

[Published in *The State of Criminal Justice 2014*, © 2014 American Bar Association. See the ABA Criminal Justice Section website at www.americanbar.org/crimjust for more information on the book.]

CHAPTER 20

CAPITAL PUNISHMENT

Ronald J. Tabak

I. OVERVIEW

A. *Recent Trends*

1. *States Ending the Death Penalty*

Connecticut, Illinois, Maryland, New Jersey, and New Mexico are the first five states to abolish the death penalty by legislative action since the 1960s. And New York achieved *de facto* abolition.

Connecticut

In April 2012, Connecticut repealed the death penalty prospectively. Both houses of the Connecticut legislature had voted in 2009 to abolish the death penalty, but they did not override Governor M. Jodi Rell's veto.¹ In November 2010, Connecticut elected a new Governor, Daniel Malloy, who opposes capital punishment. He was attacked during the campaign for his anti-death penalty position, to which he adhered during a high profile death penalty trial that was nearing its conclusion on election day.² Following the trial of a second defendant in that case, which, as had the first, ended with a death sentence, the legislature took up and passed the abolition bill and Governor Molloy signed it into law.³

Illinois

Illinois abolished the death penalty on March 9, 2011.⁴ In signing the repeal bill, Governor Pat Quinn said, "I have concluded that our system of imposing the death penalty is inherently flawed. The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right." Governor Quinn also

¹ Jon Lender and Daniela Altimari, *Death penalty abolition gets final legislative approval in Senate*, HARTFORD COURANT, May 22, 2009.

² Christopher Keating and Eric Gershon, *Bysiewicz: Malloy Winner of Governor's Race*, HARTFORD COURANT.COM, Nov. 3, 2010, available at <http://inthisogetherct.org/2010/11/bysiewicz-malloy-winner-of-governors-race/>; Christopher Keating, *Foley Concedes Governor's Race To Malloy*, HARTFORD COURANT, Nov. 8, 2010.

³ J.C. Reindl, *Senate Votes to Abolish the death penalty*, THE DAY, Apr. 5, 2012.

⁴ John Schwartz and Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011.

commuted the sentences of everyone on Illinois' death row to life without parole.⁵ Since 2000, more than \$100 million had been spent through Illinois' Capital Litigation Trust Fund, during which time 17 people (out of 500 against whom capital charges had been brought) were sentenced to death – four of whom were no longer on death row prior to Governor Quinn's commutations (two due to reversals on appeal and two due to suicide).⁶

Maryland

In March 2013, Maryland repealed the death penalty prospectively, *i.e.*, with regard to future cases.⁷ A subsequent effort to seek reinstatement by referendum vote failed to garner enough signatures to be put on the ballot.⁸

New Mexico

On March 18, 2009, New Mexico abolished the death penalty prospectively.⁹

New Jersey

New Jersey abolished the death penalty in December 2007.¹⁰

New York

In New York State, capital punishment has also become inoperative. In 2004, New York's highest court held unconstitutional a key provision of the death penalty law.¹¹ After comprehensive hearings, the New York legislature did not correct the constitutional flaw.¹² In October 2007, New York's highest court vacated New York's final death sentence.¹³

⁵ Statement from Gov. Pat Quinn on Senate Bill 3539, Mar. 9, 2011, *text and video available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

⁶ Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations*, 100 J. CRIM. L. & CRIMINOLOGY 101, 127 (2010).

⁷ Maggie Clark, *Maryland Repeals Death Penalty*, STATELINE, May 2, 2013, *available at* <http://www.pewstates.org/projects/stateline/headlines/maryland-repeals-death-penalty-85899473313>.

⁸ John Wagner, *Petition drive to halt Maryland's death penalty repeal falls short*, WASH. POST, May 31, 2013.

⁹ Associated Press, *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009.

¹⁰ Tom Hester, Jr., Associated Press, *New Jersey Bans Death Penalty*, Dec. 17, 2007, *available at* <http://www.highbeam.com/doc/1A1-D8TJCK9G0.html>; Henry Weinstein, *New Jersey Lawmakers Vote to End Death Penalty*, L.A. TIMES, Dec. 14, 2007; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007.

¹¹ *People v. LaValle*, 3 N.Y.3d 88 (2004).

¹² See NEW YORK ASSEMBLY COMMITTEES ON CODES, JUDICIARY & CORRECTIONS, THE DEATH PENALTY IN NEW YORK: A REPORT ON FIVE PUBLIC HEARINGS (2005), *available at* <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>. An effort in 2006 to revive the New York death penalty law also failed. See Yancey Roy, Gannett News Service, *Senate pushes death penalty for cop killers; Assembly resists*, June 14, 2006; Michael Gormley, Associated Press, *Senate Republicans say Assembly is coddling murderers*, June 13, 2006.

¹³ *People v. Taylor*, 9 N.Y.3d 129 (2007).

2. *States with Moratoriums on Executions*

Colorado

On May 22, 2013, Colorado Governor John W. Hickenlooper granted a temporary reprieve of Nathan J. Dunlap's execution. His reasoning strongly suggested that there would be a moratorium on executions while he is Governor. Governor Hickenlooper stated:

“If the State of Colorado is going to undertake the responsibility of executing a human being, the system must operate flawlessly. Colorado's system of capital punishment is not flawless. A recent study ... showed that under Colorado's capital sentencing system, death is not handed down fairly. ... The fact that ... defendants [who committed similar or worse crimes than Dunlap's] were sentenced to life in prison instead of death underscores the arbitrary nature of the death penalty in this State, and demonstrates that it has not been fairly or equitably imposed. As one former Colorado judge said to us, ‘[The death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or economic circumstance of the defendant.’”¹⁴

Governor Hickenlooper said that he had granted a reprieve and not clemency because the issue was “whether we as a state should be taking lives” – and not about Dunlap. He quoted the late Justice Harry Blackmun's statement that, “The death penalty experiment has failed.” The Governor's final substantive point was: “I once believed that the death penalty had value as a deterrent. Unfortunately, people continue to commit these crimes in the face of the death penalty. The death penalty is not making our world a safer or better place.”¹⁵

Oregon

Since reinstating capital punishment in 1984, Oregon has executed only two people, both in the 1990s (the more recent being in 1997). John Kitzhaber, the Governor at the time, permitted those executions to occur. On November 22, 2011, Governor Kitzhaber, who in 2010 had again been elected Governor, announced that he would grant a temporary reprieve to death row inmate Gary Haugen, who (like the two inmates executed in the 1990s) had waived appeals. Moreover, Governor Kitzhaber said he would prevent any executions from occurring while Governor. He said the executions he had permitted in the 1990s had neither “made us safer” nor “more noble as a society.” He said that he could not “participate once again in something I believe to be morally wrong.” The Governor's policy precludes – while he is Governor – the executions of those already on Oregon's death row and anyone later added to Oregon's death row. Since he did not commute any death sentences, Oregon's death row inmates could later be executed under a different Governor.¹⁶

On June 20, 2013, the Oregon Supreme Court held – over Gary Haugen's objection – that Governor Kitzhaber had the right to do this. After the ruling, Governor Kitzhaber

¹⁴ Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013) (alteration in original), *available at* <http://www.cofpd.org/docs-dun/governor-executive-order.pdf>.

¹⁵ *Id.* at 3, 4.

¹⁶ William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011.

repeated his previously stated view that the Legislature should schedule a referendum on abolishing capital punishment.¹⁷

Washington

On February 11, 2014, Washington Governor Jay Inslee announced a moratorium on executions there, for as long as he is Governor. The Governor did this after extensive consultations, after visiting death row, and after looking at the records in the cases of the state's nine death row inmates. The Governor, who had previously favored capital punishment, supported his action by pointing to the fact that most Washington death sentences get reversed during the appeals and habeas process; his doubt that "equal justice is being served"; and his beliefs that "too many doubts" have been raised and there are "too many flaws" in the capital punishment system and its continued application to people with mental retardation and substantial mental illness. He also cited Washington's lack of any meaningful type of proportionality review and the overall lack of certainty associated with Washington's capital punishment system. On February 16, 2014, the *Seattle Times'* editorial board, which had previously supported the death penalty, said that the Governor's announcement had caused it to finish reassessing its position and to call for abolition of capital punishment. It said, "Capital punishment fails the sober metrics of good public policy. Rarely used, it does not make citizens safer. It is applied inequitably, even randomly. It is much more expensive than alternatives. And it exposes the state to the risk, however small, of making a heinous mistake."¹⁸

3. States Seriously Considering Repeal or Reform of the Death Penalty

New Hampshire

On March 12 2014, a bill to repeal New Hampshire's death penalty prospectively (that is, for future cases) passed the state's House of Representatives by an overwhelming margin of 225-104, leading the New Hampshire Union Leader to report that "The state's death penalty may be headed to death row...." Governor Maggie Hassan has stated that she would sign a prospective-only repeal bill. The state's Senate – where the vote is expected to be close – will determine the fate of New Hampshire's capital punishment law.¹⁹

In February 2014, the House Criminal Justice and Public Safety Committee had passed the repeal bill by a 14-3 margin. Among a number of committee members who changed their prior positions by voting for the bill was Majority Leader Steve Shurtleff – who as a member of a death penalty study commission had cast the deciding vote against a repeal proposal.²⁰

¹⁷ Jonathan J. Cooper, Associated Press, *Oregon court upholds governor's execution delay*, June 20, 2013, available at http://www.eveningsun.com/nationworldnews/ci_23501749/oregon-court-upholds-governors-execution-delay.

¹⁸ Governor Jay Inslee, Remarks Announcing a Capital Punishment Moratorium, Feb. 11, 2014, available at http://governor.wa.gov/news/speeches/20140211_death_penalty_moratorium.pdf; Editorial, *It's time for the state to end the death penalty*, SEATTLE TIMES, Feb. 16, 2014.

¹⁹ Gary Rayno, *House overwhelmingly adopts death penalty repeal*, NEW HAMPSHIRE UNION LEADER, Mar. 12, 2014, available at <http://www.unionleader.com/article/20140312/NEWS06/140319557>.

²⁰ Kevin Landrigan, *NH House committee recommends repealing death penalty*, NASHUA TELEGRAPH, Feb. 12, 2014.

Ohio

Ohio's Chief Justice Maureen O'Connor stated in her September 2011 State of Judiciary Address that work had to be done "to ensure that Ohio's death penalty is administered in the most fair, efficient, and judicious manner possible." Toward that end, she announced that the Supreme Court of Ohio and the Ohio State Bar Association were forming a Joint Task Force to Review the Administration of Ohio's Death Penalty. While the Chief Justice said the task force would not consider whether Ohio should retain capital punishment, she stated that it would review, among many other things, the ABA's assessment report regarding Ohio's death penalty system.²¹

In June 2013, the task force recommended that a panel should report to the state attorney general, and possibly preclude local district attorneys from seeking the death penalty in particular cases.²² The task force also voted in June 2013 to recommend reducing the number of death-eligible crimes and enacting a Racial Justice Act.²³ Then, on September 26, 2013, it recommended the exclusion from death penalty eligibility of people with severe mental illness at the time of the capital crime. These and other recommendations were expected to be submitted in legislative form to the General Assembly and Senate at some time in 2014.²⁴

Former Ohio Supreme Court Justice Evelyn Lundberg Stratton voted with the majority in most of the 49 cases in which Ohio executed people during her years on the state's highest court. But on June 13, 2013, six months after leaving the court, Justice Stratton, a Republican, told members of the Ohio Joint Task Force that her views had changed. She told a reporter: "I have evolved to where I don't think the death penalty is effective." Stating that she had been against executing mentally ill people for many years, she said that "she now opposes capital punishment in general because she doesn't see it as a deterrent and victims' families don't gain the finality they seek when the murderer is put to death."²⁵

Ohio Supreme Court Justice Paul E. Pfeifer, a Republican, has been described as the "father of Ohio's death penalty." In 1981, as chairman of the Ohio Senate's Judiciary Committee, he played a key role in drafting Ohio's death penalty law.²⁶ As Justice, now senior member, of the Ohio Supreme Court, he has voted to uphold many death sentences while dissenting in a few cases.²⁷ But on January 18, 2011, he called for abolition of the

²¹ Chief Justice Maureen O'Connor, First State of the Judiciary Address, Sept. 8, 2011, *available at* http://www.sconet.state.oh.us/PIO/Speeches/2011/SOJ_090811.asp.

²² Robert Higgs, *Task force urges state panel be created to evaluate death penalty prosecutions*, PLAIN DEALER, June 14, 2013.

²³ Andrew Welsh-Huggins, Associated Press, *Analysis: Divisions mark Ohio death penalty panel*, July 15, 2013, *available at* <http://www.ohio.com/news/break-news/analysis-divisions-mark-ohio-death-penalty-panel-1.413322>.

²⁴ Alan Johnson, *Group wants to exclude severely mentally ill from death penalty*, COLUMBUS DISPATCH, Sept. 27, 2013.

²⁵ Alan Johnson, *Former Justice Stratton says she's now opposed to death penalty*, COLUMBUS DISPATCH, June 14, 2013.

²⁶ Alan Johnson, *Death Row cases should be reviewed, justice says*, COLUMBUS DISPATCH, May 15, 2010.

²⁷ Andrew Welsh-Huggins, *Justice rejects death penalty law he wrote*, COSHOCTON TRIB. (Ohio), Feb. 16, 2012.

death penalty.²⁸ Speaking to reporters on January 19, 2011, he said that statutory safeguards intended to avoid inequities – including disparities involving race and geography – have not worked. He said the best solution would be for the Governor to commute all death sentences.²⁹ At a legislative hearing on December 14, 2011, Justice Pfeifer testified, “I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole.”³⁰ He called capital punishment a “death lottery,” saying that “[t]he application is hit or miss depending on where you happen to commit the crime and the attitude of the prosecutor in that county.”³¹

Former Ohio Attorney General Jim Petro, who had strongly favored capital punishment as a legislator, has changed his position and doesn’t believe he would vote for it now. In January 2012, he stated, “I don’t think the law has done anything to benefit society and us. It’s cheaper and, in my view, sometimes a mistake can be made, so perhaps we are better off with life without parole.” Indeed, he said, “We are probably safer, better and smarter to not have a death penalty.” In his book, *False Justice: Eight Myths that Convict the Innocent*, he detailed errors by police and prosecutors in dealing with death penalty cases.³²

Julia Bates, Lucas County, Ohio’s lead prosecutor since 1997, stated in November 2013 that Ohio should abolish the death penalty. She said that “there ought to be a better way than the death penalty,” which she said was “torturous” for everyone involved – including judges, jurors, prosecutors, defense counsel, and victims’ families.³³

4. Continued Lower Level of Death Sentences, Mostly Imposed in a Few Jurisdictions

There has been a very significant drop in the number of death penalties being imposed. Death sentences reached their peak at 315 in 1996.³⁴ In 2010, 104 people were sentenced to death, the lowest number since the re-introduction of capital punishment

²⁸ Andrew Welsh-Huggins, Associated Press, *Ohio justice calls for end of death penalty*, Jan. 18, 2011, available at

http://seattletimes.com/html/nationworld/2013969803_apusdeathpenaltyohio.html?syndication=rss.

²⁹ Reginald Fields, *Ohio Supreme Court Justice Paul Pfeifer wants to scrap the death penalty*, PLAIN DEALER, Jan. 19, 2011.

³⁰ Welsh-Huggins, *supra* note 27.

³¹ Alan Johnson, *Death-penalty opponents appeal to end the system*, COLUMBUS DISPATCH, Dec. 15, 2011.

³² Mark Naymik, *Jim Petro questions about death penalty stop short of calling for repeal*, PLAIN DEALER, Jan. 22, 2012.

³³ Jennifer Feehan, *Death penalty cases ebb in Lucas County and Ohio*, THE BLADE (Toledo), Nov. 24, 2013, available at <https://www.toledoblade.com/Courts/2013/11/24/Death-penalty-cases-ebb-in-Lucas-County-and-Ohio.html>.

³⁴ DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2013: YEAR END REPORT, at 1 (2013), available at <http://www.deathpenaltyinfo.org/documents/YearEnd2013.pdf> [hereinafter DPIC, 2013 YEAR END REPORT].

following *Furman v. Georgia*.³⁵ In 2011, the number dropped considerably, to 76. The numbers stayed about the same in the next two years: 77 in 2012 and 80 in 2013.³⁶

Harris County, Texas (which, as discussed in Part I.B.1.a below, long was the “capital of capital punishment”), had no new death sentences in 2011-2012 and just one in 2013.³⁷ There were no new death sentences in 2013 in Louisiana, South Carolina, Tennessee, and Virginia, and only one in North Carolina.³⁸

a. National Analyses Focusing on the Role of a Small Percentage of Counties

Until recently, studies regarding capital punishment have tended to focus, with regard to the inconsistency of its implementation, on differences between states and within particular states. However, in recent years, several analyses have highlighted the fact that the vast majority of death sentences and executions in the entire country come from a very small percentage of counties, and that, in many respects, the vast majority of the country’s citizenry subsidizes capital punishment’s use by this very small percentage of counties.

i. Report by Robert J. Smith

Robert J. Smith’s essay, *The Geography of the Death Penalty and Its Ramifications*,³⁹ published in 2012, reported that a review by counties of death sentences and executions from 2004-2009 showed that only “10% of counties nationally returned even a single death sentence” and that in the states that most often impose capital punishment, “the majority of counties” did “not return any death verdicts” from 2004-2009. Moreover, Smith found that less than 1% of counties in the country had sentenced since 1976 anyone who was executed between 2004 and 2009.⁴⁰

Smith found that only 4% of United States counties sentenced more than one person to death in 2004-2009. These counties accounted for 76% of all death sentences imposed in the entire country in those years. Smith further reported that just 29 counties (less than 1% of the country’s counties) *averaged* one or more death sentences per year from 2004-2009. These counties were responsible for 44% of all death sentences imposed in the country in those years.⁴¹

California exemplified the disparities that so often occur between a state’s counties. During 2004-2009, 64% of its counties sentenced no one to death, and 90% death-sentenced

³⁵ 408 U.S. 238 (1972); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2010 – STATISTICAL TABLES, at 1 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf>.

³⁶ DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2012: YEAR END REPORT, at 1 (2012), *available at* <http://www.deathpenaltyinfo.org/documents/2012YearEnd.pdf> [hereinafter DPIC, 2012 YEAR END REPORT]; DPIC, 2013 YEAR END REPORT, *supra* note 34, at 1, 2.

³⁷ DPIC, 2012 YEAR END REPORT, *supra* note 36, at 5; DEATH PENALTY INFORMATION CENTER, 2013 DEATH SENTENCES (2014), *available at* <http://www.deathpenaltyinfo.org/YearEnd2013#deathsentences> [hereinafter DPIC, 2013 DEATH SENTENCES].

³⁸ DPIC, 2013 DEATH SENTENCES, *supra* note 37.

³⁹ 92 B.U. L. REV. 227 (2012).

⁴⁰ *Id.* at 228.

⁴¹ *Id.* at 233.

either zero or one person. But six counties death-sentenced at a rate of over one per year. Three of these counties were responsible for over half of all California death sentences in those years.⁴² Smith found similar results in other states – such as Florida – that, like California, were national leaders in imposing death sentences.

Smith's essay discussed research by Professor Frank Baumgartner from the University of North Carolina at Chapel Hill, whose database covered every American execution since 1976. Baumgartner's data showed that since 1976, *all* executions in the United States originated in just 15% of the country's counties. Moreover, only 50 counties (1.6% of all counties) had five or more of their death-sentenced prisoners executed.⁴³

ii. Analysis by James S. Liebman and Peter Clarke

Columbia Law School Professor James S. Liebman and law student Peter Clarke analyzed in a 2011 article possible reasons for essentially the same phenomena identified by Smith, namely, that “capital punishment in the United States is a minority practice when the actual death-sentencing practices of the nation's 3000-plus counties and their populations are considered. This feature of American capital punishment has been present for decades, has become more pronounced recently, and is especially clear when death sentences, which are merely infrequent, are distinguished from executions, which are exceedingly rare.”⁴⁴ They primarily used for their county-by-county analysis a study published in 2002 regarding death sentences in the United States between 1973 and 1995 – of which Professor Liebman was the principal author.⁴⁵

They found numerous anomalies, including a Georgia county that imposed the same number of death sentences as a Virginia county whose population was 100 times greater. Over the 23-year period studied, over half of the country's death sentences came from 66, or about 2%, of the country's 3,143 counties, parishes, and boroughs. 16% of them were responsible for 90% of all U.S. death sentences in this 23-year period. After excluding states that don't have capital punishment, “counties comprising around 10% of the population were responsible for over 38% of the death sentences.”⁴⁶ With regard to executions, Liebman and Clarke, like Smith, relied principally on Professor Baumgartner's work covering 1976-2007.⁴⁷

⁴² *Id.* at 231.

⁴³ *Id.* at 236-37 (analyzing Frank R. Baumgartner, Univ. of North Carolina at Chapel Hill, The North Carolina Database of US Executions (version 1, July 1, 2011), *available at* <http://www.unc.edu/~fbaum/Innocence/US/Baumgartner-US-execs-database-codebook-1-July-2011.pdf>).

⁴⁴ James S. Liebman and Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. OF CRIM. JUSTICE 255, 255 (2011). Among the data they cite are that slightly under 2/3 of Texas counties have not ended up with a single person executed in the last 35 years. *Id.* at 261.

⁴⁵ *Id.* at 262 n.27 (citing James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), *available at* <http://www2.law.columbia.edu/brokensystem2/>).

⁴⁶ *Id.* at 264-65.

⁴⁷ *Id.* at 265-66.

Liebman and Clarke, after examining information about the 768 newly death-sentenced people from 2004-2009, concluded that capital punishment was “retreating to its bastions,” and had become even more concentrated in fewer counties.⁴⁸

iii. *Death Penalty Information Center’s October 2013 Report: The 2% Death Penalty*

The Death Penalty Information Center (“DPIC”) issued a report in October 2013, entitled *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*.⁴⁹ This report, and discussion about it in DPIC’s December 2013 year-end report, led to substantially greater press coverage of this subject – far more than the Smith essay or the Liebman and Clarke analysis had theretofore received.

For example, the *Washington Post* stated on October 2, 2013, that the DPIC analysis indicated that “[t]wo percent of the counties in the country were responsible for 685 of the 1,320 executions from 1976, when the Supreme Court reinstated the death penalty, to 2012.”⁵⁰ The *Los Angeles Times* quoted DPIC’s Executive Director as follows: “The death penalty is not as American or as widespread as people might assume. It is clustered in a few counties.”⁵¹ *Stateline* (and others) stressed the burden that all taxpayers share because of the actions of a few counties.

5. *Further Drop in Executions, Amid Growing Controversy Over Lethal Injections*

The number of executions in the United States dropped from 98 in 1999 to 42 in 2007, a year in which many executions were stayed due to the Supreme Court’s then-pending *Baze* case regarding the manner in which lethal injection is carried out. In 2008, the year that the Supreme Court upheld Kentucky’s lethal injection system, there were 37 executions. In 2009, executions rose to 52. In 2010, the number of executions declined, to 46. In 2011 and 2012, they fell to 43 per year.⁵² In 2013, there were 39 executions. This was a drop of almost 10% from 2012. 2013 was only the second year in the last 19 years with under 40 executions.⁵³

The Four States with the Most Executions in 2013

Four states – Texas, Florida, Oklahoma, and Ohio – executed more than 82% of those executed in 2013, with Texas and Florida executing more than 59% of the total.⁵⁴ Oklahoma and Ohio’s difficulties with lethal injection drugs will be discussed in a few paragraphs below.

⁴⁸ *Id.* at 331.

⁴⁹ DEATH PENALTY INFORMATION CENTER, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* (2013), available at <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

⁵⁰ Rachel Weiner, *Study: Prince William, Fairfax among counties that account for majority of U.S. executions*, WASH. POST, Oct. 2, 2013.

⁵¹ David G. Savage, *Los Angeles County leads the U.S. in imposing the death penalty*, L.A. TIMES, Oct. 1, 2013.

⁵² SNELL, *supra* note 35, at 12; DPIC, 2012 YEAR END REPORT, *supra* note 36, at 1.

⁵³ DPIC, 2013 YEAR END REPORT, *supra* note 34, at 2.

⁵⁴ *Id.*

Florida

When Florida in October 2013 for the first time utilized midazolam in a three-drug execution mix, William Happ reportedly stayed conscious longer and exhibited more movement once he did lose consciousness than had previously executed inmates.⁵⁵ Florida's use of midazolam led anesthesiologist Joel Zivot to attack states for "usurping the tools and arts of the medical trade and propagating a fiction." He said that as bad as it was to use in executions medicines that are intended to heal, it was even worse that Florida had used midazolam for use in an execution – because "midazolam is in short supply." Midazolam is, he said, an "essential medication" that is safer to use than barbiturates. He wrote that it is unethical to use a medicine in short supply to end life rather than to heal.⁵⁶

Florida continued its accelerated pace of executions in 2014. On February 12, 2014, Florida executed the thirteenth person during the term of Governor Rick Scott – the most under any first-term Governor in Florida since capital punishment was reinstated there in 1976.⁵⁷ Then, on February 26, 2014, it executed a fourteenth person, Paul A. Howell (after, as discussed in Part III.B below, the ABA filed an *amicus curiae* brief supporting a certiorari petition).⁵⁸

Florida's accelerated pace was aided by enactment of a law in 2013 designed to speed up executions without providing for measures to ensure that the enhanced speed was accompanied by protections against unfairness or inaccuracy. Similar statutes are being considered in others states, such as Alabama⁵⁹ and Kansas,⁶⁰ in 2014.

Shortages in Lethal Injection Drugs, Beginning with Actions of Foreign Governments, Drug Manufacturers, and the DEA

A substantial part of the reason for the national decline in executions after 2009 has been shortages of drugs that could be used in lethal injections.

There have been many restrictions by foreign governments on the export of sodium thiopental for use in executions. In January 2011, Hospira, that drug's only United States manufacturer, decided to permanently cease producing it, at the demand of Italy.⁶¹ Shortly thereafter, Tennessee gave eight grams of sodium thiopental to Alabama, having bought

⁵⁵ Manny Fernandez, *Executions Stall as States, Seek Different Drugs*, NEW YORK TIMES, Nov. 8, 2013.

⁵⁶ Joel Zivot, Op-Ed., *Why I'm for a moratorium on lethal injections*, USA TODAY, Dec. 15, 2013.

⁵⁷ Marc Caputo, *With 13 executions under his watch, Rick Scott is Florida's record-holding, modern-day, first-term governor*, MIAMI HERALD, Feb. 13, 2014.

⁵⁸ Brendan Farrington, Associated Press, *Man executed for killing trooper with pipe bomb*, Feb. 27, 2014, available at <http://www.heraldtribune.com/article/20140227/WIRE/140229706?p=1&tc=pg>.

⁵⁹ Editorial, *Proposal to speed up death penalty appeals is troubling*, MONTGOMERY ADVERTISER, Jan. 11, 2014.

⁶⁰ John Milburn, Associated Press, *Kansas Senate approves death penalty appeals changes*, Feb. 13, 2014, available at <http://www.kansascity.com/2014/02/13/4822228/kansas-senate-approves-death-penalty.html>.

⁶¹ Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J., Jan. 22, 2011; AMNESTY INTERNATIONAL, USA: AN EMBARRASSMENT OF HITCHES, 47 & n.247 (2011), available at <http://www.amnesty.org/en/library/asset/AMR51/058/2011/en/6322d94e-c818-40bb-bab4-b7c1c8f56ba4/amr510582011en.pdf>.

them from a United Kingdom wholesaler. Apparently after intervention by the federal Drug Enforcement Administration (the “DEA”), Alabama handed over the eight grams to the DEA.⁶²

Two years later, on July 23, 2013, the United States Court of Appeals for the District of Columbia unanimously affirmed the district court’s decision that the Food & Drug Administration (the “FDA”) had not properly carried out its responsibilities when it allowed, without inspection, foreign drugs to be imported for use in executions.⁶³

Georgia

In March 2011, the DEA seized Georgia’s death row prison’s sodium thiopental supply.⁶⁴

On February 21, 2013, Georgia “hurriedly executed Andrew Allen Cook amid a legal scramble to carry out capital sentences before its supply” of pentobarbital reached its expiration date of March 1, 2013. *The Guardian* reported, “Georgia’s difficulties procuring execution drugs is a reflection of the gradual stranglehold that is being put on the US death penalty by authorities and companies around the world refusing to act as accomplices in the death sentence.” It added that Georgia was not the only state in which “supplies of pentobarbital are ... running out.”⁶⁵

Missouri

In 2012, Missouri altered its execution protocol to permit the use in executions of a large dose of propofol – best known as the drug responsible for Michael Jackson’s death. After harsh reactions from the United Kingdom and from propofol’s sole remaining United States manufacturer, Missouri Governor Jay Nixon stayed Joseph Paul Franklin’s execution in October 2013 and ordered the Missouri Department of Corrections to find a new drug. It quickly decided to use a form of pentobarbital made by a compounding pharmacy – but refused to indicate where it came from or who manufactured it. It used this in two executions in late 2013.⁶⁶

By the autumn of 2013, several states had started to use “new, untested drugs” in executions, while some swapped drugs, and several (like Missouri) approached “compounding pharmacies,” which are mostly unregulated by the FDA, and some of which were among the out-of-state pharmacies that provided drugs for use in executions in states in which they were not licensed.⁶⁷ Some states’ ways of paying for execution drugs moved,

⁶² AMNESTY INTERNATIONAL, *supra* note 61, at 3.

⁶³ *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

⁶⁴ Kevin Sack, *Executions in Doubt in Fallout Over Drug*, N.Y. TIMES, Mar. 17, 2011.

⁶⁵ Ed Pilkington, *Georgia rushes through executions before lethal injection drugs expire*, GUARDIAN, Feb. 21, 2013, available at <http://www.guardian.co.uk/world/2013/feb/21/georgia-executions-lethal-injection-drug-pentobarbital>.

⁶⁶ Associated Press, *The return of the firing squad? US states reconsider execution methods*, Jan. 28, 2014, available at <http://www.theguardian.com/world/2014/jan/28/return-firing-squad-us-states-execution-methods>.

⁶⁷ Abby Ohlheiser, *Missouri Turns to Compounding Pharmacies for Lethal Injection Drugs*, THE WIRE, Oct. 22, 2013, available at <http://www.thewire.com/national/2013/10/missouri-turns-compounding-pharmacies-lethal-injection-drugs/70821/>.

the *New York Times* reported, into “a strange new realm,” such as the use of petty-cash accounts, so that, as Oklahoma prisoner officials said, there would be “no public paper trail of the identities of drug suppliers or the state’s executioners.”⁶⁸

On February 4, 2014, St. Louis Public Radio reported that the Apothecary Shoppe, the Oklahoma compounding pharmacy that supplied the drug used in Missouri’s last three executions, had applied for a license in Missouri. In recent months’ court filings, Missouri had argued that its supplier’s identity had to remain hidden, saying that otherwise, the pharmacy would no longer want to supply any drug for use in executions.⁶⁹ On February 12, 2014, United States District Judge Terrence Kern issued a temporary restraining order prohibiting, at least until a hearing scheduled for February 18, 2014, the Apothecary Shoppe from supplying compounded pentobarbital to Missouri for use in the February 26, 2014 execution of Michael Taylor.⁷⁰ On February 13, 2014, Missouri Governor Jay Nixon said that Missouri was prepared to proceed with Taylor’s execution.⁷¹ Thereafter, the Apothecary Shoppe decided to stop supplying Missouri with compounded pentobarbital. Less than a week before Taylor’s scheduled execution, Missouri changed its protocol and said it had located a different compounding pharmacy, whose identity it refused to disclose, to prepare the drug. Taylor was executed as scheduled, on February 26, 2014.⁷²

Before the execution, three members of the Eighth Circuit dissented from an order denying Taylor’s petition for rehearing en banc. In an opinion by Judge Kermit Bye, the judges stressed “the importance of [knowing] the identities of the pharmacists, laboratories, and drug suppliers,” in deciding whether the execution would be constitutional. Judge Bye’s opinion said that Missouri, finding itself “unable to execute death row inmates with an FDA-approved form of injectable pentobarbital,” had, “perhaps drastically, changed how Taylor will be executed by substituting any number of new components and actors within the last week.” Judge Bye stated, “One must wonder at the skills of the compounding pharmacist. In fact, from the absolute dearth of information Missouri has disclosed ... , the ‘pharmacy’ on which Missouri relies could be nothing more than a high school chemistry class.” Moreover, “that pharmacy and its pharmacists presumably have no experience compounding injectable pentobarbital for executions” Judge Bye added that since “Missouri has again changed its procedure for executions, even the most well-trained and well-intentioned pharmacist may be unable to properly test compounded pentobarbital in such a short amount of time. Missouri is actively seeking to avoid adequate testing of the alleged pentobarbital, which raises substantial questions about the drug’s safety and effectiveness.”⁷³ Later on February 25, 2014, Justices Ginsburg, Sotomayor and Kagan

⁶⁸ Fernandez, *supra* note 55.

⁶⁹ Chris McDaniel, *After Supplying for Three Missouri Executions, Pharmacy Plans to Register in State*, ST. LOUIS PUBLIC RADIO, Feb. 2, 2014, available at <http://news.stlpublicradio.org/post/after-supplying-three-missouri-executions-pharmacy-plans-register-state>.

⁷⁰ Taylor v. Apothecary Shoppe, No. 14-CV-063-TCK-TLW (N.D. Okla. Feb. 12, 2014), available at <http://apps.npr.org/documents/document.html?id=1017669-doc-no-8-temporary-restraining-order-highlighted>.

⁷¹ Associated Press, *Nixon says state is prepared for next execution*, Feb. 13, 2014, available at <http://www.connectmidmissouri.com/news/story.aspx?id=1007372#.Uv44gbRs5lZ>.

⁷² Ed Pilkington, *US judge attacks states’ lethal injection methods as ‘high school chemistry’*, GUARDIAN, Feb. 26, 2014, available at <http://www.theguardian.com/world/2014/feb/26/death-penalty-judge-attacks-lethal-injection-drugs>.

⁷³ Zink v. Taylor, No. 14-1388 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting), available at <http://www.deathpenaltyinfo.org/documents/MichaelTaylorDissent.pdf>.

dissented from the Supreme Court's denial of a stay of execution and the denial of certiorari, "[f]or reasons well stated by Judge Bye" in his dissenting opinion.⁷⁴

Ohio

In executing Dennis McGuire on January 16, 2014, Ohio first used midazolam as a sedative, and then "the pain killer hydromorphone." *Columbus Dispatch* reporter Alan Johnson, who had attended 18 prior executions, said: "This one was different. After three to four minutes, Dennis McGuire began gasping for breath, his stomach and chest were compressing deeply, he was making a snorting sound, almost a choking sound at times." And his left hand "had clenched into a fist." For about ten minutes, McGuire seemed "to be trying to get up or at least raise up in some fashion."⁷⁵

This raised new issues. As Cleveland's *Plain Dealer* editorialized on January 18, 2014, there's "no way to know whether McGuire suffered during his lengthy death, but there's also no way to refute his attorney's characterization that it was an 'agonizing' way to go." His family plans to sue.⁷⁶ The Associated Press (Andrew Welsh-Huggins) reported that this was Ohio's longest modern execution.⁷⁷

On January 26, 2014, *Plain Dealer* reporter John Caniglia wrote that McGuire's "drawn-out execution ... did more than highlight the flaws of lethal injection in Ohio. It raised a fundamental question in the heated debate of the death penalty: Why is it so hard for governments to put an inmate to death in a humane way?"⁷⁸

After McGuire's execution, Leah Libresco, writing in the *American Conservative*, said, "The real mystery is why Ohio, faced with a shortage of drugs, found it so urgent to put Mr. McGuire to death that they turned to an experimental, poorly-tested combination of drugs. ... [W]hy would Ohio find killing on schedule as desperate a need as saving a life? ... The guillotine looks monstrous and savage, and leaves spectators bespeckled by blood, but is believed to be more merciful to the victim and is even favored by the inventor of the three-drug legal injection. Mr. McGuire's uncomfortable death exposes the illusion that we can usher criminals out of this world simply and peacefully. If we design our execution protocols to obscure the reality of the death we are inflicting, we must ask whether we can honestly endorse a sentence we can't stand to see unveiled."⁷⁹

On February 7, 2014, Ohio Governor John Kasich granted a reprieve of eight months with regard to the execution of Gregory Lott. After McGuire's execution, Lott had sued in federal court, attacking Ohio's new combination of drugs for executions, and also

⁷⁴ Taylor v. Lombardi, No 13-8856, 2014 WL 714014 (U.S. Feb. 25, 2014) (Ginsburg, J., dissenting).

⁷⁵ Tom Watkins, *Family, experts: Ohio execution snafu points to flaws in lethal injection*, CNN, Jan. 19, 2014, available at http://www.cnn.com/2014/01/17/justice/ohio-execution/?hpt=ju_13.

⁷⁶ Editorial, *Dennis McGuire's slow, gasping execution is yet another reason for abolishing the death penalty*, PLAIN DEALER, Jan. 18, 2014.

⁷⁷ Andrew Welsh-Huggins, Associated Press, *Unclear future for executions after Ohio's longest*, Jan. 17, 2014, available at <http://www.cnsnews.com/news/article/unclear-future-executions-after-ohios-longest>.

⁷⁸ John Caniglia, *Dennis McGuire's execution raises question in debate over death penalty: Why is it so hard to put a person to death humanely?*, PLAIN DEALER, Jan. 26, 2014.

⁷⁹ Leah Libresco, *An Unsettling Death in Ohio*, AMERICAN CONSERVATIVE, Jan. 20, 2014, available at <http://www.theamericanconservative.com/an-unsettling-death-in-ohio/>.

challenging Ohio's having secured the drugs without a prescription. The Governor did not indicate any intention to stay any other death row inmate's execution that might be scheduled before November 19, 2014, when Lott's reprieve is scheduled to expire.⁸⁰

Oklahoma

Due to difficulties in securing sodium thiopental, Oklahoma in December 2010 began using pentobarbital -- which has been used in euthanizing animals -- in executions. After Oklahoma refused to identify the manufacturer whose pentobarbital it had used, a spokesman for Pfizer, whose subsidiary manufactures pentobarbital, said, "[W]e want it to be known that it's [sold] for veterinarian purposes alone."⁸¹ Other efforts to switch to pentobarbital for executions were undercut by actions such as that taken by Lundbeck Inc., a Danish company, which told states that it was "adamantly opposed" to pentobarbital's use in executions.⁸² By June 2011, Germany had joined the Danish and British governments in opposing the export of such drugs as pentobarbital and sodium thiopental in executions.⁸³

In early January 2014, Oklahoma may have used pentobarbital that was beyond its expiration date when it executed Michael Lee Wilson -- whose last words were "I feel my whole body burning."⁸⁴

Growing Public Controversy Over Lethal Injections

Even before the dramatic developments in January and February 2014 in Ohio and Missouri, Jeffrey Toobin said, in the *New Yorker's* December 23, 2013 issue, that attempts to make executions humane were "oxymoronic." He stated, "It's understandable that Supreme Court Justices have tried to make the process a little more palatable; and there is a meagre kind of progress in moving from the chair to the gurney. But the essential fact about both is that they come with leather straps to restrain a human being so that the state can kill him. No technology can render that process any less grotesque."⁸⁵

On January 28, 2014, the Associated Press reported that "[w]ith lethal-injection drugs in short supply and new questions looming about their effectiveness, lawmakers in some death penalty states are considering bringing back relics of a more gruesome past: firing squads, electrocutions and gas chambers."⁸⁶ Perhaps someone will soon propose the guillotine.

⁸⁰ Andrew Welsh-Huggins, Associated Press, *Ohio governor issues 8-month reprieve for condemned inmate after recent lengthy execution*, Feb. 7, 2014, available at <http://www.startribune.com/politics/national/244395351.html>.

⁸¹ Nathan Koppel, *Oklahoma Conducts First U.S. Execution of 2011*, WALL ST. J. LAW BLOG, Jan. 7, 2011, available at <http://blogs.wsj.com/law/2011/01/07/oklahoma-conducts-first-us-execution-of-2011/>.

⁸² Sack, *supra* note 64.

⁸³ AMNESTY INTERNATIONAL, *supra* note 61, at 6 & nn.28, 30.

⁸⁴ Ian Steadman, *Prisons Are Now Using Scary, Untested Drugs to Execute Death Row Inmates*, NEW REPUBLIC, Jan. 14, 2014, available at <http://www.newrepublic.com/article/116213/death-penalty-uses-untested-drugs-lethal-injection>

⁸⁵ Jeffrey Toobin, *Cruel and Unusual*, NEW YORKER, Dec. 23, 2013.

⁸⁶ Associated Press, *U.S. states consider reviving old-fashioned executions*, Jan. 28, 2014, available at <http://www.cbc.ca/news/world/u-s-states-consider-reviving-old-fashioned-executions-1.2513783>.

In an article to be published later in 2014, Professor Deborah Denno presents her analysis of over 300 cases citing *Baze* from 2008-2013. She finds “that states can – and do – modify virtually any aspect of their lethal injection procedures with a frequency that is unprecedented among execution methods in the country’s history. The resulting protocols differ from state to state and even from one execution to the next within the same state.” So, “many states’ lethal injection issues and procedures scarcely resemble those evaluated by the *Baze* court.” Moreover, the “continuous tinkering often affects” such troubling things “as the paltry qualifications of executioners, the absence of medical experts, and the failure to account for difficulties injecting inmates whose drug-using histories diminish the availability of usable veins.” In combination, these problems have “led to some of the most glaring and gruesome failures ever documented in the history of lethal injection.” Professor Denno’s article concludes as follows:

[T]he only overarching constant appears to be states’ desire for secrecy regarding execution practices. Amidst the chaos of drug shortages, changing protocols, legal challenges and botched executions, states are unwavering in their desire to conceal this disturbing reality from the public. In fact, the current chaos may be viewed at least in part as a repercussion of that reticence: any efforts to “fix” the system via legal challenges and legislation are hindered by the difficulty in gathering enough information to even understand its problems. Until death penalty states are willing to focus more on solutions than secrecy, lethal injection as a method of execution will remain mired in an endless cycle of difficulty and disorder.⁸⁷

6. Public Opinion

In 2013, support for the death penalty, as reflected in a Gallup Poll, was at its lowest level in over 40 years. Continuing its decline from its peak of 80% in 1994, support for the death penalty dropped to 60% in 2013. Gallup stated that “[t]he recent change in death penalty attitudes could be specific to that issue, or it could be part of a broader shift to more politically liberal positions on social issues, including legal gay marriage and legal marijuana use.”⁸⁸

Notably, Gallup’s 2013 poll gave respondents *no* alternative to the death penalty for capital murder. In Gallup and other polls that *have* provided an alternative – most often, the most common actual alternative, life without parole – support for capital punishment has been substantially lower, and sometimes has been less than support for the alternative. For example, in the 2012 American Values Survey (conducted by the Public Religion Research Institute), 47% of those responding favored life without parole, compared to 46% who favored the death penalty as the most severe punishment.⁸⁹

On January 17, 2014, the Religious News Service reported on Barna’s poll of Christians conducted in the summer of 2013. The poll asked whether “the government should have the option to execute the worst criminals.” Opposition to the death penalty was greater among younger Christians. Thus, 42% of Christian “boomers,” born between

⁸⁷ Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. ____ (forthcoming 2014) (on file with author).

⁸⁸ Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More Than 40 Years*, GALLUP, Oct. 29, 2013, available at <http://www.gallup.com/poll/165626/death-penalty-suport-lowest-years.aspx>.

⁸⁹ DPIC, 2012 YEAR END REPORT, *supra* note 36, at 6-7.

1946 and 1964, said Yes, compared with just 32% of Christian “millennials,” born between 1980 and 2000. Moreover, this age cohort disparity was even more pronounced among “practicing Christians,” who considered faith very important in their lives and went to church at least once in the preceding month: almost half of those who were “boomers” answered Yes, compared to only 23% of those who were millennials. The Religious News Service said that “[o]ther polling organizations such as Gallup show similar generational trends among Americans in general.”⁹⁰

Barna’s Roxanne Stone felt the results might reflect a view of many younger Christians that the death penalty is “a human rights or social justice issue” rather than “a political dividing point.” She noted a “growing trend in the pro-life conversation among Christians to include torture and the death penalty as well as abortion.”

The Barna poll asked whether respondents thought Jesus would favor the government’s having the power to execute the worst criminals. “Two percent of Catholics, 8 percent of Protestants, and 10 percent of [what Barna termed, as described above] practicing Christians” answered Yes.

7. Possible Influences on Public Opinion

a. Justice Ginsburg

In an interview broadcast in February 2013, Justice Ruth Bader Ginsburg said, “If I had my way there would be no death penalty. But the death penalty for now is the law, and I could say ‘Well, I won’t participate in those cases,’ but then I can’t be an influence.” She analogized her situation to that of Captain Edward Vere in *Billy Budd*, who felt compelled to follow the law literally and sentence Budd to be executed notwithstanding his having doubts concerning Budd’s guilt. She said, “Every time I have to participate in a case where someone has been sentenced to death, I feel that same conflict. But when you’re with a group of nine people, the highest court in the land, you can’t pretend to be king or queen.”⁹¹

b. Opposition to or Criticism of the Death Penalty by Authors and Past Key Supporters of Death Penalty Laws, plus Judges, Prosecutors, and Prison Officials

Among the possible influences on public opinion (in addition to the particular issues discussed later in this chapter) are the views expressed by a growing number of people – many of them conservatives – who oppose or are skeptical about the death penalty *in practice* (even if they favor it *in theory*).

⁹⁰ Jonathan Merritt, *Poll: Younger Christians less supportive of the death penalty*, RELIGIOUS NEWS SERVICE, Jan. 17, 2014, available at <http://www.religionnews.com/2014/01/17/among-us-christians-declining-support-death-penalty/>.

⁹¹ Anna Louie Sussman, *Summary of Judgments for February 5: The Would-Be Diva*, THOMPSON REUTERS NEWS & INSIGHT, Feb. 5, 2013, available at http://newsandinsight.thomsonreuters.com/Legal/News/2013/02_-_February/Summary_Judgments_for_February_5/ (quoting Interview with Justice Ruth Bader Ginsburg, WQXR’s *Operavore*, Feb. 2, 2013).

In 2011-2013, authors and key supporters of enacted death penalty laws in several states (in addition to those discussed above), and many judges and prosecutors criticized their implementation. Many of them advocated abolition of the death penalty.

The Economist reported on February 9, 2013, that “[t]he politics of death have changed because the country has changed.” It noted that, in the wake of drops in violent crime, executions, and new death sentences, plus well-publicized exonerations and concerns about costs, “[w]hen polls offer life without parole as an alternative punishment for murder, Americans divide evenly.” The newsweekly’s article concluded that the capital punishment debate “is less loud and more sceptical, giving thoughtful governors room to question a policy that causes them anguish – because they think it arbitrary, ineffective and costly, and because they impose it. That grim duty does not trouble all politicians: ask Mr. Clinton and Mr. Bush. But it should.”⁹²

President Jimmy Carter

Jimmy Carter was Governor of Georgia in 1972, when the Supreme Court, in *Furman v. Georgia*,⁹³ held that Georgia’s death penalty was unconstitutional. That case precluded the execution of anyone then on death row anywhere in the United States. Georgia soon passed a new death penalty law, which Governor Carter signed in 1973. Its constitutionality was upheld by the Supreme Court in 1976 in *Gregg v. Georgia*.⁹⁴ That decision led to the resumption of executions in the United States, and remains the basis for our entire federal constitutional jurisprudence on capital punishment.

Interviewed in November 2013, former Governor (and, of course, former President) Carter revealed what a reporter termed “frank regret” over his actions as Governor. He said, “In complete honesty, when I was governor [of Georgia] I was not nearly as concerned about the unfairness of the application of the death penalty as I am now. I know much more now. I was looking at it from a much more parochial point of view – I didn’t see the injustice of it as I do now.” In November 2013, in a newspaper interview and then in a speech at a symposium at the Carter Center, Mr. Carter said that “[t]he only consistency today is that the people who are executed are almost always poor, from a racial minority or mentally deficient.” He added that “if you have a good attorney you can avoid the death penalty; if you are white you can avoid it; if your victim was a racial minority you can avoid it. But if you are very poor or mentally deficient, or the victim is white, that’s the way you get sentenced to death.” He called for a nationwide moratorium on use of the death penalty, because it is “every bit as arbitrary as it was” at the time of *Furman*. He said, “My preference would be for the court to rule that it is cruel and unusual punishment, which would make it prohibitive under the US constitution.”⁹⁵

⁹² *Death in Little Rock: Politicians with national ambitions are suddenly willing to challenge the death penalty*, *ECONOMIST*, Feb. 9, 2013.

⁹³ 408 U.S. 238 (1972).

⁹⁴ 428 U.S. 153 (1976).

⁹⁵ Ed Pilkington, *Jimmy Carter calls for fresh moratorium on death penalty*, *GUARDIAN*, Nov. 11, 2013, available at <http://www.theguardian.com/world/2013/nov/11/jimmy-carter-supreme-court-death-penalty>.

Arkansas

On February 9, 2013, *The Economist* published an article entitled *Death in Little Rock: Politicians with national ambitions are suddenly willing to challenge the death penalty*. The article cited, among other things, the January 16, 2013 statement by Arkansas' conservative Governor Mike Beebe (D) that his view on the death penalty had changed and that if sent a bill abolishing capital punishment, he would sign it.⁹⁶ In a July 10, 2013 news story, Arkansas' Attorney General, Dustin McDaniel, said that the death penalty should be abolished unless the execution method was changed. He pointed out that there were no available execution drugs and it was difficult to get doctors to participate in executions. Thus, he said, Arkansas had "a broken system" and was "throwing money and resources at essentially pointless litigation."⁹⁷

Arizona

In Arizona, Rudy Gerber, who helped author the state's capital punishment law in the 1970s, now is against the death penalty.⁹⁸

California

Don Heller, a Republican and a former prosecutor, helped author "the Briggs [ballot] initiative" that made capital punishment much broader in California. In September 2011, he wrote that he had "made a terrible mistake 33 years ago," and that the death penalty should be replaced by life without parole. He stated that the 1978 initiative had been drafted "without fiscal study, input from others, or committee hearings." Among other things, he had not realized that over the ensuing 33 years, capital punishment in California would cost over \$4 billion, amounting to over \$300 million per execution. He also recognized that California could perpetrate "[a] gross miscarriage of justice," including executing an innocent person. He said that "the cost of capital punishment takes away funds that could be used to enhance public safety." In contrast, life without parole "protects public safety better," is "a lot cheaper," and can fix "mistakes."⁹⁹

The Briggs initiative was named for then-State Senator John Briggs, and was developed and chiefly promoted by Senator Briggs, his future son-in-law, and his son Ron Briggs. In a February 12, 2012 op-ed, Ron Briggs wrote that while the three of them remain "staunch Republican conservative[s] ... [e]ach of us, independently, has concluded that the death penalty isn't working for California." Ron Briggs stated that "we created a fiscal monster that's taking a human toll on the very people we wanted to protect," and that the California death penalty system was an "ineffective legal beast" costing over \$100 million a year that "tie[d] up the lives of prosecutors and victims who could be moving on to

⁹⁶ *Death in Little Rock*, *supra* note 92.

⁹⁷ Stacy Ryburn, *McDaniel: State's Death-Penalty System 'Completely Broken,'* TIMES RECORD (Fort Smith), July 10, 2013, available at <http://swtimes.com/sections/news/mcdaniel-state%E2%80%99s-death-penalty-system-%E2%80%98completely-broken%E2%80%99.html>.

⁹⁸ Welsh-Huggins, *supra* note 27.

⁹⁹ Don Heller, Op-Ed., *Don Heller: A California Republican against death penalty*, DAILY NEWS (Los Angeles), Sept. 18, 2011.

other things.” He said that in retrospect, he would have advocated life without parole, with restitution to victims.¹⁰⁰

At the end of 2011, after her first year as California’s Chief Justice, former prosecutor and Republican appointee Tani Cantil-Sakauye told the *Los Angeles Times* that she did not think the death penalty “is working.” One of the court’s most conservative justices, she said, “It’s not effective. We know that.” The system would require “structural change, and we don’t have the money to create the kind of change that is needed.” Asked if she favored the death penalty, she said, “I don’t know if the question is whether you believe in it anymore. I think the greater question is its effectiveness and given the choices we face in California, should we have a merit-based discussion on its effectiveness and costs?”¹⁰¹ However, three former governors of California announced on February 13, 2014 their support for a constitutional amendment that would, among other things, shift most death row inmates’ appeals to lower courts from the California Supreme Court and set a five-year deadline for deciding such cases – without, apparently, doing anything about the problems identified by Chief Justice Cantil-Sakauye.¹⁰²

San Francisco District Attorney George Gascon spent 30 years as a police officer, including service as police chief in Arizona and California. Once a capital punishment supporter, he now favors its abolition. The key reasons he cited in October 2012 are the inevitability of mistakes in the criminal justice system; the danger of executing innocent persons; his belief based on data and his own experiences that capital punishment fails to diminish crime; and the capital punishment system’s expenditure of huge amounts of money that could instead be spent on fighting crime and trying to solve homicides that “understaffed police departments” cannot investigate.¹⁰³

Delaware

Delaware’s New Chief Judge, Leo Strine, Jr., said on January 13, 2014, that he is opposed to the death penalty, but would enforce it. As a member of the pardons board, he had voted for commutation of one death sentence and had voted to uphold another one. He stated, “I believe that our society is wrong to descend to the murderous level by taking his life when he’s been captured or caged.”¹⁰⁴

On April 23, 2013, retired Delaware Superior Court Judge Norman Barron – who had been referred to as a “hanging judge” due to his pro-death penalty decisions – wrote in an op-ed that he had changed his mind and now opposed the death penalty. He said the death penalty system in Delaware is “quirky and capricious” – with it being “impossible to justify why some murderers receive the death penalty while others, whose crimes are arguably worse in degree of savagery, do not.” After also discussing the greater cost of having a capital punishment system, the possibility of executing an innocent person, and

¹⁰⁰ Ron Briggs, Op-Ed., *California’s death penalty law: It simply does not work*, L.A. TIMES, Feb. 12, 2012.

¹⁰¹ Maura Dolan, *California chief justice urges reevaluating death penalty*, L.A. TIMES, Dec. 24, 2011.

¹⁰² Maura Dolan, *3 former California governors back proposed death penalty initiative*, L.A. TIMES, Feb. 12, 2014.

¹⁰³ George Gascon, Op-Ed., *Viewpoints: Should we OK Prop. 34 to end executions? Yes*, SACRAMENTO BEE, Oct. 14, 2012.

¹⁰⁴ Tom Lehman, *Strine says he’s against death penalty, but judges must put law first*, WDEL.COM, Jan. 14, 2014, *story and video available at* <http://www.wdel.com/story.php?id=56102>.

the failure to provide real closure to victims' survivors, Judge Barron said, "There is nothing incompatible" with life without parole "and being a law-and-order conservative on matters of crime and punishment, which I still consider myself to be."¹⁰⁵

Florida

Gerald Kogan, who prosecuted capital punishment cases and later, as Florida's Chief Justice, voted to uphold numerous death sentences, now favors abolishing capital punishment "with the possible exception of worst of the worst defendants such as Osama bin Laden or a mass serial killer."¹⁰⁶ No United States jurisdiction has a death penalty limited to such extreme cases.

On April 18, 2012, the *Gainesville Sun* published an op-ed by Judge Charles M. Harris, who was a Circuit Court Judge for 5 years, an Appellate Judge for 14 years, and a Senior Judge in recent years, all in Florida. He also was a member of the Governor's Commission on Capital Cases until the legislature dissolved it. Judge Harris described capital punishment as a "pig in a poke" which he opposed for "practical" reasons: it has been rendered "redundant" by life without parole; it is "excessively expensive"; it is neither a deterrent nor makes people safer; and it is "unbelievably inefficient." He concluded by asking, "Could we not spend the over half billion dollars that will be wasted on capital punishment over the next ten years for a better law enforcement purpose? Isn't that what efficiency is all about? Isn't that how a well-oiled business is run?"¹⁰⁷

Kansas

The Economist article in February 2013 also discussed Kansas Governor Sam Brownback (R), who has said that capital punishment should be limited to those who, like Osama bin Laden, might provide inspiration for additional homicidal acts.¹⁰⁸

Oregon

Edwin J. Peterson served as Chief Justice of Oregon from 1983-1991 and on the Oregon Supreme Court from 1979-1994. Twice, as a citizen, he voted in referendums in favor of capital punishment. But in an op-ed on October 23, 2013, he said that the state's "death penalty system is dysfunctional, expensive, unworkable and unfair" and should be abolished. He stated that the applicable "rules are continually changing," the cost per case just for the appellate process is \$10 million, "[t]he same crime may be treated differently based on the county" – often, due to the district attorney's attitude – and there's a "possibility of a fatal mistake – killing an innocent person."¹⁰⁹

¹⁰⁵ Norman Barron, Op-Ed., *Costs of imposing death penalty outweigh benefits*, DELAWAREONLINE, Apr. 23, 2013, available at http://www.delawareonline.com/article/20130424/OPINION07/304240011/?nclick_check=1.

¹⁰⁶ Welsh-Huggins, *supra* note 27.

¹⁰⁷ Charles M. Harris, Op-Ed., *Why Florida should abolish the death penalty*, GAINESVILLE SUN, Apr. 18, 2012.

¹⁰⁸ Death in Little Rock, *supra* note 92.

¹⁰⁹ Edwin J. Peterson, Op-Ed., *Oregon's death penalty is unjust, this former chief justice says*, OREGONIAN, Oct. 23, 2013.

Pennsylvania

On January 14, 2011, just before leaving office, Pennsylvania Governor Edward G. Rendell, a former district attorney who had always ardently supported capital punishment, urged Pennsylvania's legislature to consider the death penalty's future and its possible abolition. He suggested considering whether there are ways to speed up the process while providing what he described as "thorough and exhaustive review of the facts and the law in each case." But the American Bar Association ("ABA") October 2007 assessment study of Pennsylvania's death penalty found that there is no such review.¹¹⁰ The ABA assessment team, whose members had "varying perspectives on the death penalty," concluded unanimously that Pennsylvania's death penalty system "fails to comply or only partially complies with many" ABA policies designed to assure fairness and accuracy, "and that many of these shortcomings are substantial."¹¹¹

Texas

Former Texas District Attorney Tim Cole (now an Assistant District Attorney in another district) wrote in the *Texas Monthly's* March 18, 2013 issue that "[i]t may seem strange to say but I never really thought much about my feelings regarding the death penalty I guess support for the death penalty was simply a given." As District Attorney, he chose to seek the death penalty three times. He pointed out that although no one legally controls a district attorney's decision on whether to seek death, "there are factors that shouldn't sway the decision yet do" – such as peer pressure, the expectations of victims' families, and the views of the electorate.¹¹²

Ultimately, District Attorney Cole changed his mind. He said that it's clear that "we are not perfect" and "mistakes happen," yet in seeking the death penalty, "there is no acceptable margin of error." He stated, "Over the years I have come to believe that the time for the death penalty has passed. As more and more states abolish the sentence, or declare moratoriums on carrying it forward, the death penalty will be given less and less until the day comes when the state no longer needs to take a life to make a point."

Two other former Texas District Attorneys, Grant Jones and Sam Millsap, wrote in December 2012 that they no longer believe capital punishment is the "best punishment" for any crimes. They said they had changed their minds because they had participated in cases ending in the executions of men "who may well have been innocent." Since human beings can always err, they stated, "the problem with the death penalty is that once it is carried out, there is no way to go back and fix a mistake."¹¹³

¹¹⁰ AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT (2007), available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/pennsylvania/finalreport.authcheckdam.pdf>.

¹¹¹ *Id.* at iii.

¹¹² Tim Cole, Op-Ed., *The Death Penalty Has a Face: A DA's Personal Story*, TEXAS MONTHLY, Mar. 18, 2013.

¹¹³ Grant Jones and Sam Millsap, Op-Ed., *Legislature should seriously reconsider the death penalty*, HOUSTON CHRON., Dec. 13, 2012.

Former Corrections Leaders and Death Row Chaplain

Many former prison officials who formerly favored the death penalty – and in many instances oversaw executions – now publicly oppose it, and others have opposed particular executions. A leading example is Allen Ault, who oversaw the construction of Georgia’s death row and later, as director of the Georgia Department of Corrections, supervised executions. In 2011, he said that carrying out executions is an “inhumane job for people who have a conscience and who value life.”¹¹⁴ He said that the first two inmates whose executions he supervised had participated as teenagers in a “monstrous crime” but by the time of their executions had matured into “entirely different people.” In September 2011, he wrote that “[t]hose of us who have participated in executions often suffer something very much like posttraumatic stress. Many turn to alcohol and drugs. For me, those nights that weren’t sleepless were plagued by nightmares.”¹¹⁵ He said that when an execution was pending, he always spent time with the victim’s family. He talked to the family again after the execution, and sometimes several weeks later. He stated that “most of the victims’ families” with whom he spoke “thought they were going to get a lot of relief or closure from the execution. And in most cases, they did not.”¹¹⁶

In August 2010, Ron McAndrew, a former warden in Florida and Texas who “helped perform three electrocutions in Florida and oversaw five lethal injections in Texas,” stated that he had changed from supporting to opposing the death penalty.¹¹⁷ At a New Hampshire hearing, he testified that “[m]any colleagues turned to drugs and alcohol from the pain of knowing a man had died at their hands.” He said, “I’ve been haunted by the men I was asked to execute in the name of the state of Florida.” He stated that some corrections officers had killed themselves due to their involvement in executions.¹¹⁸

In January 2012, Frank Thompson, a former Oregon penitentiary warden, who oversaw Oregon’s only two executions since it reinstated capital punishment, said capital punishment is “a failed public policy” that “fails terribly in meeting any evidence-based outcomes.”¹¹⁹ On February 26, 2013, Warden Thompson testified in favor of a bill to abolish capital punishment, at an Oregon House Judiciary Committee hearing. He said the death penalty is not a deterrent and puts prison officials into an impossible predicament: “Asking decent men and women to participate in the name of a failed public policy that takes human life is indefensible and rises to a level of immorality.”¹²⁰

¹¹⁴ Chantal Valery, AFP, *Ex-Jailers become US anti-death penalty advocates*, Dec. 20, 2011, available at

<http://www.google.com/hostednews/afp/article/ALeqM5hQ22ox5pRFFf3y7C1JfkajTrXIa9Q?docId=CN.G.9d58c31cd5bdc7896237b12cacad3c9.131>.

¹¹⁵ Allen Ault, *I Ordered Death in Georgia*, DAILY BEAST, Sept. 25, 2011.

¹¹⁶ Interview with Allen Ault on the Rachel Maddow Show, MSNBC TV, Sept. 22, 2011, available at http://www.msnbc.msn.com/id/44639338/ns/msnbc_tv-rachel_maddow_show/.

¹¹⁷ Lynne Tuohy, Associated Press, *Warden critical of death penalty*, Aug. 13, 2010, available at <http://www.nashuatelegraph.com/news/statenewengland/822405-227/warden-critical-of-death-penalty.html>.

¹¹⁸ Annmarie Timmins, *Former warden ‘haunted’ by executions*, CONCORD MONITOR, Aug. 13, 2010.

¹¹⁹ Alan Gustafson, *Former Oregon warden seeks end to death penalty*, STATESMAN J., Jan. 14, 2012.

¹²⁰ Helen Jung, *Oregon death penalty ‘indefensible,’ says man who last carried it out*, OREGONIAN, Feb. 26, 2013.

Jeanne Woodford, former Warden of California's San Quentin prison, said in 2011 that she had concluded that capital punishment "serves no one. It doesn't serve the victims. It doesn't serve prevention. It's truly all about retribution." She has concluded that "[t]he only guarantee against executing the innocent is to do away with the death penalty."¹²¹ Ms. Woodford now heads the anti-death penalty group Death Penalty Focus.

Reverend Carroll Pickett, who was present, as chaplain of the Huntsville, Texas prison, at Texas' first post-*Furman* execution and 94 more, wrote (as quoted in a July 2013 news story): "I know for a fact that I watched four innocent men being killed by the state of Texas, and many more men die who should never have been sent to the chamber," *i.e.*, "of the 95 some 35 were 'fall partners' – that is, there were two or more people involved in the crime and they were not the one who pulled the trigger." Reverend Pickett now speaks out against capital punishment.¹²²

Conservative Editorialists, Columnists and Activists

In 2013, enough prominent conservatives had spoken out against the death penalty that they attracted editorial attention, as well as news coverage. For example, the *Dallas Morning News* ran an editorial on November 29, 2013, entitled *Conservatives vs. the death penalty*. The editorial noted that "a new national group, Conservatives Concerned About the Death Penalty," had been created as "a network of like-minded activists" and earlier in November had entered into a partnership with the campus-centered Young Americans for Liberty.¹²³

The *Lincoln Journal Star*, on April 22, 2013, ran an editorial entitled *Conservatives and Death Penalty*. It said there is evidence that the "tide" of conservatives coming out against the death penalty was "growing stronger." It noted that Edward Crane, who founded the CATO Institute, said that "the government is often so inept and corrupt that innocent people might die as a result. Thus, I personally oppose capital punishment." It also quoted Mary Kate Cary, who wrote speeches for the first President Bush, who said, "It's becoming harder to justify the death penalty in the face of evidence that our system is flawed. ... Times have changed, and it's time for conservatives to get on the right side of the death penalty argument. One can oppose the death penalty and still be in favor of a tough, affordable, accurate and fair criminal justice system." The *Star* urged Republicans in Nebraska's Legislature to recognize that "[t]hey can vote for repeal of the death penalty without turning in their conservative credentials."¹²⁴

¹²¹ DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2011: YEAR END REPORT, at 7 (2011), available at http://www.deathpenaltyinfo.org/documents/2011__Year__End.pdf.

¹²² Joseph Brean, *Tide may be turning for U.S. capital punishment as recent votes reveal states divided on life and death issue*, NATIONAL POST (Canada), July 19, 2013, available at <http://news.nationalpost.com/2013/07/19/tide-may-be-turning-for-u-s-capital-punishment-as-recent-votes-reveal-states-divided-on-life-and-death-issue/>.

¹²³ Editorial, *Conservatives vs. the death penalty*, DALLAS MORNING NEWS, Nov. 29, 2013. Another Texas newspaper, the *Star-Telegram*, changed on June 22, 2013 from favoring a moratorium on executions to favoring the death penalty's abolition. It cited moral grounds, and the continuing "arbitrary and capricious" implementation of capital punishment – whose imposition may depend on the county involved. The *Star-Telegram* also pointed to the possibility of executing an innocent person. Editorial, *It's time to halt executions in Texas*, STAR-TELEGRAM, June 22, 2013.

¹²⁴ Editorial, *Conservatives and death penalty*, LINCOLN J. STAR, Apr. 22, 2013.

Another conservative who used conservative reasoning to oppose the death penalty in 2013 was Drew Johnson, a Senior Fellow at Taxpayers Protection Alliance. In a December 1, 2013 op-ed, he said, “The truth is that government is not perfect, far from it, and the death penalty carries a dangerously high probability of killing innocent people, siphons billions of dollars from the public and gives the government power it cannot be trusted to carry out fairly.”¹²⁵

A month earlier, Chase Blasi, a board member of the Kansas Young Republicans, wrote in an op-ed that “[t]here is an unfortunate misperception that if you are conservative you must favor the death penalty. Nothing could be further from the truth. When you truly study the death penalty, it becomes clear that there is nothing conservative about it.” He added, “Let’s be honest about what the death penalty is: an ineffective government program that wastes millions in taxpayer dollars. The death penalty is an awesome power to entrust to government, especially given its long track record of errors. If the death penalty actually reduced crime, perhaps there would be an argument for keeping it. But that isn’t the case.”¹²⁶

And in September 2013, Steve Monks, describing himself as “the former chairman of the Durham County Republican Party and a staunch conservative,” said: “I am all in favor of taking a tough approach to crime. I believe people who commit murder should die in prison. I also believe we should use crime-fighting tools that are efficient and have proven results. The death penalty does not meet either of those standards.”¹²⁷

Catholic Leaders

In June 2013, Pope Francis reaffirmed the Catholic Church’s opposition to capital punishment. In supporting its abolition, the Pope said the Church’s position is “a courageous reaffirmation of the conviction that humanity can successfully confront criminality” without the death penalty. He called for commuting death sentences “to a lesser punishment that allows for time and incentives for the reform of the offender.”¹²⁸

In 2012, over 300 Catholic theologians signed “A Catholic Call to Abolish the Death Penalty.” They said that the Troy Davis case (discussed in Part I.B.3.c.viii below) demonstrated such “a deeply flawed justice system” that “the Antiterrorism and Effective Death Penalty Act, which created the legal conditions for executing a man whose guilt was not established beyond reasonable doubt” should be repealed at once. The theologians urged those who did not share their religious opposition to capital punishment to realize that, as the late Justice William J. Brennan once said, “the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are innocent.” They said that “in concert with our recent popes and bishops, we oppose the

¹²⁵ Drew Johnson, Op-ed., *Capital punishment inconsistent with conservative views*, KNOXVILLE NEWS-SENTINEL, Dec. 1, 2013.

¹²⁶ Chase Blasi, Op-Ed., *Kansas should lead on repealing death penalty*, WICHITA EAGLE, Nov. 1, 2013.

¹²⁷ Steve Monks, Op-Ed., *No deterrent, no defense for NC death penalty*, NEWS & OBSERVER, Sept. 10, 2013.

¹²⁸ *Papal Message Reaffirms Call to Abolish Death Penalty*, NATIONAL CATHOLIC REGISTER, June 19, 2013, available at <http://www.ncregister.com/daily-news/papal-message-reaffirms-call-to-abolish-death-penalty>.

death penalty, whether a person on death row is guilty or innocent, on both theological and practical grounds.”¹²⁹

8. Executing Inmates Soon After Saving Them from Their Suicide Attempts

The execution that created the most controversy in recent years was that of Troy Davis, which has been referred to above and will be discussed in more detail below. But other executions (discussed immediately below and in the sections further below about mental retardation and mental illness) raised different concerns.

In two cases, state governments provided medical treatment to save death row inmates’ lives, and then proceeded to use other medicines in lethal injection executions. The first involved Lawrence Reynolds. About 36 hours before his scheduled execution in March 2010, he was discovered to be unconscious in his Ohio death row cell, after evidently having taken a drug overdose. The next day, the Governor gave him a one-week reprieve, so he could be treated in a hospital. The next week, nine days after his drug overdose, he had gotten well enough to be, and was, killed by drugs that were lethally injected.¹³⁰

On September 21, 2010, Georgia death row inmate Brandon Rhode tried to commit suicide on the morning of his scheduled execution, by slicing open his right arm – causing a deep wound – and cutting open his left arm and slicing a deep cut on his neck’s right side. He was sent to a hospital where he got emergency treatment that saved his life. He had almost died due to losing huge amounts of blood. The Georgia Supreme Court granted an emergency stay of execution, but only until September 23 – two days after his original execution date. After his counsel went before various courts, his execution was rescheduled for September 27 – the day before his death warrant was to expire. The United States Supreme Court denied a stay on September 27. He was executed that same evening, after the execution team took about a half hour to find a vein into which they could inject lethal drugs.¹³¹

9. Execution in Violation of Vienna Convention on Consular Relations

On January 22, 2014, Texas death row inmate Edgar Arias Tamayo was executed over the objections of the United States State Department, the government of Mexico, representatives of international organizations, and many others. He had been convicted and sentenced to death in violation of the Vienna Convention on Consular Relations¹³² (“VCCR”), in that no one told him that as a foreign country’s citizen he had the right to seek help from his country’s consulate.¹³³ And he had not been permitted to raise any claim

¹²⁹ Tobias Winright, A Catholic Call to Abolish the Death Penalty, *available at* <http://catholicmoralthology.com/a-catholic-call-to-abolish-the-death-penalty>.

¹³⁰ AMNESTY INTERNATIONAL, *supra* note 61, at 45.

¹³¹ *Id.* at 45-46.

¹³² Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. For history of the VCCR, see Mark E. Wojcik, *Consular Notification for Dual Nationals*, 38 S. ILL. U. L.J. ____ (2014) (forthcoming 2014).

¹³³ Under Article 36 of the VCCR, “when a national of one country is [arrested or] detained by authorities in another, the authorities must notify the consular officers of the detainee’s home country if the detainee so requests.” *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 338-39 (2006). The individual arrested or detained must also be informed “without delay” of the right to consular

based on the VCCR in any court.¹³⁴ In so acting, Texas behaved in the same manner as it had done in a case in which Texas' right to do so had been upheld by the United States Supreme Court.

The Supreme Court's holding in that earlier case, *Medellin v. Texas*,¹³⁵ concerned a Mexican national who had lived in the United States since preschool. After being arrested for murder and rape, Mr. Medellin was not informed that he had a right, under the VCCR, to have the Mexican consulate informed of his arrest. Ignorant of this right, he did not ask that the consulate be notified. He was then convicted and sentenced to death. In state habeas, he sought to raise a claim about the violation of his VCCR rights. The Texas courts and the federal district and appeals courts barred his claim because he had not raised it earlier (and because he did not persuade them that his conviction or sentence would have been affected if the consulate had been contacted). Thereafter, the International Court of Justice ("ICJ") held in *Avena and Other Mexican Nationals*¹³⁶ that the United States had violated Article 36(1)(b) of the Vienna Convention, by failing to inform 51 Mexican nationals, including Medellin and Tamayo, of their rights under the Vienna Convention, and that the United States was required to offer some form of consideration of their convictions and sentences, irrespective of state procedural default rules.

The Supreme Court rejected President Bush's effort to get Texas to comport with the ICJ decision, to which the United States was a party. Medellin was executed on August 6, 2008.¹³⁷ On January 19, 2009, the ICJ found unanimously that by executing Medellin without providing the review and reconsideration that the ICJ had set forth in a July 16, 2008 Order, "the United States of America has breached the obligation incumbent upon it" under that Order.¹³⁸

10. Continuing International Trend Away from Capital Punishment

The international trend away from capital punishment has continued. Most of Latin America, Canada, and Western Europe abolished capital punishment by the early 1980s, as did South Africa when it ended apartheid. Following the fall of the Iron Curtain, virtually all of the European portions of the former Soviet Union either abolished capital punishment or (as in Russia) implemented moratoriums on execution that remain in effect.¹³⁹

Amnesty International reported that in 2012, the number of countries known to have carried out executions increased slightly from 20 in 2011 to 21, and that there was progress "towards abolition ... in all regions of the world." The United States was the only

notification. Vienna Convention on Consular Relations, art. 36(1)(b); *Osagiede v. United States*, 543 F.3d 399, 402 (7th Cir. 2008).

¹³⁴ Manny Fernandez, *Texas Executes Mexican Man for Murder*, N.Y. TIMES, Jan. 22, 2014.

¹³⁵ 552 U.S. 491 (2008).

¹³⁶ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

¹³⁷ See Anthony G. Amsterdam, Remarks at the Southern Center for Human Rights' Frederick Douglass Awards Dinner, at 3-5, Oct. 2, 2008, available at <http://www.deathpenaltyinfo.org/files/Tony%20Amsterdam's%20Remarks%20-%20Oct.%202%202008.pdf>.

¹³⁸ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2009 I.C.J. 3, ¶ 61(2) (Jan. 19).

¹³⁹ AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 2009, at 11, 18 (2010), available at <http://www.amnesty.org/en/library/asset/ACT50/001/2010/en/17348b70-3fc7-40b2-a258-af92778c73e5/act500012010en.pdf>.

country in the Americas to execute people in 2012, as it had been in the previous three years.¹⁴⁰ According to Amnesty International, the only countries exceeding the United States in reported executions in 2012 were China, Iran, Iraq, and Saudi Arabia.¹⁴¹

Many Asian countries implement the death penalty, with China executing more people than the rest of the world's countries combined. Arab countries, Iran, and some African countries also continue to employ capital punishment.¹⁴²

On April 19, 2012, the African Commission on Human and Peoples' Rights' Working Group on the Death Penalty issued its *Study on the Question of the Death Penalty in Africa*, after several years of work. The Study's Executive Summary said that "What emerges from the survey of the pros and cons of the death penalty is that the abolitionist case is more compelling than the retentionist case."¹⁴³ In its analysis, the Working Group pointed to "new interesting developments" that on the whole "strengthen the case against the death penalty." These include:

- (1) judicial opinions saying there is no known way of executing people that avoids some degree of cruelty or inhumanity;
- (2) statements by judges and prison commissioners in various countries that imposing and carrying out death sentences "have a brutalising and traumatic effect on the sentencing judge, on the executioner and on the family of the condemned person";
- (3) even where there are fair trials, fortuities affect whether capital punishment is imposed; studies indicating that "wrong persons have sometimes been executed";
- (4) studies finding that capital punishment "is often applied in an arbitrary and discriminatory fashion especially against vulnerable groups in society"; and
- (5) "botched executions" and other examples of "agony and cruelty" in certain executions.

The Working Group stated that "[t]hese developments have ... underscored the desirability of the total abolition of the death penalty."¹⁴⁴ Amnesty International reported that in 2012, 5 of the 54 member states of the African Union judicially executed people, whereas 37 member states were "abolitionist in law or practice."¹⁴⁵

¹⁴⁰ AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 2012, at 5, 6 (2013), available at <http://www.amnesty.org/en/library/asset/ACT50/001/2013/en/bbfea0d6-39b2-4e5f-a1ad-885a8eb5c607/act500012013en.pdf>.

¹⁴¹ *Id.*, chart: 2012 Executing Countries.

¹⁴² *Id.* at 8-9.

¹⁴³ WORKING GROUP ON THE DEATH PENALTY, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, STUDY ON THE QUESTION OF THE DEATH PENALTY IN AFRICA, at 11 (2012), available at http://www.achpr.org/files/news/2012/04/d46/study_question_deathpenalty_africa_2012_eng.pdf.

¹⁴⁴ *Id.* at 36 (footnotes omitted).

¹⁴⁵ AMNESTY INTERNATIONAL, *supra* note 140, at 7.

On December 20, 2012, the U.N. General Assembly voted 111 to 41 with 34 abstentions for a resolution calling for a moratorium on executions and encouraging all countries to ratify a U.N. protocol on abolishing capital punishment.¹⁴⁶ The U.N. General Assembly human rights committee's vote in November 2012 on a similar resolution was described in a news headline as "US sides with Iran and N. Korea in record U.N. vote over the death penalty." The vote was 110 to 39 with 36 abstentions.¹⁴⁷ Earlier U.N. General Assembly votes on similar resolutions were passed by 104 to 54 with 29 abstentions in 2007,¹⁴⁸ 106 to 46 with 34 abstentions in 2008,¹⁴⁹ and 109 to 41 with 35 abstentions in 2010 (with Russia a new co-sponsor).¹⁵⁰

On October 7, 2011, the Japan Federation of Bar Associations issued a declaration stating that "the death penalty is an inhumane penalty which deprives people of their precious lives." It concluded that "we should immediately suspend executions and conduct cross-society discussions on the abolition of the death penalty."¹⁵¹ (See Part III.E below for discussion of capital defense representation in Japan.)

On November 21, 2013, the Supreme Judicial Court of China decided that judges should preclude consideration of confessions secured by torture and should not impose the death penalty when the evidence is tenuous. The decision pointed to difficulties often cited by lawyers and human rights groups: torture by police, made-up evidence, improper investigations into the facts, and undue impact on judges of official views or public sentiment.¹⁵²

B. Important Issues

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

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

On July 19, 2013, President Barack Obama, who continues to support capital punishment, stated: "The African-American community is ... knowledgeable that there is a

¹⁴⁶ AFP, *Record vote against death penalty at UN*, Dec. 21, 2012, available at <http://dawn.com/2012/12/21/record-vote-against-death-penalty-at-un/>.

¹⁴⁷ *US sides with Iran and N. Korean in record UN vote over the death penalty*, TELEGRAPH, Nov. 20, 2012, available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9689545/US-sides-with-Iran-and-N.-Korea-in-record-UN-vote-over-the-death-penalty.html>.

¹⁴⁸ Daniel Bases, Reuters, *UN Assembly calls for moratorium on death penalty*, Dec. 18, 2007, available at <http://www.reuters.com/article/idUSN1849885920071218>.

¹⁴⁹ AMNESTY INTERNATIONAL, *DEATH SENTENCES AND EXECUTIONS IN 2008*, at 11 (2009), available at <http://www.amnesty.org/en/library/asset/ACT50/003/2009/en/0b789cb1-baa8-4c1b-bc35-58b606309836/act500032009en.pdf>.

¹⁵⁰ AMNESTY INTERNATIONAL, *DEATH SENTENCES AND EXECUTIONS IN 2010*, at 3 (2011), available at <http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf>.

¹⁵¹ Japan Federation of Bar Associations, *Declaration Calling for Establishment of Measures for Rehabilitation of Convicted Persons and Cross-Society Discussion on Abolition of the Death Penalty*, Oct. 7, 2011, available at http://www.nichibenren.or.jp/en/document/statements/year/2011/20111007_sengen.html.

¹⁵² Chris Buckley, *China: Court Seeks to Curtail Abuses*, N.Y. TIMES, Nov. 22, 2013.

history of racial disparities in the application of our criminal laws, everything from the death penalty to the enforcement of our drug laws. And that ends up having an impact in terms of how people interpret the case [regarding the killing of Trayvon Martin].”¹⁵³

a. Studies Regarding Texas’ Harris County and Delaware

In 2012, the *Houston Law Review* published a study by Scott Phillips about the racial disparities in Harris County, Texas’ death penalty system during Chuck Rosenthal’s years as District Attorney: 2001-2008. Phillips, who previously analyzed Harris County’s death penalty implementation between 1992 and 1999, when Johnny Holmes was District Attorney, said that during the periods he studied, “if Harris County were a state it would rank second in executions after Texas.” Phillips’ study regarding Rosenthal’s tenure found that whereas there no longer was a disparity in death sentences by race of defendant, death sentences were imposed where the victims were white “at 2.5 times the rate one would expect if the system were blind to race,” and death sentences were imposed where victims were white females “at 5 times the rate one would expect if the system were blind to race and gender.” Phillips termed these “disparities ... particularly troubling”¹⁵⁴ because, as the *Houston Chronicle* reported, District Attorney Rosenthal resigned “in 2008 over sexually-charged and racially-tinged emails,” one of which “included a photo of a black man, lying on the ground surrounded by watermelon and a bucket of chicken, that was labeled ‘fatal overdose.’”¹⁵⁵ The *Chronicle’s* Lisa Falkenberg, after interviewing black prosecutors in Rosenthal’s office, reported¹⁵⁶ what Phillips, with substantial understatement, described as “a broader office culture of racist comments and jokes.”¹⁵⁷

In 2012, the *Iowa Law Journal* published a study by Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans, and Martin T. Wells concerning Delaware cases since 1977 in which the death penalty has been sought. From 1977-1991, Delaware juries decided the sentence when capital punishment was sought (unless the defendant waived a jury). Thereafter, all such decisions have been made by judges. However, since 2002, determinations of the facts that make a defendant *eligible for* the death penalty have been made by juries, and judges must, in sentencing, give “appropriate consideration” to the jury’s view as to whether aggravating factors outweigh mitigating factors.¹⁵⁸

The three main conclusions of the authors were as follows:

- (1) First, the reversal rate on appeal in Delaware was much lower than in other death penalty states after judges became the sentencers.
- (2) Second, sentencing by judges (who sit in panels that need not be unanimous) has resulted in a statistically significant higher likelihood of the death sentence’s imposition than (a) in other

¹⁵³ President Barack Obama, Remarks on Trayvon Martin, July 19, 2013, *available at* <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>.

¹⁵⁴ Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131, 131-32 (2012).

¹⁵⁵ Lise Olsen, *Harris death penalties show racial pattern*, HOUSTON CHRON., Nov. 14, 2011.

¹⁵⁶ Lisa Falkenberg, *A Lonely Feeling in the DA’s Office*, HOUSTON CHRON., Feb. 7, 2008.

¹⁵⁷ Phillips, *supra* note 154, at 151.

¹⁵⁸ Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans, and Martin T. Wells, *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2011-12).

states and (b) in Delaware when its capital sentences were determined by juries.

- (3) Third, there has been, under judge sentencing, “a dramatic disparity of death-sentencing rates by race, one substantially more pronounced than in other jurisdictions.” This appears to be particularly significant when the defendants are black and the victims are white. The authors encouraged further investigation of disparity, since they had not yet done the comprehensive type of analysis pioneered by the late Professor David Baldus.¹⁵⁹

b. Study of Racial and Geographic Disparities in State of Washington

A study dated January 27, 2014 by Katherine Beckett, Ph.D. (a sociologist) and Heather Evans, M.A. (and a Ph.D. candidate), both at the University of Washington, was prepared at the request of counsel for Washington death row inmate Allen Eugene Gregory, whose appeal is pending before the Washington Supreme Court. It became public on February 23, 2014. The authors stated that this was the first study since the enactment of Washington’s capital punishment statute in 1981 to assess the role (if any) of race in capital sentencing there. The study covered 285 adjudicated Washington cases between December 1981 and May 2013 in which non-juvenile defendants were found guilty of aggravated murder and for which “trial reports” were available. (The authors could not say what differences (if any) would occur in their results if unavailable “trial reports” in 20 other cases were to become available.)¹⁶⁰

The study’s “key findings pertaining to race,” after taking many but “incomplete” case characteristics into account, included:

- (1) Prosecutors sought capital punishment in a higher percentage of aggravated murder cases where the defendant was white than where the defendant was non-white.
- (2) Juries voted for capital punishment “in a notably larger share of cases” where the defendants were black than where the defendants were not black.
- (3) Prosecutors’ decisions on seeking the death penalty were unaffected by the race of either the victims or the defendants.
- (4) But “juries were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants.”¹⁶¹

The authors stated that their fourth finding, despite being “based on an analysis of a relatively small sample, ... nonetheless indicate that the race of the defendant has had a

¹⁵⁹ *Id.* at 1954.

¹⁶⁰ KATHERINE BECKETT AND HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2012, at 1-4 (2014), *available at* <http://www.deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf>.

¹⁶¹ *Id.* at 2, 17 (emphasis omitted).

marked impact on sentencing in aggravated murder cases in Washington State since the adoption of the existing statutory framework.”¹⁶²

The authors also found substantial geographical disparities in seeking capital punishment – which did not seem to be related to either “the number of aggravating circumstances” or “the number of victims,” and that “[p]rosecutors were nearly three times more likely to seek death in cases that received extensive publicity than in cases that did not.”¹⁶³

The Associated Press noted that racial disparities were not among the key bases that Governor Jay Inslee had cited on February 11, 2014, in stating that he was imposing a moratorium on executions in Washington. It said that if the report’s findings were accurate, they “echo [the Governor’s] worry that capital punishment is ‘unequally applied’” – even in a state that many believe has “the nation’s most restrictive death-penalty system.” Spokesmen for the Washington Association of Prosecuting Attorneys asserted that the study had not established that juries had discriminated on the basis of the race of defendants – and pointed to several factors for which (as the authors acknowledged) these authors did not control. The Associated Press reported that another factor cited by Governor Inslee in imposing the moratorium – geographic disparities – was supported by the report.¹⁶⁴

c. *Repeal of North Carolina’s Racial Justice Act, after Decisions Implementing It*

North Carolina’s Racial Justice Act, enacted in 2009, provided that defendants prior to trial and death row inmates could seek to preclude prosecutors from seeking the death penalty or to have a death sentence overturned by showing that race had a significant impact on the decision to seek death or on the imposition of the death sentence. Statistical evidence could be used in seeking relief, but prosecutors could seek to rebut it.¹⁶⁵

After first being significantly amended and limited in 2012, the law was repealed in June 2013.¹⁶⁶

Before being repealed, the Act was applied at least twice. On April 20, 2012, Superior Court Judge Gregory A. Weeks held, with respect to death row inmate Marcus Robinson’s 1994 trial in Cumberland County, that “race was a materially, practically and statistically significant factor” in the decision to exercise peremptory challenges during jury selection by prosecutors that was sufficiently great as “to support an inference of

¹⁶² *Id.* at 17.

¹⁶³ *Id.* at 7, 3.

¹⁶⁴ Gene Johnson, Associated Press, *UW study: Race a factor in imposing death penalty*, Feb. 23, 2014, available at <http://www.yakimaherald.com/news/lateststatenews/1952284-8/uw-study-race-a-factor-in-imposing-death>.

¹⁶⁵ Associated Press, *Perdue signs Racial Justice Act*, August 11, 2009, available at <http://wral.com/news/state/story/5769609/>; Jon Ostendorff, *Perdue signs Racial Justice Act*, Aug. 11, 2009, available at <http://www.ncmoratorium.org/news.aspx?li=4053>.

¹⁶⁶ Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013.

intentional discrimination.” Judge Weeks resentenced Robinson to life without possibility of parole. The prosecution immediately said it would appeal.¹⁶⁷

On December 13, 2012, Judge Weeks applied the by-then-amended Racial Justice Act to grant relief to Tilmon Golphin, Christina Walters, and Quintel Augustine.¹⁶⁸ Judge Weeks stated, “In the writing of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making.” Judge Weeks held that the evidence – ironically, buttressed by the State’s own evidence and experts – overwhelmingly showed that in all three cases prosecutors had distorted juries’ compositions to become extraordinarily white. There was also statewide evidence, including evidence concerning “trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned ... to circumvent the constitutional prohibition against race discrimination in jury selection.”¹⁶⁹

Both of these decisions by Judge Weeks were pending on appeal before the North Carolina Supreme Court as of February 2014.

d. Study Regarding the Federal Death Penalty

A study regarding the federal death penalty by G. Ben Cohen and Robert J. Smith, published in 2010, found “that federal death sentences are sought disproportionately where the expansion of the venire from the county [where a case would be tried in state court] to the [federal] district level had a dramatic demographic impact on the racial make-up of the jury” and may explain “the racial distortions in the federal death penalty.”¹⁷⁰ The authors stated that most death-eligible crimes prosecuted by the federal government take place in areas with a concentration of minorities. By trying these cases in federal court – where the jury pool often includes suburbs with high percentages of white people – instead of in state courts in the counties where the crimes occurred, “the voice of the population impacted most by violent crime” decreases, the jury venires become “whiter,” and the chance that the outcome is affected by “implicit race bias increases.”¹⁷¹ The authors reported that in the eight federal districts with more than two death sentences, the counties in which the crimes occurred usually have a high African American population but that the “federal districts [where the trials took place] ... [are] heavily white.”¹⁷²

e. Study of Racial Bias Among Capital Case “Jurors”

In a 2011 article, University of California Professors Mona Lynch and Craig Haney discussed, among many other things, an experiment in which “400 jury-eligible, non-student, death-qualified participants” individually viewed a video of a simulated death

¹⁶⁷ Anne Blythe, *Racial Justice Act spares 1st inmate from death sentence*, NEWS & OBSERVER, Apr. 20, 2012; Emery P. Dalesio, Associated Press, *Judge: Race played role in NC death penalty case*, Apr. 20, 2012, available at <http://cnsnews.com/news/article/judge-race-played-role-nc-death-penalty-case>.

¹⁶⁸ Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 14, 2012.

¹⁶⁹ State v. Golphin et al., Nos. 97 CRS 47314-15, 98 CRS 34832, 35004, 01 CRS 65079, at 3-5 (N.C. General Ct. Justice Cumberland Cty. Dec. 13, 2012).

¹⁷⁰ G. Ben Cohen and Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 425 (2010).

¹⁷¹ *Id.* at 435.

¹⁷² *Id.* at 437.

penalty trial and decided on either death or life without parole. The videos that particular people saw varied in that in some, the victim and the defendant were both white; in others, the defendant was white and the victim was black; in yet others, the defendant was black and the victim was white; and in the final variation, both the defendant and the victim were black. All participants were asked to complete questionnaires about themselves and their decision making processes.

The results showed that those who saw a video with a black defendant “were significantly more likely to sentence him to death, especially” where the victim was white. The participants who least understood the jury instructions “were the most prone to racial bias.” Those with “high comprehension” of the instructions sentenced the black and white defendants in “equal proportions.” Overall, the participants “were less willing to give the identical evidence mitigating weight” when the defendant was black as compared to when the defendant was white; and they “were significantly more likely to improperly use mitigating evidence in favor of a death sentence” when the defendant was black than when the defendant was white.¹⁷³

Lynch and Haney also discussed a follow-up study that differed from the first only in this respect: the over 500 participants got to “deliberate” in 100 small group “juries,” and the deliberations were videotaped and transcribed. Once again, the black defendant was more likely to be sentenced to death than the white defendant – but “the race effect was manifested only after deliberation.” Also, again, the extent to which jurors understood the jury instructions had a “significant” impact: those with poor understanding were more likely to be affected by race – both in “the straw vote” and “final vote” of the “juries.”

Lynch and Haney found “that the evaluation of mitigating evidence was key to the measured race effects.” White males seemed to be the “driving force” for these effects. They differed both from white women and non-whites in two ways: they were far more likely to sentence the defendant to death, “but only when the defendant was Black”; and they alone accounted for the entire race effect – apparently due to their reactions to what was presented as mitigating evidence. Moreover, the more white men there were on a “jury,” the higher the death-sentencing of black defendants, with white men becoming even more “disproportionately influential” on “juries.” Thus, jury deliberations could “activate and exacerbate racial bias under certain conditions.”¹⁷⁴

Lynch and Haney said that “[t]he race-of-defendant effect appears more likely to arise in the trial stage, is more a function of jury decision-making processes, and is especially likely in certain kinds of cases. Thus, capital cases that involve Black defendants, particularly when the victims are White, and where a concentration of White men serve on the juries, are especially prone to racially-biased outcomes.”¹⁷⁵

f. Experimental Study of Jurors’ Implicit Biases

On February 19, 2013, Justin D. Levinson, Robert J. Smith and Danielle M. Young, released “an experimental study” (to be published in the *New York University Law Review*) regarding the extent to which “implicit bias” affects people eligible to sit on capital juries in

¹⁷³ Mona Lynch and Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 583-84.

¹⁷⁴ *Id.* at 584-86.

¹⁷⁵ *Id.* at 586.

Alabama, Arizona, California, Florida, Oklahoma, and Texas.¹⁷⁶ By “implicit bias,” they referred to “the notion that the human mind may unwittingly contribute bias into the seemingly neutral concepts and processes of death penalty administration.” Their findings included:

- (1) Those eligible for juries “implicitly associate Whites with ‘worth’ and Blacks with ‘worthless’”;
- (2) Jurors who remain eligible to serve on capital juries after “death qualification” (which excludes those who would never vote for the death penalty and is supposed to exclude jurors who would always vote for the death penalty if it is sought) “hold stronger implicit and self reported biases than do jury eligible citizens generally”;
- (3) Death qualification’s removal of so many non-White jurors “accounts for the differing level of implicit racial bias between death-qualified and non-death-qualified jurors”;
- (4) “Implicit racial bias predicts race of the defendant effects” (that is, that after controlling for all other relevant factors, in some jurisdictions the odds of an African American defendant being sentenced to death are far greater than for a white defendant); and
- (5) “Explicit racial bias predicts race of the victim effects” (that is, that after controlling for all other relevant factors, in many jurisdictions the odds of imposing the death penalty are far greater where the victim is white than where the victim is African American).¹⁷⁷

g. Study of Military Death Penalty

The United States Military’s administration of its capital punishment system was in 2012 the subject of a law journal article and a newspaper series.

The law journal article, by the late Professor David Baldus and three colleagues, considered all potentially death-eligible military cases between 1984 and 2005 of which they were aware. They found capital punishment to be more likely sought and more likely secured, holding non-racial variables constant, in cases involving white victims – and even more so in cases involving minority defendants and white victims. They also found that seeking and obtaining the death penalty was more likely in cases involving minority defendants (regardless of the victims’ race) – in “a magnitude that is rarely seen in state court systems.”¹⁷⁸ The authors determined that the major source of the white-victim

¹⁷⁶ Justin D. Levinson, Robert J. Smith, and Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, N.Y.U. L. REV. (forthcoming 2014), available at <http://www.deathpenaltyinfo.org/documents/LevinsonSmithYoung.pdf>.

¹⁷⁷ *Id.* at 54.

¹⁷⁸ David C. Baldus, Catherine M. Grosso, George Woodworth, and Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States*

disparities was the “combined effect of convening authority charging decisions and court-martial panel findings of guilt at trial” (the latter being a precondition to capital sentencing proceedings). They also concluded that the main source of the minority-defendant disparities (independent of the victim’s race) was “the death-sentencing decisions of panel members in capital sentencing hearings.”¹⁷⁹ In cases with white victims, which were 97% of those that proceeded to capital sentencing hearings, “court-martial members sentenced minority accused to death at a much higher rate than similarly situated white accused.”¹⁸⁰

The authors observed that the likelihood of racial bias might well be greatly lowered or eliminated if the military death penalty were applicable only to cases with “military implications” – and not to “civilian-style” murder cases.¹⁸¹ Otherwise, their findings “indicate that the 1984 executive order designed to bring military law into conformity with *Furman* failed to purge the risk of racial prejudice from the administration of the death penalty in the United States Armed Forces from 1984 through 2005.”¹⁸²

In August 2011, the McClatchy Newspapers ran a three-part series on the military death penalty. Their reporters found that of the 16 men who had been sentenced to death since the military changed its death penalty system in 1984, 10 had been removed from death row. Mostly, this was due to reversals by military appeals courts arising from “mistakes made at every level of the military’s judicial system.” These “included defense attorneys who bungled representation, judges who didn’t know how to properly instruct a jury and prosecutors who mishandled evidence.” Defense counsel in cases at each level, from trial to appeals, “routinely” were “young, inexperienced lawyers.” Moreover, both defense and prosecution attorneys “generally rotate out of their jobs after a couple of years, and many are unlikely to get experience in capital cases.”¹⁸³

McClatchy reported that experts were alarmed by many aspects of the military death penalty system, “including a racial disparity that’s worse in some ways than in civilian courts.” McClatchy also discussed the Baldus team’s finding that minorities were twice as likely than whites to be sentenced to death in courts martial.¹⁸⁴

2. Inadequacies or Unavailability of Counsel for People Facing Execution

Problems with the quality or performance of counsel representing capital defendants and death row inmates have been mentioned several times above, and will be further discussed below – in Part II.F, regarding the Supreme Court’s February 24, 2014 decision

Armed Forces (1984-2005), 101 J. CRIM. L. & CRIMINOLOGY 1227, 1228 (2012). Moreover, the authors stated that in the 16 cases involving more than one victim, “[t]he racial disparities documented ... are the largest disparities that we have seen documented in any factually defined subgroup of cases in an American death-penalty system over the last twenty-five years.” *Id.* at 1302-03.

¹⁷⁹ *Id.* at 1228.

¹⁸⁰ *Id.* at 1274.

¹⁸¹ *Id.* at 1229. They found that since 1990, 86% of imposed military death sentences were “in cases with military implications.” *Id.* at 1247.

¹⁸² *Id.* at 1300.

¹⁸³ Marisa Taylor, McClatchy Newspapers, *Many death sentences in U.S. military overturned*, Aug. 28, 2011, available at <http://www.mcclatchydc.com/2011/08/28/121849/many-death-sentences-in-us-military.html>.

¹⁸⁴ *Id.*

in *Hinton v. Alabama*, and in Part III.D, in discussing assessments by ABA teams in particular states. The present section focuses on other particular developments in recent years.

a. *A Pervasive Problem: The Failure to Have Properly Functioning Defense and Post-Conviction Teams*

In a remarkable article, Federal District Judge Mark W. Bennett has candidly described how even a very well-intentioned judge who is prepared to authorize large amounts of money and help for capital defense counsel may inadvertently appoint counsel whose performance is disastrous.¹⁸⁵ Judge Bennett, with two capital cases before him that were to be tried separately, appointed three criminal defense lawyers for both defense teams. Each team included “two of the four finest criminal defense lawyers in the state.” The judge had prior experience with all four attorneys, and he paired on one team two lawyers who had been co-counsel “on many other high profile cases.” Judge Bennett “personally vetted” the proposed “learned counsel” who would each work with one of the two pairs of lawyers whom the judge had selected.

But after presiding over the federal habeas proceeding in one of these two cases, Judge Bennett realized that “one of the ‘dream teams’” had become “my worst judicial nightmare.” This had occurred in large part because the lawyers never recognized how crucial having a team approach was. “Instead, they never developed a united theory of the defense or a consistent and cohesive mitigation strategy with each other.” Acting as “lone wolves,” and ceding virtually all responsibility for interacting with their client to a paralegal, these lawyers did not develop the rapport with the client necessary to persuade her to accept a plea offer under which she would serve life without parole. To the contrary, although the lawyers all agreed that the plea offer should be accepted, they were apparently oblivious to how severely the paralegal had been and was still undercutting them by urging the client to reject the plea offer.

Moreover, this “team” failed to develop a strategy that put together their guilt phase and penalty phase approaches. Indeed, they utterly and “inexplicably” failed to investigate psychological mitigation evidence regarding their client’s state of mind at the times that the crimes occurred – despite having been given “a virtual pre-trial mental health mitigation ‘roadmap’” by a truly extraordinary resource counsel. Compounding their errors, trial counsel ignored their mitigation specialist’s “straightforward list of forty-four mitigating factors,” which could have guided them in drafting proposed jury instructions on mitigating factors. Instead, the “learned counsel” submitted instructions on mitigating factors that “were remarkably poorly drafted” and in many ways incoherent. Although Judge Bennett had “significant misgivings at the time” about this, he ignored his fears and instructed the jury essentially as defense counsel had requested.

Judge Bennett concluded, in retrospect, that he “should have been more vigilant to ensure” that there was a team approach, in the sense articulated in the ABA Guidelines for capital case counsel. But in real time, it wasn’t until years after trial, “in the § 2255 proceeding, that [he] began to fully understand the critical need for the ‘team approach.’” It

¹⁸⁵ Mark W. Bennett, *Sudden Death: A Federal Trial Judge’s Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (first draft), HOFSTRA L. REV. (forthcoming 2014) (on file with author).

simply “never dawned on me that the lack of a defense ‘team approach’ would ultimately undo years of efforts by many, including the outstanding prosecution team and many dedicated law enforcement officers, and waste literally millions of dollars of taxpayer funds.” He now urges that “[t]rial court judges in capital cases ... be aware that, not only is the sum of the parts of the defense team not always greater than the whole, indeed, it can be far less – with dire consequences.”

Unfortunately, Judge Bennett’s horrifying account does not end there. He learned the hard way that he also should have been “vigilant in appointing the post-conviction team.” Judge Bennett relied on an apparently impeccable source in appointing the § 2255 “learned counsel” – whom Judge Bennett met before making the appointment. However, “[t]o make a very long, convoluted, tortured, and sad story short – two years later, I would end up removing [and then successfully replacing] the § 2255 defense team, shortly before the scheduled hearing, and I would file my first ever formal disciplinary grievance against a lawyer” (the “learned counsel”). This lawyer had “literally abandoned the retained experts, his death row client, and his two junior co-counsel.” He had “repeatedly lied” on the record to Judge Bennett regarding his preparation. Meanwhile, “the experts had all quit due to lack of follow-up and contact.”¹⁸⁶

b. Alabama

Alabama often has failed to find proper counsel at the trial level – as, for example, in the case of Anthony Ray Hinton (see discussion of *Hinton v. Alabama*, in Part II.F below). Moreover, many Alabama death row inmates are unable to find capable counsel in time to file appropriate state postconviction petitions within the federal habeas statute’s one-year statute of limitations. Absent a finding that the statute of limitations (adopted in 1996) has been tolled, this precludes the inmate from raising *any* federal constitutional claims – no matter how meritorious – in federal court.

The dire consequences of this problem are highlighted by the Eleventh Circuit’s 2-1 decision on December 28, 2012 to deny equitable tolling in the case of Ronald Bert Smith. Smith’s state postconviction petition was filed within the one-year federal statute of limitations, but without either (a) what would have been an uncontested motion that Smith was too poor to pay the \$154 filing fee or (b) the \$154 fee.¹⁸⁷

The majority declined to hold that the statute of limitations was equitably tolled, despite the facts that Smith’s Alabama attorney “was on probation for a public intoxication conviction,” “was often intoxicated when he came into the office,” had a continuing “history of abuse of prescription drugs and crystal methamphetamine,,” and within a month after Smith’s inadequately filed petition, “was charged with nine counts of possession of a controlled substance.” Shortly thereafter, he was placed on “disability inactive status,” and in the same time frame filed for voluntary bankruptcy. He committed suicide the next year.¹⁸⁸ In so holding, the majority relied on the actions of Smith’s out-of-state attorney, including his eventually (albeit too late) paying the filing fee.¹⁸⁹

¹⁸⁶ *Id.*

¹⁸⁷ *Smith v. Commissioner*, 703 F.3d 1266 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 513 (2013).

¹⁸⁸ *Id.* at 1272.

¹⁸⁹ *Id.* at 1272-74.

Judge Rosemary Barkett, in dissenting, stated that Smith should at least have received an evidentiary hearing on his motion for equitable tolling, due to the combination of Smith's Alabama attorney's egregious misconduct and the fact that his out-of-state attorney never made a motion to be allowed to appear in Alabama courts and allegedly did virtually nothing on Smith's behalf.¹⁹⁰

Mr. Smith's trial jury had voted 7-5 for a life sentence, but had been overruled by the trial judge (under the uniquely unfair Alabama system discussed in Part II.D below).¹⁹¹

c. Georgia

A few months before deciding against Mr. Smith, the Eleventh Circuit ruled, also by a 2-1 vote, against Georgia death row inmate Robert Wayne Holsey. While assuming for the sake of their decision (as had the Georgia Supreme Court) that Holsey's trial lawyers did not represent him effectively, the majority held that his constitutional right to the effective assistance of counsel had not been violated. The majority said it could have ruled in Holsey's favor only if he had persuaded them that the Georgia Supreme Court had been *unreasonably* incorrect when it concluded that Holsey had not been sufficiently badly prejudiced by his counsel's ineffectiveness. The prejudice test was whether there was a reasonable probability that, absent counsel's ineffectiveness, Holsey would have received a life sentence.¹⁹²

One of the two judges in the majority, Ed Carnes (who formerly led the death penalty work of the Alabama Attorney General's office) said that due to the severity of this crime and a prior crime, plus other aggravating factors, even effectively performing defense counsel would not have had a reasonable probability of avoiding a death verdict. The other judge in the majority, J.L. Edmondson, did not join in Judge Carnes' decision. He said that an amendment in 1996 to the federal habeas statute had greatly influenced his decision to give great deference to the Georgia Supreme Court's decision on the prejudice issue. Judge Edmondson stated that he believed the Georgia Supreme Court's decision was "within the outside border of the range of" being a "reasonable" holding.¹⁹³

Accordingly, Mr. Holsey got no relief even though his lead lawyer at trial "drank a quart of vodka every night of Holsey's trial because he was about to be sued and prosecuted for stealing client funds" and had testified thereafter that he "probably shouldn't have been allowed to represent anybody" at that time.¹⁹⁴

Again, the dissenter was Judge Barkett, who pointed out that – notwithstanding Judge Carnes' assertions that much of the unrepresented mitigation evidence would have been cumulative – the jury had heard only "sparse – almost non-existent – evidence of childhood abuse and mental retardation."¹⁹⁵ The available but unrepresented evidence of Holsey's having been abused included that "throughout his childhood he was subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home

¹⁹⁰ *Id.* at 1275, 1277 (Barkett, J., dissenting) (citing *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012)).

¹⁹¹ Adam Liptak, *Lawyers Stumble, and Clients Take Fall*, N.Y. TIMES, Jan. 8, 2013.

¹⁹² *Holsey v. Warden*, 694 F.3d 1230 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2804 (2013).

¹⁹³ *Id.* at 1275 (Edmondson, J., concurring).

¹⁹⁴ Bill Rankin, *Court upholds cop killer's death sentence*, ATLANTA JOURNAL-CONST., Sept. 14, 2012.

¹⁹⁵ *Holsey*, 694 F.3d at 1275 (Barkett, J., dissenting).

‘the Torture Chamber.’”¹⁹⁶ Among other things, Judge Barkett noted, the jury did not learn that his mother beat Holsey with shoes and various household objects and often held his head under the bathtub faucet, and that the house was roach-infested and one could not avoid smelling urine and rotting food.¹⁹⁷

The Georgia Supreme Court is particularly notable for reversing lower court decisions that vacate death sentences. The *Atlanta Journal-Constitution* reported on November 28, 2013, on eight such cases in the last five years. It said that these cases usually involved an ineffective assistance of counsel claim, where the Georgia Supreme Court accepted the lower court ruling that the trial counsel’s performance had been inadequate but then held that there was no reasonable probability that the jury’s unanimous vote for death would have been different if counsel had performed effectively. These cases often involved evidence not presented to the jury about the defendant’s mental health.¹⁹⁸

Among these were the cases of:

- (1) Andrew Cook, where Judge David Irwin had overturned the death sentence because Cook’s lawyers had not presented psychiatric evidence of Cook’s mental illness (After the Georgia Supreme Court reversed this decision, Cook was executed in February 2013);
- (2) Donnie Cleveland Lance, where Judge Michael Clark had overturned the death sentence because Lance’s counsel, due to inadequate investigation, had not found and presented evidence that Lance had been “hospitalized for mental illness,” had inhaled “toxic fumes and ingested gasoline as a child,” and had “been shot in the head, abused alcohol, and suffered from frontal brain damage”; and
- (3) William David Riley, where Judge Kathlene Gosselin had ordered a new trial due to the failure of Riley’s lawyer “to present evidence that Riley suffered from two mental illnesses” and had also failed to “play a recording” showing that “Riley had been ordered to move his car when [his mobile] home was on fire” – which Judge Gosselin felt would have undercut the prosecution’s assertion that Riley “chose to move the vehicle rather than rescue his children” from the home.

The *Journal-Constitution* contrasted these reversals with the Georgia Supreme Court’s last affirmance of a lower court judge’s holding of ineffective assistance in a capital sentencing proceeding. In that 2008 decision, the Georgia Supreme Court upheld a ruling ordering a new sentencing trial for Mark McPherson, where the jury had not been presented with evidence of McPherson’s being abused and neglected as a child and then as an adult suffered from mental illness and was a substance abuser.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1277-78.

¹⁹⁸ Bill Rankin, *High Court Consistently Reinstating Death Sentences*, ATLANTA JOURNAL-CONST., Nov. 28, 2013.

d. Pennsylvania

No client of Philadelphia's Public Defender Office, which handles 20% of the city's capital cases, has received the death sentence since 1993, when it began handling capital cases.¹⁹⁹ That is in great contrast with the many death sentences in Philadelphia cases where defendants have been represented by court appointed counsel.

In February 2012, Judge Benjamin Lerner issued Report and Recommendations, in *Commonwealth v. McGarrell*.²⁰⁰ He concluded that "the compensation of court appointed capital defense lawyers in Philadelphia is grossly inadequate The existing compensation system unacceptably increases the risk of ineffective assistance of counsel in individual cases and is primarily responsible for the First Judicial District's growing inability to attract a sufficient number of qualified attorneys willing to accept court appointments in capital cases."²⁰¹ Moreover, the "fee structure is completely inconsistent with how competent trial lawyers work, particularly in cases such as these which typically involve enormous preparation time and are frequently best resolved by a non-trial disposition."²⁰²

Judge Lerner recommended that the Pennsylvania Supreme Court direct the First Judicial District's Administration Governing Board to end the use of flat fees and to implement a new fee system in which hourly rates are the same for preparation time as for subsequent work and should be at least \$90 per hour for the two appointed defense attorneys.²⁰³ On February 27, 2012, John W. Herron, Administrative Judge for the Philadelphia Common Pleas Court's trial division, raised the flat fee for capital defense trial counsel from \$2,000 to \$10,000 and increased the flat fee for penalty-phase co-counsel from \$1,700 to \$7,500.²⁰⁴

On May 6, 2013, the *Philadelphia Inquirer* editorialized about "Philadelphia's thrift-shop system of paying counsel appointed to represent defendants facing the death penalty."²⁰⁵ Even with the great increase in flat fees in 2012, the *Inquirer* said that "Philadelphia remains far behind other major cities in providing adequate resources to assure these defendants' rights." The editorial noted that the Atlantic Center for Capital Representation had recently requested Judge Lerner to follow his own recommendation from February 2012 by ordering that the flat-fee system be replaced "with a more reasonable \$90 an hour rate." Marc Bookman, executive director of the Atlantic Center, said that even though flat fees could now become \$10,000, and with a \$400 daily rate after the first week of a trial, Philadelphia was still attempting to provide justice "on the cheap." The *Inquirer* agreed with distinguished Philadelphia attorney, part-time professor, and nationally renowned legal ethics expert Lawrence J. Fox that the flat-fee system "remains highly problematic, even unconstitutional" by providing an incentive for defense counsel to take shortcuts. The *Inquirer* said, "[T]he stakes couldn't be higher, since indigent

¹⁹⁹ Smith, *supra* note 39, at 260; Interview with Marc Bookman, Executive Director of the Atlantic Center for Capital Representation, Feb. 1, 2014.

²⁰⁰ Nos. 77 EM 2011 et al. (Pa. Feb. 21, 2012).

²⁰¹ *Id.* at 2-3.

²⁰² *Id.* at 11 (footnote omitted).

²⁰³ *Id.* at 17.

²⁰⁴ Joseph A. Slobodzian, *Phila. courts increase pay for capital defense*, PHILADELPHIA INQUIRER, Feb. 29, 2012.

²⁰⁵ Editorial, *Appointed lawyers aren't paid enough to do job*, PHILADELPHIA INQUIRER, May 6, 2013.

defendants with lawyers who are paid too little to mount an effective defense are that much more likely to be sent to death row. That basic lack of fairness should be an affront especially to those Pennsylvanians who back capital punishment, but say their support is based on an assurance that the system is fair.” The editorial concluded that it would make “far more sense for the Philadelphia courts to increase an investment in just verdicts at the outset, which is just what Lerner can do by ordering a fee system that doesn’t scrimp on justice.”

In July 2013, Judge Lerner issued a report stating, among other things, that the higher, \$10,000, compensation for court-appointed attorneys, and the removal of the capped “preparation fee,” had helped significantly, as had the district attorney’s “greatly expanded ... program of reviewing defense mitigation submissions before capital cases leave the calendar room and, based on this review, removing capital case designation from many of these cases.”²⁰⁶ In all of 2012, only three capital juries were seated and only two cases went to the penalty phase, one of which ended in a death verdict. In the first half of 2013, both capital cases that went to trial were settled after the guilt phase with dispositions of life without parole. (According to the Death Penalty Information Center, one Philadelphia defendant was sentenced to death later in 2013.) Judge Lerner added that “we may need a modest fee increase in the near future, regardless of whether we use an hourly rate or a flat fee plus trial day per diem to calculate counsels’ compensation.”²⁰⁷

Even though Philadelphia’s continued use of flat fees is not in conformance with the ABA Guidelines, it is apparent that changes made there in the past two years are part of the national trend (discussed in Part I.A.2 above) towards fewer people being sentenced to death. Pennsylvania had long sent more people to death row than virtually any other place in the country. As of January 1, 2013, Philadelphia trailed only two other counties in the United States as a source of people on death row. It was responsible for 88 of Pennsylvania’s 198 death row inmates as of April 1, 2013: 44.4% of the state’s total. In 2012, only one of the seven people sentenced to death in Pennsylvania was sent there by Philadelphia, and in 2013 it sent one of the four.²⁰⁸

e. Los Angeles County and California

Robert J. Smith described in 2012 a situation in Los Angeles County similar to that which long existed in Philadelphia. The Public Defender’s Office, which handles half of trial-level capital punishment cases, had only gone to trial once in six years, and that client did not receive the death sentence. During that same time frame, 33 defendants represented by the Alternative Public Defender or the private bar received death sentences. The private lawyers are at one significant disadvantage: they are usually not appointed until quite late in the time frame during which they can seek to persuade the district

²⁰⁶ Commonwealth v. McGarrell, Nos. 77 EM 2011 et al., slip op. at 4, 6-7 (Pa. July 10, 2013).

²⁰⁷ *Id.* at 9. In a footnote, Judge Lerner reiterated his preference for replacing flat fees with hourly payments, but said that he couldn’t say that highly increased flat fees combined with a daily *per diem* for trial was “inherently unfair.” *Id.* at 4 n.2. He did not discuss in this regard the fact that the daily *per diem* did not apply until the second week of trial, and that this could lead to distorted incentives.

²⁰⁸ DEATH PENALTY INFORMATION CENTER, DEATH SENTENCES IN 2012 (2013), available at <http://www.deathpenaltyinfo.org/2012-sentencing>; DPIC, 2013 DEATH SENTENCES, *supra* note 37; CRIMINAL JUSTICE PROJECT, NAACP LDF, DEATH ROW USA: SPRING 2013 (2013), available at http://www.naacpldf.org/files/publications/DRUSA_Spring_2013.pdf.

attorney not to seek the death penalty. So, private lawyers have far less ability than the Public Defender's Office to develop evidence and present it to the district attorney prior to his decision on what punishment to seek. But wholly aside from that, some private lawyers who *could* find and present evidence to the district attorney prior to his deadline fail to do so – due to ignorance, fear, or their spending their time on other cases.²⁰⁹

In California as a whole, there is on average a 10- to 12-year wait to find lawyers to represent death row inmates in state habeas corpus challenges. Almost half of those on California's death row do not yet have state habeas corpus counsel. In November 2010, then-Chief Justice Ronald M. George said that many attorneys are not appointed because they are unqualified to handle these matters. He stated, "I want to distinguish what we do in California from what they do in other states, where almost any warm body will qualify."²¹⁰

f. Idea of Prosecutors' Sometimes Filing Amici Briefs in Support of Capital Defendants

Professor Bruce A. Green noted, in an incisive *Yale Law Journal* article in 2013,²¹¹ that 23 state attorneys general had appeared in the Supreme Court in *Gideon v. Wainwright*²¹² to advocate that indigent felony defendants should be held to have a constitutional right to counsel. Their brief was a surprise to both parties in the case.

Professor Green said that "there are reasons why *Gideon*, although truly a special case, should not be an anomaly" – particularly since lawyers for the government "have a responsibility that grows out of their status as public officials, as government lawyers, and as lawyers generally." He noted that attorneys general often have carried out this responsibility outside of the context of criminal law – such as in "favoring individuals' interests at the expense of states' financial and sovereignty interests" and supporting "civil rights claims."²¹³

Professor Green cited as "missed opportunities" for such *amici* briefs the litigation over the death penalty for crimes committed by juveniles and "cases in which *former* public officials filed amicus briefs" on such issues as "the availability of postconviction relief based on actual innocence [such as relief based on a due process right to conduct DNA testing of evidence that the prosecution and introduced] and prison overcrowding." He suggested that in some circumstances, government attorneys might "avoid personal identification with a position by filing amicus briefs through [existing or newly formed] professional associations."²¹⁴

Professor Green's article concluded as follows:

On the fiftieth anniversary of *Gideon*, it is ... worth considering whether, consistent with their duty to seek justice, government lawyers should play a

²⁰⁹ Smith, *supra* note 39, at 262-63.

²¹⁰ Maura Dolan, *Lack of funding builds death row logjam*, L.A. TIMES, Nov. 27, 2010.

²¹¹ Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013).

²¹² 372 U.S. 335 (1963).

²¹³ Green, *supra* note 211, at 2343, 2346.

²¹⁴ *Id.* at 2347-48, 2356.

stronger role as amici in promoting criminal procedural fairness. There is no principled reason to categorically refrain, and pragmatic, strategic, and political reasons are not invariably compelling. As amici, attorneys general and district attorneys are not constrained to adopt any particular position, as they might be in litigation, but, rather, they serve the public interest. Those who would never support expanding criminal defendants' procedural protections view the public interest or their own role too narrowly. Prosecutors have a responsibility to engage disinterestedly in law reform; prosecutors as amici could fulfill that responsibility by telling the Supreme Court where, in their professional judgment, a legal question should be resolved in criminal defendants' favor.²¹⁵

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

As part of its re-authorization of the Patriot Act in 2006, Congress provided for a way to change the manner in which a state can be found to have "opted-in" to Chapter 154 of the Judicial Code, whose "special Habeas Corpus Procedures in Capital Cases"²¹⁶ for such states would "restrict access to habeas corpus relief and include, among other things, accelerated deadlines for the filing and resolution of federal habeas corpus petitions." To opt-in, a state must establish "in a statutorily specified way, a 'mechanism for the appointment, compensation, and reimbursement of [state postconviction counsel] that satisfies certain statutory standards.'"²¹⁷

Once the change is implemented, the initial decision on opt-in will be made by the Attorney General of the United States (rather than federal courts in the jurisdictions from which the cases come), subject to *de novo* review by the United States Court of Appeals for the District of Columbia. Opponents of this change (including the ABA) assert that Congress has created the strong possibility of a biased decision-maker, given the Justice Department's close relationships with state attorneys general and its frequent *amicus* briefs supporting state-imposed death sentences. Moreover, many opponents have observed that – unlike the circuit courts around the country that have hitherto considered and uniformly rejected states' efforts to opt in – the D.C. Circuit has *no* experience with the determinative issue regarding "opt-in," that is, the quality of postconviction counsel in state court proceedings in capital cases.

After much consideration, the Justice Department issued what it viewed a final rule to implement the op-in provision. On December 5, 2013, United States Chief District Judge Claudia Wilken enjoined the Justice Department's adopted rule. Judge Wilken said the rule would not provide "substantive criteria" for lawyers and would not put the burden on a state to demonstrate its compliance with the law's opt-in provision. She further criticized the proposal for applying opt-in to a state retroactively.²¹⁸

²¹⁵ *Id.* at 2357.

²¹⁶ Pub. L. No. 109-177, 120 Stat. 192 (2006).

²¹⁷ RANDY HERTZ AND JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at 113 (5th ed. 2005) (quoting 28 U.S.C. § 2261(b) (2000)).

²¹⁸ Bob Egelko, *Death-penalty ruling goes against Justice Dept.*, S.F. CHRON., Dec. 5, 2013.

3. ***The Continuing Danger of Executing Innocent People***
 - a. ***People Released on Innocence Grounds After Years on Death Row***
 - i. ***Joe D'Ambrosio***

On January 23, 2012, the exoneration of former Ohio death row inmate Joe D'Ambrosio effectively became final, when the Supreme Court denied certiorari with regard to the State's effort to appeal a ruling precluding his retrial.²¹⁹ D'Ambrosio had been released in 2009 after 21 years on death row for a 1988 murder. A federal district judge had ruled in 2006 that prosecutors had violated D'Ambrosio's constitutional rights by withholding 10 pieces of evidence that might have exonerated him. Retrial was pending in 2010, when United States District Judge Kate O'Malley ordered that D'Ambrosio not be retried in light of a crucial witness' death – a decision that the Sixth Circuit affirmed in 2011.²²⁰

- ii. ***Michael Keenan***

In April 2012, Federal District Judge David A. Katz ordered that Michael Keenan, who had spent nearly 25 years on Ohio's death row for the same murder at issue in D'Ambrosio's case, be retried or released.²²¹ On September 6, 2012, Judge John Russo dismissed the murder charge against Keenan and ordered him released, because a new trial could not resolve the harm he had suffered from the prosecution's withholding of evidence.²²² The prosecution appealed, but the Ohio Court of Appeals affirmed by a 2-1 vote on September 19, 2013. The Court of Appeals said: "A defendant's right to a fair trial dates back to the adoption of our nation's most revered founding documents. In this case, the federal court determined that a fair trial had not taken place; and in 2012, the trial court decided it could not in the future. While the victim deserved justice, the bad-faith conduct from 1988 forward made that impossible."²²³

- iii. ***Edward Lee Elmore***

Edward Lee Elmore's death sentence was vacated in 2010 due to his having mental retardation, and the State said it would not seek to reinstate it. In November 2011, he was granted habeas relief on his ineffective assistance of counsel claim. The Fourth Circuit majority said, "[W]e recognize that there are grave questions about whether it really was Elmore who murdered Mrs. Edwards," and concluded "that Elmore is entitled to habeas corpus relief ... premised on his trial lawyers' blind acceptance of the State's forensic

²¹⁹ Pat Galbinca, *U.S. Supreme Court closes case against Joe D'Ambrosio for murder*, PLAIN DEALER, Jan. 24, 2012 (referring to *D'Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1150 (2012)).

²²⁰ *Id.*; John Seewer, Associated Press, *U.S. Supreme Court decision means man who spent 21 years on Ohio's death row will remain free*, Jan. 24, 2012, available at <http://standdown.typepad.com/weblog/2012/01/joe-dambrosio-becomes-nations-140th-death-rowexoneree.html>.

²²¹ *Keenan v. Bagley*, No. 1:01 CV 2139, 2012 WL 1424751 (N.D. Ohio Apr. 24, 2012).

²²² CBS/Associated Press, *Michael Keenan, freed Ohio death row inmate, savors pizza, reunions*, Sept. 7, 2012, available at http://www.cbsnews.com/8301-504083_162-57508593-504083/michael-keenan-freed-ohio-death-row-inmate-savors-pizza-reunions/.

²²³ *State v. Keenan*, 998 N.E.2d 837, 847 (Ohio Ct. App. 2013).

evidence.”²²⁴ After that decision, the prosecution could have sought to secure Elmore’s conviction at a new trial. However, on March 2, 2012, “his 11,000th day in jail,” he became “a free man” under an agreement under which he “denied any involvement in the crime but pleaded guilty in exchange for his freedom.”²²⁵

iv. Larry Smith

On April 6, 2012, former Alabama death row inmate Larry Smith was freed under an agreement similar to Elmore’s. His death sentence for a robbery-related murder was based on his statement after four hours of interrogation without counsel that, contrary to police guidelines, was unrecorded. He was not tied to the crime either by physical evidence or any eyewitness. Pro bono counsel from a large law firm (Covington & Burling), who began working on Smith’s case in 2001, came up with significant proof that (a) the investigation by Smith’s trial counsel was woefully incomplete, (b) Smith’s “confession” had been coerced, and (c) discredited the testimony of the “informant” who had first led the police to think that Smith had committed the crime.²²⁶ Based on this evidence, the Alabama Circuit Court in 2007 ordered a retrial. After years in which the prosecution unsuccessfully appealed this decision,²²⁷ the parties entered into a plea agreement on the eve of the retrial. Mr. Smith was released after pleading guilty to conspiracy to commit robbery, and the murder charges against him were dismissed.

v. Erskine Leroy Johnson

On June 1, 2012, Erskine Leroy Johnson was freed under an agreement similar to Elmore’s and Smith’s.²²⁸ Under a “best-interests plea,” he pleaded guilty to second-degree murder in return for being released immediately. He had served almost 27 years in prison, including 19 years under death sentence. A prosecutor said that prison personnel had called Johnson “an exemplary prisoner” and that the parole board had ordered his release for later in June.²²⁹

²²⁴ Elmore v. Ozmint, 661 F.3d 783, 786 (4th Cir. 2011).

²²⁵ Raymond Bonner, Opinion, *When Innocence Isn’t Enough*, N.Y. TIMES, Mar. 4, 2012. Mr. Bonner is the author of a new book about Mr. Elmore’s case, ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG (2012).

²²⁶ Covington & Burling, Press Release, *Covington Secures Release of Death Row Inmate*, Apr. 12, 2012, available at <http://www.deathpenaltyinfo.org/documents/LarrySmithPressRelease.pdf>.

²²⁷ See State v. Smith, 85 So. 3d 1063 (Ala. Crim. App. 2010), *aff’g* Smith v. State, No. CC-95-200104 (Ala. Marshall Cnty. Cir. Ct. Jan. 12, 2007), *cert. denied*, No. 1100435 (Ala. Dec. 9, 2011).

²²⁸ In a July 2012 Cornell Legal Studies Research Paper, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, John H. Blume and Rebecca K. Helm discuss the phenomenon of guilty pleas by factually innocent people. They say this happens most often in two contexts: pleading guilty quickly for “low level offenses” to get out of jail quickly; and accepting a plea bargain after winning the right to a new trial, in order to get released right away or very quickly. The authors discuss some possible ameliorative steps, such as requiring “more judicial supervision of the plea bargaining process,” but conclude that most of their proposals would have no chance of being adopted. See John H. Blume and Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* (July 11, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103787 (follow “Download This Paper” hyperlink).

²²⁹ Lawrence Buser, *Memphis man released after 27 years in prison*, COMMERCIAL APPEAL, June 2, 2012.

On December 9, 2011, the Court of Criminal Appeals of Tennessee had remanded Johnson's case for a new trial.²³⁰ It held that the trial court had erred concerning newly discovered evidence that a principal prosecution witness had a close personal relationship with a gang member and had a motive to protect that friend by testifying against Johnson. The appeals court held that this new evidence could have resulted in a different judgment.²³¹

In 1999, the same appellate court, although affirming Johnson's conviction, had remanded his case for a new death penalty hearing. It held that the prosecution's failure to disclose a police report stating that Johnson "did not fire the shot that grazed [a] bystander" and that "the victim was carrying a gun" arguably had led the jury to misapply an aggravating circumstance.²³² After that holding was affirmed by the Tennessee Supreme Court, the prosecution had not again sought capital punishment, and Johnson had been sentenced to life imprisonment.²³³

vi. Seth Penalver

On December 21, 2012, a jury found Seth Penalver not guilty of three 1994 murders, armed robbery, and armed burglary. This was Penalver's third trial, the first having ended in a hung jury and the second, in 1999, having resulted in his being convicted and sentenced to death.²³⁴

In 2006, the Florida Supreme Court had vacated Penalver's conviction and ordered a new trial. It stated: "In light of the scant evidence connecting Penalver to this murder and the consequent importance of identifying the individual depicted on the videotape in sunglasses and hat, we conclude that the improperly admitted evidence and the State's suggestion [at the second trial] that the defense tampered with or suborned perjury by an identification witness meet the cumulative error requirements ... and require reversal."²³⁵

After Penalver's acquittal at his third trial, his defense counsel said that one reason for the outcome was previously unavailable evidence that a government investigator had caused an informant to receive a Crimestoppers award. Penalver had been in custody for more than 18 years before being released after the acquittal.²³⁶

vii. Reginald Griffin

Reginald Griffin was on Missouri's death row until 2011, since being convicted and sentenced to death for the 1983 murder of another inmate. At that time, the Missouri Supreme Court reversed his conviction due to the prosecution's having improperly relied on and having provided benefits to two jailhouse informants, and its having withheld from the defense evidence that guards had confiscated a sharpened screwdriver from someone else

²³⁰ Johnson v. State, 370 S.W.3d 694 (Tenn. Crim. App. 2011).

²³¹ *Id.* at 697, 703-04.

²³² Johnson v. State, No. 02C01-9707-CR-00292, 1999 WL 608861, at *11-12, *20 (Tenn. Crim. App. Aug. 12, 1999), *aff'd*, 38 S.W.3d 52 (Tenn. 2001).

²³³ Johnson, 370 S.W.3d at 697.

²³⁴ Rafael Olmeda, *Jury finds Penalver not guilty in Casey's Nickelodeon triple murder case*, SUN-SENTINEL, Dec. 21, 2012.

²³⁵ Penalver v. State, 926 So. 2d 1118, 1138 (Fla. 2006) (per curiam) (corrected opinion).

²³⁶ Olmeda, *supra* note 234.

right after the stabbing. Both of Griffin's co-defendants had always stated that the third person who was involved was the person found with the screwdriver, not Griffin. On October 25, 2013, the state dropped all charges related to Griffin's death sentence. Having thus been exonerated, Griffin (who had been released from prison on bond in December 2012) was officially a free man.²³⁷

viii. Glenn Ford

On March 11, 2014, Glenn Ford, who had spent almost 26 years on Louisiana's death row, was released after State District Judge Ramona Emanuel granted, the day before, the prosecution's motion to vacate his conviction for the 1983 murder of Isadore Rozeman. The prosecution and the judge acted in light of evidence that supported Ford's consistent assertion that he was neither present nor otherwise involved in Mr. Rozeman's killing.²³⁸

Mr. Ford was convicted by an all-white jury in 1984. His court-appointed trial lawyers had never previously tried a murder case. After his conviction was vacated, Mr. Rozeman's nephew, Phillip Rozeman, said, "This is a positive reflection on the criminal justice system We don't have animosity for anyone. If someone else was involved or others were involved in his death there also will be justice for those people."²³⁹

Mr. Ford is "one of the longest-serving death row inmates in modern American history to be exonerated and released." Andrew Cohen, writing in *The Atlantic*, provided extensive detail supporting his conclusion that it "is striking ... how weak [the case against Mr. Ford] always was, how frequently Ford's constitutional rights were denied, and yet how determined Louisiana's judges were over decades to defend an indefensible result." Cohen pointed out that the ineffectiveness of counsel for Ford continued well into the appellate process. Moreover, "[a]ll through the years, in both explicit and implicit ways, the Louisiana appellate courts expressed their unease with the results of Ford's trial. But no court, ever, reversed the conviction and sentence against him and ordered a new trial. This is so even though the first court to review the case, the Louisiana Supreme Court itself, concluded it had 'serious questions' about the result."²⁴⁰

Ironically, as explained in Cohen's article, Ford "got lucky" because he had so many issues about trial unfairness that he got hearings that led to his staying alive long enough to be exonerated. Cohen predicted that few would focus on "why it took 30 years for justice to shine through here or why anyone (in or out of Louisiana) ought to have any confidence in a judicial system that so mightily defends verdicts like this one." Yet, he said, Ford's case "raises the inescapable question of how many *other* condemned men and woman are sitting on death row in the nation's prisons, after sham trials like this, after feckless

²³⁷ Bill Draper, Associated Press, *Ex-death row inmate exonerated in prison stabbing*, Oct. 30, 2013, available at <http://bigstory.ap.org/article/ex-death-row-inmate-exonerated-prison-stabbing>.

²³⁸ Associated Press, *Man Who Spent Decades on LA. Death Row Is Freed*, Mar. 11, 2014, available at <http://bigstory.ap.org/article/man-who-spent-decades-la-death-row-freed>.

²³⁹ *Glenn Ford, La. death row inmate, released after 30 years*, CRIMESIDER, Mar. 11, 2014, available at <http://www.cbsnews.com/news/louisiana-death-row-inmate-glenn-ford-ordered-released-after-30-years/>.

²⁴⁰ Andrew Cohen, *Freedom After 30 Years on Death Row*, ATLANTIC, Mar. 11, 2014.

appellate review, waiting for lightning to strike them the way it has Glenn Ford. How many men, that is, who have not yet been executed despite being innocent of murder.”²⁴¹

b. Significant Doubts About the Guilt of People Still, or Until Recently, on Death Row Who Have Gotten No Final Relief Regarding Their Convictions (and Usually No Sentencing Relief)

i. Kevin Cooper

There is substantial doubt about the guilt of California death row inmate Kevin Cooper. In 2009, at the outset of a 101-page dissent from a Ninth Circuit order denying Mr. Cooper’s effort to avoid execution, Judge William A. Fletcher said, “The State of California may be about to execute an innocent man.” Judge Fletcher stated that the police and prosecution had failed to disclose and had tampered with evidence.²⁴² On December 1, 2010, Professor Alan Dershowitz and attorney David Rivkin Jr. (who served in the Justice Department and the White House Counsel’s Office under President Reagan and the first President Bush) wrote an op-ed about Cooper’s case. They said that while they had differing views on capital punishment, they both felt that “too many of the facts allegedly linking Cooper to the murders just don’t add up.” These included an initial statement that the perpetrators were white (Cooper is black), law enforcement’s “blatantly mishandl[ing]” some crucial “evidence pointing to other” possible killers and the strong possibility that the chief prosecution forensic witness had “falsified evidence.”²⁴³ However, Governor Arnold Schwarzenegger did not commute Cooper’s death sentence before leaving office, and Cooper remains on death row.

ii. Justin Wolfe

On July 12, 2011, Federal District Judge Raymond A. Jackson vacated the murder conviction and death sentence of Justin Wolfe, after he had served almost a decade on death row for allegedly leading a conspiracy to kill his marijuana supplier. Judge Jackson’s decision was based on Virginia prosecutors’ permitting the use of false testimony connecting Wolfe to the slaying, not revealing evidence that other people may have wished the victim to be killed and conspired to have him killed, and the recanting of a crucial prosecution witness’ testimony. Judge Jackson said that the prosecution’s actions violated due process and were “abhorrent to the judicial process.” Moreover, he found that a potential juror had been erroneously disqualified, in violation of the Sixth Amendment.²⁴⁴ Wolfe still faced a potential new trial. The prosecution appealed to the Fourth Circuit, which affirmed.

On December 26, 2012, Judge Jackson determined that the prosecution had not retried Wolfe during the time frame he had set, and ordered Wolfe released within 10

²⁴¹ *Id.*

²⁴² Cooper v. Brown, 565 F.3d 581, 581 (9th Cir. 2009) (Fletcher, J., dissenting), *discussed in* John Schwartz, *Judges’ Dissents for Death Row Inmates Are Rising*, N.Y. TIMES, Aug. 13, 2009.

²⁴³ Alan M. Dershowitz and David B. Rivkin Jr., Op-Ed., *A time for clemency*, L.A. TIMES, Dec. 1, 2010.

²⁴⁴ Wolfe v. Clarke, 819 F. Supp. 2d 538 (E.D. Va. 2011), *aff’d*, 691 F.3d 410 (4th Cir. 2012); Josh White, *Va. Judge throws out drug dealer’s death sentence in slaying*, WASH. POST, July 12, 2011.

days.²⁴⁵ After staying Judge Jackson's order, the Fourth Circuit, by a 2-1 vote, vacated the order on May 22, 2013, holding that Wolfe could be retried.²⁴⁶

iii. Tyrone Noling

In January and February 2012 *The Atlantic's* Andrew Cohen wrote about two death row inmates whose convictions he found to be highly questionable.

Cohen wrote first about Tyrone Noling, who had been convicted and sentenced to death in 1996 for the murder of an elderly couple in 1990. Initially, there was neither physical evidence nor any witness against him. After a new investigator became involved in 1992, Noling was indicted, but the charges were dropped after Noling passed a polygraph test and his co-defendant recanted his incrimination of Noling. Several years later, having been (they now said) threatened by an investigator, some witnesses testified against Noling, saying that he had been at the scene of the crime and had confessed to the murders.²⁴⁷

Cohen pointed out there still was no physical evidence against Noling, and the prosecution had failed to investigate "other viable suspects." Unfortunately, Cohen said, this does not suffice to establish any constitutional claim that the federal habeas law, as amended in 1996, would permit to be the considered on its merits.²⁴⁸

Moreover, Cohen expressed great concern about the prosecution's preventing DNA testing of a cigarette butt that could be tied to Daniel Wilson, whom Noling's lawyers say was the actual murderer. Wilson was executed for a murder committed one year later than the murders at issue, and had previously gone to a home and attacked a man who was elderly, as were the victims killed at home in Noling's case. Only in 2009 did prosecutors very belatedly produce handwritten police notes from 1990 in which Wilson's foster brother apparently identified his "brother" as the murderer in *this* case.²⁴⁹

On May 2, 2013, the Ohio Supreme Court held, 5-2, that a Portage County judge had to reconsider DNA testing. It held that Noling's most recent request for testing should not have been rejected merely because he had unsuccessfully sought testing before, and that new standards and expanded criteria for testing enacted in 2010 should have been considered.²⁵⁰

On December 19, 2013, Portage County Common Pleas Judge John Enlow ordered the Ohio Bureau of Criminal Investigation to conduct new DNA tests on a cigarette butt found in the driveway at the home of the elderly victims – with any positive results to be sent to the FBI lab to see if they compare to genetic profiles of criminals in the lab's database.²⁵¹

²⁴⁵ Justin Jouvenal, *Federal Judge Bars Retrial in Prince William Murder Case*, WASH. POST, Dec. 26, 2012.

²⁴⁶ Wolfe v. Clarke, 718 F.3d 277 (4th Cir. 2013).

²⁴⁷ Andrew Cohen, *Is Ohio Keeping Another Innocent Man on Death Row?*, ATLANTIC, Jan. 31, 2012.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ State v. Noling, 992 N.E.2d 1095 (Ohio 2013).

²⁵¹ Ed Meyer, *Death row inmate Noling wins new DNA tests of cigarette evidence in 1990 double murder*, BEACON JOURNAL (Ohio), Dec. 19, 2013.

iv. Thomas Arthur

Cohen wrote in late February 2012 about Alabama death row inmate Thomas Arthur, who was convicted and sentenced to death for a murder that took place 30 years before. Cohen noted many similarities between the problems with Noling's case and troublesome aspects of Arthur's case. He added that Arthur "has the unwelcome distinction of being one of the few prisoners in the DNA-testing era to be this close to capital punishment after someone else confessed under oath to the crime." Arthur's lawyers were prepared to pay for DNA testing, but Alabama opposed allowing the testing.²⁵²

Cohen's main concern was that the prosecution had based its whole case on the testimony of the victim's wife. A few months after the murder, she had been convicted of the murder and sentenced to life, for having hired someone to kill her husband. Some years later, she had reached the following agreement with the prosecution: it would recommend that she be released early if she would alter her original testimony and accuse Arthur. Her revised testimony led to Arthur's third conviction – the first two having been reversed. Years later, in 2008, Bobby Ray Gilbert confessed under oath to having committed the killing after he had started an affair with the victim's wife. Gilbert said he finally came forward because the Supreme Court had fairly recently held that someone who at the time of the crime was under age 18 (as Gilbert had been) could not be sentenced to death. Thereafter, though, at a hearing, Gilbert "took the Fifth Amendment" – which Arthur's counsel said resulted from Gilbert's having been punished by prison officials after admitting to this murder. The State took a different view, and the victim's wife said Gilbert's confession was false. The trial judge then ruled against Arthur.²⁵³

Arthur's counsel sought "more advanced DNA testing on the wig" that Gilbert's statement said he had used during the killing – earlier DNA testing having not resulted in any link to either Gilbert or Arthur. Arthur's counsel said that everyone involved had agreed that the perpetrator wore this wig during the crime, and stated that they were willing to pay for the additional DNA testing. The State maintained that the requested DNA testing would be no better than the prior testing, and that the wig had no additional DNA that could be tested.²⁵⁴

On January 6, 2014, the federal Eleventh Circuit held, on procedural grounds, that Mr. Arthur had not shown an "extraordinary circumstance" permitting him to seek federal court relief again.²⁵⁵

v. James Dennis

On August 21, 2013, Senior United States District Judge Anita B. Brody overturned the 1992 conviction of James Dennis, whom she said had been death-sentenced improperly for a murder he likely did not commit.²⁵⁶ In what the *Philadelphia Inquirer* described as "a scathing ruling," Judge Brody said Philadelphia police and prosecutors had either overlooked, lost, or "covered up" evidence of Dennis' innocence – including a sworn

²⁵² Andrew Cohen, *Another Death Row Debacle: The Case Against Thomas Arthur*, ATLANTIC, Feb. 27, 2012.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014).

²⁵⁶ *Dennis v. Wetzel*, – F. Supp. 2d –, 2013 WL 4457047 (E.D. Pa. Aug. 21, 2013).

statement from another inmate three weeks prior to Dennis' arrest, saying that a cousin had admitted to committing the crime. Moreover, she found, they had failed to provide information about this and other leads to the defense. She found that "[t]he Commonwealth of Pennsylvania has committed a grave miscarriage of justice." Judge Brody said that some of the government's misconduct and errors could have been rectified at the time if Dennis had had an effective lawyer – instead of his actual lawyer, who neither interviewed any eyewitness, tested the evidence, nor utilized experts. District Attorney Seth Williams said that the judge had been taken in by "slanted factual allegations" and a false "newly concocted alibi defense."²⁵⁷ The state filed an appeal with the Third Circuit.

vi. 27 People On Death Row Whose Cases May Have Been Tainted By FBI Forensic Testimony Errors

On July 17, 2013, the *Washington Post* reported that "[a]n unprecedented federal review of old criminal cases has uncovered as many as 27 death penalty convictions in which FBI forensic experts may have mistakenly linked defendants to crimes with exaggerated scientific testimony." The review had already led to a last-hour stay of Mississippi's scheduled execution of William Jerome Manning in May 2013.²⁵⁸

The review of old criminal cases, announced in July 2012 by the FBI and the Justice Department, which have collaborated on this with the Innocence Project and the National Association of Criminal Defense Lawyers (the "NACDL"), began after the *Washington Post* revealed earlier in 2012 "that authorities had known for years that flawed forensic work by FBI hair examiners may have led to convictions of potentially innocent people, but officials had not aggressively investigated problems or notified defendants." For decades, including long after the FBI Laboratory began stating internally in the 1970s that hair association could not achieve positive identifications, "some FBI experts exaggerated the significance of 'matches' drawn from microscopic analysis of hair found at crime scenes."²⁵⁹

The FBI's announcement in 2012 of its review had led many state and local labs to undertake similar reviews. That is particularly significant, the *Post* said, because "FBI cases may represent only the tip of the problem." This is due to the fact (first revealed in July 2013) that whereas the FBI had 27 hair examiners during the time frame being reviewed, "about 500 people attended one-week hair comparison classes given by FBI examiners between 1979 and 2009" – nearly all "from state and local labs." Over 95% of violent crimes are dealt with by state and local prosecutors²⁶⁰ – much as there are about 60 federal death row inmates out of a national death row population exceeding 3,100.²⁶¹

FBI officials said in July 2013 that they intended "to review and disclose problems in capital cases even after a defendant has been executed." But, as the *Post* reported, it was not as yet known "how many of the cases involve errors, how many led to wrongful convictions or how many mistakes may now jeopardize valid convictions."²⁶²

²⁵⁷ John P. Martin, *Citing 'miscarriage of justice,' judge overturns murder conviction*, PHILADELPHIA INQUIRER, Aug. 23, 2013.

²⁵⁸ Spencer S. Hsu, *U.S. reviewing 27 death penalty convictions for FBI forensic testimony errors*, WASH. POST, July 17, 2013.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ CRIMINAL JUSTICE PROJECT, *supra* note 208.

²⁶² Hsu, *supra* note 258.

The review is prioritizing capital case first. In an agreement reached with the Innocence Project and the NACDL in June 2013, the Justice Department agreed to notify prosecutors, convicts, or their attorneys if either an internal review panel or the two outside groups determine that FBI examiners “exceeded the limits of science” in asserting – in reports or testimony – that crime scene hair was tied to defendants. In such cases, the Justice Department agreed to help affected prisoners in highly unusual ways, such as waiving time-bars and other court door-closing provisions of the Antiterrorism and Effective Death Penalty Act of 1996, and by having the FBI test DNA evidence if a judge or prosecutor requests such a test.²⁶³

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

i. Joe Arridy

On January 7, 2011, Colorado Governor Bill Ritter, Jr. “granted a full and unconditional pardon ... to Joe Arridy, who was convicted of killing a 15-year-old girl, sentenced to death and executed by lethal gas seven decades ago.” Governor Ritter said that “an overwhelming body of evidence indicates” that Mr. Arridy (whose IQ was 46) “was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else.”²⁶⁴ Arridy was executed in 1939 for the 1936 killing.

ii. George J. Stinney, Jr.

In January 2014, South Carolina Circuit Court Judge Cameron T. Mullen held a two-day hearing regarding the effort by the family of George J. Stinney, Jr. to secure a new trial or a voided verdict with regard to the conviction and electrocution of Stinney in 1944. Stinney, an African American aged 14, was the youngest person executed in the United States in the 20th century. Although Stinney was executed 70 years ago, two of his sisters are alive and attended the hearing.²⁶⁵

Stinney was executed fewer than three months after two white girls’ dead bodies were found. Stinney purportedly confessed to murdering the girls, who, according to his now-lost “confession,” had inquired about ideas for finding a local flower. His trial, hurriedly put together, was over in less than three hours. He was electrocuted in June 1944, the same month as the D-Day invasion.

Speaking on behalf of the State of South Carolina in opposing any relief, Ernest A. Finney II (a son of the first African American South Carolina Chief Justice since Reconstruction) said: “We should have known better but we didn’t. ... [T]he fact of the matter is it happened, and it occurred because of a legal system of justice that was in place.” Much of the hearing dealt with difficulties created by potential issues with memory and the loss of much of the evidence. A niece of one of the victims said she felt there should

²⁶³ *Id.*

²⁶⁴ Governor Bill Ritter, Jr., Press Release, *Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, Jan. 7, 2011, available at <http://www.deathpenaltyinfo.org/documents/ArridyPardon.pdf>.

²⁶⁵ Alan Blinder, *Family of South Carolina Boy Put to Death Seeks Exoneration 70 Years Later*, N.Y. TIMES, Jan. 23, 2014.

be no relief, since she believed Stinney's confession and "[h]e was tried, found guilty by the laws of 1944, which are completely different now – it can't be compared – and I think that it needs to be left as is."

As the Associated Press reported, "The hearing at least gave Stinney something he was denied in 1944 – his day in court. His white lawyer back then called no witnesses and did no cross-examination. He normally handled civil cases and was running to be a legislator at a time when almost all voters were white. The boy was likely the only black face in the courthouse." Judge Mullen gave each side time, following the hearing, to confer with witnesses and present further arguments.²⁶⁶

iii. *Carlos DeLuna*

In May 2012, the *Columbia Human Rights Law Review* published a book-length article concluding that Texas had executed Carlos DeLuna in 1989 for a murder actually committed by Carlos Hernandez.²⁶⁷ The authors concluded, after a five-year investigation, that DeLuna had been convicted, death-sentenced, and executed solely based on contradictory eyewitness accounts that mistakenly identified him as his "spitting image": Hernandez. The report said that the law enforcement investigation was extremely inadequate and was fatally flawed by many mistakes, failure to follow up on clues, and numerous other omissions. Moreover, DeLuna's court-appointed lawyer had been so inept that he had said it was likely that Hernandez had never existed – much as the lead prosecutor had told the jury at trial that Hernandez was a "phantom" made up by DeLuna. To the contrary, Hernandez had a history of using a knife in attacking people and was once jailed for killing a woman using the same knife as in the killing for which DeLuna was executed.²⁶⁸

After reading the study, *The Guardian's* Ed Pilkington said: "It is now clear that a person was executed for a crime he did not commit."²⁶⁹ Andrew Cohen, writing in *The Atlantic*, said "[T]his intense piece establishes beyond any reasonable doubt" that Texas executed Carlos DeLuna "for a murder" committed by Carlos Hernandez. Cohen noted that in investigating a pathbreaking three-part *Chicago Tribune* series about this case in June 2006, *Tribune* reporters had found five people to whom Hernandez had admitted killing both (a) the victim for whose killing DeLuna had been executed and (b) another woman four years earlier for which Hernandez had been indicted but not tried. One of the *Tribune* reporters told Cohen that what really had caught his attention was that whereas the crime scene photos showed tremendous amounts of blood, DeLuna, arrested nearby soon after the crime, had no blood on him. Moreover, as Cohen pointed out, DeLuna's fingerprints were

²⁶⁶ Jeffrey Collins, Associated Press, *George Stinney Gets Day in Court 70 Years After Teen Was Executed For Killing White Girls*, Jan. 23, 2014, available at http://www.huffingtonpost.com/2014/01/23/george-stinney-new-trial_n_4650905.html.

²⁶⁷ James S. Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White and Daniel Zharkovsky, *Los Tacayos Carlos: Anatomy of a Wrongful Execution*, 43 COLUM. HUM. RIGHTS L. REV. 711 (2012).

²⁶⁸ Chantal Valery, AFP, *Wrong man was executed in Texas, probe says*, May 14, 2012, available at <http://www.google.com/hostednews/afp/article/ALeqM5gKjcKUa17t1CXiTjPw8tN-V6fNSg?docid=CNG.37ab293d08346aa6f7c1d1bfbdd5758f.491>.

²⁶⁹ Ed Pilkington, *The Wrong Carlos: how Texas sent an innocent man to his death*, GUARDIAN, May 14, 2012, available at <http://www.guardian.co.uk/world/2012/may/15/carlos-texas-innocent-man-death>.

not found at the crime scene, and when arrested he did not have on him either the hair or fibers from the victim. Cohen said that “the only eyewitness to the crime” itself – as opposed to eyewitnesses to, for example, someone’s being near the crime scene – had “identified DeLuna” when DeLuna “was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene.” In short, Cohen said – after presenting a top 10 list of serious problems with the case against DeLuna – this case involved “epic malfeasance and misfeasance.”²⁷⁰

iv. Benjamin Herbert Boyle

On July 17, 2013, when it revealed the FBI’s new collaborative efforts to identify and deal with cases in which the FBI had mistakenly exaggerated evidence of links between hair evidence and defendants (as discussed in Part I.B.3.b.vi above), the *Washington Post* reported that although the FBI had begun reviewing cases in the 1990s, it had made its conclusions available only to prosecutors – not defendants or their counsel – in the particular cases, and it had limited its review notwithstanding warnings of a far more extensive problem.

The *Post* reported that in a Texas case, “Benjamin Herbert Boyle was executed in 1997, more than a year after the Justice Department began its review. Boyle would not have been eligible for the death penalty without the FBI’s flawed work, according to a prosecutor’s memo.”²⁷¹ Although it is not clear from the *Post* article when the prosecutor’s memo was written (*i.e.*, before or after the execution), and since the article does not provide further detail, the only thing that seems reasonably clear is that Mr. Boyle should never have had the death penalty sought against him – no less imposed and carried out in his case. Even if he was guilty of something, the prosecutor’s memo, first revealed 16 years after his execution, stated that it was not capital murder.

As noted in Part I.B.3.b.vi above, FBI officials said in 2013 that if they determine that similar errors occurred, during the period now being studied, in cases in which people have been executed, they will reveal that information – just as they will if their determination occurs after an execution that has thus far not occurred. As also noted above, they are endeavoring to prevent the latter by prioritizing capital cases, and already have helped to secure a last-hour stay of execution.

v. Three North Carolina Cases

In 2010, former FBI agents completed an audit of North Carolina’s State Bureau of Investigation (the “SBI”) requested by North Carolina Attorney General Roy Cooper. It found that SBI agents repeatedly helped prosecutors secure convictions, and that there were instances in which “information that may have been material and even favorable to the defense of an accused defendant was withheld or misrepresented.” The former FBI agents recommended that 190 criminal cases in which the SBI reports were, at best, incomplete be thoroughly reviewed. These included three cases in which the defendants had been executed and four others in which people were still on death row. Although the audit did not determine that any innocent person had been convicted, it pointed out that

²⁷⁰ Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, ATLANTIC, May 14, 2012.

²⁷¹ Spencer S. Hsu, *Convicted defendants left uninformed of forensic flaws found by Justice Dept.*, WASH. POST, Apr. 16, 2012.

even where defendants had confessed (as all three executed people had done) or pleaded guilty, tainted SBI reports may have helped secure confessions or guilty pleas.²⁷² Counsel for the first of those executed, John Hardy Rose (executed on November 30, 2001), said that if they had known about the undisclosed negative results from a test for blood, the sentence might not have been death – since there already was a question as to whether the crime was premeditated or impulsive. The second executed man, Desmond Carter (executed on December 10, 2002), had been represented by inexperienced counsel who had simply assumed that the SBI lab evidence was accurate. Counsel for the third executed man, Joseph Timothy Keel (executed on November 7, 2003), having begun to consider what impact the undisclosed evidence might have had, said, “[T]here are no do-overs with the death penalty. We can’t go back and fix these errors.”²⁷³

vi. Claude Jones

New DNA tests completed in November 2010 raised significant doubts about the guilt of Claude Jones, whom Texas had executed in December 2000. Mr. Jones’ conviction was based principally on a strand of hair recovered from the scene of the crime – hair that the prosecution had asserted was Jones’. The hair was the only *physical* evidence that purportedly tied Jones to the crime scene. The only other evidence tying him there was testimony (later recanted) by an alleged accomplice. Under Texas law, the alleged accomplice’s testimony was insufficient to convict Jones in the absence of independent corroborating evidence.

The technology to do proper DNA testing did not exist at the time of Jones’ trial. Before his execution, Jones unsuccessfully asked the Texas courts and Governor George W. Bush to issue a stay so that the hair could be subjected to DNA testing. Governor Bush was not advised by lawyers in his office that Jones was seeking DNA testing or that it might tend to exonerate him – even though Governor Bush had issued a stay to permit DNA testing in another death row inmate’s case.²⁷⁴

The testing in 2010 showed that the hair was not Jones’. Instead, the tests, done by Mitotyping Technologies in Pennsylvania, showed that the hair was from the victim. The Innocence Project’s Barry Scheck said, “The DNA results prove that testimony about the hair sample on which this entire case rests was just wrong.” He added, “Unreliable forensic science and a completely inadequate post-conviction review process cost Claude Jones his life.”²⁷⁵ Mr. Scheck said, “I have no doubt that if President Bush had known about the request to do a DNA test of the hair he would have issued a 30-day stay in this case and Jones would not have been executed.”²⁷⁶ The *Texas Observer* reported that the DNA test results mean that “Jones’ case now falls into the category of a highly questionable execution – a case that may not have resulted in a conviction were it tried with modern forensic science.”²⁷⁷

²⁷² Associated Press, *Outside Review Finds Flaws in 190 SBI Prosecutions*, Aug. 19, 2010, available at <http://www.wral.com/news/state/story/8153666/>.

²⁷³ Joseph Neff and Mandy Locke, *For Executed Men, Audit’s Too Late*, NEWS & OBSERVER, Aug. 19, 2010.

²⁷⁴ Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEXAS OBSERVER, Nov. 11, 2010.

²⁷⁵ *Id.*

²⁷⁶ Allan Turner, Cindy Horswell, and Mike Tolson, *Hair Casts Doubts on Executed Man’s Guilt*, HOUSTON CHRON., Nov. 12, 2010.

²⁷⁷ Mann, *supra* note 274.

vii. Cameron Willingham

There continues to be controversy over Texas' 2004 execution of Cameron T. Willingham for arson/murder – including new developments in February 2014.

It was revealed in 2009 that Governor Rick Perry had failed in 2004 to grant a 30-day reprieve to Mr. Willingham despite receiving material from a renowned arson expert, working with the defense, who had found major problems with the prosecution's trial evidence about arson. It was unclear whether Governor Perry had reviewed that material, and he refused to make public his general counsel's memorandum from 2004. In September 2009, shortly before the State Forensic Science Commission was to have held hearings at which its arson expert, Craig L. Beyler, would have testified about his conclusion that the evidence failed to prove that Willingham had set the fatal fire, Governor Perry replaced the Commission's chair and two other members. As a result, the hearings were cancelled.²⁷⁸ Mr. Beyler, "a nationally known fire scientist" had prepared "a withering critique" which concluded – as had a *Chicago Tribune* investigation published in December 2004 – that there was no proof that the fire was set and that it may instead have been an accident. Beyler's report said the state Fire Marshal's findings "are nothing more than a collection of personal beliefs that have nothing to do with science-based fire investigation."²⁷⁹

The new chair of the Texas Forensic Science Commission, John Bradley, tried to have the Commission close the case and conclude that there had been no professional misconduct. However, other Commission members disagreed. After lengthy delay, the Commission held a special hearing on January 7, 2011, at which it heard from several arson experts, including Beyler (who was then chair of the International Association of Fire Safety Science). Although the state Fire Marshal's Office and some others from within Texas supported the arson finding, John DeHaan, author of *Kirk's Fire Investigation*, "the most widely used textbook in the field," joined in Beyler's criticism. He stated, "There was no evaluation, at least as reported in the documents I reviewed, to determine arson." He added that "[e]verything that was documented post-fire was consistent with accidental rather than intentional fire. There was no basis for concluding that this was arson."²⁸⁰

After the State Senate chose not to confirm Bradley's nomination to continue to lead the panel, Texas Attorney General Greg Abbott issued a ruling in July 2011 that the Texas Forensic Science Commission was not entitled to investigate evidence collected or tested prior to 2005, when it was created.²⁸¹

Accordingly, on October 28, 2011, the Commission closed its investigation into the Willingham case. But the October 2011 addendum to its report recognized that unreliable

²⁷⁸ James C. McKinley, Jr., *Controversy Builds in Texas Over an Execution*, N.Y. TIMES, Oct. 20, 2009.

²⁷⁹ Steve Mills, *Cameron Todd Willingham case: Expert Says Fire for Which Father Was Executed Was Not Arson*, CHICAGO TRIB., August 25, 2009.

²⁸⁰ Erin Mulvaney, *National experts criticize state's study of fatal '91 fire*, DALLAS MORNING NEWS, Jan. 8, 2011; see also Associated Press, *Texas panel re-examines arson execution case*, Jan. 8, 2011, available at http://www.news-journal.com/news/state/article_0e86827a-6b21-5771-806f-be4ff5ca39af.html; Charles Lindell, *Experts criticize, defend Willingham arson investigators*, AUSTIN AMERICAN-STATESMAN, Jan. 7, 2011; Yamil Berard, *Arson experts testify that Willingham investigators violate standards*, STAR-TELEGRAM, Jan. 7, 2011.

²⁸¹ Claire Cardona, *Forensic Science Panel Recommends Arson Probe*, TEXAS TRIB., Oct. 28, 2011.

science about fires had played a role in Willingham's conviction. The Commission found that arson investigators who testified for Willingham's trial prosecutors had relied on what were then common beliefs, but which by 2011 were generally recognized to be incorrect.²⁸²

On September 23, 2013, the Innocence Project, plus an exoneree and several Willingham relatives, asked the Governor to open an investigation into whether Willingham should be pardoned – in light of (in addition to everything else) “new evidence that the prosecutor in the case paid favors to the jailhouse informant whose testimony [that Willingham had confessed to him] was also key to a conviction.”²⁸³

Thereafter, the current district attorney made files available to the Innocence Project. The *New York Times* reported on February 28, 2014 that an undated, unsigned “note scrawled on the inside of the district attorney's file folder stat[ed] that Mr. Webb's charges were to be listed as robbery in the second degree,” rather than his actual first-degree conviction, “based on coop in Willingham.” The Innocence Project submitted the note to the Board of Pardons and Paroles. Its co-founder, Barry Scheck, said this was a “smoking pistol” for which the Project was “reaching out to the principals to see if there is an innocent explanation I don't see one.” The trial prosecutor, now a retired judge (who had insisted in a 2013 interview that no deal had been made with Webb), failed to respond to several *Times* requests to comment. The current district attorney said he had no opinion about the situation. Mr. Scheck stated that if Webb's testimony “was really based on a deal and misrepresentation, then the system cannot be regulated” and “you cannot prevent the execution of an innocent person.” Even if the Board of Pardons and Paroles were to agree with the Innocence Project's pardon request, a pardon could be granted only by Governor Perry – or his successor next year.²⁸⁴

viii. Troy Davis

Georgia's execution of Troy Davis on September 21, 2011 was the most controversial execution in the United States in many years. Below, after summarizing briefly some of the last significant legal developments, there is a discussion of some of the ongoing issues illustrated by Davis' case.

On August 17, 2009, the Supreme Court took the highly unusual action of transferring Davis' petition for an original writ of habeas corpus to a federal district court in Georgia. The district court was instructed to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence.”²⁸⁵ Following a hearing, the district judge found that

²⁸² Chuck Lindell, *Willingham inquiry ends, but effects linger*, AUSTIN AMERICAN-STATESMAN, Oct. 28, 2011.

²⁸³ Jason Heid, *Innocence Project Asks Governor Perry to Pardon Cameron Todd Willingham*, D MAGAZINE FRONT/BURNER BLOG, Sept. 27, 2013, available at <http://frontburner.dmagazine.com/2013/09/27/innocence-project-asks-governor-perry-to-pardon-cameron-todd-willingham/>.

²⁸⁴ John Schwartz, *Evidence of Concealed Jailhouse Deal Raises Questions About a Texas Execution*, N.Y. TIMES, Feb. 28, 2014.

²⁸⁵ *In re Davis*, 130 S. Ct. 1, 1 (2009) (mem.).

Davis had not met the extraordinarily high burden set by the Supreme Court.²⁸⁶ The district judge also questioned the credibility of several witnesses who had, in whole or part, recanted their trial testimony prior to the hearing.²⁸⁷

(a) *Extraordinarily High Burden on a Death Row Inmate to Disprove Guilt, If Evidence Emerges Belatedly*

The courts' disposition of Troy Davis' case has implications for future cases in which there are substantial doubts about guilt.

The first implications involve situations in which a death row inmate receives inadequate representation from trial lawyers who do not raise available attacks on the evidence purporting to show guilt, and/or the trial prosecution presents questionable evidence or withholds from the defense evidence that might cast doubt on guilt. Ordinarily, such issues would be raised first in the initial state postconviction proceeding. Federal constitutional issues raised unsuccessfully in an initial state postconviction proceeding may be raised in federal habeas corpus, although the circumstances under which the federal court may grant relief even in a first federal habeas corpus proceeding have been substantially curtailed by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") – the statute that has been referred to repeatedly above as amending the federal habeas law to make it far more difficult for federal courts to rule in favor of meritorious constitutional claims.²⁸⁸

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

Even when the newly developed evidence creates a real question about whether the defendant is actually innocent, the federal courts' doors are usually effectively closed to second or subsequent habeas proceedings. The AEDPA has a very narrow exception for situations in which the factual basis for a federal constitutional claim could not have been discovered before through due diligence *and* the facts on which the claim is based, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."²⁸⁹

When that provision of the AEDPA, along with Georgia's severe restrictions, made it impossible for Mr. Davis to secure relief based on his new evidence, he filed a petition to the United States Supreme Court for an original writ of habeas corpus, asserting that it would be unconstitutional to execute him because the new evidence created a grave danger that

²⁸⁶ Greg Bluestein, Associated Press, *Ga. execution leaves debate over guilt unresolved*, Sept. 22, 2011, available at <http://www.independentmail.com/news/2011/sep/22/ga-execution-leaves-debate-over-guilt-unresolved/>.

²⁸⁷ *In re Davis*, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

²⁸⁸ Pub. L. No. 104-132, 110 Stat. 1214.

²⁸⁹ 28 U.S.C. § 2244(b)(2)(B)(ii).

an innocent man would be executed. When, as noted above, the Supreme Court transferred Davis' petition for an original writ of habeas corpus to a federal district court in Georgia "for hearing and determination," the Supreme Court set forth an extremely high legal standard for Mr. Davis to meet: that "evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."²⁹⁰

That legal standard could virtually never be met. Undoubtedly, many people who would never have been convicted (by proof of guilt beyond a reasonable doubt) if the new evidence had been presented at trial will not be able "clearly" to prove their innocence via evidence that even an effective trial lawyer could not have secured at the time of trial.

(b) *Clemency Proceedings Theoretically Might Be, But Usually Are Not, Fail-safes to Permit Consideration of Facts and Equitable Arguments That Are Barred from Judicial Consideration*

Clemency proceedings could be fail-safes to permit consideration of facts and equitable arguments that emerge so late that the AEDPA and other legal hurdles prevent their consideration by the courts. However, clemency proceedings have become far less likely to be fail-safes in recent decades than in the pre-1972 incarnation of capital punishment. The death penalty has become considerably more politicized since the death penalty re-emerged in the mid-1970s, making it far more difficult to secure clemency than before.

One of the few contexts in which some death row inmates – but not Troy Davis – have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt. Yet, even where such doubt should exist, governors, pardons and paroles boards, and other clemency bodies usually deny relief. When they do so, they often cite the number of different occasions when the death row inmate unsuccessfully attempted to present claims in court. These recitations almost always fail to mention that the courts either completely failed to consider the new evidence bearing on guilt/innocence, or else considered the evidence under such an extraordinarily difficult standard that only a conclusive DNA exclusion or other 100% proof of innocence might lead to relief.

(c) *Failure in Clemency to Consider the Unavailability of Life Without Parole When the Death Row Inmate Was Tried, Where It Became Available for Those Sentenced Thereafter*

Life without parole was not an available alternative to the death penalty for capital murder at the time of Troy Davis' trial. If it had been, it is quite possible that he might have received life without parole rather than death. Interviews of actual jurors by the National Jury Project have revealed that many jurors have voted for capital punishment for defendants they did not believe should be executed. They did so because they had the misimpression that the alternative was parole eligibility in as little as seven years. To the extent that life without parole is now an alternative and jurors believe that it really means – as it does – that there is no possibility of parole, it is quite possible that they will vote for life without parole instead of the death penalty. This is particularly likely to occur where

²⁹⁰ *In re Davis*, 130 S. Ct. 1, 1 (2009) (mem.).

jurors have lingering doubt about guilt, or believe that the defendant should be severely punished but not executed.

Moreover, as discussed early in this chapter, a major reason that far fewer death sentences are now being sought, no less secured, than in the past is that there is far greater awareness now that life without possibility of parole really exists and really means “without possibility of parole.”

The fact that life without parole is now, but was not at the time of trial, an available alternative to the death penalty in Georgia is one of many reasons to believe that if Davis’ case had been tried in recent years, he would not – even if convicted – have received the death sentence. Yet, this was not considered in his clemency proceeding. The same is true in many cases in various states.

This same phenomenon led Cuyahoga County Chief Prosecutor Timothy McGinty to write to the Ohio Parole Board in 2013 to ask it to recommend a form of clemency that would change Billy Slagle’s death sentence to life without parole.²⁹¹ McGinty pointed to changes in Ohio law and in how he and his team now assess potential death penalty cases. He said that these changes “would likely have led a jury to recommend a sentence of life without the possibility of parole had that been an option,” which in 1988 it was not. On July 16, 2013, the Parole Board voted 6-4 against recommending clemency. Governor John Kasich then denied clemency. Mr. Slagle was found hanged in his cell on August 3, 2013, three days before his scheduled execution. He was unaware of a recent revelation that the prosecutor’s office had been prepared to enter into a plea deal in 1988 that would have averted imposition of the death penalty.²⁹²

A particular example of the impact of life without parole’s now being a recognized sentencing alternative in Georgia is the case of Brian G. Nichols. Nichols was convicted of four murders of government employees, including a judge and court reporter killed in a courtroom. No one doubted that Nichols had killed these people. After a highly contested and extremely expensive trial in 2008 (almost two decades after Troy Davis was death-sentenced), Nichols was sentenced to multiple life sentences without parole.²⁹³

The Supreme Court has repeatedly (albeit over spirited dissents by Justice Scalia, in particular) limited the categories of cases in which capital punishment may be implemented by reference to “evolving standards of decency.” It seems utterly at odds with today’s standards of decency, and with actual prosecutorial and juror practices, to permit a person to be executed who would most likely *not* have the death penalty sought against him – and reasonably certainly would *not* have it imposed – if the exact same case were to arise today. Yet, it is likely that a considerable majority of those now being executed would not be sentenced to death if charged with the same crimes today.

²⁹¹ Robert Higgs, *Parole board recommends against clemency for murderer, despite urgings of Cuyahoga prosecutor*, PLAIN DEALER, July 16, 2013.

²⁹² Alan Johnson, *Death-row inmate who killed self didn’t know of new hope*, COLUMBUS DISPATCH, Aug. 6, 2013.

²⁹³ Associated Press, *Multiple Life Terms for Courthouse Killings in Atlanta*, N.Y. TIMES, Dec. 13, 2008.

(d) Studies Regarding Reliance on Eyewitness “Identifications” and “Confessions”

(1) Eyewitness Errors: The Single Largest Cause of Wrongful Convictions

Much of the public furor about Troy Davis’ execution arose from the fact that there was no physical evidence linking him directly to the capital crime and that the principal evidence against him was the testimony of eyewitnesses – most of whom recanted their testimony thereafter, either completely or partially.

By the time of Davis’ execution, there was a growing awareness that reliance on eyewitness identifications is fraught with danger. Much of this awareness has been generated by analyses of what led to the convictions of people whose innocence was later proven.

Most often, these exonerations have been based on DNA evidence. Yet, DNA evidence does not exist in over 80% of capital murder cases. Hence, it is not available to exonerate people – like Troy Davis – in whose cases such evidence does not exist. But there is no reason to believe that the problems that caused the convictions of people whom DNA has been able to exonerate exist only in the small minority of cases in which DNA evidence is available. Rather, there is every reason to believe that these problems exist in cases in which DNA is not available to exonerate people.

Accordingly, these analyses raise great cause for concern about basing convictions – and, in particular, executions – on the types of evidence, like eyewitness identifications, that are so frequently responsible for convicting innocent people.

One of these analyses was issued by the Center on Wrongful Convictions at Northwestern Law School in 2001. The Center analyzed the cases of 86 death row exonerees. It found various reasons why innocent people had been wrongly convicted in capital cases. (Some cases involved more than one reason.) These reasons were: eyewitness error – *from confusion or faulty memory*: 46 cases; government misconduct – *by both the police and the prosecution*: 17 cases; junk science – *mishandled evidence or use of unqualified “experts”*: 9 cases; snitch testimony – *often given in exchange for a reduction in sentence*: 10 cases; false confessions – *resulting from mental illness or retardation, as well as from police torture*: 8 cases; and other, such as *hearsay, questionable circumstantial evidence, etc.*: 29 cases.²⁹⁴

Consistent with the Center’s results, the Innocence Project has reached the following conclusion, based on analysis not limited to death penalty cases: “Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing. While eyewitness testimony can be persuasive evidence before a judge or jury, 30 years of strong social science research has proven that eyewitness identification is often unreliable.”²⁹⁵

²⁹⁴ Rob Warden, Exec. Dir., Ctr. of Wrongful Convictions, How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row, Presented at Andrews University, Berrien Springs, Michigan, May 2, 2001, *available at* <http://www.deathpenaltyinfo.org/StudyCWC2001.pdf>.

²⁹⁵ The Innocence Project, Understand the Causes: Eyewitness Misidentification, *available at* <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

Eyewitnesses can be honestly incorrect, even without any effort by the police or prosecutors to affect their testimony. The *Chicago Tribune's* Steve Chapman noted that “[i]n one experiment, a ‘customer’ went into a convenience store to buy a soft drink with a traveler’s check, which required him to provide an ID and spend a few minutes conversing with the clerk. Later, the clerks were asked to find the person in a group of photos. Forty-one percent made a wrong pick.”²⁹⁶

Such errors can occur, as Chapman also recognized, when the witness is very confident. For example, rape victim Jennifer Thompson made an intense effort while being raped to study and note “every single detail on the rapist’s face” so she could identify him. Nonetheless, the person whom she repeatedly identified was innocent. After many years, DNA exonerated him and implicated the real perpetrator. Thereafter, Ms. Thompson and the person wrongfully convicted have made numerous public appearances together to discuss the problems that can exist with eyewitness identifications.²⁹⁷

Often, as in the Troy Davis case, eyewitnesses' encounters with the crime or the perpetrator are far briefer and more confusing than in either the convenience store experiment or the Jennifer Thompson case. This further increases the chance of error.

In August 2011, the New Jersey Supreme Court set forth new guidelines for assessing eyewitness identifications in the context of lineups, if the defense presents a basis for challenging the identifications.²⁹⁸ The court issued the guidelines when deciding a case in which, prior to trial, the eyewitness (whose testimony was the key prosecution evidence) said a detective was “nudging” him to identify the defendant.²⁹⁹ Writing for the unanimous court, Chief Justice Stuart Rabner noted that eyewitness misidentification is the largest cause of wrongful convictions in the United States.³⁰⁰ The *New York Times*, reporting in the wake of the New Jersey Supreme Court’s decision, said, “The idea that human memory is frail and suggestible has gradually gained acceptance among leaders in law enforcement, buttressed by more than 2,000 scientific studies demonstrating problems with witness accounts and the DNA exonerations of at least 190 people whose wrongful convictions involved mistaken identifications. About 75,000 witness identifications take place each year, and the studies suggest that about a third are incorrect.”³⁰¹

In July 2012, the New Jersey Supreme Court adopted a rule that contained instructions that must be given to jurors before they begin deliberating in criminal cases, to deal with what it called the “troubling lack of reliability in eyewitness identifications.” One instruction, to be given when a witness and the person identified are of different races, is that “research has shown that people may have greater difficulty in accurately identifying members of a different race.” Another instruction points out that “memory is not like a video recording that a witness need only replay to remember what happened. Memory is

²⁹⁶ Steve Chapman, Op-Ed., *Injustice, in plain sight: The trouble with eyewitness identification*, CHICAGO TRIB., Aug. 28, 2011.

²⁹⁷ Jennifer Thompson, Op-Ed., *I Was Certain but I Was Wrong*, N.Y. TIMES, June 18, 2000.

²⁹⁸ *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

²⁹⁹ *Id.* at 881.

³⁰⁰ *Id.* at 878.

³⁰¹ Erica Goode and John Schwartz, *Police Lineups Start to Face Fact: Eyes Can Lie*, N.Y. TIMES, Aug. 29, 2011.

far more complex.” In another rule, the New Jersey Supreme Court requires that law enforcement officers make a detailed record regarding how an identification took place.³⁰²

(2) *False Confessions by Innocent People*

A study released in 2010 concerned another important reason – not presented by Troy Davis’ case – why many innocent people have been convicted of crimes: confessing to crimes they did not commit. Professor Brandon L. Garrett of the University of Virginia School of Law studied over 40 cases since 1976 in which people had confessed to crimes that DNA evidence subsequently proved they did not commit. He reviewed trial transcripts, recorded confessions, and other materials to determine how apparently incriminating facts had ended up in false confessions. He found that during interrogations, police – intentionally or not – had provided important case facts to people from whom they then secured “confessions.”³⁰³ He was surprised by how complex the “confessions” were. He told the *New York Times* that “almost all of these confessions looked uncannily reliable,” replete with details that must have come from the police. He said that while he would have expected there to be some cases in which the police had introduced facts into the questioning process, “I didn’t expect to see that almost all of them had been contaminated.” Over half of the innocent people whose cases Professor Garrett studied were “mentally” disabled, under age 18 when questioned, or both. “Most were subjected to lengthy, high-pressure interrogations, and none had a lawyer present.”³⁰⁴

In the Virginia case of Earl Washington, Jr., “a mentally impaired man who spent 18 years in prison and came within hours of being executed for a murder he did not commit,” the police fed him erroneous information that he included in his “confession.” That inaccurate “fact” had appeared in an early police report. Steven A. Drizin, director of Northwestern University’s Center on Wrongful Convictions, told the *New York Times* that law enforcement’s providing suspects with details about crimes “is the primary factor in wrongful convictions,” because “[j]uries demand details from the suspect that make the confession appear to be reliable – that’s where these cases go south.” Videotaping entire interrogations, which is required in some circumstances in some places, could alleviate the extent in which such “contamination” occurs and goes uncorrected.³⁰⁵ Other suggestions are to bar police “from lying [to suspects] about nonexistent evidence [and] from inducing a suspect to imagine leniency”; to require police “to corroborate a confession with stringent evidence”; and to assign postconviction “challenges of confessions ... to judges and prosecutors other than those who tried the original cases.”³⁰⁶

³⁰² Benjamin Weiser, *New Jersey Court Issues Guidance for Juries About Reliability of Eyewitnesses*, N.Y. TIMES, July 20, 2012.

³⁰³ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

³⁰⁴ John Schwartz, *Confessing to Crime, but Innocent*, N.Y. TIMES, Sept. 13, 2010. In a February 2012 commentary, David K. Shipler said that psychological studies of false confessions “show an overrepresentation of children, the mentally ill and mentally retarded, and suspects who are drunk or high. They are susceptible to suggestion, eager to please authority figures, disconnected from reality or unable to defer gratification.” David K. Shipler, Op-Ed., *Why Do Innocent People Confess?*, N.Y. TIMES, Feb. 26, 2012.

³⁰⁵ Schwartz, *supra* note 304. Earl Washington, Jr. would have been executed if another death row inmate, Joseph Giarratano, had not brought Mr. Washington’s case to the attention of a major law firm, Paul, Weiss, which then devoted huge resources in a very limited time to saving Washington’s life. See Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089 (2001).

³⁰⁶ Shipler, *supra* note 304.

d. Problems with Testimony by Forensic “Experts”

As discussed in Part I.B.3.b.vi above, it is now clear that many convictions, including in capital cases, may have been tainted by FBI or other law enforcement experts giving misleading “expert” testimony that mistakenly linked defendants to hair evidence. In at least some of these cases, those convicted were not guilty.³⁰⁷ And as discussed in Part II.F below, it is apparent from the Supreme Court’s decision in *Hinton v. Alabama* that the prosecution’s trial experts’ testimony that six bullets from three crime scenes came from Mr. Hinton’s gun was eventually refuted by the highly qualified experts presented by postconviction counsel. (Yet, notwithstanding this, the Court would not have even considered granting relief if it were not for Hinton’s trial counsel’s mistaken understanding of Alabama law, which he thought precluded him from seeking additional money for experts.)

There is continuing controversy about the way in which bite marks have been used in evidence, supported by “expert” testimony. The Associated Press reported in June 2013 that “[a]t least 24 men convicted or arrested largely on murky bite-mark evidence have been exonerated by DNA testing, had charges dropped or otherwise been proven not guilty.” These included Ray Krone, convicted twice in Arizona, who spent three years on death row. He was released in 2002 after DNA testing demonstrated Krone’s innocence by matching someone else.³⁰⁸

Also included was Kennedy Brewer, who was sentenced to death in Mississippi. After his conviction was vacated and he was taken off of death row but awaited retrial, DNA testing matched someone else, who confessed. The bite marks in his case – which “forensic dentist Dr. Michael West” had testified “matched Brewer’s teeth” – “later were determined to be more likely made by crawfish and insects in water” where her body was dumped. Similar DNA testing regarding another killing matched the same person as in Brewer’s case. That third party confessed in that case, too, leading to the release of Levon Brooks (who had been serving a life sentence). As in Brewer’s case, the bite marks that Dr. West had testified “were human bite marks that matched Brooks” were later found more likely to be bites by crawfish and insects in water. Dr. West told the Associated Press in 2013 that it was not his fault that jurors found Brewer and Brooks guilty, because he never testified that they were the murderers, “only that they bit the children.” He added that he no longer did bite-mark analysis, which he said had been made almost obsolete by DNA.³⁰⁹ He also told the Associated Press that “[p]eople love to have a black-and-white, and it’s not black and white I thought it was extremely accurate, but other cases have proven it’s not.” Dr. West was suspended from the American Board of Forensic Odontology (“the only entity that certifies and oversees bite mark analysts”) and later chose to leave the board.³¹⁰

The FBI does not utilize bite-mark analysis and it is not recognized by the American Dental Association, the Associated Press stated in its June 2013 report. But “[a] small,

³⁰⁷ Hsu, *supra* note 258.

³⁰⁸ Amanda Lee Myers, Associated Press, *Men wrongly convicted or arrested on bite evidence*, June 13, 2013, available at <http://www.dailytribune.com/article/DT/20130616/NEWS04/130619694>.

³⁰⁹ *Id.*

³¹⁰ Amanda Lee Myers, Associated Press, *Once key in some cases, bite-mark evidence now derided as unreliable*, June 17, 2013, available at http://www.denverpost.com/ci_23474835/once-key-some-cases-bite-mark-evidence-now.

mostly ungoverned group of dentists carry out bite mark analysis and their findings are often key evidence in prosecutions, even though there is no scientific proof that teeth can be matched definitively to a bite into human skin.” Indeed, unlike Dr. Marks, several “forensic dentists implicated in faulty [bite-mark] testimony connected to high-profile exonerations, remain[] on the American Board of Forensic Odontology.”³¹¹

Those who say such matching can be valid “say problems that have arisen are not about the method, but about the qualifications of those testifying.” Dr. Gregory Golden, president of the American Board of Forensic Odontology, told the Associated Press that there is now a “new era” of accountability, and a “good side” to bite-mark analysis. Some forensic dentists have begun work on guidelines and a proficiency test to enable the continued use of bite-mark testimony while avoiding past problems. Dr. Frank Wright, who is active in these efforts, said: “The problem lies in the analyst or the bias. ... So if the analyst is ... not properly trained or introduces bias into their exam, sure, it’s going to be polluted, just like any other scientific investigation. It doesn’t mean bite mark evidence is bad.”³¹²

The Innocence Project believes that bite-mark evidence is so seemingly powerful that “[i]t’s highly prejudicial, [given that] its probative value is completely unknown.” Accordingly, the Innocence Project, along with others, has been attempting to exclude bite-mark evidence and testimony from court cases.³¹³ One of its major efforts at exclusion failed in September 2013, when Manhattan justice Maxwell Wiley held that bite-mark evidence was admissible under New York law. Innocence Project attorney Chris Fabricant attacked Justice Wiley’s ruling as “contrary to the overwhelming consensus of the scientific community” and “a victory for the Flat Earth Society.” Justice Wiley stated on September 5, 2013 that he would be issuing an opinion explaining his ruling.³¹⁴ As of February 4, 2014, he has not yet done so.

e. Prosecutorial Misconduct Often Not Rectified

On June 25, 2013, the Oklahoma Supreme Court suspended for 180 days the license to practice law of attorney Robert Bradley Miller and fined him over \$12,800 in court costs for his misconduct in prosecuting two separate murder trials. He prosecuted these cases as an assistant district attorney. The District Attorney, Bob Macy, was “known for his aggressive pursuit of the death penalty,” having gotten 54 death sentences in 25 years. Miller’s misconduct had led to the release of two death row inmates after a federal district judge found in 2006 that their convictions were unconstitutional because the star prosecution witness had received an undisclosed deal from the prosecution. The Oklahoma Supreme Court said Miller had abused the subpoena process to cause witnesses to cooperate, failed to disclose evidence to the defense, and actually impeded the defense’s access to evidence. Two dissenters said he should have been disbarred.³¹⁵

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ Amanda Lee Myers and David B. Caruso, Associated Press, *In Pivotal NY Test, Judge OKs Bite Mark Evidence*, Sept. 5, 2013, available at <http://bigstory.ap.org/article/apnewsbreak-ny-judge-allows-bite-mark-analysis>.

³¹⁵ Sean Murphy, Associated Press, *Ex-prosecutor suspended over death penalty case*, June 26, 2013, available at <http://examiner-enterprise.com/sections/news/state/ex-prosecutor-suspended-over-death-penalty-case.html>.

However, as the *Arizona Republic* reported in a four-part series in October 2013, even the modest sanctions against Miller are unusual in Arizona. The *Republic* found that in capital cases, prosecutorial misconduct was alleged in half of appeals in the years it studied, and almost half (16 out of 42) of “those allegations were validated by the Arizona Supreme Court.” Yet, merely “two death sentences were thrown out” and in one of them the prosecutor’s conduct was deemed to be “overreaching” but not misconduct in that the trial judge had permitted the prosecutor to behave as he did.³¹⁶ There were additional capital cases with serious prosecutorial misconduct in Arizona, but those cases did not ever reach the Arizona Supreme Court, for this reason: “the misconduct caused a mistrial or the prosecution offered a favorable plea agreement to avoid mistrial.”³¹⁷

The reason for the low reversal rate after misconduct was found was that the Arizona Supreme Court usually concluded that it was “harmless error” – either because the court felt the jury would have decided the same way absent the misconduct or because the trial judge had endeavored to solve the problem by a curative instruction to the jury. Of all the prosecutors found to have engaged in misconduct in capital cases, two “were punished, one with disbarment, the other with a short suspension.” Before being found to have engaged in misconduct, such prosecutors “are often congratulated.” “Since 1990, six different prosecutors who were named prosecutor of the year by the Arizona Prosecuting Attorneys Advisory Committee ... were later found by appeals courts to have engaged in misconduct ... during death-penalty trials.”³¹⁸

Although judges could in theory declare mistrials or reverse on appeal due to prosecutorial misconduct, they almost never do. One reason is that they wish to avoid arguments that retrials are barred by double jeopardy.³¹⁹

Another reason for inaction by trial judges and for harmless error holdings on appeal was illustrated by a Maricopa County Superior Court judge whom the *Arizona Republic* interviewed on condition of anonymity. She first “drew a line on the table with her finger and then placed an eating utensil there to mark the line” and said, “That’s misconduct.” She next “placed another utensil an inch away and parallel to the first one on the table” and said, “That’s reversible error.” Finally, the judge “put her finger between the utensils and said, ‘That’s where a lot of prosecutors operate.’”³²⁰

Defense counsel rarely refer prosecutors to the state Bar on ethics charges. In a rare instance where a defense counsel, Rick Lougee, did so against Ken Peasley, Peasley was named Prosecutor of the Year for a second time and received national awards. “Judges rallied around him,” and he went across the state “to train other prosecutors” – whereas Lougee “was shunned by the legal community for having made the accusation.”

Lougee had acted after discovering (before his capital client’s retrial) that “Peasley conspired to present false testimony.” Moreover, Peasley had, at the retrial of another defendant (who was returned to death row) and at the retrial of Lougee’s client (who was

³¹⁶ Michael Kiefer, *Prosecutorial misconduct alleged in half of capital cases*, ARIZONA REPUBLIC, Oct. 28, 2013 (corrected Nov. 25, 2013).

³¹⁷ Michael Kiefer, *Prosecutors under scrutiny are seldom disciplined*, ARIZONA REPUBLIC, Oct. 28, 2013 (corrected Nov. 25, 2013).

³¹⁸ Kiefer, *Prosecutorial misconduct*, *supra* note 316.

³¹⁹ *Id.*

³²⁰ *Id.*

acquitted), “repeated the perjury.” In particular, Peasley used an informant to get death sentences against three men (two of whose retrials have just been mentioned), but had “misrepresented the informant’s knowledge, [falsely] claiming that police knew nothing of the defendants until the informant brought them up.” He “lied to the judge and the jury and encouraged a witness to commit perjury.”

Eventually, after seven years, the state Bar found Lougee’s allegations to be valid, and Peasley was disbarred. Thereafter, the death penalty from the first retrial was overturned, while the third defendant (whose death sentence was vacated because of a Supreme Court decision that death sentences could not be imposed on people below age 18 at the time of the crime) remains in prison.

Rick Lougee thereafter commented that “Ken Peasley [who had prosecuted about 60 capital cases] corrupted the system for 15 years. That puts the system at risk for more than just my clients.”³²¹

The *Arizona Republic* reported that “overly aggressive prosecutors continue to have their way in the courtroom – as long as they win cases, experts say.” The consensus of the defense counsel, prosecutors, and judges whom the *Republic* interviewed was that “the final word on defining and curbing prosecutorial misconduct rests with judges.” The *Republic*’s series ended with this quote from Arizona Court of Appeals Judge Peter Swann: “When a judge thinks a lawyer’s conduct is questionable, the lawyer should be referred.”³²²

4. Mental Retardation

a. Apparent Misapplication of *Atkins* by Texas Led to Execution in 2012

In *Atkins v. Virginia*,³²³ the Supreme Court held it unconstitutional to execute a person with mental retardation. However, a few states have applied “exclusion criteria that deviate from and are more restrictive than the accepted scientific and clinical definitions,” and thus arguably are permitting executions of people whose executions are unconstitutional under *Atkins*.³²⁴

Texas permitted such an execution in 2012, in the opinion of the two organizations whose expertise the Court specifically cited in *Atkins*: (what is now named) the American Association on Intellectual and Developmental Disabilities (the “AAIDD”) and the American Psychiatric Association. Both organizations have long recognized that strengths can co-exist with weaknesses and that what is crucial in assessing mental retardation are the weaknesses and not the strengths (or such things as whether the person can tell lies). However, Texas has “a separate set of questions, known as the Briseño standard, that ask psychologists to determine whether the defendant has demonstrated leadership abilities or planning skills, whether their families thought the defendant was mentally retarded during

³²¹ *Id.*

³²² Michael Kiefer, *Can the system curb prosecutorial abuses?*, ARIZONA REPUBLIC, Oct. 29, 2013.

³²³ 536 U.S. 304 (2002).

³²⁴ John H. Blume, Sheri Lynn Johnson, and Christopher Seeds, *Of Atkins and Men: Deviations From Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 691-92 (2009).

development, or whether the defendant can lie.”³²⁵ Applying these factors, the Texas Court of Criminal Appeals upheld the death sentence of Marvin Wilson, despite his IQ of 61 and his having been “diagnosed with mild mental retardation by a court-appointed specialist, the only expert in the case.”³²⁶

The Supreme Court will shed more light on this subject when it decides *Hall v. Florida* by June 2014. The ABA, the AAIDD, and the American Psychiatric Association are among many *amici curiae* who have urged the Court to hold that Florida violated *Atkins* by applying a rigid IQ cut-off limitation – without regard to anything else, including (to take just one example) the generally accepted understanding that there is a standard error of measurement in IQ test results. According to numerous press accounts of the March 3, 2014 oral argument in *Hall v. Florida*, No. 12-10882, a majority of the Court appeared likely to hold that Florida did indeed violate *Atkins*.³²⁷

b. Georgia’s Uniquely Harsh Burden of Proof May Result in the Execution of A Person Whom All Experts Now Recognize Has Mental Retardation

Georgia’s death penalty law – ironically, the first in the country to bar executions of people with mental retardation – is unique in requiring that defendants at trial must establish their mental retardation beyond a reasonable doubt. The *en banc* Eleventh Circuit upheld the constitutionality of this burden of proof in deciding Warren Lee Hill’s case in November 2011.³²⁸

Mr. Hill was on the verge of being executed on February 19, 2013 when the Eleventh Circuit granted a provisional stay, by a 2-1 vote,³²⁹ in light of “newly filed affidavits by the State’s psychiatric experts that the petitioner is mentally retarded.” In 2000, Hill’s four experts had testified that he had mental retardation, but the prosecution’s three experts had “testified” that he was not mentally retarded. The state court had concluded that Hill had shown “by a preponderance of the evidence” that he *was* mentally retarded, but had not proven this “beyond a reasonable doubt.” In February 2013, Hill presented affidavits in

³²⁵ Maggie Clark, *Mentally Challenged Defendants Still Face Execution*, MAGGIE CLARK’S BLOG, Dec. 3, 2010, available at <http://maggieclarkblog.wordpress.com/2010/12/03/mentally-challenged-defendants-still-face-execution/> (discussing *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004)).

³²⁶ Brief of American Association on Intellectual and Developmental Disabilities as Amicus Curiae Supporting Petitioner at 2, *Wilson v. Thaler*, No. 12-5349 (U.S. 2012), available at <http://www.yettercoleman.com/wp-content/uploads/2012/08/No-12-5349-Wilson-v-Thaler-Amicus-Brief-of-AAIDD.pdf>.

³²⁷ See, e.g., Lyle Denniston, *Argument analysis: When simplicity won’t do*, SCOTUS BLOG, Mar. 3, 2014, available at <http://www.scotusblog.com/2014/03/argument-analysis-when-simplicity-wont-do/#more-205888>; Lawrence Hurley, Reuters, *Majority of U.S. justices sympathize with inmate in death row case*, Mar. 3, 2014, available at <http://www.globalpost.com/dispatch/news/thomson-reuters/140303/majority-us-justices-sympathize-inmate-death-row-case>; Adam Liptak, *Justices Hear Florida Case on Measuring Intellectual Disabilities of Inmates*, N.Y. TIMES, Mar. 3, 2014; Mark Sherman, Associated Press, *Court skeptical of IQ scores in deciding execution*, Mar. 3, 2014, available at http://hosted2.ap.org/OHCOL/8ef5320729ce4298abefc1903704c7d5/Article_2014-03-03-US-Supreme-Court-Mental-Disability/id-6562846d82354705b63bf7c3d8f96afe.

³²⁸ *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc), cert. denied, 132 S. Ct. 2727 (2012).

³²⁹ Kate Brumback, Associated Press, *Georgia Execution Halted At The Last Minute*, Feb. 19, 2013, available at <http://bigstory.ap.org/article/federal-appeals-court-halts-ga-execution>.

which “*all* three of the State’s experts ... [have] revised [their] opinion[s] and now testif[y] that Hill meets the criteria for mental retardation.” The Eleventh Circuit, when issuing the provisional stay, ordered Hill to demonstrate that he could meet the federal habeas statute’s “stringent requirements ... for leave to file a second or successive petition.”³³⁰

On April 22, 2013, the Eleventh Circuit held that Hill’s claim was barred by the AEDPA.³³¹ The Supreme Court declined on October 7, 2013, to consider Mr. Hill’s case, but he later got a stay unrelated to his mental retardation claim.

On October 24, 2013, Georgia’s House Judiciary Non-Civil Committee held a hearing regarding whether to change the beyond-a-reasonable-doubt burden imposed on capital defendants who assert that they are mentally retarded. Committee chair Rich Golick, a Republican, said Georgia’s being the only state with so stringent a standard warranted consideration as to whether to change it. But he said that the hearing was for informational purposes only and that he did not expect to introduce legislation on the subject.³³²

5. Serious Mental Disabilities

a. Policies of Three Leading Professional Groups

The ABA, the American Psychiatric Association, and the American Psychological Association all have adopted three policies concerning mental disability and capital punishment.³³³ The first would ensure that *Atkins* is implemented in a manner that comports with the definition of mental retardation most recently endorsed by what is now the AAIDD. It would also exempt from execution people who have dementia or traumatic injury at the time of the crime, since these disabilities have very similar impact on intellectual adaptive functioning as mental retardation but may not come within the definition of mental retardation because they always (dementia) or usually (head injury) arise after age 18.

The second policy is designed to prohibit the execution of people with severe mental disabilities where demonstrated impairments of mental and emotional functioning at the time of the offense would make a death sentence disproportionate to their culpability.³³⁴

The third policy deals with a death-sentenced prisoner: (a) whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly

³³⁰ In re Hill, No. 13-10702-P, at 3-5 (11th Cir. Feb. 19, 2013), *application to vacate denied*, *Humphrey v. Hill*, 133 S. Ct. 1325 (2013).

³³¹ In re Hill, 715 F.3d 284 (11th Cir. 2013).

³³² Kate Brumback, Associated Press, *Ga. lawmakers study ‘intellectually disabled’ death penalty provisions*, Oct. 25, 2013, available at http://www.mdjonline.com/pages/full_story/push?article-Ga-lawmakers+study+intellectually+disabled+death+penalty+provisions%20&id=23918061; Jeanner Bonner, *Death Penalty and Mental Disability*, GEORGIA PUBLIC BROADCASTING, Oct. 24, 2013, available at <http://www.gpb.org/news/2013/10/24/death-penalty-and-mental-disability>.

³³³ See *Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006).

³³⁴ For detailed discussion of the first and second paragraphs, see *id.* and Christopher Slobogin, *Mental Disorder As An Exemption From the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005).

impaired by a mental disorder or disability, (b) whose mental illness impairs his ability to assist counsel or otherwise to take part meaningfully in postconviction proceedings with regard to one or more specific issues as to which his participation is necessary, or (c) whose understanding of the nature and purpose of the punishment has become so impaired as to render him incompetent for execution.³³⁵

As discussed in Part II.A below, the Supreme Court's January 8, 2013 decision in *Ryan v. Gonzales* stated that if a death row inmate's mental inability to help his counsel is likely to continue *indefinitely*, his execution should not be stayed – even if there are one or more issues on which the inmate's help would be important to his counsel.

b. *Growing Support for Excluding From The Death Penalty People Who Were Severely Mentally Ill At The Time Of Their Capital Crimes*

There was growing support in 2013 for the second policy of the three leading professional organizations. Most significantly, the Ohio's Joint Task Force to Review the Administration of Ohio's Death Penalty voted 15-2 on September 26, 2013, to exclude from death penalty eligibility people who had a diagnosable "serious mental illness" at the time of the crime. There was some disagreement among those who voted for this recommendation as to which mental illnesses should come within the exclusion. Some of them said that how this is eventually resolved legislatively would affect whether they support whatever emerges. Several task force members stated that the legislature is a better forum for delineating when serious mental illnesses should be part of the exemption. This and the Joint Task Force's other recommendations will be submitted in 2014 to the legislature, the Governor, and others.³³⁶

c. *Executions, and Possible Future Execution, of People with Serious Mental Disabilities*

On November 15, 2011, Ohio executed Reginald Brooks. His counsel asserted that Brooks was a paranoid schizophrenic who had severe mental illness long before he shot his sons. His attorneys said Brooks thought his co-workers and wife were poisoning him and had asserted conspiracy theories about the killings that included police, his relatives, and a look-alike. Prosecutors conceded that Brooks was mentally ill but said this neither led to the killings nor made him incompetent. Brooks' counsel stated that the prosecution had withheld information that would have helped a mental health defense and led to a different court ruling. Indeed, former Judge Harry Hanna, who had been a member of the three-judge panel that convicted Brooks and voted to impose the death penalty, told the Ohio Parole Board he would not have voted for the death penalty if had known of information in the police reports that had been provided to Brooks' counsel only shortly before his execution. Governor John Kasich decided not to commute Brooks' death sentence.³³⁷

³³⁵ For detailed discussion of the third paragraph, see *Recommendations and Report*, *supra* note 333, and Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

³³⁶ Johnson, *supra* note 24; Andrew Welsh-Huggins, Associated Press, *Panel: Weigh mental state in capital cases*, Sept. 27, 2013, available at <https://groups.google.com/forum/#!msg/standdown-l/dupbZzktIRo/3EoavIwVTucJ>.

³³⁷ Associated Press, *Ohio executes dad who killed his 3 sons in 1982*, DAILY NEWS (New York), Nov. 16, 2011.

Oklahoma executed Garry Allen on November 6, 2012. He had been diagnosed as having schizophrenia. In 2005, the Oklahoma Board of Pardons and Paroles had recommended that his sentence be commuted to life without parole. In that same year an Oklahoma State Penitentiary doctor had concluded, after a psychological examination, that Allen had dementia arising from seizures, drug abuse, and having been shot in the face. During his execution, he spent his last minutes making “unintelligible ramblings.”³³⁸

Two days later, Rachel Petersen, having witnessed and reported on Allen’s execution – the eighth she had witnessed, wrote an opinion column. She said that as she had sat down to write her story on the night of the execution, she had “searched for the words within me to describe the huge injustice I had just witnessed” – but did not write of “injustice” because that would reflect her opinion. Now, she did opine: “I watched as ... one of Allen’s attorneys lowered her head in her hands as Allen rambled on unintelligibly about Obama, Romney and Jesus. In fact, Allen said a lot of things in his lengthy ramblings – I just couldn’t understand what he was saying. ... My judgment, my bias, my opinion: Allen had no idea he was about to be executed. ... And when the deputy warden said ‘Let the execution begin,’ Allen turned his head and looked at him and said ‘Huh? What?’ And then when the lethal dose of drugs ran through his body, he looked again at the deputy warden and loudly groaned. I truly believe he didn’t know what was happening to him. And now, ... I am questioning myself. I was a witness, I was there, and I sat quietly taking notes with a pen and paper. I watched an injustice take place before my own eyes and I did nothing. I merely scribbled words on a piece of paper.”³³⁹

A six-part series, *Trouble In Mind*, on “the intersections of the mental health and criminal justice systems in Texas,” ran in the *Texas Tribune* in February 2013. The series focused on Texas death row inmate Andre Thomas, who “began exhibiting signs of mental illness as a boy,” then in 2004 “committed a brutal triple murder,” and while imprisoned became blind “because he pulled out both of his eyes.” In part one, writer Brandi Grissom said that this “case offers a lens through which to examine the effects of a mental health system in Texas that is too fractured and too underfunded to care for the mentally ill[,] ... a system that often punishes the deluded instead of helping them to recover and protecting society from them.”³⁴⁰

The series’ final story noted that “[i]n 2009, months after he pulled out his second eye and ate it, the Texas Court of Criminal Appeals denied Thomas’ appeal.”³⁴¹ In Judge Cathy Cochran’s concurring statement, she said, “This is an extraordinary tragic case.” She noted that Thomas “has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia. He also has a long history of drug and alcohol abuse. ... [His] behavior in the months before the killings became increasingly ‘bizarre’” Twice within 20 days before the killings, he tried to kill himself, was taken to places where he could be observed or get psychiatric treatment but left before being seen. The concurrence ended by

³³⁸ Rachel Peterson, *Okla. death row inmate Garry Allen executed*, MCALESTER NEWS-CAPITAL, Nov. 6, 2012.

³³⁹ Rachel Petersen, Editorial, *A heartbreaking day – Execution Day*, MCALESTER NEWS-CAPITAL, Nov. 8, 2012.

³⁴⁰ Brandi Grissom, *Trouble In Mind*, Part 1, *Andre Thomas: Mental Health, Criminal Justice Collide*, TEXAS TRIB., Feb. 20, 2013.

³⁴¹ Brandi Grissom, *Trouble in Mind*, Part 6, *Andre Thomas: Questions of Conscience*, TEXAS TRIB., Feb. 26, 2013.

saying, “This is a sad case. Applicant is clearly ‘crazy,’ but he is also ‘sane’ under Texas law.”³⁴² As of March 2013, Thomas’ “eyelids [were] surgically closed.”³⁴³

On March 1, 2013, the *Dallas Morning News* editorialized that Andre Thomas’ “saga ... resembles a medieval horror story featuring madness, a family’s homicidal slaughter, ... and a waiting executioner. Knowing it’s real makes the story almost too grotesque to stomach.” It is a case, the editorial said, that “challenges this state’s collective conscience.” The editorial concluded by quoting from the concurrence in the Texas Court of Criminal Appeals (quoted in the preceding paragraph above), and then saying: “It seems, rather, that the world has gone mad. That this human being is responsible for his psychotic actions is a preposterous notion. To strap down and terminate the life of such a tortured creature is the way a medieval society would deal with its embarrassments. Texas must be better than that, and the courts should save us from insane ideas of what constitutes justice.”³⁴⁴

d. Texas Court of Criminal Appeals Forbids Forced Medication To Restore Competency For Execution

On September 11, 2013, by a 5-4 vote, the Texas Court of Criminal Appeals held that a trial judge had acted improperly in ordering that death row inmate Steven Staley – who had previously been held to be mentally incompetent to be executed – be medicated forcibly in order to restore his competency to be executed. The court held that the trial judge’s order was not in compliance with statutes about either competency for execution or involuntary medication. The court also decided that, were it not for the “unauthorized order, the evidence conclusively shows that [Staley] is incompetent to be executed.” At a hearing in 2006, experts testified that Staley had suffered from paranoid schizophrenia for almost 15 years, “and that his condition had deteriorated over time.”³⁴⁵

The Court of Criminal Appeals had ruled in 2006 that under the then-extant law on competency-to-be-executed, it had no jurisdiction to consider an appeal from the trial judge’s order of involuntary medication. However, a new competency-to-be-executed law became effective in September 2007. The court held that this law applied to Staley’s case. Moreover, the court determined that it could consider not only Staley’s competency to be executed but also the “intertwined” involuntary-medication order – since he only had become competent because of that order. It held that under Texas law, all that a trial court could do after a death row inmate is found incompetent to be executed is to consider his competency periodically. The court did not rule on any state or federal constitutional arguments.³⁴⁶

6. Costs of the Capital Punishment System

As is evident from materials cited earlier in this chapter, the costs of the death penalty system have been playing an increasing role in the public discourse over capital punishment.

³⁴² *Ex Parte* Thomas, No. WR-69,859-01 (Tex. Crim. App. Mar. 18, 2009) (Cochran, J., concurring).

³⁴³ Grissom, *supra* note 340.

³⁴⁴ Editorial, *Death penalty insanity in the case of Andre Thomas*, DALLAS MORNING NEWS, Mar. 1, 2013.

³⁴⁵ *Staley v. Texas*, 2013 WL 4820128, at *1 (Tex Crim. App. Sept. 11, 2013).

³⁴⁶ *Id.*

In Utah, the first-ever comparative analysis of the costs to Utah's state and local governments of capital punishment and life without parole was performed at the request of Representative Steve Handy, a Republican. He told the Law Enforcement and Criminal Justice Interim Committee in November 2012 that a fiscal analyst for the legislature had "unofficially" stated that seeking the death penalty resulted in an extra \$1.6 million cost per inmate from trial on.³⁴⁷

A three-year cost analysis by Ninth Circuit Senior Judge Arthur L. Alarcón and Loyola Los Angeles Law School Adjunct Professor Paula M. Mitchell was published in 2011. After discussing the "true costs of administering the death penalty in California,"³⁴⁸ they concluded, among other things, that since 1978, "California taxpayers have spent roughly \$4 billion to fund a dysfunctional death penalty system." Noting the absence of legislative action to "improve th[e] death row deadlock," they said that the voters have instead exacerbated the problem by adding to the list of death-eligible crimes.³⁴⁹ They "estimated that the additional costs of capital trials, enhanced security on death row and legal representation for the condemned adds \$184 million to the budget each year," and that this number would increase greatly without ameliorative action. They concluded that keeping the death penalty system intact would require \$85 million more per year, reducing the number of death-eligible crimes would save \$55 million per year, and abolishing the death penalty would save about \$1 billion every five or six years.³⁵⁰

Particularly in New York, there has been growing criticism, most notably by federal judges, of federal prosecutors' costly but predictably unsuccessful efforts to secure federal death sentences. For example, in 2010, Judge Nicholas G. Garaufis said it would be a useless expenditure of time and money to seek the death penalty for Vincent Basciano, who was serving life without parole "under extremely restrictive conditions in one of the nation's most secure penal institutions." After pretrial preparation, extensive jury selection, and trial, the jury took only two and a half hours on June 1, 2011 to vote unanimously against imposing the death sentence. The estimated cost of this unsuccessful attempt to seek the death penalty exceeded \$10 million.³⁵¹

In his 2012 book, Judge Frederic Block (who, as does Judge Garaufis, sits in the Eastern District of New York) pointed out that during the guilt phase of the trial of Kenneth McGriff, he thought that the government shared his belief "that the prosecutors would simply be going through the motions and wasting everybody's time and valuable judicial resources, as well as the taxpayers' money," by continuing to seek capital punishment. So, before the jury rendered its guilt phase verdict, Judge Block suggested that the prosecutors tell Attorney General Alberto Gonzalez "that in this judge's opinion, there is not a chance in the world there would be a death verdict in this case." The Attorney General declined to change his mind. After the penalty phase evidence and argument, "It took the jurors less than an hour – over lunch – to do what everyone following

³⁴⁷ Brooke Adams, *Utah's death penalty costs \$1.6M more per inmate*, SALT LAKE TRIB., Nov. 15, 2012.

³⁴⁸ Judge Arthur L. Alarcón and Paula M. Mitchell, *Executing the Will of the Voters? A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41 (2011).

³⁴⁹ *Id.* at S41-42.

³⁵⁰ Carol J. Williams, *Death penalty costs California \$184 million a year, study says*, L.A. TIMES, June 20, 2011.

³⁵¹ Jim Dwyer, *Dizzying Price for Seeking the Death Penalty*, N.Y. TIMES, June 3, 2011.

the case believed would happen. They rejected the death penalty in favor of life imprisonment.”³⁵²

Only one federal death sentence has been imposed in New York through February 2014.

In 2013, the *University of Denver Criminal Law Review* published an analysis of the costs of Colorado’s death penalty system by Justin F. Marceau and Hollis A. Whitson. They concluded (among other things) that:

- (1) Prosecutions in which the death penalty is sought “require substantially more days and court, and take substantially longer to resolve than non-death-prosecuted first degree murder cases that result in ... life imprisonment without parole”;
- (2) “[T]he threat of the death penalty at the charging stage does not save costs by resulting in speedier pleas when the defendant wants to avoid the death penalty”; and
- (3) The death penalty’s “substantial cost ... cannot be justified by the possibility of future deterrence insofar as social scientists increasingly agree that the deterrence benefits of the death penalty are entirely speculative.”

In sum, the analysis concluded that “Colorado’s death penalty imposes a major cost without yielding any measurable benefits.”³⁵³

7. *Lack of Substantial Evidence of Deterrence*

In April 2012, the National Research Council, associated with the National Academy of Sciences, issued a report by its Committee on Deterrence and the Death Penalty. The committee stated:

The committee concludes that research to date is not informative about whether capital punishment decreases, increases, or has on effect on homicide rates. Therefore, these studies should not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Claims that research demonstrates that capital punishment decreases or increases the homicide rate or has no effect on it should not influence policy judgments about capital punishment.³⁵⁴

³⁵² FREDERIC BLOCK, *DISROBED: AN INSIDE LOOK AT THE LIFE AND WORK OF A FEDERAL TRIAL JUDGE*, at 260-61, 263 (2012).

³⁵³ Justin F. Marceau and Hollis A. Whitson, *The Cost of Colorado’s Death Penalty*, 3 U. DENV. CRIM. L. REV. 145 (2013).

³⁵⁴ COMMITTEE ON LAW AND JUSTICE OF THE DIVISION OF BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, REPORT BRIEF, at 2 (2012) (based on COMMITTEE ON DETERRENCE AND THE DEATH PENALTY, *DETERRENCE AND THE DEATH PENALTY* (2012)), available at http://sites.nationalacademies.org/dbasse/claj/deterrence_and_death_penalty/ (follow “Report Brief” hyperlink).

Commenting on the committee's work, Betsey Stevenson and Justin Wolfers of the University of Pennsylvania's Wharton School said, "[W]e have no evidence at all on how would-be murderers perceive the risk of execution if they are caught, which is what really matters for deterrence."³⁵⁵ They added, in light of the "lockstep" movement of homicide rates across states and with Canada, that "the data do allow one conclusion that the National Academy should have emphasized more strongly: The death penalty isn't the dominant factor driving the fluctuations in the U.S. homicide rate."³⁵⁶

Columbia Law Professor Jeffrey Fagan pointed out on January 24, 2014, that the committee had found no difference depending on the extent of publicity about executions, the number of executions, whether there were years of moratorium on executions, or other factors.³⁵⁷

II. SIGNIFICANT LEGAL DEVELOPMENTS

A. *Ryan v. Gonzales*, 133 S. Ct. 696 (2013)

The Supreme Court decided two cases in which federal circuit courts had held that death row inmates were entitled to indefinite stays of execution for as long as the inmates were incompetent during federal habeas corpus proceedings. In Valencia Gonzales' case, there had been no determination that there would be any issues decided on the basis of anything outside of the existing record. In Sean Carter's case, the federal district court had determined that Carter's counsel needed Carter's help in developing four claims.

The Court first ruled that neither 18 U.S.C. § 3599 nor 18 U.S.C. § 4241 provides a statutory basis for staying federal habeas proceedings due to a petitioner's incompetence.

The Court determined that it need not, in deciding either case, consider "the outer limits" of a federal district court's discretionary power to issue stays. The Court said that if it were to turn out that one of Carter's claims were unexhausted and not barred by procedural default, "an indefinite stay would be inappropriate," because that would allow Carter to undermine the AEDPA's goal of promoting finality.

The Court said that where there is a competency-based stay based on a type of incompetence other than incompetence to be executed, "[a]t some point, the State must be allowed to defend its judgment of conviction." The Court concluded, by saying:

If a district court concludes that a petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptive valid judgment.³⁵⁸

³⁵⁵ Betsey Stevenson and Justin Wolfers, *The Death-Penalty Debate Represents a Market Failure*, BLOOMBERG, June 11, 2012, available at <http://www.bloomberg.com/news/2012-06-11/the-death-penalty-debate-represents-a-market-failure.html>.

³⁵⁶ *Id.*

³⁵⁷ Jeffrey Fagan, Remarks at the OHCHR Global Panel "Moving Away from the Death Penalty – Deterrence and Public Opinion," Jan. 24, 2014 (on file with author).

³⁵⁸ *Ryan v. Gonzales*, 133 S. Ct. 696, 708-09 (2013).

B. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)

The Supreme Court's holding in this case extended *Martinez v. Ryan*,³⁵⁹ which involved Arizona's precluding claims of trial counsel's unconstitutional ineffectiveness that were raised for the first time in a second state postconviction proceeding. The Court had held that negligence or other ineffectiveness of the initial state postconviction counsel could be "cause" for the failure to raise a claim at the time when state law required it to be raised. The *Martinez* Court stressed that Martinez never got – and, if procedural default were applied in federal habeas, never could get – a ruling by *any* court on his ineffective assistance of trial counsel claim. The Court concluded that "[i]nadequate assistance of counsel at initial-review capital proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."³⁶⁰

In *Trevino*, the Supreme Court found that, despite surface appearances, "[t]he structure and design of the Texas system in actual operation ... make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review."³⁶¹ The Court concluded that the case before it illustrated that "as a systemic matter," Texas fails to provide most defendants, prior to state postconviction, "meaningful review of a claim of ineffectiveness of trial counsel." Moreover, if the Court did not extent the *Martinez* exception, "the Texas procedural system would create significant unfairness," since "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review." Accordingly, it extended *Martinez* because "Texas precludes as a matter of course" what Arizona law explicitly barred.

The Court stressed that the constitutional right involved, namely, the right to effective assistance of counsel at trial, is "critically important." In order to raise a claim that this right has been violated requires such things as new counsel, expanding (after finally getting) the trial court record, and "sufficient time to develop the claim."³⁶²

C. *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013)

This case dealt with whether the AEDPA's one-year statute of limitations, set forth in 28 U.S.C. § 2244(d)(1), which begins, pursuant to § 2244(d)(1)(D), no later than "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," can be overcome by a convincing showing of actual innocence. The Court held that, as with procedural default, the answer is yes.

However, the Supreme Court cautioned that the threshold for overcoming the statute of limitations would very rarely be satisfied. That is because, as with procedural default, the petitioner must "persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."³⁶³ Moreover, in considering whether this stringent test is satisfied, a relevant factor to be considered is the "timing of the [petition]."³⁶⁴

³⁵⁹ 132 S. Ct. 1309 (2012).

³⁶⁰ *Id.* at 1315.

³⁶¹ *Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013).

³⁶² *Id.* at 1919, 1921.

³⁶³ *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

³⁶⁴ *Id.* (alteration in original) (quoting *Schlup*, 513 U.S. at 332).

The Court vacated the Sixth Circuit's judgment and remanded, because the Sixth Circuit had seemingly deemed irrelevant – rather than as “a factor in determining whether actual innocence has been reliably shown” – any “unjustifiable delay” before the petitioner raised the claim.

D. *Woodward v. Alabama*, 134 S. Ct. 405 (2013)

Justice Sotomayor dissented from the denial of certiorari, for two reasons, in the first of which Justice Breyer joined. The case involved Alabama's capital sentencing statute. In this case, it permitted the trial judge, following the jury's advisory 8-4 vote in favor of life without parole, to impose capital punishment. The judge did so “after hearing new evidence [that the prosecution presented regarding the mitigation evidence that had been presented to the jury] and finding, contrary to the jury's prior determination of the same question, that the aggravating circumstances outweighed the mitigating circumstances.” Justice Sotomayor noted that over the last decade, “Alabama has been the only State in which judges have imposed the death penalty in the face of contrary jury verdicts. Since Alabama adopted its current statute, its judges have imposed death sentences on 95 defendants contrary to a jury's verdict,” of whom 43 continued to be on Alabama's death row.³⁶⁵

Justice Sotomayor, joined by Justice Breyer, acknowledged that “in *Harris v. Alabama*, 513 U.S. 504 (1995), we upheld Alabama's ... statute,” but added that 18 years thereafter, “the time has come for us to reconsider that decision.” She cited data showing that in the intervening time, “judicial overrides” had “become increasingly rare” elsewhere, and that “Alabama has become a real outlier.” Indeed, of the states that when *Harris* was decided had permitted judicial overrides, only in Alabama did judges still actually override jury votes against imposing the death penalty. Due to what Justice Sotomayor described as “a dramatic shift” in the last decade, whereas over three states in the 1980s and 1990s about 10 jury recommendations of life were overridden each year, “[j]udges now override jury verdicts of life in just a single State, and they do so roughly twice a year.” She stated that the only apparent reason for this unique practice by Alabama judges is that they “appear to have succumbed to electoral pressures” – with some judges even touting their overrides during their re-election campaigns.³⁶⁶

Justice Sotomayor pointed out that in many override cases, the jury's recommendation had been unanimous. She added that Alabama judges often gave no “meaningful explanation” for their overrides, while on other occasions, they gave reasons that seemed inconsistent with the Court's Eighth Amendment jurisprudence.

Justice Sotomayor's second reason for feeling that certiorari should have been granted – reasoning in which Justice Breyer did not join – was the Court's *Apprendi* line of cases, which require juries to make the decisions on various matters.³⁶⁷

³⁶⁵ *Woodward v. Alabama*, 134 S. Ct. 405, 405 (2013) (Sotomayor, J., dissenting).

³⁶⁶ *Id.* at 407-08 (citations omitted).

³⁶⁷ *Id.* at 410-11.

E. *Kansas v. Cheever*, 134 S. Ct. 596 (2013)

The Supreme Court considered whether, consistent with the Fifth Amendment, the government could introduce expert testimony arising from a federal court-ordered medical evaluation of the defendant. The prosecution expert testimony responded to defense expert testimony that had been offered in an effort to prove voluntary intoxication as a defense.

The Court unanimously held that the Kansas Supreme Court had erred in reversing the trial court for permitting the government's rebuttal expert testimony. In doing so, the Court said it was reaffirming a prior ruling that "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal." The Court rejected the Kansas Supreme Court's attempt to distinguishing the prior ruling as applicable only to a "mental disease or defect" and in any event not to a "temporary" condition.³⁶⁸

F. *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (*per curiam*)

In a unanimous *per curiam* decision, arrived at based on the certiorari papers, the Court held that trial counsel for Alabama death row inmate Anthony Ray Hinton had "rendered constitutionally deficient performance." He did so where the case's central issue was the validity of prosecution experts' testimony that six bullets from three crime scenes had been fired from Hinton's revolver. Trial counsel hired someone whom he realized "was not a good expert" on this crucial issue.

Trial counsel hired this expert because of his erroneous belief – which the trial judge shared – that available funding for experts was capped at \$1,000. But unbeknownst to the trial lawyer, the statute concerning reimbursement for expert fees had been changed more than a year before Hinton's arrest. Counsel could now be "reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." Due to his failure to research this, despite the trial judge's invitation that he do so, Hinton's trial attorney failed to correct "the trial judge's mistaken belief that a \$1,000 limit applied" and therefore did not follow up on the trial judge's "invitation to file a motion for additional funds."³⁶⁹

Instead, the trial attorney used an expert, Andrew Payne, whom "the prosecutor badly discredited" on cross-examination and closing argument – due to his paucity of experience as an expert on this subject, his difficulty in using the state forensic lab's microscope, his having only one eye, and his not having expertise in firearms and toolmark identification – all of which compared negatively to the training and experience of the state's experts.

Thereafter, counsel representing Hinton in state postconviction presented "three new experts on toolmark evidence," one of whom had worked at the FBI on this subject – and for six years had been "chief of the firearms and toolmark unit at the FBI's headquarters." The other two were extremely experienced "firearms and toolmark

³⁶⁸ *Kansas v. Cheever*, 134 S. Ct. 596, 601-02 (2013).

³⁶⁹ *Hinton v. Alabama*, No. 13-6440, 2014 WL 684015, at *1-2 (U.S. Feb. 24, 2014).

examiners at the Dallas County Crime Laboratory.” All three “testified that they could not conclude that any of the six bullets had been fired from the Hinton revolver.”³⁷⁰

The Court’s holding was limited to the following: “[I]t was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at \$1,000.” Putting it another way, the Court added, “The trial attorney’s failure to request additional funding because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance.” Although the lawyer realized he required more funding to put on a viable defense, “he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for \$1,000 but for ‘any expenses reasonably incurred.’”³⁷¹

The Court went to great pains to emphasize that it was *not* holding that anything unconstitutional would have occurred if all the facts of the case were the same but the law had been different – that is, if Alabama still had the \$1,000 cap on expert expenses. The Court said, “We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, although qualified, was not qualified enough.” Instead, “[t]he only inadequate assistance of counsel here was the inexcusable mistake of law – the unreasonable failure to understand the resources that state law made available to him – that cause counsel to employ an expert that *he himself* deemed inadequate.”³⁷²

The Court remanded the case, for a determination of whether Hinton (having met the deficient performance prong) could also meet the prejudice prong of the constitutional test for ineffective assistance of counsel. Noting that the Alabama Court of Appeals and the prosecution had asserted that there was insufficient prejudice because Mr. Payne had “said all that Hinton could have hoped for from a toolmark expert,” the Court said the following:

It is true that Payne’s testimony would have done Hinton a lot of good *if the jury had believed it*. But the jury did not believe Payne. And if there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer’s deficient performance and is entitled to a new trial.³⁷³

The Court also noted, as relevant to the determination of prejudice on remand, that experts presented by prosecutors “can sometimes make mistakes” and that “[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.”³⁷⁴

³⁷⁰ *Id.* at *4.

³⁷¹ *Id.* at *6.

³⁷² *Id.* at *7.

³⁷³ *Id.* at *8.

³⁷⁴ *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)) (citation to study omitted).

G. Noteworthy Lower Court Developments

In addition to the New Jersey Supreme Court decisions about eyewitnesses and the Texas Court of Criminal Appeals decision barring involuntary medication to restore competency to be executed, there was a notable dissent by a new Ohio Supreme Court Justice.

On January 25, 2013, Ohio Supreme Court Justice William O’Neill, who had joined the court 23 days earlier, dissented from the scheduling of an execution. After saying that if there were ever a case in which the death sentence would be proper, this was it, Justice O’Neill said he believed that the death penalty violated both the United States and Ohio Constitutions. He stated: “The death penalty is inherently both cruel and unusual,” a remnant of “barbaric days” in which “decapitations, hangings, and brandings were also the norm.” Justice O’Neill noted that “the death penalty is becoming increasingly rare both around the world and in America” and thus is “unusual.” He added that even when lethal injection is used, death “is a cruel punishment” –citing Ohio’s failure after more than two hours of effort to administer a lethal injection to Romell Broom in 2011.³⁷⁵ Almost three years later, Broom is still on death row.

III. RELEVANT ACTIVITIES BY THE AMERICAN BAR ASSOCIATION (THE ABA)

A. ABA President’s Opposition to Attacks on Debo Adegbile to be Assistant Attorney General for Civil Rights

On January 13, 2014, ABA President James Silkenat sent a letter to the Senate Judiciary Committee urging that Debo Adegbile’s nomination to become Assistant Attorney General for Civil Rights not be adversely affected by the successful pro bono work that he and others at the NAACP Legal Defense Fund did on behalf of Pennsylvania death row inmate Mumia Abu-Jamal. That work had been raised by opponents of Mr. Adegbile’s nomination at, before, and after his January 8, 2014 confirmation hearing. President Silkenat wrote that “[a] fundamental tenet of our justice system and our Constitution is that anyone who faces loss of liberty has a right to legal counsel. Lawyers have an ethical obligation to uphold that principle and provide zealous representation to people who otherwise would stand alone against the power and resources of the government – even those accused or convicted of terrible crimes.” He added that Mr. Adegbile’s “work, like the work of ABA members who provide thousands of hours of pro bono legal services every year, is consistent with the finest tradition of this country’s legal profession and should be commended, not condemned.”³⁷⁶

The committee was reminded in another letter that Chief Justice John Roberts, when in private practice, had helped represent pro bono Florida death row inmate John Ferguson, who had been convicted of murdering eight people.³⁷⁷

³⁷⁵ State v. Wogenstahl, 134 Ohio St. 3d 1437 (2013) (O’Neill, J., dissenting).

³⁷⁶ Letter from James R. Silkenat to Senate Judiciary Committee, Jan. 13, 2014, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014jan13_adegbile_noms_1.authcheckdam.pdf.

³⁷⁷ Tony Mauro, *Prominent Defenders for Nominee to Head Civil Rights Division*, LEGAL TIMES, Jan. 28, 2014.

On March 5, 2014, the Senate rejected Mr. Adegbile's nomination, primarily because of his role in the NAACP Legal Defense Fund's pro bono work for Mr. Abu-Jamal "decades after his conviction," resulting in his sentence being changed from death to life without parole. The nomination failed because of Democratic Senators who joined with Republicans to oppose it. Reacting to the vote, President Obama said, "The fact that his nomination was defeated solely based on his legal representation of a defendant runs contrary to a fundamental principle of our system of justice — and those who voted against his nomination denied the American people an outstanding public servant."³⁷⁸

B. ABA Amicus Briefs

As noted above, the ABA filed an *amicus curiae* brief in support of the petitioner in *Hall v. Florida*, the Supreme Court case concerning Florida's rigid IQ cutoff limitation in determining assertions of mental retardation in capital punishment cases.³⁷⁹

The ABA earlier filed an *amicus curiae* brief in support of granting certiorari in *Ferguson v. Secretary, Florida Department of Corrections* "to resolve multiple conflicts and confusion in the state and lower federal courts concerning the scope and application of the competency-to-be-executed standard this Court announced in *Panetti v. Quarterman*, 551 U.S. 930 (2007)."³⁸⁰ However, the Supreme Court denied certiorari and Mr. Ferguson was executed on August 5, 2013.³⁸¹

On February 4, 2014, the ABA filed an *amicus curiae* brief in support of the petitioner in *Howell v. Secretary, Florida Department of Corrections*. The ABA asserted that certiorari should be granted to clarify the manner in which a federal court should consider a death row inmate's request for relief under Federal Rule of Civil Procedure 60(b). The ABA said that the Eleventh Circuit should have found that Rule 60(b) relief was justified because the Court's decision in *Holland v. Florida*³⁸² was an "extraordinary circumstance" with regard to equitable tolling of the AEDPA's statute of limitations.³⁸³ The Supreme Court denied certiorari and a motion to stay Howell's execution,³⁸⁴ and, as noted above, Howell was executed on February 26, 2014.³⁸⁵

³⁷⁸ Jonathan Weisman, *Senate Rejects Obama Nominee Linked to Abu-Jamal Case*, N.Y. TIMES, Mar. 5, 2014.

³⁷⁹ Brief of Amicus Curiae the American Bar Association in Support of Petitioner, *Hall v. Florida*, No. 12-10882 (U.S. filed Dec. 23, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/amicus/12-10882tsa_amicus_brief.authcheckdam.pdf.

³⁸⁰ Motion for Leave to File Brief and Brief of Amicus Curiae the American Bar Association in Support of Petitioner at i, *Ferguson v. Sec'y, Fla. Dep't of Corr.*, No. 13-5507 (U.S. filed July 26, 2013), *available at* <http://www.americanbar.org/content/dam/aba/administrative/amicus/no135507.authcheckdam.pdf>.

³⁸¹ David Ovalle, *Miami killer John Errol Ferguson executed*, MIAMI HERALD, Aug. 5, 2013.

³⁸² 130 S. Ct. 2549 (2010).

³⁸³ Brief of Amicus Curiae the American Bar Association in Support of Petitioner, *Howell v. Sec'y, Fla. Dep't of Corr.*, No. 13-8530 (U.S. filed Feb. 4, 2014), *available at* <http://www.americanbar.org/content/dam/aba/administrative/amicus/howellabaamicuscuriaebrief20140203.authcheckdam.pdf>.

³⁸⁴ *Howell v. Crews*, Nos. 13-8530, 13A824, 2014 WL 414172 (U.S. Feb. 26, 2014).

³⁸⁵ Farrington, *supra*, note 58.

C. *Representation Project*

The ABA Death Penalty Representation Project (the “Representation Project”) was created in 1986 to address a growing problem with the quality and availability of defense counsel for death row prisoners. Since that time, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and re-sentencing proceedings. Volunteer firms have also written *amicus* briefs on behalf of the ABA and other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation at the state level. As of 2012, the thousands of lawyers whom the Representation Project has recruited had devoted well over \$100,000,000 worth of billable time to pursuing justice in death penalty cases.

In dozens of the cases that the Representation Project has placed with volunteer counsel, inmates have been either exonerated or had their death sentences commuted.

In the past decade, the Representation Project’s work has greatly expanded to meet the demands for its help. It provides technical assistance, expert testimony, training, and resources to the capital defender community and to the volunteer counsel whom it has recruited. Its staff members frequently speak at public events to raise awareness about significant problems with the fair administration of the death penalty. And over 1,100 capital defenders and volunteer attorneys subscribe to its secure on-line practice area, containing information about all aspects of the capital defense effort.³⁸⁶

The Representation Project organizes coalitions of judges, bar associations, civil law firms, and government lawyers in jurisdictions that use the death penalty to champion meaningful systemic reforms designed to ensure that all capital defendants and death row prisoners have the assistance of effective, well-trained, and adequately resourced lawyers. In particular, the Representation Project has endeavored to secure the implementation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Its 2003 revision of these Guidelines was approved as ABA policy in 2003 (the “ABA Guidelines”). The ABA Guidelines have now been adopted in many death penalty jurisdictions by court rule and state statute – although the extent to which they have been implemented in practice is a separate matter. They have also been widely adopted by state bar associations, indigent defense commissions, and judicial conferences.³⁸⁷ The ABA Guidelines are now the widely accepted standard of care for the capital defense effort and have been cited in more than 400 state and federal cases,

³⁸⁶ For information on the Representation Project, see the American Bar Association’s website for the Death Penalty Representation Project, available at http://www.americanbar.org/groups/committees/death_penalty_representation/. A new on-line resource, added in 2013, contains decades of capital training materials that are searchable by author, subject and date.

³⁸⁷ See Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (updated Sept. 2012), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/implementation_fact_sheet.authcheckdam.pdf.

including decisions by the United States Supreme Court.³⁸⁸ In 2013, the Ohio Joint Task Force (discussed in Part I.A.1 above), before which the Representation Project's Director had testified, recommended that Ohio adopt and implement the revised Guidelines. The Representation Project has also made a considerable effort in Arizona to assist with adoption of the ABA Guidelines by Court Rule and the creation of a capital counsel certification program in Maricopa County, among other reforms.

On October 21, 2013, the Representation Project co-hosted a symposium at Hofstra Law School to mark the revised Guidelines' tenth anniversary. It was accompanied by symposium-related articles spread over two issues of the *Hofstra Law Review*.

The Representation Project participates as faculty in more than a dozen state and national training seminars for judges and defense counsel each year in the United States, on the elements of capital defense and the importance of an effective capital defense function. It also works internationally: since 2003, it has organized training seminars for capital defenders and judges in other countries that retain use of the death penalty – including Japan, Malaysia, and Vietnam, and extensive work in China. It has also participated as faculty at international conferences on the death penalty in Canada, France, Ireland, Spain, and Switzerland. (Its most recent international activities are described in Part III.E below.)

The Representation Project also plays a key role in other ABA activities, including, for example, the letter from ABA President Silkenat concerning the nomination of Debo Adegbile (see Part III.A above) and the ABA *amicus* briefs in *Ferguson* and *Howell* (see Part III.B above).

D. Assessments Under ABA Auspices of Particular States' Implementation of the Death Penalty

1. Assessments from 2004-2007 and 2011-2012

From 2004-2007, the ABA Death Penalty Due Process Review Project (referred to herein as the Review Project), assessed the extent to which the capital punishment systems in eight states comported with ABA policies designed to promote fairness and due process. These assessments were not intended as substitutes for comprehensive studies that the ABA hopes will be undertaken during moratoriums on executions. Rather, they were intended to provide insights on the extent to which these states were acting in a manner consistent with relevant ABA policies. The assessment reports were prepared by in-state assessment teams and Review Project staff, for these states: Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. Serious problems were found in every state death penalty system, although the problems were not precisely the same in each state. The same was true of the assessments of the death penalty in Kentucky (issued on December 7, 2011) and Missouri (issued on March 1, 2012).

³⁸⁸ See generally American Bar Association, ABA Guidelines, available at http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html.

The Review Project's final two assessment reports, which concerned Virginia and Texas, were issued in 2013.³⁸⁹

2. Virginia Assessment Report (August 2013)

The Virginia assessment team's overall unanimous conclusion was that "as long as Virginia imposes the death penalty, it must be reserved for a narrow category of the worst offenders and offenses, ensure heightened due process, and minimize the risk of executing the innocent."³⁹⁰ After recognizing several areas in which there have been improvements in recent years in Virginia, the assessment team "identified several areas of concern" and the areas "most in need of reform, followed by specific recommendations."

Pretrial areas found to warrant reform included aspects of eyewitness identification procedures, the failure to require electronic recording of questioning of suspects and their confessions, Virginia's unusually restrictive discovery rules in criminal cases, and the frequent failures of others in law enforcement to inform prosecutors of anything that might be helpful to the defense. Post-trial areas found to warrant reform included the failure to require preservation of evidence that likely impacted eligibility for the death penalty, the high burden to overcome when seeking postconviction DNA testing, the failure to ensure that there is effective counsel for the appellant on direct appeal, the state habeas system's emphasis on the finality of convictions and death sentences as being more important than fairness – including Virginia's having many limitations in state habeas that "are not imposed in other capital jurisdictions," and the relative dearth of evidentiary hearings.

The assessment team said that there was higher confusion in Virginia than in other states about important jury instructions, including an "alarming" majority who thought the death penalty was mandatory in a circumstance when it was discretionary. The team recommended a number of specific instructions.

The assessment team was particularly concerned about Virginia's IQ cut-off for finding mental retardation as "contrary to the modern, scientific understanding of mental retardation." The assessment team also urged that Virginia comport with the first two ABA policies on mental disability (discussed in Part I.B.5.a above), including the bar on death penalty eligibility for "persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the person's capacity" in on one of the three ways set forth in the ABA policy.

³⁸⁹ Each state assessment report can be found through individual links on the ABA's website, available at http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project/death_penalty_assessments.html.

³⁹⁰ AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT (2013), available at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf.

3. *Texas Assessment Report (September 2013)*

The Texas Assessment Team issued its report in September 2013.³⁹¹ It concluded that notwithstanding “some progress” in the past few years, there were “a number of areas in which the state’s death penalty falls short” of what is needed in order to “ensure fairness in selection of offenders to receive the death penalty, reduce to the extent possible the risk of executing the innocent, and preserve public confidence in the administration of criminal justice.” Indeed, the assessment team concluded that “[i]n many areas, Texas appears out of step with better practices implemented in other capital jurisdictions, fails to rely upon scientifically reliable methods and processes in the administration of the death penalty, and provides the public with inadequate information to understand and evaluate capital punishment in the state.”

The assessment team unanimously made numerous recommendations for reform, including:

- (1) “Texas should adopt legislation to require all law enforcement agencies to video- or audio-record the entire of custodial investigations in serious felony investigations – especially those which may lead to capital charges”;
- (2) “Texas should require indefinite preservation of biological evidence collected in any violent felony case” and the impact of its failure to comply with existing preservation requirements should be considered “in determining relief for a death row inmate’s possible meritorious legal claims”;
- (3) Texas law should be amended to greatly expand the availability of testing or re-testing of biological evidence;
- (4) “Texas should adhere to the various recommendations promulgated by the [Forensic Science] Commission in its report on the dubious forensic science used to convict Cameron Todd Willingham and Ernest Ray Willis”;
- (5) “Texas should ... abandon altogether the use of the ‘future dangerousness’ special issue”;
- (6) “Texas should revise its jury instructions in capital cases” and continually monitor them “to determine whether they ameliorate jurors’ tendency to misunderstand their awesome responsibility to determine if the defendant will live or die”; moreover, the jury should be much more clearly instructed regarding mitigation and be specifically instructed not to rely on “a mental disorder or disability” as a basis for opting for the death penalty;

³⁹¹ AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TEXAS DEATH PENALTY ASSESSMENT REPORT (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

- (7) Texas must conform its statute to the AAIDD's definition of mental retardation and prohibit consideration of factors that allow commonly held misperceptions "to trump AAIDD-accepted criteria";
- (8) Texas should adopt the first two ABA policies regarding disability and the death penalty, including forbidding capital punishment "for persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of his/her conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law";
- (9) "The Texas Court of Criminal Appeals ... should conduct a searching and thorough proportionality review of every death sentenced imposed," including "a comparison to similar ... cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not. The review should also encompass a meaningful comparison to co-defendants' or co-participants' cases" – including "cases that resulted in a sentence less than death";
- (10) "Texas should amend its capital habeas statute" in numerous ways; the Court of Criminal Appeals "should reexamine the strict application of procedural default rules ... to ensure that death row inmates are not executed despite serious questions of constitutional error"; "Texas has a long history of providing capital petitioners with deficient and incompetent counsel," and a death row inmate should not end up waiving a constitutionally significant claim "due to his/her attorney's poor performance"; further, "the harmless error standard" should be used when adjudicating in state habeas claims of "constitutional error";
- (11) "[A]ll remaining death row inmates who were sentenced to death prior to the U.S. Supreme Court's mandated changes to Texas's capital sentencing scheme should be granted new sentencing hearings so that their punishment can be reassessed under a constitutional standard";
- (12) "The Board of Pardons and Paroles should ... adopt guidelines directing its members to independently review all clemency applications and consider all factors that might lead a decision-maker to conclude that death is not the appropriate punishment";
- (13) Texas should create a commission that would, among other things, consider "all cases in which an innocent person was convicted and exonerated" and then to try to "develop solutions and methods to correct the identified errors and defects";

- (14) “Counsel must be appointed at the earliest stage, even if capital charges have not been filed but the case could be death-eligible.”
- (15) Appointing authorities for counsel should consist of members “with demonstrated knowledge and expertise in capital representation” and “to the extent possible, independent of the elected judiciary”; and
- (16) “District Attorneys ... should ... ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose *all* evidence in a particular case.”

4. *Symposium and Key Findings Report from the Twelve State Assessments*

On November 12, 2013, the Review Project and the Carter Center co-hosted a National Symposium on the Modern Death Penalty. The symposium included remarks by Former President Carter, a conversation with President Carter, ABA President Silkenat, and Southern Center for Human Rights President (and law professor) Stephen Bright – who ended the day with closing remarks; plus panels on (a) Professionalism and the Role of the Bar in Ensuring Fairness: Defense Lawyers, Prosecutors, and Judges; (b) Executing People with Mental Illness and Mental Retardation/Intellectual Disability; (c) Righting Wrongs: Preventing and Correcting Wrongful Conviction in Capital Cases; and (d) Lightning Strikes: Arbitrariness and the Death Penalty.³⁹² At the symposium, the Review Project released an overview of its twelve assessment reports.³⁹³

E. *International Activities*

On December 6 and 7, 2005, the European Commission, the ABA, and the Japan Federation of Bar Associations sponsored an International Leadership Conference on Human Rights and the Death Penalty, in Tokyo, Japan. The sponsoring organizations are contemplating possible follow-up activities. The *Thomas M. Cooley Law Review* published in 2012 a special edition containing numerous articles based on presentations at the 2005 conference, including some updates covering some of the ensuing years, plus my introductory commentary written in 2011.³⁹⁴

On August 16-17, 2013, the ABA Death Penalty Representation Project participated, with the International Justice Project and the Japanese Federation of Bar Associations, in

³⁹² For videos of President Carter’s remarks and the first three panels, see http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/national_symposium_death_penalty_carter_center.html.

³⁹³ ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, *THE STATE OF THE MODERN DEATH PENALTY IN AMERICA: KEY FINDINGS OF STATE DEATH PENALTY ASSESSMENTS 2006-2013* (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf.

³⁹⁴ *International Leadership Conference on Human Rights and the Death Penalty*, 28 T.M. COOLEY L. REV. 3 (2011), *available at* http://www.cooley.edu/lawreview/_docs/archive_volumes/volume27_2/Cooley_Death_Penalty_Book_Final.pdf.

conducting a two-day training program on the defense of capital punishment cases in Japan. This was the first such specialized training there, and was attended by over 60 attorneys. The seminar stressed such things as thorough and independent factual investigation, the importance of investing potential mitigation evidence, and the importance of working towards special protection of vulnerable parts of the population.³⁹⁵

In September 2013, the ABA Death Penalty Due Process Review Project met with a group of Japanese death penalty lawyers. They discussed the work done by the Due Process Review Project. The Japanese lawyers group thereafter decided to call itself the “death penalty due process group.”³⁹⁶

Maiko Tagusari, who played a crucial role in the 2005 conference and long has been a key leader of Japanese bar efforts on the death penalty, spoke at the October 21, 2014 conference marking the tenth anniversary of the revised ABA capital punishment capital defense guidelines. After noting that she had read the revised ABA Guidelines in 2004 and had translated them into Japanese, she said that for a long time, relatively few people in Japan were particularly interested in them. Japan’s bar associations never had focused on capital defense in their trainings, and only in 2010 had developed a working team concerning capital defense. Ms. Tagusari said that it has been very hard to find counsel willing to represent defendants in capital cases.³⁹⁷

Ms. Tagusari mentioned several obstacles to investigating and presenting mitigation evidence in Japan, including the fact that prosecutors are not required to say whether they will seek the death penalty until the end of the trial. Although this will, she hopes, change after the August 2013 training, until then the two defense counsel virtually never have contradicted any facts presented by the prosecutor. All they have done to try to avoid the death penalty has been to interview and present the defendant’s close relatives, and beg for mercy. She noted that a bare majority, 5-4 vote, suffices to impose the death penalty (as long as one career judge is in the majority along with lay jurors). Ms. Tagusari stated that Japan has no system whereby defendants can appeal from death sentences, whereas prosecutors can appeal from non-death outcomes.

With all this unfortunate history and with the past lack of good training, Ms. Tagusari said that the August 2013 training marked real progress. She said that the ABA Death Penalty Representation Project is the Japanese Federation of Bar Associations’ (“JFBA”) best model. She also stated that the JFBA plans to hold seminars in eight cities nationwide, and will stress the need to emphasize the whys and hows of death being different. Moreover, the JFBA is contemplating drafting Guidelines for the Appointment and Performance of Capital Defense Counsel.

Robin Maher, director of the ABA Death Penalty Representation Project, will be participating in trainings in Taiwan and Japan in 2014.

³⁹⁵ See Project News and Highlights (vol. VI, issue 3), ABA Death Penalty Representation Project, http://www.americanbar.org/publications/project_press/2013/year-end/2013-project-news.html (last visited Mar. 10, 2014).

³⁹⁶ ABA Death Penalty Due Process Review Project, internal ABA planning document at 2, Nov. 21, 2013 (on file with author).

³⁹⁷ Maiko Tagusari, Remarks at Symposium at Hofstra Law School, Oct. 21, 2013 (as reflected in contemporaneous notes by this chapter’s author, Ronald J. Tabak).

The ABA Death Penalty Due Process Review Project is in the process of formulating an effort to enhance human rights in other countries that utilize capital punishment. Among other things, this effort would likely include the promotion of reforms – such as precluding execution of the mentally disabled and juveniles, and barring the death penalty where there has not been an intentional taking of human life – and monitoring how such reforms are implemented.³⁹⁸

IV. THE FUTURE

There is increasing recognition of major, systemic problems with capital punishment. In six states – most recently Maryland in 2013 – this has led in recent years to abolition or discontinuation of capital punishment. Elsewhere, three Governors have ordered moratoria on executions, and a joint court/bar task force is preparing to issue its final recommendations for substantial reforms in Ohio.

New death sentences remain at a far lower level than in the past. To the extent that efforts to improve the quality of defense representation in capital cases succeed, there would likely be even fewer new death sentences.

Due to a variety of factors mostly relating to lethal injection, executions fell noticeably in 2013. In early 2014, some people advocated a return to electrocution, firing squads, and/or hangings. Meanwhile, several states engaged in contorted efforts to secure drugs – even from anonymous sources that were most likely unregulated by the federal government and often apparently not licensed in the executing states – that enabled them to execute people. This contributed to a modern record pace of executions in Florida, and to numerous dubiously performed executions in Missouri.

Perhaps the increased reporting about surreptitious, manipulative, and sometimes seemingly illegal efforts to carry out executions will lead more people to focus on the fact that our society is deliberately killing people who would otherwise live out their lives in prison with no possibility of parole.

Events leading up to Troy Davis' execution in 2011 led to greater appreciation of serious problems with the death penalty's implementation. That case and others have increasingly led people who are or have been in the judiciary or law enforcement, or who have taken part in executions, to speak out against capital punishment – at least in practice. Indeed, several authors of death penalty laws have now called for their repeal. The media (including two newspaper editorial boards) have begun to recognize that a growing number of conservatives now oppose the death penalty – some of them referring to capital punishment as a failed, inefficient, expensive government program that accomplishes nothing.

Given all these developments, it is not surprising that – even when providing no alternative – the Gallup poll recently showed the lowest level of support for capital punishment in over 40 years.

Increased attention is being paid to recent analyses showing that a very small number of counties are responsible for very disproportionate percentages of capital

³⁹⁸ ABA Death Penalty Due Process Review Project, *supra* note 396, at 2-3.

punishment prosecutions and executions. Some of those counties have recently stopped seeking the death penalty frequently.

It has been shown repeatedly that providing competent counsel reduces drastically the number of death outcomes. This should – but is not likely to – lead to a systematic re-examination of the quality of representation received by those already on death row. The Supreme Court’s decisions concerning defense representation in capital sentencing proceedings have been fact-specific and, when handed down in a federal habeas context, constrained by the AEDPA. Indeed, in its February 2014 decision in *Hinton v. Alabama* – in which it appeared that due to counsel’s ineffectiveness an innocent man was found guilty and sentenced to death – the Court stressed that the only reason why it had considered the case was that trial counsel had been wrong as a matter of law in believing that state law prohibited him from seeking more funds for experts on the case’s crucial issue. Most lower courts are likely to continue to ignore the deadly impact of many capital defense counsel – at least unless they learn the hard way, as Judge Mark W. Bennett did – that what may seem like a “dream team” of defense counsel may actually be an unmitigated disaster for the defendant.

It is crucial that the public recognize, and that scholars document, that the majority of those now being executed would not be sentenced to death (and often would not even have the death penalty sought for them) if the exact same cases were to arise today. This is due to such things as the greater availability of life without parole, greater discretion for prosecutors not to seek the death penalty, improved performance by defense counsel, and greater skepticism by many jurors. Legal arguments need to be developed about its being unconstitutional – as well as unconscionable – to carry out executions in such cases.

But in the meantime, all too many courts will continue to use procedural technicalities to bar consideration of fundamental, highly prejudicial constitutional violations. And all too many clemency authorities will continue to hide behind the fiction that judges or juries have fully considered all facts relevant to a fair determination of whether an execution should be carried out. Usually, they will continue to fail completely to act as the “fail-safe” against unfairness that those with clemency authority are supposed to be. Often, they are the first, and last, people who could consider, weigh, and act on crucial mitigating facts about the defendant.

In this and so many other respects, it is vital that the legal profession and the public be better informed about what is really going on in the capital punishment system. It continues to be true (as reflected by the changed opinions of so many people discussed near the outset of this chapter) that the more that people know about the death penalty system as actually implemented, the more they oppose it.

Ultimately, our society must decide whether to continue with a system that cannot survive any serious cost/benefit analysis. As more and more people recognize that our capital punishment system is inconsistent with both conservative and liberal principles, and with plain common sense, the opportunity for its abolition throughout the United States will arrive. It is the responsibility of those who realize that our death penalty system is like “the emperor’s new clothes” to do everything possible to accelerate the date of its demise.