁰⁵ Kate Scanlon, *Catholic governor calls on Louisiana lawmakers to abolish the death penalty as 'a pro-life state'*, CATHOLIC REV., Apr. 13, 2023.

the Clark County District Attorney's office when the legislature was out of session. The State's District Attorneys association rallied opposition to repeal.¹⁰⁶

Governor Sisolak was narrowly defeated for re-election in November 2022 by Republican Joe Lombardo. Although capital punishment was not a major issue in the campaign, Lombardo had attacked Sisolak as being weak on crime. Perhaps influenced by Oregon Governor Kate Brown's December 13, 2022 announcement that she would be commuting all 17 death sentences there, Governor Sisolak announced on December 14, 2022, that at the December 20, 2022 meeting of Nevada's Board of Pardons he would ask for there to be an agenda item regarding the commutation of all of Nevada's death row prisoners' death sentences to LWOP sentences. He said it was important to focus attention on the issue. Pardons and commutations can be approved only by a majority of the nine-member Pardons Board, whose members are the Governor, the Attorney General, and the seven Supreme Court justices.¹⁰⁷

But the formal discussion was precluded after a district attorney secured a court order issued pursuant to a new law enacted while Sisolak was Governor which precludes such a discussion without giving 15-days' notice to victims' families. At the December 20 meeting, Sisolak said he still hoped to have started the necessary conversations. "Placing this matter on the agenda was done as an act of grace and with the understanding that the penalty is fundamentally broken."¹⁰⁸

Nevada has not executed anyone since 2006. It does not seem to ever overcome all the obstacles to execute someone – even without a formal or informal moratorium. Death row inmate Scott Raymond Dozier pleaded to be executed, but when delays over the drugs and the execution procedure did not end, he said it was important to resolve things. He did so, dying by suicide in prison in January 2019.¹⁰⁹

There is a huge geographic disparity in securing death sentences in Nevada. Clark County has sent more people to death row than any but four other counties in the United States. And Nevada prosecutors secure capital sentences so often – and fail so often to execute those on death row – that Nevada is exceeded only by Alabama in the percentage of the State's population who are sentenced to death.

Florida Legislation and Judiciary Changes Designed to Increase Greatly New Death Sentences and Executions

In the spring of 2023, Florida Governor Ron DeSantis wanted to make Florida the leader among death penalty states in both new death sentences and executions. During his first term, there were no executions. The Governor's main involvement during most of that term concerned the many changes in Florida law that had begun in 2016 after the Supreme Court held unconstitutional the imposition of a death penalty where the jury had not made

¹⁰⁶ Nevada Governor, *Senate Leaders Block Death-Penalty Abolition Bill That Passed State Assembly*, DEATH PENALTY INFO. CTR., May 19, 2021.

¹⁰⁷ Taylor R. Avery, *All 57 prisoners on Nevada's death row may get a reprieve*, LAS VEGAS REV.-J., Dec. 15, 2023.

¹⁰⁸ Steve Sebelius & Taylor R. Avery, *Sisolak: Proposal for death row inmates was 'act of grace'*, LAS VEGAS REV.-J., Dec. 20, 2022.

¹⁰⁹ Ken Ritter, *Nevada inmate whose execution called off found dead in cell*, AP NEWS, Jan. 6, 2019.

every factual finding that was a pre-requisite to a constitutional imposition of capital punishment.

Governor DeSantis' key role with regard to Florida's death penalty in his first term was in nominating members of the Florida Supreme Court, which he did in a manner that made the court far more conservative, particularly with regard to capital punishment.

Governor DeSantis was publicly furious when, in October 2022, Nikolas Cruz, who had been convicted of killing 17 people at Marjory Stoneman Douglas High School in Parkland, was sentenced to LWOP because under Florida law – as changed after 2016 – a death penalty required a unanimous jury vote, as it still does in every other death penalty state except Missouri and Indiana, in which a judge may impose the sentence if the jury is not unanimous and Alabama, which allows 10-2 votes for death and sometimes a judge override of a jury.¹¹⁰

DeSantis later proposed a bill enabling imposition of the death penalty in a Cruz-like situation even if four jurors voted against the death penalty. His bill was passed, signed and became law in April 2023.¹¹¹

Governor DeSantis' position on capital punishment also included expanding it in ways that the U.S. Supreme Court has held are unconstitutional – notably including sexual battery of a child. These and other punitive proposals not involving capital punishment were major parts of his presidential campaign's effort to portray him as being "to the right" of former President Trump. Meanwhile, former President Trump has spoken at rallies about executions for drug sellers and more brutal execution methods.¹¹² And former Vice President Pence advocated quick executions after mass killings without any reference to due process of law.¹¹³

Fear of another presidential campaign making a "tough on crime" argument based in large part on capital punishment may help explain some of the Biden administration's tentativeness now about Biden's 2020 campaign rhetoric against the death penalty. But analyses of murder rates in states that have abolished their death penalties have shown no data supporting the false assertion that the death penalty is needed to fight crime.¹¹⁴

Racism Developments Not Already Summarized

Comprehensive Study of Georgia with New Data

Three of the most distinguished experts on analyzing such issues have done a new comprehensive study of capital punishment's operation in Georgia. The study "reveals that

¹¹⁰ Bruce Ritchie, *DeSantis says Parkland shooter deserves the death penalty*, POLITICO, Oct. 13, 2022.

¹¹¹ Gary Fineout, *DeSantis signs bill to end unanimous death sentence requirement*, POLITICO, Apr. 20, 2023.

¹¹² Maurice Chammah, *How the Death Penalty is Returning to Presidential Politics*, THE MARSHALL PROJECT, Apr. 22, 2023.

¹¹³ Brady Knox, *Pence calls for quick executions of mass shooters*, WASH. EXAM'R, Apr. 14, 2023.

¹¹⁴ *E.g.*, John Lamperti, *Does Capital Punishment Deter Murder? A brief look at the evidence*, Mar. 2010, <https://math.dartmouth.edu/~lamperti/my%20DP%20paper.%20current%20edit.htm> (Mr. Lamperti is Professor of Mathematics, Emeritus, at Dartmouth College).

the concerns over both arbitrariness and race discrimination are not only present, but they intersect and perhaps multiply the constitutional flaws addressed in these core cases [*Furman*, *Gregg*, and *McCleskey*]. . . . [R]ace continues to matter, and . . . the statutory aggravators that distinguish death cases from other killings are themselves racialized. By tracing the decisions that move cases from death eligibility to executions, we show the role of race in the progressions of cases and the features of cases that explain the attrition of cases whose defendants avoid death. There are two faces to these progressions: one shaped by race, and a second shaped by the features of the cases that mediate each decision in the progression of cases. *Only one of those should matter, but here, they combine to sustain the fatal lottery that is the death penalty.*"¹¹⁵

Relationship Between Racial Resentment and Death Sentences for African Americans

Researchers at the University of North Carolina found a strong statistical relationship between a state's level of racial resentment (often expressed as a proxy by data regarding the number of lynchings in the era when lynchings were more commonplace) and the number of death sentences for African Americans. Racial resentment was a stronger predictor of African American death sentencing than conservative views and crime rates. The authors found that "racial hostility translates directly into more death sentences, particularly for black offenders,"¹¹⁶ through both "contemporary racial resentment" and "contemporary conservative ideologies reflective of antigovernment intervention, consistent with the vigilantism hypothesis."¹¹⁷

Changes in Composition of the North Carolina Supreme Court Lead to Drastic Changes in the Court's Batson Rulings

Two decisions handed down by the North Carolina Supreme Court on April 6, 2023, are examples of the intended results of racially oriented political campaigns designed to reshape state high courts. These are key examples of how changes in composition of the North Carolina Supreme Court can affect outcomes in *Batson* cases.¹¹⁸

There were decades in which – unlike the highest courts in many other states, including some states with long histories of segregation – the North Carolina Supreme Court never recognized the validity of a *Batson* claim, that is, racial discrimination in jury selection that can affect the outcome of a case. Last year, for the first time, the North Carolina Supreme Court acknowledged that a *Batson* claim may be valid.

Now, in its two decisions on April 6, 2023, the North Carolina Supreme Court has seemingly reverted to its prior view of such claims. Why? One explanation is that the court's Democratic majority was changed into a Republican majority through a series of state

¹¹⁵ Jeffrey Fagan, Garth Davies & Raymond Paternoster, *Getting to Death: Race and the Paths of Capital Cases After Furman*, 107 CORNELL L. REV. 1565, 1616 (2022) (emphasis added).

¹¹⁶ Frank R. Baumgartner, Christian Caron & Scott Duxbury, *Racial Resentment and the Death Penalty*, J. RACE, ETHNICITY, & POL., Dec. 2022, at 1.

¹¹⁷ *Id.* at 16.

¹¹⁸ Kelan Lyons, *In two rulings, NC Supreme Court finds no racial discrimination in jury selection*, NC NEWSLINE, Apr. 10, 2023.

supreme court justice elections in which large sums of money were spent by Republicans in campaigns characterizing the Democratic justices as soft on crime.¹¹⁹

Greater Recognition of a Severe Mental Illness Exemption

In early 2022, Kentucky passed (and on April 8, 2022, Governor Andy Beshear signed) the country's second statewide narrowing of death penalty eligibility including a definition of severe mental illness. Those meeting the exemption provision could be exempt from capital punishment. The first state to enact such a law was Ohio, in January 2021.¹²⁰

Secrecy Surrounding Executions

Idaho, Florida, and Mississippi expanded the secrecy surrounding executions in an effort to protect participants from opprobrium or sanctions.

The Catholic Church

On August 31, 2022, Pope Francis announced that he would devote the September 2022 worldwide prayer intention to ending capital punishment. He said capital punishment "offers no justice to victims, but rather encourages revenge. And it prevents any possibility of undoing a possible miscarriage of justice."¹²¹

In April 2023, Florida's Bishops were extremely critical of Florida's new law that lowers from 12 to 8 the number of jurors needed to sentence a defendant to death. On April 13, 2023, after the legislature passed the bill, the executive director of the Florida Conference of Catholic Bishops, Michael Sheedy, said this "shocking" development takes Florida "again to outlier status once again with the lowest standard for imposing the death penalty. On April 21, 2023, M. Krisanne Vaillancourt Murphy, executive director of the Catholic Mobilizing Network, said the new law is a "thinly veiled attack on human life." Noting Governor De Santis' anticipated Presidential campaign, Ms. Murphy stated, "It is not lost on us that people with political aspirations often use executions as a way to gain political support. The death penalty should not be used to score political points. Human beings should not be used as political pawns -- including human beings on death row."¹²²

Continuing International Trend Against Capital Punishment

Historical Background

Most of Latin America, Canada, and Western Europe abolished capital punishment by the early 1980s, as did South Africa when it ended apartheid. After the Iron Curtain fell,

¹¹⁹ Will Doran, *Advocates fear reversal on racial justice reforms at North Carolina Supreme Court*, WRAL NEWS (Raleigh-Durham-Fayetteville), Apr. 12, 2023.

¹²⁰ *Kentucky Becomes Second State to Bar Imposing Death Penalty on Those Diagnosed as Seriously Mentally Ill*, DEATH PENALTY INFO. CTR., Apr. 14, 2022.

¹²¹ *Pope's September prayer intention: For abolition of the death penalty*, VATICAN NEWS, Aug. 31, 2022.

¹²² Kate Scanlon, *Florida's Catholic Bishops criticize DeSantis for lowering death penalty threshold*, NATIONAL CATHOLIC REPORTER, April 25, 2023.

all European portions of the former Soviet Union except Belarus either abolished capital punishment or, as did Russia, began moratoriums on execution that remain in effect.¹²³

The World's Leading Executioner Countries; Increase in Executions despite More Countries Abolishing the Death Penalty

According to Amnesty International's annual review of the death penalty, issued on May 16, 2023, the countries that led the world in executions were (in the order of the number of executions): China, Iran, Saudi Arabia, Egypt, and the United States. Amnesty International knew that China ranked first even though it could not get solid information about the number of people it executed. [All information in the rest of this portion of the chapter concerning capital punishment in 2022 is based on Amnesty International, *Death sentences and executions 2022* (May 16, 2023).]

There was an overall increase in executions in the world as a whole in 2022, even though the trend towards more and more countries' abolishing the death penalty continued. This overall increase was attributable to extremely authoritarian regimes seeking to intimidate or kill their opponents. In some countries, the increase in executions was due to efforts to stop drug use – which in several instances was focused largely on marijuana use.

UN General Assembly Passes Moratorium Resolution by Biggest Margin Ever

On December 15, 2022, the United Nations General Assembly adopted the 9th resolution for a moratorium on the use of the death penalty, which also urges countries retaining the death penalty to seek to ensure that it is not implemented in an arbitrary or discriminatory manner. The final totals were 125 votes in favor (2 more than in 2020), 37 votes against, 22 abstentions and 9 absent. When this resolution was first adopted in 2007, there were 104 votes in favor and 54 votes against. The United States has never voted in favor of the resolution.¹²⁴

Trend Toward Abolition in Africa

Ghana, Liberia and Uganda, which had previously abstained, voted for the resolution for the first time in 2022. This was part of a continuing trend: in 2007, 17 African countries voted for the resolution; in 2022, 29 did.

Continuation of Recent Trends Favoring the Resolution

Similarly, the trend towards much greater support for the resolution was solidified in 2022. For the second or third consecutive time, Djibouti, Jordan, Lebanon, South Korea, Malaysia (whose government was reportedly moving towards abolition), and Philippines voted for the resolution. Myanmar (hardly an exemplar of a pro-democracy regime) changed

¹²³ AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2022 (2023)

¹²⁴ *9th Resolution for a moratorium on the death penalty: the trend is growing*, WORLD COALITION AGAINST THE DEATH PENALTY, Dec. 20, 2022.

from abstaining to favoring, and Papua New Guinea (which abolished the death penalty) moved from opposing to abstaining.

Disappointments to the Resolution's Proponents

Proponents of the resolution were dismayed by the Democratic Republic of Congo opposing it for the first time and by the United States' continuing to oppose it notwithstanding President Biden's anti-death penalty rhetoric during the 2020 presidential campaign. Minor disappointments were the absences of Vanuata (a country in Oceania) and Venezuela, both previously votes in favor.¹²⁵

V. ABA ACTIVITIES

Selected ABA Amicus Briefs from 2019-22

On April 4, 2022, the ABA filed an amicus brief with the U.S. Supreme Court in *Shoop v. Twyford*.¹²⁶ The ABA argued that well-established norms of capital defense, as embodied in the ABA Guidelines, require defense counsel to conduct a thorough investigation prior to choosing which claims to present. The State of Ohio urged the Court to adopt a rule that would require a habeas court, before approving an investigation, to prematurely evaluate the claims that the investigation would develop and its own ability to consider the supporting evidence. The Court ruled against Mr. Twyford insofar as he failed to properly identify the particular defaulted claims to which his requested investigation related. The case raised important questions about the ability of defense counsel to conduct investigations in federal habeas proceedings.

On September 20, 2021, the ABA filed an amicus brief with the U.S. Supreme Court in *Shinn v. Martinez Ramirez*.¹²⁷ The brief in support of prisoners Barry Lee Jones and David Martinez Ramirez asked the Court to uphold the unanimous decisions of the Ninth Circuit below and adhere to existing precedent that allows a federal court to consider new evidence supporting an ineffective trial counsel claim where state postconviction counsel was also ineffective. The State of Arizona contended, and the Supreme Court agreed, that even in such unfortunate circumstances that arise at no fault of the prisoner, federal courts should not be allowed to hear new evidence. This functionally blocks prisoners from obtaining relief from unconstitutional convictions and sentences.

¹²⁵ *Id.*

¹²⁶ Brief of the American Bar Association as Amicus Curiae in Support of Respondent, *Shoop v. Twyford*, No. 21-511 (U.S. filed Apr. 4, 2022), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/shoop-v-twyford-aba-amicus.pdf.

¹²⁷ Brief for the American Bar Association as Amicus Curiae Supporting Respondents, *Shinn v. Martinez Ramirez*, No. 20-1009 (U.S. filed Sept. 20, 2021), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/shinn-v-ramirez-jones-amicus.pdf.

On November 18, 2021, the ABA filed an amicus brief with the U.S. Supreme Court in support of certiorari in the case of Terrence Andrus.¹²⁸ Mr. Andrus won relief from the Supreme Court in 2020, based on his trial counsel's ineffective representation. On remand from that decision; however, the state court failed to adhere to the factual findings made by the Supreme Court and, the amicus brief said, did not give proper weight to the impact of trial counsel's deficient performance. The ABA's brief, which drew upon the Association's expertise about the detrimental impact of ineffective defense counsel in death penalty cases, urged the Supreme Court to grant the petition and vacate the state court's most recent order denying relief, noting also that the case had important implications for rule of law principles and vertical stare decisis.

On August 20, 2020, the ABA filed an amicus brief in the U.S. Court of Appeals for the D.C. Circuit in support of petitioners in *Office of the Federal Public Defender for the District of Arizona v. Barr*.¹²⁹ The ABA earlier opposed Arizona's application for certification as an "opt-in" state, pointing to its 2006 Assessment of the State's death penalty system that found it failed to meet numerous benchmarks for fairness and due process, as well as the work of the Death Penalty Representation Project, which recruited pro bono counsel for numerous Arizona prisoners because of a lack of a functioning statewide mechanism for indigent capital representation. The ABA's amicus brief urged the D.C. Circuit – which has statutory authority to conduct *de novo* review of the Department of Justice's certification decisions – to overturn the certification based on these considerations as well as the failure of Arizona's counsel system to ensure compliance with the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

One of the first acts of the Biden administration in 2021 was to request that the D.C. Circuit return the case to the Department of Justice for further consideration. The court agreed, and the Department of Justice subsequently requested additional information from Arizona, with particular focus on information provided by the ABA in prior comments regarding the State's use of data from cases where representation was provided by pro bono counsel. The State's answer sought to downplay the role played by pro bono counsel, suggesting that the example case it had previously cited was an outlier. In response, the ABA submitted further comments to the Department of Justice, providing additional clarifying information about its extensive involvement in recruiting out-of-state pro bono law firms to assist Arizona prisoners on death row due to the State's inadequate appointment system.

On October 3, 2019, the ABA filed an amicus brief in the Nevada Supreme Court in *Vanisi v. Gittere*,¹³⁰ stating that the application of capital punishment to people who at the

¹²⁸ Brief of Amicus Curiae American Bar Association in Support of Granting the Petition for a Writ of Certiorari, *Andrus v. Texas*, No. 21-6001 (U.S. filed Nov. 18, 2021), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/andrus-ii-aba-amicus.pdf.

¹²⁹ The ABA's Brief as Amicus Curiae in Support of Petitioners, *Off. of the Fed. Pub. Def. for the Dist. of Ariz. v. Barr*, No. 20-1144 (D.C. Cir. filed Aug. 20, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/federal-public-defender-arizona-v-barr-opt-in-amicus.pdf.

¹³⁰ Brief for Amicus Curiae the ABA in Support of Appellant and Reversal, *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.

time of the crime suffered from severe mental illness is unconstitutional under both the U.S. and Nevada constitutions. The Due Process Project was primarily responsible for this brief.

VI. THE FUTURE

If capital punishment were a business, with its success or failure being determined by the extent to which it achieves its ostensible goals, it would be adjudged an utter failure. This judgment would be based principally on the facts that:

1. In no death penalty jurisdiction is there valid evidence that capital punishment accomplishes either of the two purposes recognized as its constitutional underpinnings: deterring crime and guided discretion of jury decision-making such that the jury is able to, and does, select a person who is more morally culpable than the "average murderer."
2. Although there have been a few jurisdictions whose courts or legislatures have brought their definition of intellectual disability closer to the practical definition used by the Supreme Court, most states are not in conformance with the Supreme Court's working definition.
3. Although it is a positive sign that Ohio and Kentucky now have definitions for mental illness or aspects thereof, neither comports with the accepted definitions; and most other states do not come close to comporting with the ABA mental illness policies. It is also potentially promising that Texas is considering the issue.
4. The additional studies covering numerous states showed disparities based on the victim's race or the defendant's race. These might breathe new life into lawsuits regarding, *e.g.*, *Batson* claim rejections by the North Carolina Supreme Court and other courts.
5. If legislators like Republican Representative Jeff Leach of Texas remain unhappy with actions by courts and regarding clemency, they may succeed in getting enacted a law narrowing greatly the impact of the felony murder rule and the law of parties, such that the ability to seek death would be significantly narrowed.
6. It is potentially important that perhaps a majority of Oklahoma state legislators are troubled that Oklahoma may execute an innocent man, Mr. Glossip. Depending on how the Supreme Court rules in his case, there might be substantial bipartisan support in Oklahoma for abolishing the death penalty unless significant reforms are made to the system by which it is implemented.
7. It will certainly be worth watching how the synagogue killing trial comes out in Pittsburgh federal court. Governor Shapiro gave a thoughtful, eloquent speech opposing capital punishment in February 2023.
8. There is, after the dramatic executions of 13 federal inmates in six months, much greater appreciation of major 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, there has been a significant increase in the number of

conservatives who now 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 if more Catholics oppose the death penalty.

9. 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. And legislators have said that 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 – especially at a time of greater public support for the concept that Black lives matter.

10. It has been shown repeatedly that having 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.

11. 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.

12. Reality belies that fiction. All too often, key evidence relating to guilt or innocence – 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* 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 fairness oriented 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 system 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.