

CHAPTER 19

CAPITAL PUNISHMENT

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I. OVERVIEW

A. *Recent Trends*

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

There has been a significant drop in the number of death penalties being imposed. Death sentences reached their annual peak at 315 in 1996.¹ In 2010, 114 people were sentenced to death, the lowest number since the 1973, the year that states began re-introducing capital punishment following *Furman v. Georgia*.² In 2011, the number dropped considerably, to 85. The numbers were slightly lower in the next two years: 82 in 2012 and 83 in 2013.³ Then, in 2014, the Death Penalty Information Center estimated that there were 72 death sentences – a number subject to revision by the Bureau of Justice Statistics, but reflecting a considerable decline in one year and a new low in the post-*Furman* era.⁴

Half of all death sentences in 2014 reported by the Death Penalty Information Center were in California (14), Texas (11), or Florida (11).⁵ This was the seventh consecutive year in which Texas' total was under a dozen, well below its prior yearly totals (which peaked in 1999 at 48). Missouri, which equaled Texas in having the most executions (10), had no new death sentences.⁶

2. *States Ending the Death Penalty*

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

a. *New York*

In New York State, capital punishment has become inoperative. In 2004, New York's highest court held unconstitutional a key provision of the death penalty law.⁷ After

¹ TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES, tbl.16, at 19 (2014), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp13st.pdf>.

² 408 U.S. 238 (1972); SNELL, *supra* note 1, tbl.16, at 19.

³ SNELL, *supra* note 1, tbl.16, at 19.

⁴ DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2014: YEAR END REPORT, at 2 (2014), available at <http://deathpenaltyinfo.org/documents/2014YrEnd.pdf> [hereinafter DPIC, 2014 YEAR END REPORT].

⁵ DEATH PENALTY INFORMATION CENTER, 2014 DEATH SENTENCES BY STATE (2015), available at <http://www.deathpenaltyinfo.org/YearEnd2014#deathsentencesdpic>.

⁶ DPIC, 2014 YEAR END REPORT, *supra* note 4, at 2.

⁷ *People v. LaValle*, 3 N.Y.3d 88 (2004).

comprehensive hearings, the legislature did not correct the provision.⁸ In 2007, New York's highest court vacated the last death sentence.⁹

b. New Jersey

New Jersey abolished the death penalty in December 2007.¹⁰

c. New Mexico

On March 18, 2009, New Mexico abolished the death penalty prospectively, that is, with regard to future cases.¹¹

d. Illinois

Illinois abolished the death penalty on March 9, 2011.¹² In signing the repeal bill, Governor Pat Quinn said, “[O]ur 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 commuted the sentences of everyone on Illinois’ death row to life without parole.¹³ After Quinn lost his 2014 re-election effort, there has been no discernible effort to bring back the death penalty.

e. Connecticut

In April 2012, Connecticut repealed the death penalty prospectively. Both legislative houses had voted in 2009 to abolish the death penalty but did not override Governor M. Jodi Rell’s veto.¹⁴ In November 2010, Connecticut elected a new governor, Daniel Malloy. During the campaign, in the midst of a high profile death penalty trial, Malloy was attacked for his anti-death penalty position.¹⁵ After the trial of a second defendant in the case, which again ended with a death sentence, the legislature passed the abolition bill. As

⁸ 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.

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

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

¹² John Schwartz and Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011.

¹³ 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>.

¹⁴ Jon Lender and Daniela Altimari, *Death penalty abolition gets final legislative approval in Senate*, HARTFORD COURANT, May 22, 2009.

¹⁵ Christopher Keating and Eric Gershon, *Bysiewicz: Malloy Winner of Governor’s Race*, HARTFORD COURANT.COM, Nov. 3, 2010, available at <http://inthisstogetherct.org/2010/11/bysiewicz-malloy-winner-of-governors-race/>; Christopher Keating, *Foley Concedes Governor’s Race To Malloy*, HARTFORD COURANT, Nov. 8, 2010.

the voters had known he would do, Governor Molloy signed it into law.¹⁶ Molloy was re-elected in 2014.

f. Maryland

In March 2013, Maryland repealed the death penalty prospectively.¹⁷ A subsequent effort to seek a reinstatement referendum got too few signatures to be put on the ballot.¹⁸ On January 20, 2015, Governor O'Malley, shortly before leaving office, commuted the death sentences of those still on Maryland's death row.¹⁹

3. Four States with Moratoriums on Executions

a. Colorado

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

If the State of Colorado is going to undertake the responsibility of executing a human being, the system must operate flawlessly. Colorado's system of capital punishment is not flawless. A recent study ... showed that under Colorado's capital sentencing system, death is not handed down fairly. ... The fact that ... defendants [who committed similar or worse crimes than Dunlap's] were sentenced to life in prison instead of death underscores the arbitrary nature of the death penalty in this State, and demonstrates that it has not been fairly or equitably imposed. As one former Colorado judge said to us, "[The death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or economic circumstance of the defendant."²⁰

On August 17, 2014, Hickenlooper, during his re-election campaign, said he opposed the death penalty, whereas in 2010 he had stated that he supported it. He said he had changed his view because he got new facts, such as that "it costs 10 times, maybe 15 times more money" and does not deter. He now realized there were "good reasons" why no country in Europe or South America, Mexico, Australia, or Israel supports it.²¹ Governor Hickenlooper was re-elected.

¹⁶ J.C. Reindl, *Senate Votes to Abolish the death penalty*, THE DAY, Apr. 5, 2012.

¹⁷ Maggie Clark, *Maryland Repeals Death Penalty*, STATELINE, May 2, 2013, available at <http://www.pewstates.org/projects/stateline/headlines/maryland-repeals-death-penalty-85899473313>.

¹⁸ John Wagner, *Petition drive to halt Maryland's death penalty repeal falls short*, WASH. POST, May 31, 2013.

¹⁹ Associated Press, *Outgoing Gov. O'Malley Officially Commutes Death Sentences*, Jan. 20, 2015, available at <http://baltimore.cbslocal.com/2015/01/20/outgoing-gov-omalley-officially-commutes-death-sentences>.

²⁰ Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013) (second alteration in original), available at <http://www.cofpd.org/docs-dun/governor-executive-order.pdf>.

²¹ Eli Stokols, *In interview, Hickenlooper offers new anti-death penalty stance, light support for Keystone*, KDVR-TV, Aug. 18, 2014, available at <http://kdvr.com/2014/08/18/in-interview-hickenlooper-offers-new-anti-death-penalty-stance-light-support-for-keystone/>.

b. Oregon

Since reinstating capital punishment in 1984, Oregon has executed twice, both in the 1990s while John Kitzhaber was Governor. On November 22, 2011, Governor Kitzhaber, who in 2010 had again been elected Governor, announced that he would prevent executions while Governor, since the executions he had permitted in the 1990s had neither “made us safer” nor “more noble as a society.” His policy precluded – while he was Governor – executions of those already on Oregon’s death row and anyone later added to its death row. He did not commute any death sentences, so death row inmates could be executed under a different governor. His moratorium policy was upheld by the Oregon Supreme Court in 2013.²² During his 2014 re-election campaign, Governor Kitzhaber strongly supported his moratorium policy, while his opponent attacked him for refusing “to enforce the law.”²³ Governor Kitzhaber was re-elected. After his resignation for unrelated reasons, the new Governor, Kate Brown, said on February 20, 2015, that she would continue the moratorium.²⁴

c. Pennsylvania

In an October 8, 2014 debate, Pennsylvania Governor Tom Corbett said he supported the death penalty and had recently signed several execution warrants. Democratic candidate Tom Wolf said, “[W]e ought to have a moratorium on capital punishment cases,” due to doubts the system was functioning properly or having a positive impact.²⁵ Wolf defeated Corbett in the November election. On February 13, 2015, Governor Wolf announced a moratorium on executions until a bi-partisan commission on the death penalty appointed by the State Senate issues its report, Governor Wolf reviews it, and “any recommendations contained therein are satisfactorily addressed.”²⁶

d. Washington

On February 11, 2014, Washington Governor Jay Inslee (previously pro-death penalty) announced a moratorium on executions for as long as he is Governor. He did so after extensive consultations, visiting death row, and looking at the case records of the state’s nine death row inmates. The Governor pointed 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 that

²² William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011; Jonathan J. Cooper, Associated Press, *Oregon court upholds governor’s execution delay*, June 20, 2013, available at http://www.eveningsun.com/nationworldnews/ci_23501749/oregon-court-upholds-governors-execution-delay.

²³ Laura Gunderson, *Tough Question Tuesday: Kitzhaber on death penalty decision; Richardson says he won’t impose personal convictions*, OREGONIAN, October 21, 2014.

²⁴ Jonathan J. Cooper, Associated Press, *New Oregon Governor Will Continue Death Penalty Moratorium*, Feb. 20, 2015, available at <http://abcnews.go.com/Politics/print?id=29114589>.

²⁵ Nick Field, *PA-Gov: The Third Gubernatorial Debate*, POLITICSPA.COM, Oct. 8, 2014, available at <http://www.politicspa.com/pa-gov-the-third-gubernatorial-debate/60930/>.

²⁶ Memorandum from Gov. Tom Wolf, Feb. 13, 2015, at 1, 4, available at <http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>. On January 14, 2011, just before leaving office, Governor Edward G. Rendell, who had ardently supported capital punishment, urged considering its abolition. He also suggested considering if a faster process could provide “thorough and exhaustive review of the facts and the law in each case.” *Governor Rendell Urges General Assembly to Review Effectiveness of Pennsylvania’s Death Penalty*, PR NEWSWIRE, Jan. 14, 2011, available at <http://www.prnewswire.com/news-releases/governor-rendell-urges-general-assembly-to-review-effectiveness-of-pennsylvanias-death-penalty-113610439.html>.

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 supported the death penalty, said the Governor’s announcement had caused it to finish reassessing its position and to call for capital punishment’s abolition. 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.”²⁷

4. States Considering Reform or Repeal of the Death Penalty

a. Ohio

In September 2011, Ohio’s Chief Justice Maureen O’Connor 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.²⁸ The 22-person Task Force included judges, prosecutors, defense counsel, the state public defender, legislators, and law professors. Its final report, released on May 21, 2014, indicated the number of Task Force members voting for and against each recommendation. There was a dissenting report by two county prosecutors and a deputy attorney general. Action on the report’s recommendations was not anticipated to occur quickly, and Chief Justice O’Connor said she would comment “later” on the report.²⁹

The Task Force’s 56 recommendations include (among many others): attempting to ensure recording of custodial interrogations; reforms affecting coroners and laboratories; adoption of the ABA capital case counsel guidelines and supplemental guidelines regarding mitigation, and other reforms and funding to enhance counsel’s performance; precluding death penalty eligibility for anyone with serious mental illness at the time of either the crime or the intended execution; prohibition of capital punishment absent (a) biological or DNA evidence linking the defendant to the crime, (b) videotape of a voluntary interrogation and the defendant’s confession to murder, (c) video recording conclusively linking the defendant to the murder, or (d) “other like factors”; inclusion in proportionality review of cases in which death was sought but not imposed; prohibition of jailhouse informant testimony without independent corroboration; elimination of various aggravating factors; various steps to inhibit racial disparities, including adoption of a Racial Justice Act, measures that could lead to sanctions against prosecutors and recusals of judges, expansion of jury pools, and creation of a death penalty charging committee in the Ohio Attorney General’s office to aid in implementing a requirement that the Attorney General approve any effort to seek capital punishment, and in considering this, pay “particular attention to the race of the victim(s) and defendant(s)”; annual reviews and reforms of capital jury instructions, and use of “plain English” in instructions throughout trials; ensure that juries are instructed that they may vote for life (a) based on mercy arising from evidence or (b)

²⁷ 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.

²⁸ 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.

²⁹ Jeremy Pelzer, *Supreme Court task force’s final report proposes major reforms to Ohio’s death penalty system*, CLEVELAND PLAIN DEALER, May 21, 2014.

even when the number of aggravating factors exceeds the number of mitigating factors; reform discovery, disclosures by prosecutors, and the clemency process; and *ex parte, in camera* consideration of defense motions regarding experts, at defense counsel's option.³⁰

However, on February 1, 2015, the Ohio Supreme Court issued final "Rules for Appointment of Counsel in Capital Cases" that fell short of its original version, which would have (as the Task Force recommended) mandated compliance with the ABA Guidelines. Instead, compliance is optional. The final rules do make it much easier to file a formal complaint with a new Commission on Appointment of Counsel in Capital Cases asserting that appointed counsel's defense was insufficiently diligent. The Court said the rules are unrelated to the Task Force's recommendations.³¹

b. New Hampshire

On March 12, 2014, a bill to repeal New Hampshire's death penalty prospectively (*i.e.*, for future cases) passed the state's House of Representatives by an overwhelming margin of 225-104. Governor Maggie Hassan stated that she would sign a prospective-only repeal bill.³² The bill would have become law if a single member of the Senate had changed his or her vote. It lost there on April 17, 2014 on a tie vote.³³

Repeal prospects in the 2015-2016 legislature seem dim. Although Governor Hassan was re-elected in November 2014, the House changed from having a 40-seat Democratic majority to a 79-seat Republican majority,³⁴ and the Senate Republicans increased their majority from one seat to four seats.³⁵

5. Further Drop in Executions

The number of executions in the United States dropped from 98 in 1999 to 42 in 2007, when many executions were stayed due to the Supreme Court's pending *Baze* case regarding the manner in which lethal injection is carried out. In 2008, the year the Supreme Court upheld Kentucky's lethal injection system, there were 37 executions. Executions rose to 52 in 2009 before declining to 46 in 2010, 43 in 2011 and 2012, 39 in 2013, and 35 in 2014 – the least in 20 years.³⁶ Executions dropped by over 10% from 2013 to 2014 and by of over 18.5% since 2011-2012.³⁷

³⁰ JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY, FINAL REPORT & RECOMMENDATIONS (2014), available at <http://www.sc.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>.

³¹ Rules for Appointment of Counsel in Capital Cases (effective Feb. 1, 2015), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/capitalCases/capitalCases.pdf>.

³² Garry Rayno, *House overwhelmingly adopts death penalty repeal*, N.H. UNION LEADER, Mar. 12, 2014.

³³ Lynne Tuohy, Associated Press, *N.H. Senate votes to leave death penalty intact*, Apr. 17, 2014, available at http://www.bostonglobe.com/news/nation/2014/04/17/new-hampshire-senate-votes-leave-death-penalty-intact/bTCJcu6sZnDQowVG9cVWIJ/story.html?s_campaign=sm_tw.

³⁴ New Hampshire House of Representatives elections, 2014, BallotPedia, http://ballotpedia.org/New_Hampshire_House_of_Representatives_elections,_2014 (last visited Jan. 30, 2014).

³⁵ New Hampshire State Senate elections, 2014, BallotPedia, http://ballotpedia.org/New_Hampshire_State_Senate_elections,_2014 (last visited Jan. 30, 2014).

³⁶ SNELL, *supra* note 1, at 3, 14.

³⁷ DPIC, 2014 YEAR END REPORT, *supra* note 4, at 2.

6. The States with the Most Executions in 2014

Three states – Texas (10), Missouri (10), and Florida (8) – executed 80% of those executed in the United States in 2014.³⁸

a. Texas

Texas' 10 executions in 2014 were fewer than in any year since 1996, and a drop of almost 40% from the 16 executions in 2013.

b. Missouri

Despite Missouri's difficulties in securing drugs for lethal injections (as discussed in Parts I.A.8.a & I.A.8.b.i below), it kept up its pace of executions, unlike Ohio and Oklahoma. But no death sentences were imposed in Missouri in 2014, as noted above.

c. Florida

Florida continued its accelerated pace of executions in 2014. On February 12, 2014, it 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 1976.³⁹ Then, on February 26, 2014, it executed a fourteenth person, Paul A. Howell (after, as discussed in Part III.C below, the ABA filed an *amicus curiae* brief supporting his certiorari petition).⁴⁰

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. The Florida Supreme Court upheld the law on June 12, 2014.⁴¹

7. National Analyses of the Role of a Small Percentage of Counties

Until recently, studies regarding the inconsistency of capital punishment's implementation focused on differences between states and within states. But in recent years, several analyses have shown that the vast majority of death sentences and executions in the United States 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.

a. Report by Robert J. Smith

Robert J. Smith's *The Geography of the Death Penalty and Its Ramifications*,⁴² published in 2012, reported on a review by counties of death sentences and executions from 2004-2009. This showed that only "10% of counties nationally returned even a single death

³⁸ SNELL, *supra* note 1, at 3.

³⁹ 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.

⁴⁰ 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>.

⁴¹ *Abdool v. Bondi*, 141 So. 3d 529 (Fla. 2014).

⁴² 92 B.U. L. REV. 227 (2012).

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, everyone executed in this country in 2004-2009 was sentenced by less than 1% of America’s counties.⁴³

As for new death sentences in the United States from 2004-2009, Smith found that only 4% of counties sentenced more than one person to death – and that these counties accounted for 76% of all American death sentences 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 new death sentences in America in those years.⁴⁴

California exemplified the disparities that so often occur between a state’s counties. During 2004-2009, 64% of its counties did not sentence anyone to death, and 90% death-sentenced either zero or one person. Six counties death-sentenced over one per year; and three sent to California’s death row over half of its new inmates.⁴⁵ Smith found similar results in other states – such as Florida – that, like California, were national leaders in imposing death sentences.

Smith noted research by Professor Frank Baumgartner of the University of North Carolina at Chapel Hill, whose database of every American execution since 1976 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 since 1976.⁴⁶

b. 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. They said that the geographic concentration of death sentencing and executions had “become more pronounced” over time, and were especially clear with regard to executions, which are “exceedingly rare.” They found that from 2004-2009 capital punishment had become even more concentrated in fewer counties than in earlier post-*Gregg* years.⁴⁷

8. Lethal Injection Drug Shortages and Problematic Executions

A substantial reason for why executions declined from 2010-2014 was shortages of drugs useable in lethal injections. Starting in late 2013, there were several very problematic executions due to dubious attempts to deal with the drug shortages.

⁴³ *Id.* at 228.

⁴⁴ *Id.* at 233.

⁴⁵ *Id.* at 231.

⁴⁶ *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>).

⁴⁷ James S. Liebman and Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 255, 331 (2011). Among the data cited 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.

a. *Developments from 2010-2013*

Many foreign governments and foreign manufacturers began by 2010 to restrict or object to the export of sodium thiopental for use in executions – and outright bans later followed. In January 2011, Hospira, the drug’s only U.S. manufacturer, decided to permanently cease producing it, at the demand of Italy.⁴⁸ Shortly thereafter, Tennessee gave eight grams of sodium thiopental to Alabama, having bought them from a United Kingdom wholesaler. Apparently after Drug Enforcement Administration (“DEA”) intervention, Alabama handed over the eight grams to the DEA.⁴⁹ In March 2011, the DEA seized Georgia’s death row prison’s sodium thiopental supply.⁵⁰

In December 2010, due to difficulties in securing sodium thiopental, Oklahoma began using pentobarbital – already used in euthanizing animals – in executions, but refused to identify the manufacturer.⁵¹ Other efforts to switch to pentobarbital were undercut by actions such as Lundbeck’s. This Danish company told states that it “adamantly opposed” pentobarbital’s use in executions.⁵² By June 2011, Germany had joined the Danish and British governments in opposing the export of such drugs as pentobarbital and sodium thiopental for use in executions.⁵³

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. *The Guardian* reported that this reflected “the gradual stranglehold ... being put on the US death penalty by authorities and companies around the world refusing to act as accomplices in the death sentence.” It said Georgia was not the only state whose pentobarbital supplies were “running out.”⁵⁴

On July 23, 2013, the U.S. Court of Appeals for the District of Columbia unanimously affirmed the district court’s decision that the Food & Drug Administration (the “FDA”) had not properly carried out its responsibilities when it allowed, without inspection, foreign drugs to be imported for use in executions.⁵⁵

By the autumn of 2013, several states had started to use “new, untested drugs” in executions, while some swapped drugs, and several (such as Missouri) approached “compounding pharmacies,” which are mostly unregulated by the FDA. Some of these were out-of-state pharmacies that provided execution drugs to states in which they were not licensed.⁵⁶ Some states changed how they paid for execution drugs. Oklahoma began using

⁴⁸ 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>.

⁴⁹ AMNESTY INTERNATIONAL, *supra* note 48, at 3.

⁵⁰ Kevin Sack, *Executions in Doubt in Fallout Over Drug*, N.Y. TIMES, Mar. 17, 2011.

⁵¹ 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/>.

⁵² Sack, *supra* note 50.

⁵³ AMNESTY INTERNATIONAL, *supra* note 48, at 6 & nn.28, 30.

⁵⁴ Ed Pilkington, *Georgia rushes through executions before lethal injection drugs expire*, GUARDIAN, Feb. 21, 2013.

⁵⁵ *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

⁵⁶ Abby Ohlheiser, *Missouri Turns to Compounding Pharmacies for Lethal Injection Drugs*, THE WIRE, Oct. 22, 2013.

petty-cash accounts, so there would be “no public paper trail of the identities of drug suppliers or the state’s executioners.”⁵⁷

In October 2013, Florida utilized midazolam for the first time, in a three-drug mix when executing William Happ. He reportedly stayed conscious longer, and, once unconscious exhibited more movement, than those previously executed.⁵⁸ Anesthesiologist Joel Zivot said Florida acted unethically by using midazolam in an execution, since it was an “essential medication” that was “in short supply.”⁵⁹

In 2012, Missouri altered its execution protocol to permit a large dose of propofol – the drug that caused Michael Jackson’s death. After harsh reactions from the United Kingdom and propofol’s remaining U.S. manufacturer, Governor Jay Nixon stayed Joseph Paul Franklin’s October 2013 execution and ordered the Department of Corrections to find a new drug. It quickly decided to use a form of pentobarbital made by a compounding pharmacy – but refused to indicate where it came from or who manufactured it. It used this in two executions in late 2013.⁶⁰

b. Developments in 2014 and Early 2015

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.”⁶¹

i. Missouri

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.⁶² On February 12, 2014, U.S. 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.⁶³ On February 13, 2014, Missouri Governor Jay Nixon said that Missouri was prepared to proceed with Taylor’s execution.⁶⁴ Less than a week before the scheduled execution, Missouri changed its protocol and said it had located a different compounding

⁵⁷ Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES, Nov. 8, 2013.

⁵⁸ *Id.*

⁵⁹ Joel Zivot, Op-Ed., *Why I’m for a moratorium on lethal injections*, USA TODAY, Dec. 15, 2013.

⁶⁰ 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>.

⁶¹ 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>.

⁶² 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.stpublicradio.org/post/after-supplying-three-missouri-executions-pharmacy-plans-register-state>.

⁶³ 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>.

⁶⁴ 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>.

pharmacy, whose identity it refused to disclose, to prepare the drug. Taylor was executed as scheduled, on February 26, 2014.⁶⁵

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, they said Missouri, "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." They said the compounding "pharmacy and its pharmacists presumably have no experience compounding injectable pentobarbital for executions." 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. Missouri is actively seeking to avoid adequate testing of the alleged pentobarbital, which raises substantial questions about the drug's safety and effectiveness."⁶⁶ On February 25, 2014, Justices Ginsburg, Sotomayor, and Kagan dissented from the denials of a stay of execution and of certiorari, "[f]or reasons well stated by Judge Bye" in his dissenting opinion.⁶⁷

In July 2014, Missouri executed John Middleton. In his execution, as in all other executions since November 2013, Missouri used significant amounts of midazolam – contrary to the testimony by its top corrections officials that it would never again be used.⁶⁸

ii. Ohio

In executing Dennis McGuire on January 16, 2014, Ohio used midazolam (which Florida had so problematically used in the Happ execution three months earlier) as a sedative, and then "the pain killer hydromorphone." *Columbus Dispatch* reporter Alan Johnson, who had attended 18 prior executions, said, "This one was different. After three to four minutes, Dennis McGuire began gasping for breath, his stomach and chest were compressing deeply, he was making a snorting sound, almost a choking sound at times." And his left hand "had clenched into a fist." For about 10 minutes, McGuire seemed "to be trying to get up or at least raise up in some fashion."⁶⁹ After the execution, Leah Libresco, writing in the *American Conservative*, said, "The real mystery is why Ohio, faced with a shortage of drugs, found it so urgent to put Mr. McGuire to death that they turned to an experimental, poorly-tested combination of drugs. ... [W]hy would Ohio find killing on schedule as desperate a need as saving a life? ... The guillotine looks monstrous and savage, and leaves spectators bespeckled by blood, but is believed to be more merciful to the victim and is even favored by the inventor of the three-drug legal injection. Mr. McGuire's uncomfortable death exposes the illusion that we can usher criminals out of this world simply and peacefully. If we design our execution protocols to obscure the reality of the death we are inflicting, we must ask whether we can honestly endorse a sentence we can't stand to see unveiled."⁷⁰

⁶⁵ Ed Pilkington, *US judge attacks states' lethal injection methods as 'high school chemistry'*, GUARDIAN, Feb. 26, 2014.

⁶⁶ *Zink v. Taylor*, No. 14-1388 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting), available at <http://www.deathpenaltyinfo.org/documents/MichaelTaylorDissent.pdf>.

⁶⁷ *Taylor v. Lombardi*, 134 S. Ct. 1375, 1376 (2014) (Ginsburg, J., dissenting).

⁶⁸ Chris McDaniel, *Missouri Swore It Wouldn't Use A Controversial Execution Drug. It Did.*, ST. LOUIS PUBLIC RADIO, Sept. 2, 2014, available at <http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did>.

⁶⁹ 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.

⁷⁰ Leah Libresco, *An Unsettling Death in Ohio*, AMERICAN CONSERVATIVE, Jan. 20, 2014.

In light of the botched execution, Ohio Governor John Kasich granted an eight-month reprieve from execution to Gregory Lott on February 7, 2014.⁷¹ On August 11, 2014, U.S. District Judge Gregory L. Frost extended his previously ordered stay of executions to January 15, 2015, due to the continuing need for discovery and necessary preparations for adopting and implementing a new execution protocol.⁷² On August 12, 2014, an anesthesiologist working for McGuire's family said McGuire had experienced pain and suffering before losing consciousness.⁷³

On January 8, 2015, Ohio's Department of Corrections announced that it would no longer use the two-drug combination used in McGuire's execution, would resume using sodium thiopental, and would delay the scheduled February 11, 2015 execution of Ronald Phillips while securing (somehow) sodium thiopental.⁷⁴ In December 2014, Governor Kasich had signed legislation effective in late March 2015 intended to avoid disclosure of the sources of drugs used in lethal injections. This may enable Ohio to secure sodium thiopental – as well as more of a drug used in McGuire's execution.⁷⁵

iii. Arizona

On July 23, 2014, it took Arizona more than two hours to execute Joseph Wood III, using the same drugs that Ohio had used in its botched execution six months earlier of Donnie McGuire. Mr. Wood "gasp[ed] and snort[ed]" over "600 times" while being executed.⁷⁶ Earlier, in dissenting from the Ninth Circuit's stay of Wood's execution, Chief Judge Alex Kozinski said that the use of drugs to execute people was an effort to hide the "reality" that "executions are, in fact, brutal, savage events." Interviewed prior to the execution, he stated that he personally preferred the guillotine but thought the firing squad was "probably the right way to go."⁷⁷

iv. Oklahoma

In early January 2014, Oklahoma may have used pentobarbital that was beyond its expiration date when it executed Michael Lee Wilson – whose last words were "I feel my whole body burning."⁷⁸

On April 29, 2014, Clayton D. Lockett "gasp[ed] and struggl[ed] against his restraints before dying 43 minutes into the" execution. Thereafter, Oklahoma suspended executions so it could enhance its training and procedures. A subsequent state investigation determined that a doctor had improperly inserted an intravenous needle into Lockett's groin, resulting in first midazolam (the controversial sedative used in Ohio's and Arizona's botched executions earlier and later in 2014) and then "paralytic and heart-stopping agents to

⁷¹ 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>.

⁷² Alan Johnson, *Moratorium on Ohio's executions extended until January*, COLUMBUS DISPATCH, Aug. 12, 2014.

⁷³ Associated Press, *Ohio execution 'was not humane,' anaesthesiologist determines*, Aug. 12, 2014, available at <http://www.theguardian.com/world/2014/aug/12/ohio-execution-not-humane-drugs-dennis-mcguire>.

⁷⁴ Robert Higgs, *Ohio to discard controversial two-drug cocktail from use in executions*, CLEVELAND PLAIN DEALER, Jan. 8, 2015.

⁷⁵ *Id.*

⁷⁶ Mark Berman, *Arizona execution lasts nearly two hours; lawyer says Joseph Wood was 'gasping and struggling to breathe'*, WASH. POST, July 23, 2014.

⁷⁷ Maura Dolan, *Executions should be by firing squad, federal appeals court judge says*, L.A. TIMES, July 23, 2014.

⁷⁸ Ian Steadman, *Prisons Are Now Using Scary, Untested Drugs to Execute Death Row Inmates*, NEW REPUBLIC, Jan. 14, 2014.

diffuse in surrounding tissue.” Oklahoma later claimed it had come up with new procedures to avert the same mistake. But it worried experts because the procedures entailed doubling the dosage of midazolam used in Lockett’s execution.⁷⁹

Oklahoma executed Charles Frederick Warner on January 15, 2015, after a 5-4 Supreme Court vote denying a stay.⁸⁰ The dissenters, in an opinion by Justice Sotomayor, said they found it “difficult to accept” the federal district court’s “conclusion that midazolam will in fact work as intended ... given recent experience with the use of this drug. ... The questions before us are especially important now, given States’ increasing reliance on new and scientifically untested methods of execution. ... [T]he Eighth Amendment guarantees that no one should be subjected to an execution that causes searing, unnecessary pain before death.”⁸¹

The Court on January 23, 2015, granted the certiorari petition of three inmates on their constitutional challenge to Oklahoma’s use of the new three-judge protocol.⁸² Warner had also been a petitioner until his execution eight days earlier. On January 28, 2015, at the request of Oklahoma’s Attorney General, the Court stayed the three inmates’ executions until the Court decides their case.⁸³

Briefing in petitioners’ support will likely cite Professor Deborah Denno’s 2014 law review article analyzing over 300 cases citing *Baze* from 2008-2013. She found that states had changed almost all aspects “of their lethal injection procedures.” They did so more frequently than had ever occurred with other U.S. execution methods. “The resulting protocols differ from state to state and even from one execution to the next within the same state.” Professor Denno said persistent problems included “the paltry qualifications of executioners, the absence of medical experts, and the failure to account for the difficulties with injecting inmates whose drug-using histories diminish the availability of usable veins.” In combination, these “led to some of the most glaring and gruesome failures ever documented in the history of lethal injection.” She concluded that “the only overarching constant appears to be states’ desire for secrecy regarding execution practices.”⁸⁴

v. Leading Government Expert Ceases Involvement

In August 2014, it became clear that Dr. Mark Dershwitz, who had testified for over 20 states and the federal government, would no longer testify favorably about lethal

⁷⁹ Erik Eckholm, *Four Oklahoma Inmates Seek Delay in Executions*, N.Y. TIMES, Jan. 9, 2015.

⁸⁰ Erik Eckholm, *Oklahoma Executes First Inmate Since Slipshod Injection in April*, N.Y. TIMES, Jan. 15, 2015.

⁸¹ Warner v. Gross, 135 S. Ct. 824 (2015) (Sotomayor, J., dissenting).

⁸² Glossip v. Gross, Nos. 14-7955, 14-A761, 2015 WL 302647 (U.S. Jan. 23, 2015). In *Glossip*, certiorari was granted to address: (1) Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious? (2) Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*? (3) Must a prisoner establish the availability of an alternative drug formula even if the state’s lethal-injection protocol, as properly administered, will violate the Eighth Amendment? See Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Warner et al. v. Gross, No. 14-7955 (U.S. Jan. 13, 2015), available at 2015 WL 309509.

⁸³ Glossip v. Gross, No. 14-7955 (14A796), 2015 WL 341655 (U.S. Jan. 28, 2015).

⁸⁴ Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1335, 1382 (2014).

injection protocols. He feared potential harm to his profession as a board certified anesthesiologist.⁸⁵

9. President Obama's Order that the Attorney General Review Capital Punishment's Implementation

On May 2, 2014, President Barack Obama ordered Attorney General Eric H. Holder, Jr. to undertake a policy review regarding how the death penalty was being implemented by the federal government and those states that use it. Speaking to reporters the President said, "In the application of the death penalty in this country, we have seen significant problems – racial bias, uneven application of the death penalty, you know, situations in which there were individuals on death row who later on were discovered to have been innocent because of exculpatory evidence And all these, I think, do raise significant questions about how the death penalty is being applied." The President, while reiterating that he supported capital punishment in some circumstances, said that Americans should "ask ourselves some difficult and profound questions" about its use.⁸⁶

Although the President spoke only days after Oklahoma's botched execution of Clayton D. Lockett, which the President called "deeply disturbing," the President's order extended beyond the methods used for executions. How far was unclear in May 2014 and continues to remain unclear as of February 2015.

10. Public Opinion

In April 2014, *The Economist* published a story entitled *The Slow Death of the death penalty: American is falling out of love with the needle*. It cited several factors, including a sharply lower crime rate, life without parole's availability, lesser public support, particularly among "young people" and "ethnic minorities," the "at best equivocal" evidence on deterrence, many mistaken death sentences of innocent people and the likely innocence of at least one executed man (see discussion in I.B.5.d.ii below of the Willingham case), and the far greater cost of capital punishment than the alternative, plus problems (including botched executions) involving lethal injection. The story concluded, "It may be a long wait, but the death penalty's days are surely numbered."⁸⁷

On June 5, 2014, ABC News reported that for the first time in the history of the ABC News/Washington Post poll, "A majority of Americans favor life imprisonment without parole over the death penalty for convicted murderers." The margin was 52% to 42%. When

⁸⁵ Jessica Glenza, *US executions face more uncertainty as expert refuses to defend drug protocols*, GUARDIAN, Aug. 22, 2014.

⁸⁶ Peter Baker, *Obama Orders Policy Review on Executions*, N.Y. TIMES, May 3, 2014. Former President Jimmy Carter was Georgia's Governor when the Supreme Court held in 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972), that Georgia's death penalty was unconstitutional. In 1973, he signed a new penalty law, whose constitutionality the Court upheld in 1976 in *Gregg v. Georgia*, 428 U.S. 153 (1976). In November 2013, President Carter expressed "frank regret" about his actions as Governor, saying he had not been "nearly as concerned about the unfairness of the application of the death penalty" as now, when he knows "much more," recognizes "the injustice of it," and is no longer "looking at it from a much more parochial point of view." In a speech that month, he said "[t]he only consistency today is that the people who are executed are almost always poor, from a racial minority or mentally deficient." 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 he would prefer that the Court hold it unconstitutionally "cruel and unusual punishment." See Ed Pilkington, *Jimmy Carter calls for fresh moratorium on death penalty*, GUARDIAN, Nov. 11, 2013.

⁸⁷ *The Slow Death of the death penalty: American is falling out of love with the needle*, ECONOMIST, Apr. 26, 2014.

no alternative was provided, 61% supported capital punishment – percentage equal to the lowest in the poll’s history.⁸⁸ A Pew Research Center survey in 2013 (issued on March 28, 2014) showed 55% support for the death penalty (no alternative was presented), down from 62% in November 2011, continuing a gradual “ticking downward for the past two decades.”⁸⁹

The Gallup Poll issued on October 23, 2014, indicated that when given a choice, 50% favored capital punishment and 45% favored life without parole. Without a choice, 63% favored the death penalty, up slightly from 62% a year before but consistent with a downward trend of support in the last two decades.⁹⁰

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.” Forty-two percent of Christian “boomers,” born between 1946 and 1964, said Yes, compared with just 32% of Christian “millennials,” born between 1980 and 2000. This age cohort disparity was even more pronounced among “practicing Christians”: 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.” Barna’s Roxanne Stone felt the results could indicate that many younger Christians think the death penalty is “a human rights or social justice issue,” not “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.” When the poll asked whether Jesus would favor the government’s having the power to execute the worst criminals, 2% of Catholics, 8% of Protestants, and 10% of what Barna termed “practicing Christians” answered Yes.⁹¹

11. *Possible Influences on Public Opinion*

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

a. *Changed Views on the Death Penalty by Authors and Past Key Supporters of Its Enactment, plus Judges and Prosecutors*

In 2011-2014, authors and key supporters of enacted death penalty laws in several states, and many judges and prosecutors, criticized their implementation. Many of them advocated abolition of the death penalty.

⁸⁸ Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS, June 5, 2014, available at <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/>.

⁸⁹ *Shrinking Majority of Americans Support Death Penalty*, PEW RESEARCH CENTER, Mar. 28, 2014, available at <http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/>.

⁹⁰ Jeffrey M. Jones, *Americans’ Support for Death Penalty Stable*, GALLUP, Oct. 23, 2014, available at <http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx>.

⁹¹ 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/>.

i. Arizona

In Arizona, Rudy Gerber, who helped author the state's capital punishment law in the 1970s, now is against the death penalty.⁹²

ii. California

Don Heller, a Republican former prosecutor, helped author "the Briggs [ballot] initiative" that greatly broadened California's death penalty. In September 2011, he said he had "made a terrible mistake 33 years ago," when the initiative was drafted "without fiscal study, input from others, or committee hearings." Over the ensuing years, capital punishment in California cost over \$4 billion, amounting to over \$300 million per execution. And California could perpetrate "[a] gross miscarriage of justice," including executing an innocent person. He said life without parole "protects public safety better," is "a lot cheaper," and can fix "mistakes."⁹³

The Briggs initiative, named for State Senator John Briggs, was developed and chiefly promoted by Senator Briggs, his future son-in-law, and his son Ron Briggs. Ron Briggs said in a February 12, 2012 op-ed that while all three remain "staunch Republican conservative[s] ... [e]ach of us, independently, has concluded that the death penalty isn't working for California" for reasons similar to Heller's.⁹⁴

At the end of 2011, her first year as California's Chief Justice, former prosecutor and Republican appointee Tani Cantil-Sakauye said that to make capital punishment effective would require "structural change, and we don't have the money to create the kind of change that is needed." One of the court's most conservative justices, she said of the death penalty, "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?"⁹⁵

San Francisco District Attorney George Gascon spent 30 years as a police officer, including 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; 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.⁹⁶

iii. Delaware

Delaware's 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 to uphold another one. He stated, "I believe that

⁹² Andrew Welsh-Huggins, *Justice rejects death penalty law he wrote*, COSHOCTON TRIB. (Ohio), Feb. 16, 2012.

⁹³ Don Heller, Op-Ed., *Don Heller: A California Republican against death penalty*, DAILY NEWS (L.A.), Sept. 18, 2011.

⁹⁴ Ron Briggs, Op-Ed., *California's death penalty law: It simply does not work*, L.A. TIMES, Feb. 12, 2012.

⁹⁵ Maura Dolan, *California chief justice urges reevaluating death penalty*, L.A. TIMES, Dec. 24, 2011.

⁹⁶ George Gascon, Op-Ed., *Viewpoints: Should we OK Prop. 34 to end executions? Yes*, SACRAMENTO BEE, Oct. 14, 2012.

our society is wrong to descend to the murderous level by taking his life when he's been captured or caged."⁹⁷

Retired Delaware Superior Court Judge Norman Barron – who had been called a “hanging judge” due to his pro-death penalty decisions – wrote an April 23, 2013 op-ed against the death penalty. He called Delaware’s death penalty system “quirky and capricious” – saying it was “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 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.”⁹⁸

iv. 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.”⁹⁹ No U.S. jurisdiction has a death penalty limited to such extreme cases.

Florida’s Charles M. Harris was a Circuit Court Judge for five years, an Appellate Judge for 14 years, and a Senior Judge in recent years. He also was a member of the Governor’s Commission on Capital Cases until the legislature dissolved it. In an April 18, 2012 op-ed, he 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 neither is 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?”¹⁰⁰

v. Ohio

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 a reporter: “I have evolved to where I don’t think the death penalty is effective.” 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.”¹⁰¹

⁹⁷ 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>.

⁹⁸ 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.

⁹⁹ Welsh-Huggins, *supra* note 92.

¹⁰⁰ Charles M. Harris, Op-Ed., *Why Florida should abolish the death penalty*, GAINESVILLE SUN, Apr. 18, 2012.

¹⁰¹ Alan Johnson, *Former Justice Stratton says she’s now opposed to death penalty*, COLUMBUS DISPATCH, June 14, 2013.

Former Ohio Attorney General Jim Petro, who strongly favored capital punishment as a legislator and oversaw 18 executions as Attorney General, had increasing doubts due to his “up-close view of our death penalty in practice, which is much different from theory or intention.” In a September 19, 2014 op-ed, Petro said he now opposes capital punishment as currently implemented.¹⁰²

Julia Bates, Lucas County’s lead prosecutor since 1997, said in November 2013 that Ohio should abolish the death penalty, since “there ought to be a better way than the death penalty.” She said it is “torturous” for everyone involved – including judges, jurors, prosecutors, defense counsel, and victims’ families.¹⁰³

vi. Oregon

In April 2014, Former Oregon Chief Justice Wallace P. Carson, Jr., advocated abolishing the death penalty, in view of its “exceptional cost,” “the seeming haphazard selection of which cases deserve the death penalty,” and the availability of life without parole.¹⁰⁴ In October 2013, another Former Oregon Chief Justice, Edwin J. Peterson (who twice, as a citizen, voted in referendums in favor of capital punishment), said Oregon’s “death penalty system is dysfunctional, expensive, unworkable and unfair” and should be abolished. He added, “[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 ... killing an innocent person.”¹⁰⁵

In May 2013, yet another Former Oregon Chief Justice, Paul De Muniz, said the death penalty was “bad public policy” and encouraged a complete audit of the economics of capital punishment (which he said costs millions of dollars more per case than other murder cases), and then a referendum to repeal it.¹⁰⁶

vii. Texas

Judge Tom Price of the Texas Court of Criminal Appeals announced in November 2014 his changed view of capital punishment: “Having spent the last forty years as a judge for the State of Texas, of which the last eighteen years have been as a judge on this Court, I have given a substantial amount of consideration to the propriety of the death penalty as a form of punishment for those who commit capital murder, and I now believe that it should be abolished.”¹⁰⁷

Former Texas District Attorney Tim Cole (now an Assistant District Attorney in another district) wrote in the *Texas Monthly* in March 2013 that “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 sought the death penalty three times.

¹⁰² Jim Petro and Nancy Petro, Op-Ed., *Jim Petro: Ohio shouldn’t risk executing innocent*, CINCINNATI ENQUIRER, Sept. 19, 2014.

¹⁰³ Jennifer Feehan, *Death penalty cases ebb in Lucas County and Ohio*, THE BLADE (Toledo), Nov. 24, 2013.

¹⁰⁴ Oregonians for Alternatives to the Death Penalty, *Yet Another Former Oregon Chief Justice Speaks Out*, April 2014 Update Newsletter, Apr. 1, 2014, available at <http://www.oadp.org/content/april-2014-update-newsletter#chief>.

¹⁰⁵ Edwin J. Peterson, Op-Ed., *Oregon’s death penalty is unjust, this former chief justice says*, OREGONIAN, Oct. 23, 2013.

¹⁰⁶ *Killing doesn’t Pay*, WILLAMETTELIVE.COM, May 15, 2013, available at <http://www.willamettelive.com/2013/news/killing-doesnt-pay>.

¹⁰⁷ *Ex parte Panetti*, No. WR-37,145-04, 2014 WL 6974007 (Tex. Crim. App. Nov. 26, 2014) (Price, J., dissenting).

While 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, victims' families' expectations, and the views of the electorate.¹⁰⁸ He now opposes capital punishment because "mistakes happen," yet in seeking the death penalty, "there is no acceptable margin of error."

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 crime. 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." They said that "the problem with the death penalty is that once it is carried out, there is no way to go back and fix a mistake."¹⁰⁹

b. 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. A leading example is Allen Ault, who oversaw Georgia's death row's construction and later, as director of the Georgia Department of Corrections, supervised executions. In an October 12, 2014 op-ed, his arguments against the death penalty included: it is not a deterrent; it is more costly than life without parole; it is "not applied to the most egregious cases"; in an "extremely imperfect" system, many death row inmates have turned out to be innocent; and it takes a "heavy toll" on those who carry it out. He said, "I know two executioners who have committed suicide and several who are completely dysfunctional due to drugs, alcohol or suicidal depression. I do not know one who has not experienced a negative impact."¹¹⁰

Frank Thompson, who as a penitentiary warden oversaw Oregon's only two executions since it reinstated capital punishment, testified on February 26, 2013, in support 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."¹¹¹ In November 2014, while appearing in Nebraska at anti-death penalty events, Thompson said the money spent on capital punishment should be devoted to crime victim services or rehabilitating prisoners. He also said that carrying out an execution can leave you emotionally scarred.¹¹²

Jeanne Woodford, former Warden of California's San Quentin prison, said in 2011 that capital punishment "serves no one. It doesn't serve the victims. It doesn't serve prevention. It's truly all about retribution." She stated, "The only guarantee against

¹⁰⁸ Tim Cole, Op-Ed., *The Death Penalty Has a Face: A DA's Personal Story*, TEX. MONTHLY, Mar. 18, 2013.

¹⁰⁹ Grant Jones and Sam Millsap, Op-Ed., *Legislature should seriously reconsider the death penalty*, HOUSTON CHRON., Dec. 13, 2012.

¹¹⁰ Allen Ault, Op-Ed., *Why should Ky. end the death penalty? Ask those who carry it out*, LEXINGTON HERALD-LEADER, Oct. 12, 2014.

¹¹¹ Helen Jung, *Oregon death penalty 'indefensible,' says man who last carried it out*, OREGONIAN, Feb. 26, 2013.

¹¹² Joe Duggan, *Former prison warden says Nebraska would be better off without death penalty*, OMAHA WORLD-HERALD, Nov. 11, 2014.

executing the innocent is to do away with the death penalty.”¹¹³ Ms. Woodford now heads the anti-death penalty group Death Penalty Focus.

Reverend Carroll Pickett was, as Huntsville prison’s chaplain, at Texas’ first post-*Furman* execution and 94 more. He wrote: “I know ... 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.*, 35 of the 95 “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.” He now speaks out against capital punishment.¹¹⁴

c. *Conservatives*

On June 21, 2014, the *Dallas Morning News* reported on *The Conservative Case Against the Death Penalty*. It said long-time conservative activist/strategist Richard Viguerie “is part of a small but expanding group of conservatives publicly arguing that true conservatism points away from ... the death penalty.” The report noted that conservative S.E. Cupp had recently stated in a *Daily News* column that “conservatives ... should lead the charge to abolish’ the death penalty.” The story summarized conservatives’ anti-death penalty argument as “extraordinarily straightforward: People who share a deep worry about government overreach, who believe in the sanctity of life and who place great importance on fiscal responsibility should not support a policy that empowers the state to spend large sums of money killing people.”¹¹⁵

The story also discussed Marc Hyden, Conservatives Concerned About the Death Penalty’s organizer, who formerly was a National Rifle Association field organizer. He now viewed capital punishment as an extremely intrusive governmental act, contrary to conservatives’ belief in the sanctity of life (particularly since innocent people could be executed), and fiscally irresponsible. He was particularly concerned by several criminology studies that persuaded him that the deterrence argument was “patently false.”

National Review columnist and American Enterprise Institute visiting fellow Ramesh Ponnuru also opposes the death penalty. He told the *Morning News* that because “[o]ur emotional or intuitive reactions are not a sure guide to right and wrong in matters of moral import,” more conservatives should question their “emotions on this issue” and ensure they “are rationally defensible and in keeping with our other views.”¹¹⁶

A May 14, 2014 *Newsweek* story discussed both Mr. Hyden and Ballard Everett, a North Carolina Republican consultant who now led a conservative group of death penalty opponents in North Carolina. Mr. Everett said that the cost of the death penalty “sways” many conservatives. Hyden said North Carolina, Kentucky, Montana, Kansas, and Nebraska had substantial conservative anti-death penalty sentiment.¹¹⁷

¹¹³ 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.

¹¹⁴ 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/>.

¹¹⁵ Leon Neyfakh, Op-Ed., *The conservative case against the death penalty*, DALLAS MORNING NEWS, June 21, 2014 (alteration in original).

¹¹⁶ *Id.*

¹¹⁷ Pema Levy, *An Unlikely Conservative Cause: Abolish the Death Penalty*, NEWSWEEK, May 14, 2014.

d. Catholic Leaders

On October 23, 2014, Pope Francis reaffirmed the Catholic Church's opposition to capital punishment and also opposed life without parole. He said the death penalty had recently been removed from the Vatican penal code.¹¹⁸

In 2012, over 300 U.S. Catholic theologians signed "A Catholic Call to Abolish the Death Penalty." The theologians urged those who did not share their religious opposition to capital punishment to realize that, as 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," they opposed all executions, "on both theological and practical grounds."¹¹⁹

12. Execution Violating Vienna Convention on Consular Relations

On January 22, 2014, Texas executed Edgar Arias Tamayo over the objections of the U.S. State Department, Mexico's government, representatives of international organizations, and many others. He had been convicted and sentenced to death in violation of the Vienna Convention on Consular Relations¹²⁰ ("VCCR"), since no one told him that, as a foreign country's citizen, he had the right to seek help from his country's consulate.¹²¹ He had not been permitted to raise any VCCR-based claim in any court.¹²² Texas had behaved in the same manner before. In *Medellin v. Texas*,¹²³ the Supreme Court upheld its right to do so.

13. Continuing International Trend Versus 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.¹²⁴

Amnesty International reported that in 2013, while the number of countries known to have carried out executions increased slightly from 21 in 2012 to 22, "the trend is still firmly towards abolition," with "[p]rogress towards abolition ... in all regions of the world."

¹¹⁸ Francis X. Rocca, *Pope Francis calls for abolishing death penalty and life imprisonment*, NATIONAL CATHOLIC REPORTER, Oct. 23, 2014.

¹¹⁹ Tobias Winright, *A Catholic Call to Abolish the Death Penalty*, available at <http://catholicmoraltheology.com/a-catholic-call-to-abolish-the-death-penalty>.

¹²⁰ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77. For history of the VCCR, see Mark E. Wojcik, *Consular Notification for Dual Nationals*, 38 S. ILL. U. L.J. 73 (2013).

¹²¹ 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 notification. *VCCR*, art. 36(1)(b); *Osagiede v. United States*, 543 F.3d 399, 402 (7th Cir. 2008).

¹²² Manny Fernandez, *Texas Executes Mexican Man for Murder*, N.Y. TIMES, Jan. 22, 2014.

¹²³ 552 U.S. 491 (2008).

¹²⁴ AMNESTY INTERNATIONAL, *DEATH SENTENCES AND EXECUTIONS 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>.

The United States was again alone in the Americas in executing people.¹²⁵ The only countries exceeding the United States in reported executions in 2013 were China, Iran, Iraq, and Saudi Arabia.¹²⁶

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.¹²⁷ In December 2014, Pakistan and Jordan resumed executions.¹²⁸

In April 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*. It concluded that even after fair trials, fortuities affect whether capital punishment is imposed; innocent people are sometimes executed; capital punishment "is often applied in an arbitrary and discriminatory fashion especially against vulnerable groups in society"; and some executions are botched and others involve different types of "agony and cruelty."¹²⁹ Amnesty International reported that in 2013, five of the African Union's 54 countries had "carried out judicial executions," whereas 37 others were "abolitionist in law or practice."¹³⁰

On December 18, 2014, the U.N. General Assembly voted by a record margin, 117 to 38 with 34 abstentions, for a resolution calling for a moratorium on executions and encouraging all countries not to implement the death penalty with regard to those with mental or intellectual disabilities.¹³¹ The most recent vote had been 111 to 41 with 34 abstentions in 2012.¹³²

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.¹³³

¹²⁵ AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2013, at 3 (2014), available at <http://www.amnestyusa.org/sites/default/files/act500012014en.pdf>.

¹²⁶ *Id.* at 50, Annex I: Death Sentences and Executions in 2013.

¹²⁷ *Id.*

¹²⁸ *UN rights chief criticizes resumption of executions in Pakistan and Jordan*, JURIST, Dec. 22, 2014, available at <http://jurist.org/paperchase/2014/12/un-rights-chief-criticizes-resumption-of-death-penalty-in-pakistan-and-jordan.php>.

¹²⁹ 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.

¹³⁰ AMNESTY INTERNATIONAL, *supra* note 125, at 6.

¹³¹ Natasja Sheriff, *Record number of states vote for UN resolution on death penalty moratorium*, Dec. 18, 2014, <http://omnifeed.com/article/america.aljazeera.com/articles/2014/12/18/record-number-ofstatesvoteforunresolutionondeathpenaltymoratori.html>.

¹³² 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/>.

¹³³ Chris Buckley, *China: Court Seeks to Curtail Abuses*, N.Y. TIMES, Nov. 22, 2013.

B. Important Issues

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

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

a. Discordancies Analyzed by Carol and Jordan Steiker

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

[D]espite [seemingly] intensive, intrusive, and demanding constitutional regulation, the ultimate result of the Court's regulatory efforts was to require fairly minimal departures from the pre-*Furman* regime [that were] unlikely to actually achieve the regulatory goals of predictability, fairness, and accuracy that the Court had articulated in 1972 and 1976. As a result, actors in the capital justice process (such as sentencing juries, trial and appellate judges, and governors with the power of pardon and clemency) were likely to feel more comfortable than ... justified in imposing and approving capital sentences, secure in their (false or exaggerated) beliefs that their individual roles [were] merely one small part of a new and impressive regulatory apparatus. Similarly, the public at large was likely to conclude, again without true justification, that any death sentences and executions produced by such a complex and time-consuming system must be more than fair enough. Moreover, the most common form that state statutory innovations took in response to the Court's innovations – imposing [a] process by which juries compared “aggravating” and “mitigating” factors in their capital sentencing deliberations – itself helped both to distance jurors from the essentially moral task of deciding life or death and to cloak their decisions for public consumption in an aura of scientific computation rather than essentially free discretion.¹³⁴

There is great divergence between states with capital punishment statutes in the extent to which people are sentenced to death, and even more divergence with regard to the extent to which those sentenced to death are actually executed. The Steikers state that “variation in execution rates creates a new and potentially unconstitutional form of arbitrariness.”¹³⁵

“Over the past fifteen years ... , the death penalty has become increasingly fragile. Politically, concerns about cost and wrongful convictions, as well as the precipitous drop in violent crime and the widespread adoption of life-without-possibility-of parole sentencing alternatives, have changed the dynamics of the public debate On the judicial side, the Supreme Court has ... embraced significant substantive proportionality limits on the reach of the death penalty” – such as holding unconstitutional the execution of those who were juveniles at the time of their crimes, people with intellectual disability, and those who

¹³⁴ Carol S. Steiker and Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 752-53 (2014).

¹³⁵ *Id.* at 754-56, 759.

committed many nonhomicidal crimes such as rape of a child. “In crafting proportionality limits, the Court has developed a methodology [albeit one not ‘without difficulties’] conducive to judicial abolition – a methodology that privileges professional and elite opinion as well as actual sentencing practices”¹³⁶

“The experience with regulation over the past four decades has shifted the debate from the death penalty as a punishment in the abstract to the adequacy of the American death penalty in practice. This shift, in turn, has made the death penalty more vulnerable to constitutional and political attack, given the highly visible failures of the prevailing system (e.g., wrongful convictions, continued arbitrariness and discrimination, inadequate lawyering, etc.).”¹³⁷

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

Any analysis of capital punishment *as applied* must consider various barriers that preclude the federal courts from ruling on the merits or meritorious federal constitutional claims. Many of these are set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”).¹³⁸ This chapter is replete with examples of how the AEDPA and related technicalities have prevented granting relief to people facing execution whose constitutional rights have been egregiously violated – such as the AEDPA’s “trap for the unwary” statute of limitations, its requirement that federal courts usually “defer” to erroneous federal constitutional rulings by state courts, its unusually sweeping “harmless error” standard, and its extraordinarily high bar against second habeas corpus petitions. Professor Anthony G. Amsterdam discussed the AEDPA in a 2004 talk, selectively excerpted as follows:

In 1996, swept by a wave of fury in the wake of the Oklahoma City bombing, Congress enacted the so-called Antiterrorism and Effective Death Penalty Act, building on issue preclusion and review-curbing ideas that the Court had initiated and ratcheting them up so as to make federal habeas relief for constitutional violations still more difficult to obtain.

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

Congress ... further ... provided that if a state court has rejected a criminal defendant’s claim of federal constitutional error on the merits, federal habeas corpus relief cannot be granted ... upon a finding that the state court’s

¹³⁶ *Id.* at 764 (citations omitted).

¹³⁷ *Id.* at 775-76.

¹³⁸ Pub. L. 104-132, 110 Stat. 1214 (1996).

decision was erroneous as a matter of federal constitutional law. Federal habeas relief can be granted only if the state court's decision involves an "unreasonable application" of federal constitutional law – an application so strained that it cannot be regarded as within the bounds of reason. ... Federal habeas corpus courts ... [now] ask only whether any errors that the state courts may have committed in rejecting a defendant's federal constitutional claims were outside the range of honest bungling or were close enough to it for government work.¹³⁹

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

On July 19, 2013, President Barack Obama stated: "The African-American community is ... knowledgeable that there is a 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]."¹⁴⁰ As noted above, on May 2, 2014, President Obama, in discussing his order that Attorney General Holder do a policy review of the federal and state government's implementation of capital punishment, pointed to "significant problems" involving "racial bias" and "uneven application of the death penalty," as well as exonerations of death row inmates and issues regarding how executions have been carried out.

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 and 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 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." 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.'"¹⁴¹

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 was 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

¹³⁹ Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law*, 33 HOFSTRA L. REV. 403, 409-12 (2004) (alterations omitted) (citations omitted).

¹⁴⁰ 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>.

¹⁴¹ Lise Olsen, *Harris death penalties show racial pattern*, HOUSTON CHRON., Nov. 14, 2011.

made by juries, and judges must, in sentencing, give “appropriate consideration” to the jury’s view as to whether aggravating factors outweigh mitigating factors.¹⁴²

The authors’ three main conclusions were: (1) the reversal rate on appeal in Delaware became much lower than in other death penalty states after judges became the sentencers; (2) sentencing by judges (who sit in panels that need not be unanimous) resulted in a statistically significant higher likelihood of the death sentence’s imposition than (a) in other states and (b) in Delaware when its capital sentences were determined by juries; and (3) under judge sentencing, there was “a dramatic disparity of death-sentencing rates by race, one substantially more pronounced than in other jurisdictions” – and apparently much more so when the defendants were black and the victims were white.¹⁴³

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

North Carolina’s Racial Justice Act, enacted in 2009, provided that a defendant prior to trial could seek to preclude the prosecutor from seeking the death penalty by showing that race had a significant impact on the decision to seek death. And a death row inmate could seek to have a death sentence overturned by showing that race had a significant impact on the death sentence’s imposition. Statistical evidence could be used in seeking relief, but prosecutors could seek to rebut it.¹⁴⁴

After first being significantly amended and limited in 2012, the law was repealed in June 2013.¹⁴⁵ Before its amendment, Judge Gregory A. Weeks held in April 2012, with respect to death row inmate Marcus Robinson’s 1994 trial in Cumberland County, that “race was [so great] a materially, practically and statistically significant factor” in the prosecutor’s use of peremptory changes during jury selection as “to support an inference of intentional discrimination.” Judge Weeks resentenced Robinson to life without possibility of parole. The prosecution immediately said it would appeal.¹⁴⁶

On December 13, 2012, Judge Weeks applied the amended Racial Justice Act to grant relief to Tilmon Golphin, Christina Walters, and Quintel Augustine.¹⁴⁷ He stated, “In the writing of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making.” Judge Weeks held that the evidence – ironically, buttressed by the State’s own evidence and experts – overwhelmingly showed that in all three cases prosecutors had distorted juries’ compositions to make them extraordinarily white. There was also statewide evidence, including evidence concerning “trainings sponsored by the North Carolina

¹⁴² 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 (2011-2012).

¹⁴³ *Id.* at 1954.

¹⁴⁴ 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>.

¹⁴⁵ Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013.

¹⁴⁶ 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>.

¹⁴⁷ Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 14, 2012.

Conference of District Attorneys where prosecutors learned ... to circumvent the constitutional prohibition against race discrimination in jury selection.”¹⁴⁸

c. UNL Study of Racial Bias in Death Penalty Decisions

In a study published on August 25, 2014, Professor Cynthia Willis-Esqueda and Russ K.E. Espinoza reported on what happened when they presented to people who had reported for jury duty in Southern California a hypothetical case’s facts, including the defendant’s poverty. Among white “jurors,” those who were told that the defendant was Latino were considerably more likely to recommend the death penalty than those who were told that the defendant was white. There was no similar difference among Latino “jurors.”¹⁴⁹

d. Study of Military Death Penalty

The U.S. Military’s administration of its capital punishment system was in 2012 the subject of a law journal article by the late Professor David Baldus and three colleagues, who 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.”¹⁵⁰ The authors determined that the major source of the white-victim 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 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.”¹⁵¹ 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.”¹⁵²

3. Inadequacies or Unavailability of Counsel for People Facing Execution

Problems with the quality or performance of counsel representing capital defendants and death row inmates have been mentioned several times above, and will be further discussed below – in Parts II.B, II.F & II.G, regarding recent Supreme Court decisions, and

¹⁴⁸ State v. Golphin et al., Nos. 97 CRS 47314-15, 98 CRS 34832, 35004, 01 CRS 65079, at 3-5 (N.C. Gen. Ct. Just. Cumberland Cnty. Dec. 13, 2012).

¹⁴⁹ Russ K.E. Espinoza and Cynthia Willis-Esqueda, *The Influence of Mitigation Evidence, Ethnicity, and SES on Death Penalty Decisions by European American and Latino Venire Persons*, CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOLOGY, Aug. 25, 2014.

¹⁵⁰ 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 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.

¹⁵¹ *Id.* at 1228.

¹⁵² *Id.* at 1274.

in Part III.E, in discussing assessments by ABA teams in particular states. This section focuses on other recent developments regarding counsel.

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

U.S. District Judge Mark W. Bennett described in 2013 how a judge who authorizes large sums and help for capital defense counsel may inadvertently make disastrous appointments. Dealing with two capital cases to be handled separately, he appointed three criminal defense lawyers in each. He appointed two “of the [four] finest criminal defense lawyers in the state” in the first case and the other two in the second case. He had prior experience with all four. One team included two lawyers who had been co-counsel “on many other high profile cases.”¹⁵³

After presiding over the federal habeas proceeding in one of the cases, Judge Bennett realized that the “dream team[]” had become “my worst judicial nightmare” – largely because the lawyers never recognized how crucial having a team approach was. “[T]hey never developed a united theory of the defense or a consistent and cohesive mitigation strategy” Acting as “lone wolves,” and ceding virtually all responsibility for interacting with their client to a paralegal, they did not develop the rapport necessary to persuade their client to accept an offer of life without parole. The lawyers all wanted their client to accept the offer but didn’t realize how severely their paralegal had undercut them by urging him to reject the offer.¹⁵⁴

Moreover, this “team” failed to develop a strategy integrating their guilt phase and penalty phase approaches. They “inexplicably” failed to investigate psychological mitigation evidence about their client’s state of mind at the times of the crimes – ignoring “a virtual pretrial mental health mitigation ‘roadmap’” provided by an extraordinary resource counsel. Trial counsel also ignored their mitigation specialist’s “straightforward list of forty-four mitigating factors,” which could have guided them in drafting proposed jury instructions on mitigating factors. Instead, the defense’s proposed mitigation instructions “were remarkably poorly drafted” and in many ways incoherent. Ignoring his “significant misgivings,” the judge instructed the jury essentially as defense counsel had requested.¹⁵⁵

Judge Bennett concluded, in retrospect, that he “should have been more vigilant to ensure” there was a team approach, as articulated in the ABA Guidelines for capital case counsel. Only years after trial, “in the § 2255 proceeding, [did he begin] to fully understand the critical need for the ‘team approach.’” It simply had “never dawned on” him that the lack of a defense “team approach” would ultimately undo years of efforts by many, including the outstanding prosecution team and many dedicated law enforcement officers, and waste literally millions of dollars of taxpayer funds. He urged that “[t]rial court judges in capital cases ... be aware that, not only is the sum of the parts of the defense team not always greater than the whole, indeed, it can be far less – with dire consequences.”¹⁵⁶

Judge Bennett also belatedly learned that he should have been “vigilant in appointing the post-conviction team.” Relying on an apparently impeccable source, he

¹⁵³ Mark W. Bennett, *Sudden Death: A Federal Trial Judge’s Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 391 (2013).

¹⁵⁴ *Id.* at 406.

¹⁵⁵ *Id.* at 411, 413.

¹⁵⁶ *Id.* at 407.

appointed the § 2255 “learned counsel” after meeting him. Yet, “two years later, I would end up removing [and then successfully replacing] the § 2255 defense team, shortly before the scheduled hearing.” He filed his first ever “formal disciplinary grievance” – against the “learned counsel,” who had literally abandoned the retained experts, his death row client, and his two junior co-counsel. He had “repeatedly lied” on the record to Judge Bennett about his preparation, despite the experts all having quit due to lack of follow-up and contact.¹⁵⁷

b. Alabama

Alabama often fails to find proper trial counsel – as, for example, in the case of Anthony Ray Hinton (see discussion of *Hinton v. Alabama*, in Part II.B below). And many Alabama death row inmates cannot 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 as part of the AEDPA in 1996) is 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 for Ronald Bert Smith. His state postconviction petition was filed within the one-year federal statute of limitations, but without either (a) a motion that he was too poor to pay the \$154 filing fee or (b) payment of the fee.¹⁵⁸ The majority denied equitable tolling, despite Smith’s Alabama attorney’s having been “on probation for a public intoxication conviction,” his frequent intoxication in the office, his continuing “abuse of prescription drugs and crystal methamphetamine,” and (within a month after Smith’s inadequate petition filing) his being “charged with nine counts of possession of a controlled substance.” Put on “disability inactive status,” he committed suicide the next year. The majority relied on Smith’s also having an out-of-state attorney, who eventually (albeit too late) paid the filing fee.¹⁵⁹ Dissenting, Judge Rosemary Barkett said Smith should have received an evidentiary hearing, due to his Alabama attorney’s egregious misconduct and his other attorney’s never moving for permission to appear in Alabama courts and doing almost nothing for Smith.¹⁶⁰

Mr. Smith’s trial jury had voted 7-5 for a life sentence, but had been overruled by the trial judge.¹⁶¹

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

¹⁵⁷ *Id.* at 408-09.

¹⁵⁸ *Smith v. Commissioner*, 703 F.3d 1266 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 513 (2013).

¹⁵⁹ *Id.* at 1272-74.

¹⁶⁰ *Id.* at 1275, 1277 (Barkett, J., dissenting) (citing *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012)).

¹⁶¹ Adam Liptak, *Lawyers Stumble, and Clients Take Fall*, N.Y. TIMES, Jan. 8, 2013.

reasonable probability that, absent counsel's ineffectiveness, Holsey would have received a life sentence.¹⁶²

One of the two judges in the majority, Ed Carnes, 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, James Edmondson, disagreed with Carnes' opinion. He said the AEDPA had greatly influenced him to give great deference to the Georgia Supreme Court's decision regarding prejudice. He joined the majority since the Georgia Supreme Court's decision was "within the outside border of the range of" being a "reasonable" holding.¹⁶³ Thus, Holsey got no relief even though his lead lawyer at trial "drank a quart of vodka every night [of the 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.¹⁶⁴

Judge Barkett's dissent 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." The available but unrepresented abuse evidence included that "throughout his childhood he was subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'" 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.¹⁶⁵

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 the Georgia Supreme Court's accepting the lower court ruling that the trial counsel's performance had been inadequate but then holding 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.¹⁶⁶

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 she felt would have undercut the prosecution's

¹⁶² *Holsey v. Warden*, 694 F.3d 1230 (11th Cir. 2012), cert. denied, 133 S. Ct. 2804 (2013).

¹⁶³ *Id.* at 1275 (Edmondson, J., concurring).

¹⁶⁴ Bill Rankin, *Court upholds cop killer's death sentence*, ATLANTA JOURNAL-CONST., Sept. 14, 2012.

¹⁶⁵ *Holsey*, 694 F.3d at 1275, 1277-78 (Barkett, J., dissenting).

¹⁶⁶ Bill Rankin, *High Court Consistently Reinstating Death Sentences*, ATLANTA JOURNAL-CONST., Nov. 28, 2013.

assertion that Riley “chose to move the vehicle rather than rescue his children” from the home.

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.¹⁶⁷ That is in great contrast with the many death sentences in Philadelphia cases where defendants have been represented by court appointed counsel. Philadelphia was as of late 2014 responsible for 69 of Pennsylvania’s death row population of 185.¹⁶⁸

e. Los Angeles County

Robert J. Smith wrote in 2012 about a situation in Los Angeles County similar to Philadelphia’s. The Public Defender’s Office, handling half of trial-level capital punishment cases, went to trial once in six years, and avoided any death sentences. In the same years, 33 defendants represented by the Alternative Public Defender or the private bar got death sentences. Private lawyers had a significant disadvantage: they were usually appointed late in the time frame during which the district attorney decided whether to seek the death penalty. So, they had far less ability than the Public Defender’s Office to develop and present evidence to the district attorney before he chose what punishment to seek. But some private lawyers who *could* find and present evidence to the district attorney prior to his deadline did not do so – due to ignorance, fear, or working instead on other cases.¹⁶⁹

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

A Marshall Project analysis, published in two parts in the *Washington Post* in November 2014, discussed implementation of the AEDPA’s one-year statute of limitations for filing a federal habeas petition. In investigating the implementation of the deadline, the Marshall Project found that out of the 80 situations in which it found the AEDPA deadline was missed, 16 death row inmates were executed. In 2/3 of the 80 cases, death row inmates lost the chance to seek federal habeas corpus relief, which the analysis said is “arguably the most critical safeguard” in the U.S. capital punishment system. In the other 1/3, federal courts have found ways to permit the death row inmates to proceed with federal habeas petitions. The analysis showed that complexities in interpretations of the AEDPA’s one-year deadline and missteps by judges have sometimes contributed to failures to miss the deadline – which in a number of the cases has been missed by a single day.¹⁷⁰

The Marshall Project said that “powerful claims” were waived in some of the cases in which the statute of limitations was missed. These included a Mississippi case in which a death row inmate was barred from challenging a conviction partly dependent on “a forensic hair analysis that the FBI now admits was flawed,” and a Florida case in which a death row

¹⁶⁷ Smith, *supra* note 42, at 260; Interview with Marc Bookman, Executive Director of the Atlantic Center for Capital Representation, Feb. 1, 2014.

¹⁶⁸ Nicole Brambila, Ford Turner and Mike Urban, *Capital punishment in Pennsylvania: When death means life*, READING EAGLE, Dec. 14, 2014.

¹⁶⁹ Smith, *supra* note 42, at 262-63.

¹⁷⁰ Ken Armstrong, *Death By Deadline*, Part One, *A lethal mix. Lawyers’ mistakes, unforgiving law*, WASH. POST, Nov. 15, 2014; Ken Armstrong, *Death By Deadline*, Part Two, *When lawyers stumble, only their clients fall*, WASH. POST, Nov. 16, 2014.

inmate was precluded from challenging a conviction based on “a type of ballistics evidence that has long since been discredited.” That case was one of 37 Florida cases among the 80 in which the investigation found that the AEDPA deadline was missed.

The analysis revealed that even in the cases where lawyers missed the AEDPA deadline “through remarkable incompetence or neglect – it is almost always the prisoner alone who suffers” any consequence. Only one of the “dozens” of attorneys who missed the deadline in the 80 cases was sanctioned for missing the deadline by a disciplinary body. Hence, “many of the lawyers who missed the habeas deadlines” are eligible to “handle” new capital habeas matters.

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 changed the manner in which a state can be found to have “opted-in” to “special Habeas Corpus Procedures in Capital Cases”¹⁷¹ under which, for example, there could be a far shorter deadline than in the AEDPA for filing a federal habeas petition and new, draconian deadlines for resolving such cases. To opt-in, a state would have to establish “a ‘mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings’ and ‘standards of competency for the appointment of counsel in [such] proceedings....’” Any decision on whether a state qualifies for opt-in would be made initially by the U.S. Attorney General, subject to *de novo* review by the Court of Appeals for the District of Columbia, which could then be reviewed by the Supreme Court.¹⁷² Opponents of this change (including the ABA) say the Attorney General may be a biased decision-maker, given the Justice Department’s close relationships with state attorneys general and its frequent *amicus* briefs supporting state-imposed death sentences. Moreover, the D.C. Circuit has *no* experience with the determinative issue regarding “opt-in”: the quality of postconviction counsel in state court proceedings in capital cases.

The Justice Department’s most recent effort to implement the opt-in mechanism was halted when U.S. District Judge Claudia Wilken granted partial summary judgment precluding the Department from implementing “a final rule.” Her August 7, 2014 order said that before any rule could be implemented, the Department must “remedy” numerous aspects of its “final rule.”¹⁷³

4. Failure to Limit Executions to People Materially More Culpable than the Average Murderer

The Supreme Court repeatedly has held that the Eighth Amendment permits application of capital punishment only to those convicted of “a narrow category of the most serious crimes” where they have such extreme “culpability” that they are “the most deserving of execution.”¹⁷⁴ For example, in holding capital punishment categorically unconstitutional for people with what it then called mental retardation (later referred to as

¹⁷¹ Pub. L. No. 109-177, 120 Stat. 192 (2006).

¹⁷² RANDY HERTZ AND JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at 153, 155-156 (6th ed. 2011) (quoting 28 U.S.C. § 2265(a)(1)(A),(C) and discussing 28 U.S.C. § 2265 (c)(1)-(3) (2006)).

¹⁷³ Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice, No. C 13-4517 CW, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014).

¹⁷⁴ *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

intellectual disability) and for those below age 18 at the times of their crimes, the Court said that the retribution rationale for the death penalty's constitutionality did not apply. The Court stated in *Roper v. Simmons*:

[W]e remarked in *Atkins* that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” The same conclusions follow from the lesser culpability of the juvenile offender.¹⁷⁵

However, the Court has thus far not ensured that this constitutional requirement applies even to all of those with intellectual disability (who are supposed to be categorically excluded), nor to those whose severe mental illness at the time of the crime or other substantial mitigating factors make their culpability well below that of the “average murderer.” This is apparent from the discussion in the subparts of this section (see below).

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

A starting point for considering this subject is a recent study regarding the 100 most recently executed people in the United States as of the time of the study (excluding two others who had refused to permit any introduction of mitigating evidence). Based simply on the incomplete information that the authors could locate, they “found that the overwhelming majority of executed offenders suffered from intellectual impairments, were barely into adulthood, wrestled with severe mental illness, or endured profound childhood trauma. Most executed offenders fell into two or three of these core mitigation areas, all [of] which are characterized by significant intellectual and psychological deficits.”¹⁷⁶

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

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

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

As a study of state practices showed in 2014, “some states attempt, either through procedural obstacles or substantive deviations, to eviscerate the holding of *Atkins*.”¹⁷⁷ Texas is one of those states.

¹⁷⁵ *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (alteration in original) (quoting *Atkins*, 536 U.S. at 319). The Court also held, for similar reasons, that the other constitutional rationale for capital punishment – deterrence – was also inapplicable.

¹⁷⁶ Robert J. Smith, Sophie Cull, and Zoë Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1255 (2014).

¹⁷⁷ John H. Blume, Sheri Lynn Johnson, Paul Marcus, and Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 414 (2014).

Texas carried out an execution in 2012 that clearly violated *Atkins* in the opinion of the two organizations whose expertise the Court had specifically cited in *Atkins* (and cited again in 2014, in *Hall v. Florida*¹⁷⁸): 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 development, or whether the defendant can lie.”¹⁷⁹ 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.”¹⁸⁰ He was executed on August 6, 2012.

In May, 2014, the Court in *Hall* held unconstitutional Florida’s categorical IQ cutoff, in large part because the cutoff egregiously deviated from how IQ is dealt with by most experts in assessing for intellectual disability. A month later, the Fifth Circuit dealt with what most experts feel are “Texas’ gross deviations from clinical definitions of adaptive functioning” – the other key factor in assessing for intellectual disability.¹⁸¹ In *Mays v. Stephens*,¹⁸² the Fifth Circuit “roundly disagree[d]” that *Hall* cast doubt on Texas’ continued use of the Briseño standard. The Supreme Court denied certiorari on January 12, 2015, and Mays’ execution is, as of early February, scheduled for March 18, 2015.

Before Mays’ execution date, Texas on January 29, 2015, executed Robert Ladd, who in 1970 had been diagnosed as “obviously retarded,” and had an IQ of 67. Using the Briseño standard, the Texas courts denied relief. As Jordan Steiker observed, “There’s a professional definition of intellectual disability that is embraced by psychologists and psychiatrists, and the Supreme Court referenced the professional definition in its [*Hall*] opinion, ... But Texas has taken the view that the definition of intellectual disability used broadly is not appropriate in a criminal context because it might just exempt too many people.”¹⁸³

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

Georgia’s death penalty law – ironically, the first in the country to bar executions of people with intellectual disability – is unique in requiring that defendants at trial must establish their intellectual disability beyond a reasonable doubt. In 2011, the *en banc* Eleventh Circuit rejected Warren Lee Hill’s constitutional attack on this burden of proof.¹⁸⁴

¹⁷⁸ 134 S. Ct. 1986 (2014).

¹⁷⁹ 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)).

¹⁸⁰ 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>.

¹⁸¹ Blume et al., *supra* note 177, at 414.

¹⁸² 757 F.3d 211, 215, 219 (5th Cir. 2014), *cert. denied*, No. 14-6679 (U.S. Jan. 12, 2015).

¹⁸³ Ned Resnikoff, *Texas set to execute “intellectually disabled” inmate*, ALJAZEERA AMERICA, Jan. 28, 2015, available at <http://america.aljazeera.com/articles/2015/1/28/texas-set-to-execute-mentally-disabled-man.html>.

¹⁸⁴ *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 2727 (2012).

Long before Hill was executed on January 27, 2015, all the experts in his case agreed that he had intellectual disability. Originally, in 2000, Hill's four experts testified he had intellectual disability, but the prosecution's three experts said he did not. The state court concluded that Hill had shown his intellectual disability "by a preponderance of the evidence" but had not "beyond a reasonable doubt." By February 2013, "all three of the State's experts" had changed their views and testified via sworn affidavits that Hill did satisfy all criteria for intellectual disability.¹⁸⁵ But later that year, the Eleventh Circuit held that Hill's claim was barred by the AEDPA, and certiorari was then denied.¹⁸⁶ On January 20, 2015, a week before his scheduled execution, the Georgia Supreme Court voted 5-2 to deny Hill's application for leave to appeal from the denial of his habeas corpus petition. His later efforts to get any court to consider the merits of his claims all failed.

On October 24, 2013, Georgia's House Judiciary Non-Civil Committee held an "informational" 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 of changing it. But he said he did not expect to introduce legislation on the subject.¹⁸⁷

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

Missouri executed John Middleton in July 2014 notwithstanding a federal district judge's concerns arising from the facts that he "frequently talks to people who are not there and tells stories that could not have any basis in reality."¹⁸⁸

As reflected in Part I.B.3, numerous mentally ill people have been executed without their sentencers' considering their mental illness due to errors or omissions by their counsel. For the reasons discussed below in Part I.B.4.d, sentencers' implicit biases, compounded by misleading or otherwise inadequate jury instructions, are further reasons why jurors who are presented with evidence of serious mental illness often do not consider them as mitigating and frequently consider them as aggravating. Following trial, procedural obstacles or unreasonable burdens often doom efforts by subsequent counsel to seek relief. And serious mental illness is infrequently deemed important in clemency proceedings.

The *Texas Tribune's* February 2013 six-part series, *Trouble In Mind*, focused on Texas death row inmate Andre Thomas. He "began exhibiting signs of mental illness as a boy," then in 2004 "committed a brutal triple murder," and while imprisoned became blind after removing his eyes. Reporter Brandi Grissom said this "case offers a lens through which to examine the effects of a mental health system in Texas that is too fractured and

¹⁸⁵ *In re Hill*, No. 13-10702-P, slip op. at 3-5 (11th Cir. Feb. 19, 2013), *application to vacate denied*, *Humphrey v. Hill*, 133 S. Ct. 1325 (2013).

¹⁸⁶ *In re Hill*, 715 F.3d 284 (11th Cir. 2013).

¹⁸⁷ 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>.

¹⁸⁸ Ed Pilkington, *Missouri inmate's execution blocked over mental health concerns*, *GUARDIAN*, July 15, 2014.

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.”¹⁸⁹ The final story said that “[i]n 2009, months after he pulled out his second eye and ate it, the Texas Court of Criminal Appeals denied Thomas’ appeal.”¹⁹⁰ Judge Cathy Cochran’s concurring statement, said it was “an extraordinary tragic case,” since Thomas “has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia. He also has a long history of drug and alcohol abuse. ... [His] behavior in the months before the killings became increasingly ‘bizarre’ ... ,” and when he twice tried to commit suicide within 20 days before the killings, he was taken but never seen at places where he could be observed or get psychiatric treatment. Judge Cochran concluded by saying, “Applicant is clearly ‘crazy,’ but he is also ‘sane’ under Texas law.”¹⁹¹ As of March 2013, his “eyelids [were] surgically closed.”¹⁹² He remains on death row.

On March 1, 2013, the Dallas Morning News editorialized that the case “resembles a medieval horror story featuring madness, a family’s homicidal slaughter, ... and a waiting executioner.” It is “almost too grotesque to stomach” and “challenges this state’s collective conscience.” After quoting Judge Cochran’s opinion, the editorial said: “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.”¹⁹³

Oklahoma executed Garry Allen on November 6, 2012. He had been diagnosed with schizophrenia. In 2005, the Board of Pardons and Paroles recommended commutation to life without parole. That same year, an Oklahoma State Penitentiary doctor concluded, after a psychological examination, that Allen had dementia arising from seizures, drug abuse, and being shot in the face. During his execution, he spent his last minutes making “unintelligible ramblings.”¹⁹⁴

Two days later, Rachel Petersen, having witnessed and reported on Allen’s execution – the eighth she had witnessed, wrote an opinion column. She said: “I watched as ... one of Allen’s attorneys lowered her head in her hands as Allen rambled on unintelligibly about Obama, Romney and Jesus. In fact, Allen said a lot of things in his lengthy ramblings – I just couldn’t understand what he was saying My judgment, my bias, my opinion: Allen had no idea he was about to be executed. ... And when the deputy warden said ‘Let the execution begin,’ Allen turned his head and looked at him and said ‘Huh? What?’ And then 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.”¹⁹⁵

¹⁸⁹ Brandi Grissom, *Trouble In Mind*, Part 1, *Andre Thomas: Mental Health, Criminal Justice Collide*, TEX. TRIB., Feb. 20, 2013.

¹⁹⁰ Brandi Grissom, *Trouble in Mind*, Part 6, *Andre Thomas: Questions of Conscience*, TEX. TRIB., Feb. 26, 2013.

¹⁹¹ *Ex parte* Thomas, No. WR-69,859-01, 2009 WL 693606 (Tex. Crim. App. Mar. 18, 2009) (Cochran, J., concurring).

¹⁹² Grissom, *supra* note 189.

¹⁹³ Editorial, *Death penalty insanity in the case of Andre Thomas*, DALLAS MORNING NEWS, Mar. 1, 2013.

¹⁹⁴ Rachel Peterson, *Okla. death row inmate Garry Allen executed*, MCALESTER NEWS-CAPITAL, Nov. 6, 2012.

¹⁹⁵ Rachel Petersen, Editorial, *A heartbreaking day – Execution Day*, MCALESTER NEWS-CAPITAL, Nov. 8, 2012.

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, and that he 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, 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 against commuting Brooks' death sentence.¹⁹⁶

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

i. 2011 Article Regarding Study and Follow-up Thereon

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

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 well understood the jury instructions "were the most prone to racial bias." Those with "high comprehension" of the instructions sentenced the black and white defendants in "equal proportions." Overall, the participants "were less willing to give the identical evidence mitigating weight" when the defendant was black than when the defendant was white; and they "were significantly more likely to improperly use *mitigating* evidence in *favor* of a death sentence" when the defendant was black than when the defendant was white.¹⁹⁷

In a follow-up study, over 500 participants "deliberate[d]" in 100 small group "juries": 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." 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."

¹⁹⁶ Associated Press, *Ohio executes dad who killed his 3 sons in 1982*, DAILY NEWS (N.Y.), Nov. 16, 2011.

¹⁹⁷ 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 (emphasis added).

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 “jurors” becoming even more “disproportionately influential.” So, jury deliberations could “activate and exacerbate racial bias under certain conditions.” The authors said “[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.”¹⁹⁸

ii. Experimental Study of Jurors’ Implicit Biases

Justin D. Levinson, Robert J. Smith and Danielle M. Young’s “experimental study,” published in 2014, addressed the extent to which “implicit bias” affects people eligible to sit on capital juries in Alabama, Arizona, California, Florida, Oklahoma, and Texas. “Implicit bias refers to the automatic attitudes and stereotypes that appear in individuals.”¹⁹⁹ Their findings included: (1) “jury-eligible citizens implicitly associate Whites with ‘worth’ and Blacks with ‘worthless’”; (2) the process of “death qualification” (which excludes those who would never vote for the death penalty and is supposed to exclude jurors who would always vote for the death penalty) exacerbates the impact of implicit and self-reported biases, primarily by disproportionately excluding minority group jurors; (3) “explicit bias matters too” in capital cases, and “predicts race-of-victim effects”; (4) “race-of-defendant effects” are predicted “by implicit racial bias” and may be attributable to an unintentional decrease in receptivity to mitigation evidence proffered by a Black defendant” and (5) “[a]t least at an implicit level, we value White lives more than Black lives, and we thus seek to punish those individuals who have destroyed those whom we value more.”²⁰⁰

iii. Jurors’ Misunderstandings About Mitigation

In a 2014 article, John Robert Barner of the University of Georgia analyzed interviews of 36 jurors who had sat in capital cases in a variety of states, and the jury instructions they had been given. They had been interviewed for 3-4 hours each, in open-ended questioning by the Capital Jury Project. It had also collected the jury instructions. Barner’s analysis showed “failures to achieve the factors of fairness and procedural integrity or to allow for full and equal consideration of mitigating and aggravating factors.” In particular, juror interviews “seemed to indicate that by the time of sentencing deliberations,” jurors “either thought they could not access mitigating evidence, or were barred in their efforts for procedural clarification.”²⁰¹

¹⁹⁸ *Id.* at 584-86.

¹⁹⁹ 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*, 89 N.Y.U. L. REV. 513, 518 (2014).

²⁰⁰ *Id.* at 564, 567, 571, 573.

²⁰¹ John Robert Barner, *Life or death decision making: Qualitative analysis of death penalty jurors*, 13 QUALITATIVE SOCIAL WORK 842, 846, 855, 854 (2014).

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

i. The Policies These Groups Advocate

The ABA, the American Psychiatric Association, and the American Psychological Association all have adopted three policies concerning mental disability and capital punishment.²⁰² The first would implement *Atkins* in a manner comporting with the positions of the AAIDD and the American Psychiatric Association. It would also exempt from execution anyone with dementia or traumatic injury at the time of the crime. These disabilities have very similar impacts as intellectual disability but may not come within its definition since they always (dementia) or usually (head injury) arise after age 18.

The second policy would prohibit executing someone with severe mental disability where demonstrated impairment of mental and emotional functioning at the time of the offense make execution disproportionate to his culpability.²⁰³

The third policy deals with a death-sentenced prisoner: (a) whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly impaired by a mental disorder or disability, (b) whose mental illness impairs his ability to assist counsel or otherwise take part meaningfully in postconviction proceedings regarding one or more specific issues on which his participation is necessary, or (c) whose understanding of the nature and purpose of the punishment is so impaired as to render him incompetent for execution.²⁰⁴ Contrary to the second part of the third policy, the Supreme Court held in 2013 that if a death row inmate’s mental inability to help his counsel is likely to continue *indefinitely*, his execution should not be stayed – even if there are one or more issues on which the inmate’s help would be important to his counsel.²⁰⁵

ii. 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 2014 for the second policy of the three leading professional organizations. Most significantly, the final report of the Ohio’s Joint Task Force to Review the Administration of Ohio’s Death Penalty proposed excluding from death penalty eligibility people who had a diagnosable “serious mental illness” at the time of the crime.²⁰⁶

iii. Barring Forced Medication to Restore Competency for Execution

In September 2013, the Texas Court of Criminal Appeals held by a 5-4 vote that a trial judge had acted improperly in ordering that death row inmate Steven Staley – who

²⁰² See *Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006).

²⁰³ 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).

²⁰⁴ For detailed discussion of the third paragraph, see *Recommendations and Report*, *supra* note 202, and Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

²⁰⁵ *Ryan v. Gonzales*, 133 S. Ct. 696, 708-09 (2013).

²⁰⁶ FINAL REPORT & RECOMMENDATIONS, *supra* note 30, at 6.

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. It also said 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.”²⁰⁷

The Court of Criminal Appeals had ruled in 2006 that under the then-extant law, it had no jurisdiction to consider an appeal from the trial judge’s order of involuntary medication. But in 2013 it held that a new competency-to-be-executed law that became effective in September 2007 applied to Staley. And it considered 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. It did not rule on any state or federal constitutional arguments.²⁰⁸

The 2013 decision is in complete accord with a portion of the third policy of the three leading professional organizations.

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

i. Denials Are the Norm

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

Former Ohio Governor Bob Taft stated in a December 29, 2014 op-ed that before taking office he had not considered much the Governor’s key role on capital clemency requests. But during the execution of a death row inmate who had waived appeals and sought execution, “it suddenly struck me” and “I felt somehow complicit in a dire and irrevocable act.” Thereafter, he “was never really comfortable with this responsibility,” although he granted capital clemency only once. Now, “[c]onsidering the cases that came to me and developments after I left office in 2007, I believe the days of the death penalty may be numbered, in Ohio and across the country.” Noting problems in the execution process, lack of consistency among Ohio’s counties, the years and great cost involved, and the fact that since life without parole became an option in 1996 Ohio prosecutors had sought the death penalty much less often, Taft concluded: “It may be time to ask the question whether the death penalty in Ohio is a ‘dead man walking.’”²⁰⁹

²⁰⁷ Staley v. State, 420 S.W.3d 785, 787, 788 (Tex. Crim. App. 2013).

²⁰⁸ *Id.* at 787, 796.

²⁰⁹ Bob Taft, Op-Ed., *No going back*, UNIV. DAYTON MAG., Dec. 29, 2014.

ii. Usual Failures of Innocence-Based Efforts

One of the few contexts in which some death row inmates have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt. Yet, even where such doubt should exist, governors, pardons and paroles boards, and other clemency bodies usually deny relief (as reflected in several cases discussed below in Parts I.B.5.c & I.B.5.d). In doing so, they often cite the number of times the inmate unsuccessfully attempted to get relief in the courts. These recitations almost never mention that the courts either completely failed to consider the new evidence bearing on guilt/innocence, or considered the evidence under such an extraordinarily difficult standard that only a conclusive DNA exclusion or other 100% proof of innocence might lead to relief.

iii. Rare Clemency Grants Based on Severe Mental Illness or Other Mitigating or Fail-Safe Factors

Ohio Governor John Kasich, a conservative Republican, sometimes has used his clemency power in cases not involving strong evidence of factual innocence – although not for Brooks or Slagle (see above and below). He has granted clemency on the basis of “limited mental capacity,” being abused as a child, and inadequate defense counsel performance, as well as doubts about guilt. He has been referred to as “a nationwide leader in death-row clemencies.”²¹⁰ Governor Kasich easily won re-nomination and re-election in 2014. So, granting clemency where other governors would not do so has not caused Kasich the adverse political consequences that so many public officials who deny clemency seem to fear.

In a rare action, the Georgia Board of Pardons and Paroles commuted Tommy Lee Waldrip’s sentence to life without parole on July 9, 2014, just 26 hours before his scheduled execution. One possible reason for its doing so was that although Waldrip, his son, and his brother were all convicted of a 1991 murder, prosecutors did not seek the death sentence against his brother and the jury did not return a death verdict against his son – the triggerman who fired buckshot into Keith Evans’ face and then used a blackjack to beat Evans to death. Waldrip’s son was sentenced to life with possibility of parole and has been parole-eligible since 1998. The year before the murder, Evans had testified in an armed robbery case against Waldrip’s son, and was expected to testify again at a retrial.²¹¹

iv. Potential Equitable Argument for Clemency

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

Interviews of actual jurors by the Capital Jury Project have revealed that many voted for capital punishment for defendants they did not believe should be executed. They did so because they incorrectly thought the alternative was parole eligibility in as little as seven years. Now that life without parole is – and is believed by many jurors to be – an alternative in which there is no chance of parole, many juries have voted for life without

²¹⁰ Jeremy Pelzer, *Gov. John Kasich has been a nationwide leader in death-row clemencies*, CLEVELAND PLAIN DEALER, June 30, 2014.

²¹¹ Rhonda Cook, *Waldrip’s death sentence commuted to life without parole*, ATLANTA JOURNAL-CONSTITUTION, July 9, 2014.

parole instead of the death penalty. This likely happens most often when jurors have lingering doubt about guilt, or believe the defendant should be severely punished but not executed. Moreover, as discussed early in this chapter, a major reason that far fewer death sentences are now being *sought* than in the past is that there is far greater awareness that life without possibility of parole really exists and really means “without possibility of parole.”

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

It was considered by Cuyahoga County Chief Prosecutor Timothy McGinty, who wrote the Ohio Parole Board in 2013 to ask it to recommend a form of clemency changing Billy Slagle’s death sentence to life without parole.²¹² 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 not to recommend clemency. Governor Kasich denied clemency. Mr. Slagle was found hanged in his cell on August 3, 2013, three days before his scheduled execution. He was unaware of a recent revelation that the prosecutor’s office had been prepared to enter into a plea deal in 1988 that would have averted imposition of the death penalty.²¹³

A particular example of the impact of life without parole’s being a recognized sentencing alternative in Georgia is Brian G. Nichols’ case. He was convicted of murdering four government employees, including a judge and court reporter killed in a courtroom. No one doubted his guilt. After a highly contested, extremely costly trial in 2008, he was sentenced to multiple life sentences without parole.²¹⁴

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

5. *The Continuing Danger of Executing Innocent People*

a. *Exoneration and Full Pardon for Executed Men*

i. *George J. Stinney, Jr.*

On December 16, 2014, South Carolina Circuit Court Judge Carmen T. Mullen vacated the conviction of George J. Stinney, Jr., who had been convicted and executed in 1944. Having held a two-day hearing the previous January, Judge Mullen held that

²¹² Robert Higgs, *Parole board recommends against clemency for murderer, despite urgings of Cuyahoga prosecutor*, CLEVELAND PLAIN DEALER, July 16, 2013.

²¹³ Alan Johnson, *Death-row inmate who killed self didn’t know of new hope*, COLUMBUS DISPATCH, Aug. 6, 2013.

²¹⁴ Associated Press, *Multiple Life Terms for Courthouse Killings in Atlanta*, N.Y. TIMES, Dec. 13, 2008.

Stinney's lawyer had done essentially nothing, "the essence of being ineffective."²¹⁵ The prosecutor decided not to appeal Judge Mullen's decision.

An African American aged 14, Stinney was the youngest person executed in the United States in the 20th century.²¹⁶ His purported confession was never produced, an available alibi witness was not called, no defense investigation occurred, and no prosecution witness was cross-examined. An all-white jury took 10 minutes to convict after a 3-hour trial.²¹⁷ Stinney's lawyer did find time to seek an almost all-white electorate's votes for a legislative seat.²¹⁸

ii. Joe Arridy

On January 7, 2011, Colorado Governor Bill Ritter, Jr. "granted a full and unconditional pardon ... to Joe Arridy, ... convicted of killing a 15-year-old girl [in 1936], sentenced to death and executed by lethal gas" in 1939. Governor Ritter said "an overwhelming body of evidence indicates" that Arridy (whose IQ was 46) "was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else."²¹⁹

b. People Released on Innocence Grounds from 2012-2014 After Years on Death Row

i. Debra Jean Milke

In a decision released on December 11, 2014, an Arizona appeals court dismissed murder charges against Debra Jean Milke and barred her retrial "because of the state's severe, egregious prosecutorial misconduct in failing to disclose impeachment evidence." The Ninth Circuit earlier had granted habeas relief because the prosecution had not disclosed many past cases of misconduct by its key witness, a Phoenix police detective. The state's case relied perhaps exclusively on the detective's testimony that Milke had confessed – a "confession" of which there was no recording. Milke had been released in September 2013 after spending 22 years on death row. The prosecution which had purportedly abandoned its plan to retry her when the now-retired detective "balked at testifying for fear of federal misconduct charges," insisted in December 2014 that it would appeal to the Arizona Supreme Court.²²⁰

²¹⁵ State v. Stinney, Order (S.C. 3d Jud. Cir. Dec. 16, 2014), available at <http://nuweb9.neu.edu/civilrights/wp-content/uploads/Stinney-Order.pdf>.

²¹⁶ Alan Blinder, *Family of South Carolina Boy Put to Death Seeks Exoneration 70 Years Later*, N.Y. TIMES, Jan. 23, 2014.

²¹⁷ Lindsay Bever, *It took 10 minutes to convict 14-year-old George Stinney, Jr. It took 70 years after his execution to exonerate him*, WASH. POST, Dec. 18, 2014.

²¹⁸ 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.

²¹⁹ 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>.

²²⁰ Michael Muskal, *Arizona court tosses charges against woman on death row for 22 years*, L.A. TIMES, Dec. 11, 2014.

ii, iii, and iv. Kwame Ajamu (formerly Ronnie Bridgeman), Wiley Bridgeman, and Ricky Jackson

Kwame Ajamu (formerly Ronnie Bridgeman) was exonerated formally on December 9, 2014, of the murder in 1975 for which he had been convicted and sentenced to death in Ohio (as had his brother, Wiley Bridgeman, and co-defendant Ricky Jackson). His death sentence had been changed to a lesser sentence in 1978 when the law under which he had been sentenced was held unconstitutional, and he had been let out of prison in 2003. His exoneration arose from the admission by the crucial trial witness (at the time, age 12) that he had not observed the murder. Indeed, several persons said they had seen the boy on a school bus when the crime occurred. A gun and car observed at the scene of the crime were linked to someone else who in 1978 was arrested for another murder. County prosecutors said they would not object to attempts by the three exonerees to seek compensation, stating they were “victims of terrible injustice.”²²¹

For the same reason that Mr. Ajamu was exonerated, co-defendants Wiley Bridgeman and Ricky Jackson were formally exonerated in November 2014, both after 39 years in prison. They had also been removed from death row earlier.²²²

v. Manuel Velez

Manuel Velez was released on October 8, 2014, after nine years of imprisonment in Texas, four of them on death row. His conviction was vacated by the Texas Court of Appeals after it emerged that an expert neurologist’s opinion provided two years prior to trial and “prominently” included in the autopsy report “destroyed the state’s case” by showing that the deceased baby’s fatal brain injury had occurred long before Mr. Velez ever had contact with him. Defense counsel had overlooked this, as well as the baby’s mother’s videotaped interrogation, where she conceded burning her baby with a cigarette. Counsel did not elicit statements from members of the mother’s family, who eventually provided testimony that was critically inconsistent with what (following a plea-bargain agreement) she said at trial. The police had not videotaped Velez’s questioning despite having available equipment, but had required him to sign two statements in English – in which he “was functionally illiterate.” Despite all this, none of which the prosecution disputed, it insisted on a retrial. To avert potential re-conviction despite his innocence, Velez pleaded guilty to reckless injury to a child. So, while released on time served, he has a criminal record.²²³

vi and vii. Henry Lee McCollum and Leon Brown

Henry Lee McCollum, who had spent 30 years on death row, and his half-brother Leon Brown, who had initially been sentenced to death and was serving a life sentence, were declared innocent and ordered released by a Superior Court judge on September 2, 2014. The mentally disabled inmates, who had always said their “confessions” had been

²²¹ John Caniglia, “My battle has come to an end!” Judge throws out the 1975 murder conviction of Ronnie Bridgeman, CLEVELAND PLAIN DEALER, Dec. 9, 2014.

²²² Kim Palmer, Reuters, *Ohio man exonerated after 39 years in prison*, Nov. 19, 2014, available at <http://www.reuters.com/article/2014/11/19/us-usa-ohio-exoneration-idUSKCN0J32IL20141119>; Mark Gillispie, Associated Press, *Judge dismisses two men charged in 1975 slaying*, Nov. 21, 2014, available at <http://www.ohio.com/news/break-news/judge-dismisses-two-men-charged-in-1975-slaying-1.543007?localLinksEnabled=false>.

²²³ Ed Pilkington, *Texas releases death row inmate Manuel Velez after wrongful conviction*, GUARDIAN, Oct. 8, 2014.

coerced, secured relief when the prosecution case, “always weak, fell apart after DNA evidence implicated another man whose possible involvement had been somehow overlooked by the authorities even though he lived only a block from where the victim’s body was found, and he had admitted to committing a similar rape and murder around the same time.”²²⁴

In 1994, Justice Antonin Scalia, criticizing Justice Harry Blackmun for using Bruce Edwin Callins’ case as “the vehicle” for stating that the capital punishment is always unconstitutional, said Blackmun’s position would seem far weaker had he instead articulated his views in the context of McCollum’s then-pending case. Justice Scalia said the case involved an “11-year-old girl raped by four men and then killed by stuffing her panties down her throat. *See* McCollum v. North Carolina, cert. pending, No. 93–7200. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within ‘the Court’s Eighth Amendment jurisprudence’ should not prevent them.”²²⁵ So, Justice Scalia justified executing McCollum to avenge a crime of which we now know he was innocent.

viii. Carl Dausch

On June 12, 2014, the Florida Supreme Court ordered death row inmate Carl Dausch’s acquittal because “our comprehensive review [leads to] the inescapable conclusion that the evidence is insufficient to conclude, beyond a reasonable doubt, that Dausch was the person responsible” for the murder; the evidence at most “creates a suspicion of guilt.”²²⁶ Dausch had been convicted and death-sentenced in 2011 and 2012 for a murder and battery that had occurred in 1987.²²⁷

ix. 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 prosecution’s motion to vacate his conviction for the 1983 murder of Isadore Rozeman. Evidence had emerged supporting Ford’s consistent assertion that he was neither present nor otherwise involved in Rozeman’s killing.²²⁸

Ford was convicted by an all-white jury in 1984. His court-appointed trial lawyers had never previously tried a murder case.²²⁹ He was “one of the longest-serving death row inmates in modern American history to be exonerated and released.” Andrew Cohen, writing in *The Atlantic*, pointed to how often Ford’s constitutional rights were denied, “how determined Louisiana’s judges were over decades to defend an indefensible result” and that he had ineffective counsel well into the appellate process. Cohen noted that the very first

²²⁴ Jonathan M. Katz and Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES, Sept. 3, 2014.

²²⁵ Callins v. Collins, 510 U.S. 1141, 1142-43 (1994) (mem.) (Scalia, J., concurring in denial of certiorari).

²²⁶ Dausch v. Florida, 141 So. 3d 513, 519 (Fla. 2014) (per curiam).

²²⁷ *Id.* at 514.

²²⁸ 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>.

²²⁹ *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/>.

court to review the case, the Louisiana Supreme Court, said it had ‘serious questions’ about the result.” Yet, no court ever reversed and ordered a new trial even though “[a]ll through the years, in both explicit and implicit ways, the Louisiana appellate courts had [continued to indicate] their unease with the results of Ford’s trial.”²³⁰

Ford “got lucky” because so many hearings were held to deal with the numerous issues about trial unfairness that he remained alive long enough for evidence to be unearthed that exonerated him. Cohen observed that 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 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.”²³¹

x. 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. The Missouri Supreme Court reversed his conviction in 2011 due to the prosecution’s having improperly relied on and provided benefits to two jailhouse informants, and having withheld from the defense the fact that immediately after the stabbing guards had confiscated a sharpened screwdriver from someone else. Both of his co-defendants always said the third person involved was the man found with the screwdriver, not Griffin. On October 25, 2013, the state dropped all charges related to Griffin’s death sentence. Effectively exonerated, Griffin (who had been released from prison on bond in December 2012) was officially a free man.²³²

xi. 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 Joe D’Ambrosio’s case (see Subpart xvi below) be retried or released.²³³ 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.²³⁴ The prosecution appealed, but the Ohio Court of Appeals affirmed by a 2-1 vote on September 19, 2013. It said: “[T]he 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.”²³⁵

xii. Seth Penalver

On December 21, 2012, a jury found Seth Penalver not guilty of three 1994 murders, armed robbery, and armed burglary. That was his third trial, the first having ended in a

²³⁰ Andrew Cohen, *Freedom After 30 Years on Death Row*, ATLANTIC, Mar. 11, 2014.

²³¹ *Id.*

²³² 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>.

²³³ *Keenan v. Bagley*, No. 1:01 CV 2139, 2012 WL 1424751 (N.D. Ohio Apr. 24, 2012).

²³⁴ 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-keen-an-freed-ohio-death-row-inmate-savors-pizza-reunions/.

²³⁵ *State v. Keenan*, 998 N.E.2d 837, 847 (Ohio Ct. App. 2013), *appeal allowed*, 3 N.E.3d 1215 (Ohio 2014).

hung jury and the second, in 1999, having resulted in his being convicted and sentenced to death.²³⁶ In 2006, the Florida Supreme Court vacated his conviction and ordered the third trial, due to “the scant evidence connecting Penalver to this murder,” “improperly admitted evidence and the State’s suggestion [at the second trial] that the defense tampered with or suborned perjury by an identification witness.”²³⁷ After the acquittal, defense counsel noted the newly available evidence that a government investigator had caused an informant to receive a Crimestoppers award. Penalver had been in custody for 18 years.²³⁸

xiii. Erskine Leroy Johnson

On June 1, 2012, Erskine Leroy Johnson was freed under a “best-interests plea,” whereby he pleaded guilty to second-degree murder in return for being released immediately. He had served almost 27 years, including 19 under death sentence. A prosecutor said prison personnel had called him “an exemplary prisoner” and that the parole board had ordered his release for later in June.²³⁹

On December 9, 2011, the Tennessee Court of Criminal Appeals had remanded for a new trial because of error regarding newly discovered facts 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.²⁴⁰

xiv. Larry Smith

On April 6, 2012, former Alabama death row inmate Larry Smith was freed under an agreement similar to Johnson’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 by physical evidence or any eyewitness. Pro bono counsel from Covington & Burling proved (a) defense counsel’s investigation was woefully incomplete, (b) Smith’s “confession” had been coerced, and (c) the testimony of the “informant” who had first led the police to think Smith committed the crime lacked credibility.²⁴¹ Based on this evidence, the Alabama Circuit Court in 2007 ordered a retrial. After years of unsuccessful prosecution appeal,²⁴² the parties entered into a plea agreement on the eve of the retrial. Smith was released after pleading guilty to conspiracy to commit robbery, and the murder charges against him were dismissed.

²³⁶ Rafael Olmeda, *Jury finds Penalver not guilty in Casey’s Nickelodeon triple murder case*, SUN-SENTINEL, Dec. 21, 2012.

²³⁷ Penalver v. State, 926 So. 2d 1118, 1138 (Fla. 2006) (per curiam) (corrected opinion).

²³⁸ Olmeda, *supra* note 236.

²³⁹ Lawrence Buser, *Memphis man released after 27 years in prison*, COM. APPEAL, June 2, 2012.

²⁴⁰ Johnson v. State, 370 S.W.3d 694, 697, 703-04 (Tenn. Crim. App. 2011). Twelve years earlier, the same appeals court, although affirming Johnson’s conviction, remanded 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 “the victim was carrying a gun” arguably led to misapplication of an aggravating circumstance. After that the Tennessee Supreme Court’s affirmance, the prosecution did not again seek capital punishment, and Johnson was sentenced to life imprisonment. *Id.* at 697.

²⁴¹ Covington & Burling, Press Release, *Covington Secures Release of Death Row Inmate*, Apr. 12, 2012, available at <http://www.deathpenaltyinfo.org/documents/LarrySmithPressRelease.pdf>.

²⁴² 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).

xv. Edward Lee Elmore

Edward Lee Elmore's death sentence was vacated in 2010 due to his having mental retardation. The State said it would not seek to reinstate the sentence. In 2011, the Fourth Circuit said, "[W]e recognize that there are grave questions about whether it really was Elmore who murdered Mrs. Edwards," and held he should get habeas relief "premised on his trial lawyers' blind acceptance of the State's forensic evidence."²⁴³ The prosecution could have sought conviction at a new trial. But on March 2, 2012, "his 11,000th day in jail," Elmore was freed under an agreement in which he "denied any involvement in the crime but pleaded guilty"²⁴⁴

xvi. Joe D'Ambrosio

On January 23, 2012, former Ohio death row inmate Joe D'Ambrosio's exoneration effectively became final, when the State's certiorari petition was denied. He 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 his constitutional rights by withholding 10 pieces of possibly exonerating evidence. In 2010, U.S. District Judge Kate O'Malley ordered that he not be retried, in light of a crucial witness' death – an order that the Sixth Circuit affirmed in 2011.²⁴⁵

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

i. Daniel Dougherty

In 2000, Daniel Dougherty was convicted and sentenced to death for purportedly causing the 1985 fire that killed two children. His lawyer did nothing to challenge an assistant fire marshal's testimony that arson caused the fire – despite developments by 2000 concerning fires' causes. In 2012, the prosecution agreed to changing the sentence to life due to defense counsel's omissions. In 2014, the Pennsylvania Superior Court ordered retrial because "no reliable adjudication of guilt or innocence took place." On October 2, 2014, the state Supreme Court denied the State's effort to be allowed to appeal. If the Philadelphia District Attorney proceeds with a retrial, the defense has two experts prepared to testify that there is no support for concluding that arson occurred.²⁴⁶

ii. Thomas Arthur

Andrew Cohen wrote in 2012 about Alabama death row inmate Thomas Arthur, who had been convicted and sentenced to death for a murder that took place 30 years before. Cohen noted many similarities between the problems with Arthur's case and those with

²⁴³ Elmore v. Ozmint, 661 F.3d 783, 786 (4th Cir. 2011).

²⁴⁴ Raymond Bonner, Opinion, *When Innocence Isn't Enough*, N.Y. TIMES, Mar. 4, 2012. Mr. Bonner wrote ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG (2012), concerning this case.

²⁴⁵ Pat Galbincea, *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)); 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/exoneration/page/4/>.

²⁴⁶ Jeff Gammage, *Advances in fire science cast doubt on arson-murder cases*, Oct. 9, 2014, http://articles.philly.com/2014-10-09/news/54790439_1_thomas-ciccone-david-fryman-arson.

Tyrone Noling's case (see Subpart iv below). He said Arthur was "one of the few prisoners in the DNA-testing era to be this close to capital punishment after someone else confessed under oath to the crime."²⁴⁷

Cohen stressed that the prosecution had based its whole case on the testimony of the victim's wife. She had been convicted of the murder and sentenced to life for having hired someone to kill her husband. Years later, she agreed to the prosecution's recommending her early release in return for her altering her original testimony and implicating Arthur. Her revised testimony led to his third conviction – the first two having been reversed. Then, in 2008, Bobby Ray Gilbert confessed under oath to having committed the killing. He had, at the time of the killing, started an affair with the victim's wife. He said he finally came forward because of a Supreme Court holding precluding the death penalty for someone under age 18 at the time of the crime (as Gilbert had been). Thereafter, though, Gilbert "took the Fifth Amendment" at a hearing. Arthur's counsel said this resulted from Gilbert's being punished by prison officials after admitting to the murder. The State took a different view, and the victim's wife said Gilbert's confession was false. The trial judge then ruled against Arthur.²⁴⁸

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 had 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 offered 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.²⁴⁹ On January 6, 2014, the Eleventh Circuit held, on procedural grounds, that Mr. Arthur had not shown an "extraordinary circumstance" permitting him to seek federal court relief again.²⁵⁰ After U.S. District Judge W. Keith Watkins stayed Arthur's February 19, 2015 execution date, Alabama appealed on January 22, 2015 to the Eleventh Circuit.²⁵¹

iii. 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 Virginia's death row for allegedly leading a conspiracy to kill his marijuana supplier. Judge Jackson held that Virginia prosecutors had violated due process by permitting false testimony connecting Wolfe to the slaying, not revealing evidence that others may have wished the victim killed and had conspired to have him killed, and the recanting of a crucial prosecution witness' testimony. Judge Jackson said that the prosecution's actions were "abhorrent to the judicial process." He also held that a potential juror had been erroneously disqualified, in violation of the Sixth Amendment.²⁵² The Fourth Circuit affirmed.

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

²⁴⁷ Andrew Cohen, *Another Death Row Debacle: The Case Against Thomas Arthur*, ATLANTIC, Feb. 27, 2012.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Arthur v. Thomas*, 739 F.3d 611 (11th Cir.), *cert. denied*, 135 S. Ct. 106 (2014).

²⁵¹ Kim Chandler, *Alabama asks federal appeals court to allow Arthur Execution*, WASH. TIMES, Jan. 22, 2015.

²⁵² *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.

within 10 days.²⁵³ 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.²⁵⁴ Certiorari was denied in February 2014.

There has still not been a new trial, but prosecutors have brought new charges, including much stiffer drug conspiracy charges under a novel theory. If convicted, Wolfe would face mandatory life in prison. As of late November 2014, the retrial was to occur in the summer of 2015. Commenting on all this, Dahlia Lithwick said Wolfe was still imprisoned "[b]ecause the commonwealth of Virginia can indict him for whatever it wants, and prosecutors seemingly face no consequences for doing so. ... Prosecutors made it impossible for Wolfe to have a fair trial. They have pushed forward with another trial, on even more attenuated charges, because to do anything less would be to admit defeat. The paradox here is that the inability to admit error in the face of the truth is precisely what got them into this mess. And so Justin Wolfe sits in prison. It's been 13 years."²⁵⁵

iv. Tyrone Noling

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

Cohen was very troubled by, among many other things, the prosecution's preventing DNA testing of a cigarette butt that could be tied to Daniel Wilson, whom Noling's lawyers say was the real murderer. Wilson was executed for a murder committed a year after the murders at issue. Previously, he had attacked an elderly man in the man's home. In 2009, prosecutors very belatedly produced handwritten police notes from 1990 in which Wilson's foster brother apparently identified his "brother" as the murderer in *this* case.²⁵⁶

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.²⁵⁷ 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 compared to genetic profiles of criminals in the lab's database.²⁵⁸

²⁵³ Justin Jouvenal, *Federal Judge Bars Retrial in Prince William Murder Case*, WASH. POST, Dec. 26, 2012.

²⁵⁴ Wolfe v. Clarke, 718 F.3d 277 (4th Cir. 2013), cert. denied, 134 S. Ct. 1281 (2014).

²⁵⁵ Dahlia Lithwick, *Why Is Justin Wolfe Still In Prison?*, SLATE MAG., Nov. 15, 2014, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/justin_wolfe_case_his_murder_conviction_was_vacated_three_years_ago_so_why.html.

²⁵⁶ Andrew Cohen, *Is Ohio Keeping Another Innocent Man on Death Row?*, ATLANTIC, Jan. 31, 2012.

²⁵⁷ State v. Noling, 992 N.E.2d 1095 (Ohio 2013).

²⁵⁸ Ed Meyer, *Death row inmate Noling wins new DNA tests of cigarette evidence in 1990 double murder*, BEACON JOURNAL (Ohio), Dec. 19, 2013.

Then, on March 31, 2014, the Ohio Court of Appeals remanded for further consideration an order from 2011 in which a Portage County judge had denied Noling leave to file a motion for a new trial.²⁵⁹

v. *James Dennis*

On August 21, 2013, Senior U.S. 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.²⁶⁰ Judge Brody said Philadelphia police and prosecutors had either overlooked, lost, or “covered up” evidence of Dennis’ innocence – including a sworn statement from another inmate three weeks prior to Dennis’ arrest saying that a cousin had admitted to committing the crime. Judge Brody stated that some of the government’s misconduct and errors could have been rectified contemporaneously 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 the judge had been taken in by “slanted factual allegations” and a false “newly concocted alibi defense.”²⁶¹ The state filed an appeal with the Third Circuit.

vi. *Kevin Cooper*

There is substantial doubt about the guilt of California death row inmate Kevin Cooper. In 2009, Judge William A. Fletcher, in dissenting, said Cooper could be innocent. He stressed the government’s failure to disclose some evidence and tampering with other evidence.²⁶² In December 2010, Professor Alan Dershowitz and David Rivkin Jr. (who served in the Justice Department and White House Counsel’s Office under two Republican Presidents) said in an op-ed that although they differed about the death penalty, they agreed that “too many of the facts allegedly linking Cooper to the murders just don’t add up.” These included a statement that the perpetrators were white (Cooper is black), law enforcement’s “blatantly mishandl[ing]” crucial “evidence pointing to other” possible killers and the strong possibility that the state’s chief forensic witness: falsified evidence.²⁶³

vii. *People On Death Row Whose Cases May Have Been Tainted By FBI or FBI-related Forensic 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 in May 2013 to a last-hour stay of Mississippi’s execution of William Jerome Manning.²⁶⁴

This review was announced in July 2012 by the FBI and the Justice Department, after the *Washington Post* revealed that “authorities had known for years that flawed

²⁵⁹ State v. Noling, 2014-Ohio-1339 (Ohio Ct. App. Mar. 31, 2014).

²⁶⁰ Dennis v. Wetzel, 966 F. Supp. 2d 489 (E.D. Pa. 2013).

²⁶¹ John P. Martin, *Citing ‘miscarriage of justice,’ judge overturns murder conviction*, PHILA. INQUIRER, Aug. 23, 2013.

²⁶² 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.

²⁶³ Alan M. Dershowitz and David B. Rivkin Jr., *Op-Ed., A time for clemency*, L.A. TIMES, Dec. 1, 2010.

²⁶⁴ Spencer S. Hsu, *U.S. reviewing 27 death penalty convictions for FBI forensic testimony errors*, WASH. POST, July 17, 2013.

forensic work by FBI hair examiners may have led to convictions of potentially innocent people, but ... had not aggressively investigated problems or notified defendants.” For decades, including long after the FBI Laboratory stated internally in the 1970s that hair association could not yield positive identifications, “some FBI experts exaggerated the significance of ‘matches’ draw from microscopic analysis of hair found at crime scenes.” The 2012 announcement led many state and local labs to do similar reviews, in part because while the FBI had had 27 hair examiners, “about 500 people attended one-week hair comparison classes given by FBI examiners between 1979 and 2009” – nearly all “from state and local labs.”²⁶⁵

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 it was not yet known “how many of the cases involve errors, how many led to wrongful convictions or how many mistakes may now jeopardize valid convictions.” A month earlier, the Justice Department reached an agreement with the Innocence Project and the NACDL under which the Department would notify prosecutors, convicts, or their attorneys if either an internal review panel or the two outside groups determined 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 Department agreed to help affected prisoners in highly unusual ways, such as waiving time-bars and other court door-closing provisions of the AEDPA, and by the FBI’s testing DNA evidence at a judge or prosecutor’s request.²⁶⁶

In July 2014, the Justice Department’s Inspector General’s office issued an assessment of a departmental Task Force’s review, initiated in 1996, of the FBI’s crime lab. That review was not limited to hair examiners. In April 1997, the Inspector General’s office criticized 13 FBI crime lab examiners for having used scientifically unsupportable analysis and providing overstated testimony. But despite the Task Force’s existence, the FBI then took five years to identify the 64 people sentenced to death after involvement (not necessarily material) by at least one of the 13 examiners. The Department then failed to notify state authorities, who thus “had no basis to consider delaying scheduled executions.” Benjamin H. Boyle was executed based on material but scientifically unsupportable, and overstated and inaccurate “expert” testimony after the April 1997 report’s publication but before the Task Force focused on it. “In all, the Task Force referred only 8 of the 64 death penalty cases involving the criticized examiners for review by an independent scientist ... and ... the independent scientists’ reports were forwarded to [defense counsel] in only two cases.”²⁶⁷

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

i. Troy Davis

Georgia’s execution of Troy Davis on September 21, 2011 was the most controversial execution in the United States in many years.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, AN ASSESSMENT OF THE 1996 DEPARTMENT OF JUSTICE TASK FORCE REVIEW OF THE FBI LABORATORY, at i-ii (2014), available at <http://www.justice.gov/oig/reports/2014/e1404.pdf>.

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 Georgia federal district court, instructing it to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence."²⁶⁸ The district judge found that Davis had not met that very great burden.²⁶⁹ He also questioned the credibility of several witnesses who had, in whole or part, recanted trial testimony before the hearing.²⁷⁰

ii. Cameron T. Willingham

There is still-growing controversy over Texas' 2004 execution of Cameron T. Willingham for arson/murder. As revealed in 2009, Governor Rick Perry failed in 2004 to grant a 30-day reprieve despite receiving material from a renowned arson expert (retained by Willingham's counsel) who found major problems with the prosecution's trial evidence about arson. It was unclear whether Governor Perry had reviewed that material. In September 2009, shortly before the State Forensic Science Commission was to hold hearings at which its arson expert, Craig L. Beyler, was to testify, Governor Perry replaced the Commission's chair and two other members, and the hearings were cancelled.²⁷¹ 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. His report said the state Fire Marshal's findings "are nothing more than a collection of personal beliefs that have nothing to do with science-based fire investigation."²⁷²

The Commission's new chair John Bradley tried to have the Commission close the case and conclude there had been no professional misconduct. But other Commission members disagreed. After lengthy delay, the Commission held a special hearing on January 7, 2011, at which it heard from several arson experts, including Beyler (who then chaired 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," stated, "Everything that was documented post-fire was consistent with accidental rather than intentional fire. There was no basis for concluding that this was arson."²⁷³ After the State Senate chose not to confirm Bradley's nomination to continue as chair, Texas Attorney General Greg Abbott ruled in July 2011 that the Commission was not entitled to investigate evidence collected or tested prior to 2005.²⁷⁴ So, on October 28, 2011, it closed its investigation. But the October 2011 addendum to its report recognized that unreliable science about fires had played a role in Willingham's conviction. The Commission found

²⁶⁸ *In re Davis*, 130 S. Ct. 1, 1 (2009) (mem.).

²⁶⁹ 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/>.

²⁷⁰ *In re Davis*, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

²⁷¹ James C. McKinley, Jr., *Controversy Builds in Texas Over an Execution*, N.Y. TIMES, Oct. 20, 2009.

²⁷² Steve Mills, *Cameron Todd Willingham case: Expert Says Fire for Which Father Was Executed Was Not Arson*, CHICAGO TRIB., August 25, 2009.

²⁷³ 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.

²⁷⁴ Claire Cardona, *Forensic Science Panel Recommends Arson Probe*, TEX. TRIB., Oct. 28, 2011.

that arson investigators who testified for Willingham's trial prosecutors had relied on what were then common beliefs that by 2011 were generally recognized to be incorrect.²⁷⁵

On September 23, 2013, the Innocence Project, plus an exoneree and several Willingham relatives, asked Governor Perry to open an investigation into whether Willingham should be pardoned – in light of (in addition to everything else) “new evidence that the prosecutor in the case paid favors to” Johnny Webb, the jailhouse informant who gave key testimony that Willingham had confessed to him.²⁷⁶ Later, 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 this to the Board of Pardons and Paroles. At this point, a pardon can only be granted by Governor Greg Abbott (the former Attorney General).²⁷⁷

On July 25, 2014, the Innocence Project, on behalf of Willingham's survivors, filed a grievance against trial prosecutor John H. Jackson with the State Bar of Texas. It is based on Jackson's alleged nondisclosure of the alleged deal with Johnny Webb concerning Willingham's supposed confession. That purported confession played a major role at trial (where Webb was the first witness Jackson called to testify). The grievance relies on extensive supporting documentary evidence indicating that Jackson got county clerks to conceal Webb's First Degree robbery conviction from the correction department (thereby enabling his early parole), took steps to ease Webb's prison time and to facilitate his early parole, got a millionaire businessman to help Webb financially in various ways, acted as both a prosecutor and a judge to avoid public access to documents evidencing his deal with Webb and Webb's threats to recant his testimony, and in 2004, in opposing a motion to stay Willingham's execution, and denied that Webb got anything for his testimony.²⁷⁸

iii. Three North Carolina Cases

In 2010, former FBI agents completed an audit of North Carolina's State Bureau of Investigation (the “SBI”) requested by state Attorney General Roy Cooper. It found that SBI agents repeatedly helped prosecutors secure convictions, and that sometimes “information that may have been material and even favorable to the defense of an accused defendant was withheld or misrepresented.” The former agents recommended that 190 criminal cases in which SBI reports were, at best, incomplete be thoroughly reviewed. These included three cases where 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 said that even where defendants confessed (as all three executed people had done) or pleaded guilty, tainted SBI reports may have helped secure confessions or guilty pleas.²⁷⁹

²⁷⁵ Chuck Lindell, *Willingham inquiry ends, but effects linger*, AUSTIN AMERICAN-STATESMAN, Oct. 28, 2011.

²⁷⁶ 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/>.

²⁷⁷ John Schwartz, *Evidence of Concealed Jailhouse Deal Raises Questions About a Texas Execution*, N.Y. TIMES, Feb. 28, 2014.

²⁷⁸ Maurice Possley, *Fresh doubts over a Texas execution*, WASH. POST, Aug. 3, 2014.

²⁷⁹ Associated Press, *Outside Review Finds Flaws in 190 SBI Prosecutions*, Aug. 19, 2010, available at <http://www.wral.com/news/state/story/8153666/>.

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 whether the crime was premeditated or impulsive. The second man, Desmond Carter (executed on December 10, 2002) was represented by inexperienced counsel who assumed the SBI lab evidence was accurate. Counsel for the third man, Joseph Timothy Keel (executed on November 7, 2003), began considering the impact the undisclosed evidence might have had, but said, “[T]here are no do-overs with the death penalty. We can’t go back and fix these errors.”²⁸⁰

iv. Claude Jones

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

The technology to do proper DNA testing did not exist at the time of Jones’ trial. Before his execution, he unsuccessfully asked the Texas courts and Governor George W. Bush for a stay for DNA hair testing. The Governor’s office’s lawyers never told Governor Bush of the request or that such testing might tend to exonerate Jones. Bush had stayed another execution to permit DNA testing.²⁸¹

The 2010 testing showed the hair was from the victim. The Innocence Project’s Barry Scheck said this proved that the hair sample testimony “on which this entire case rests was just wrong Unreliable forensic science and a completely inadequate post-conviction review process cost Claude Jones his life.” The *Texas Observer* said this was “a highly questionable execution – a case that may not have resulted in a conviction were it tried with modern forensic science.”²⁸²

v. Benjamin Herbert Boyle

As noted in Part I.B.5.c.vii above, the Justice Department’s Inspector General’s office reported in July 2014 that Texas had executed Benjamin Herbert Boyle in 1997 *after* the Inspector General’s office concluded that his conviction was based in substantial part on significant but scientifically baseless “expert” testimony.

vi. Carlos DeLuna

The May 2012 *Columbia Human Rights Law Review* includes a lengthy article (later expanded into a book) concluding that Texas executed Carlos DeLuna in 1989 for a murder actually committed by Carlos Hernandez.²⁸³ The authors determined, after a five-year

²⁸⁰ Joseph Neff and Mandy Locke, *For Executed Men, Audit’s Too Late*, NEWS & OBSERVER, Aug. 19, 2010.

²⁸¹ Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEX. OBSERVER, Nov. 11, 2010.

²⁸² *Id.*

²⁸³ 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);

investigation, that DeLuna had been executed solely based on contradictory eyewitness accounts that mistakenly identified him, whereas the witnesses had actually seen his “spitting image,” Hernandez. The authors said law enforcement’s investigation was extremely inadequate and fatally flawed by many overt mistakes plus numerous omissions, including failures to follow up on clues. And DeLuna’s court-appointed lawyer was so inept that he said it was likely that no one named Hernandez was involved. The lead prosecutor told the jury that Hernandez was a “phantom” made up by DeLuna. Yet, Hernandez existed, had a history of using a knife in attacking people and was once jailed for killing a woman using the same knife as in the killing for which DeLuna was executed.²⁸⁴

Andrew Cohen said in *The Atlantic*: “[T]his intense piece establishes beyond any reasonable doubt” that Texas executed Carlos DeLuna “for a murder” committed by Carlos Hernandez. He noted that in investigating a 2006 series about this case *Chicago Tribune* reporters found five people to whom Hernandez had admitted killing both (a) the victim for whose killing DeLuna had been executed and (b) another woman four years earlier for which Hernandez had been indicted but not tried. One of the reporters told Cohen that whereas the crime scene photos showed tremendous amounts of blood, DeLuna, when arrested nearby soon after the crime, had no blood on him. DeLuna’s fingerprints were not found at the crime scene, and when arrested he did not have on him the victim’s hair or fibers. Cohen noted that “the only eyewitness to the crime” itself had “identified DeLuna” when he “was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene.” Cohen said the case involved “epic malfeasance and misfeasance.”²⁸⁵

6. *Problems of the Capital Punishment System (Beyond Those Already Discussed) Illustrated by Innocence Cases*

a. *Extraordinarily High Burden on a Death Row Inmate to Disprove Guilt or Prove Ineligibility for the Death Penalty, If Evidence Emerges Belatedly*

One systemic factor involves situations in which a death row inmate receives inadequate representation from trial lawyers who do not raise available attacks on the evidence purporting to show guilt, and/or the trial prosecution presents questionable evidence or withholds from the defense evidence that might cast doubt on guilt. Ordinarily, such issues would be raised first in the initial state postconviction proceeding. Federal constitutional issues raised unsuccessfully in that proceeding may be raised in federal habeas corpus, although the AEDPA has made it far more difficult to grant relief on meritorious constitutional claims.²⁸⁶

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

JAMES S. LIEBMAN AND THE COLUMBIA DELUNA PROJECT, *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* (2014).

²⁸⁴ 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.37ab293d08346aa6f7c1d1bfbd5758f.491>.

²⁸⁵ Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, ATLANTIC, May 14, 2012.

²⁸⁶ Pub. L. No. 104-132, 110 Stat. 1214.

what can be presented, and a contorted legal standard for granting relief, in second or later federal habeas proceedings.

Even when the newly developed evidence creates a real question about the defendant's guilt, the federal courts' doors are usually effectively closed to second or later habeas proceedings. The AEDPA has a very narrow exception, involving situations in which the factual basis for a federal constitutional claim could not have been discovered before through due diligence *and* the facts on which the claim is based, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."²⁸⁷ And when the issue is whether constitutional prerequisites to imposing the death penalty all exist, the appellate rulings to date hold that even meeting the daunting AEDPA standard is of no avail.

When it proves impossible either to satisfy that provision of the AEDPA or a court finds the provision inapplicable, a prisoner may attempt to secure relief by filing a petition to the Supreme Court for an original writ of habeas corpus. That is far more difficult – as in *Davis*, where the Court required "evidence that could not have been obtained at the time of trial [to] clearly establish[] ... innocence."²⁸⁸ That standard could virtually never be met. Undoubtedly, many people who would not have been convicted if the new evidence had been presented at trial will not be able "clearly" to prove their innocence via evidence that could not have been secured at the time of trial. It is unclear whether the Court would ever apply even this high standard to a claim of "innocence of the death penalty" – such as if evidence that could not have been obtained for trial clearly establishes intellectual disability.

b. Fallibility of Eyewitness "Identifications" and "Confessions"

i. Eyewitness Errors: The Single Largest Cause of Wrongful Convictions

There is increasing 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. So, it cannot exonerate people in whose cases such evidence does not exist. There is no reason to believe that the problems causing the convictions of people whom DNA has exonerated exist only in the small minority of cases in which DNA evidence is available, and every reason to believe that these problems exist in cases in which DNA is not available. Thus, these analyses raise great concern about basing convictions – and, in particular, executions – on the types of evidence, like eyewitness identifications, so frequently responsible for convicting innocent people.

The Innocence Project 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 72% of convictions overturned through DNA testing. While eyewitness testimony can be persuasive evidence before a judge or jury,

²⁸⁷ 28 U.S.C. § 2244(b)(2)(B)(ii).

²⁸⁸ *In re Davis*, 130 S. Ct. 1, 1 (2009) (mem.).

30 years of strong social science research has proven that eyewitness identification is often unreliable.”²⁸⁹

Eyewitnesses can be honestly incorrect, without any effort to affect their testimony. Indeed, “[i]n one experiment, each ‘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.”²⁹⁰

Such errors can occur even when the witness is very confident. For example, rape victim Jennifer Thompson intensely studied and noted “every single detail on [her] rapist’s face” so she could identify him. Yet, the man she repeatedly identified was innocent. DNA later exonerated him and implicated the real perpetrator.²⁹¹ Often, 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 2011, the New Jersey Supreme Court unanimously issued guidelines for assessing eyewitness identifications during lineups if the defense presents a basis for challenging the identifications.²⁹² The *New York Times*, discussing the decision, said that over 2,000 scientific studies had demonstrated problems with witness accounts, and DNA had led to exonerations of at least 190 people whose wrongful convictions involved mistaken identifications. Studies suggest that about 1/3 of the 75,000 witness identifications each year are incorrect.²⁹³

In 2012, the New Jersey Supreme Court adopted a rule with instructions to be given to jurors before they begin criminal case deliberations, 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 points out that “memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.” New Jersey also requires law enforcement officers to make a detailed record of how an identification took place.²⁹⁴

ii. False Confessions by Innocent People

In a study published in 2010, Professor Brandon L. Garrett of the University of Virginia School of Law analyzed more than 40 cases since 1976 in which people had confessed to crimes that DNA evidence subsequently proved they did not commit. He found that during interrogations, police – intentionally or not – had provided important case facts

²⁸⁹ The Innocence Project, Understand the Causes: Eyewitness Misidentification, *available at* <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Feb. 4, 2015).

²⁹⁰ Steve Chapman, Op-Ed., *Injustice, in plain sight: The trouble with eyewitness identification*, CHICAGO TRIB., Aug. 28, 2011.

²⁹¹ Jennifer Thompson, Op-Ed., *I Was Certain but I Was Wrong*, N.Y. TIMES, June 18, 2000.

²⁹² *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

²⁹³ Erica Goode and John Schwartz, *Police Lineups Start to Face Fact: Eyes Can Lie*, N.Y. TIMES, Aug. 29, 2011.

²⁹⁴ Benjamin Weiser, *New Jersey Court Issues Guidance for Juries About Reliability of Eyewitnesses*, N.Y. TIMES, July 20, 2012.

to people from whom they then secured “confessions.”²⁹⁵ He said that “almost all of these confessions looked uncannily reliable,” replete with details the police provided. Many of the innocent people whose cases he studied were “mentally” disabled. “Most were subjected to lengthy, high-pressure interrogations, and none had a lawyer present.”²⁹⁶

Steven A. Drizin, director of Northwestern University’s Center on Wrongful Convictions, said 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.”²⁹⁷ Among the suggestions to avoid such confessions 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 not involved in the trials.²⁹⁸

c. *Problems with Testimony by Forensic “Experts”*

As discussed in Part I.B.5.c.vii 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 or baseless “expert” testimony. In at least some of these cases, those convicted and even executed were not guilty.²⁹⁹

One area of continuing controversy not discussed in detail above is the way prosecutors have used bite marks, 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.³⁰⁰

Also among the 24 was Kennedy Brewer, sentenced to death in Mississippi. After his conviction was vacated and he was off death row awaiting retrial, DNA testing matched someone else, who confessed. The bite marks – which “forensic dentist” Dr. Michael West had testified “matched Brewer’s teeth” – “later were determined to be more likely made by crawfish and insects in water” where the victim’s body was dumped. Dr. West said in 2013 that it was not his fault that jurors found Brewer and another innocent person guilty, because he never testified they were the murderers, “only that they bit the children.”³⁰¹

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

²⁹⁵ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

²⁹⁶ 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.

²⁹⁷ Schwartz, *supra* note 296.

²⁹⁸ Shipler, *supra* note 296.

²⁹⁹ Hsu, *supra* note 264.

³⁰⁰ 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>.

³⁰¹ *Id.*

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, several “forensic dentists implicated in faulty [bite-mark] testimony connected to high-profile exonerations, remain[] on the American Board of Forensic Odontology.” 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.” Some forensic dentists began work on guidelines and a proficiency test to enable the continued use of bite-mark testimony while purportedly avoiding past problems. But the Innocence Project says bite-mark evidence is “highly prejudicial” because it seems very powerful yet “its probative value is completely unknown.”³⁰²

d. 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 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 led to the release of two death row inmates after a federal district judge found in 2006 that 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.³⁰³

But as the *Arizona Republic* reported in a four-part series in October 2013, even the modest sanctions against Miller are unusual in Arizona. It found that in capital cases, 16 of 42 prosecutorial misconduct allegations “were validated by the Arizona Supreme Court.” Yet, only “two death sentences were thrown out,” and in one of those cases the prosecutor’s conduct was deemed “overreaching” but not misconduct since the trial judge had permitted the prosecutor’s behavior.³⁰⁴ There were additional Arizona capital cases with serious prosecutorial misconduct, but they did not reach the Arizona Supreme Court because “the misconduct caused a mistrial or the prosecution offered a favorable plea agreement to avoid mistrial.”³⁰⁵

The reason for the low reversal rate where the Arizona Supreme Court found prosecutorial misconduct was that it usually held errors to be “harmless” – either because it thought the jury would have decided the same way absent misconduct or because the trial judge had given the jury a curative instruction. Of all the prosecutors found to have engaged in misconduct in capital cases, only two “were punished, one with disbarment, the other with a short suspension.” Moreover, “[s]ince 1990, six different prosecutors who were named prosecutor of the year by the Arizona Prosecuting Attorneys Advisory Committee ...

³⁰² 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.

³⁰³ 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>.

³⁰⁴ Michael Kiefer, *Prosecutorial misconduct alleged in half of capital cases*, ARIZ. REPUBLIC, Oct. 28, 2013 (corrected Nov. 25, 2013).

³⁰⁵ Michael Kiefer, *Prosecutors under scrutiny are seldom disciplined*, ARIZ. REPUBLIC, Oct. 28, 2013 (corrected Nov. 25, 2013).

were later found by appeals courts to have engaged in misconduct ... during death-penalty trials.”³⁰⁶

One reason for inaction by trial judges and for harmless error holdings on appeal was illustrated by a Maricopa County Superior Court judge 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.’”³⁰⁷

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 acquitted), “repeated the perjury.” After using an informant to get death sentences against three men (two of whose retrials have just been mentioned), Peasley falsely claimed 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 (who had prosecuted over 60 capital cases) was disbarred.³⁰⁸

The *Arizona Republic* reported that “overly aggressive prosecutors continue to have their way in the courtroom – as long as they win cases, experts say.”³⁰⁹

On December 16, 2014, the Oklahoma Supreme Court – having first learned that Arizona had suspended prosecutor Richard M. Wintory for 90 days, suspended him for two years. Heavy reliance was placed on the Arizona sanction (and Wintory’s failure to disclose it) for misleading “the defense ... , his supervisor ... , and the trial court when he failed to reveal multiple conversations with a confidential intermediary appointed for the purpose of aiding defense counsel in uncovering evidence of mitigation” in a capital murder case. His misconduct led to the filing by himself, his supervisor, and a co-worker of false affidavits in the trial court. Once his misconduct was uncovered, the prosecution withdrew its demand for the death penalty and a settlement was reached under which the defendant pleaded guilty to second-degree murder. The Oklahoma Supreme Court described Wintory as “a seasoned prosecutor” in the Arizona Attorney General’s office who long served under Oklahoma County District Attorney Bob Macy (who also supervised Robert Bradley Miller, whose discipline is discussed earlier in this section).³¹⁰

³⁰⁶ Kiefer, *Prosecutorial misconduct*, *supra* note 304.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Michael Kiefer, *Can the system curb prosecutorial abuses?*, ARIZ. REPUBLIC, Oct. 29, 2013.

³¹⁰ *State ex rel. Okla. Bar Ass’n v. Wintory*, No. SCBD-6119, 2014 OK 113 (Okla. Dec. 16, 2014).

7. *Costs of the Capital Punishment System*

The costs of the death penalty system have been playing an increasing role in the public discourse over capital punishment. The following is a summary of some recent studies.

The results of a “rigorous” seven-month Seattle University empirical analysis of Washington State’s capital punishment system were released in January 2015. After analyzing 147 aggravated first degree-murder cases filed in the state since 1997, four professors determined that a death penalty prosecution and conviction cost slightly above \$3 million per case, whereas not attempting to get death and securing a life sentence cost about \$2 million per case.³¹¹

The *Reading Eagle* published in December 2014 the result of its probably “conservative” effort to estimate of the amount Pennsylvania had spent to put its then-current number of death row inmates on death row. The analysis did not include the cost of unsuccessful efforts to seek the death penalty at trial or the costs of the many cases in which the death penalty was imposed at trial but overturned thereafter. The analysis estimated that Pennsylvania had spent over \$350 million “for a dysfunctional system that has sentenced hundreds but hasn’t executed anyone in 15 years.”³¹²

In November 2014, Nevada’s Legislative Auditor released the results of its study – commissioned by the state legislature – into the average costs of murder cases where the death penalty is sought vis-à-vis the average costs of murder cases where it is not sought. The Legislative Auditor determined that the average cost of a tried death penalty case was \$1.03 to \$1.3 million, compared to an average cost of \$775,000 where death was not sought. The Legislative Auditor pointed out that the extra expenses of death penalty trials that did not end up in a death sentence were incurred anyway, and that such cases averaged a cost of \$1.2 million. The study omitted some court and prosecution costs that could not be secured, and thus “understated” its cost estimates.³¹³

In March 2014, the Idaho Legislature’s Office of Performance Evaluations issued, at legislators’ request, an analysis of the relative costs of sentencing defendants to death vis-à-vis sentencing them to life in prison. Although “[m]ajor limitations in available cost data [precluded] ... quantifying the total financial cost of the death penalty,” the evaluations office “found other ways to provide ... meaningful information.” The analysis concluded that “[s]imply having death as a sentencing option costs money” and that cases where the death penalty is sought take longer to finish than cases where it is not sought. These results were consistent with every national and other state study the Office reviewed. The report said, “Even though every study has its own limitations, the studies we reviewed found that capital cases are more expensive than noncapital cases.”³¹⁴

³¹¹ Jennifer Sullivan, *Seeking death penalty adds \$1M to prosecution cost, study says*, SEATTLE TIMES, Jan. 7, 2015.

³¹² Nicole Brambila, Ford Turner and Mike Urban, *Capital punishment in Pennsylvania: When death means life*, READING EAGLE, Dec. 14, 2014.

³¹³ STATE OF NEVADA, PERFORMANCE AUDIT: FISCAL COSTS OF THE DEATH PENALTY, 2014, at 11, 12 (2014), available at <http://www.deathpenaltyinfo.org/documents/NevadaCosts.pdf>; Colton Lochhead, *Audit: Death penalty nearly doubles cost of Nevada murder cases*, LAS VEGAS REV.-J., Dec. 2, 2014.

³¹⁴ OFFICE OF PERFORMANCE EVALUATIONS, IDAHO LEGISLATURE, FINANCIAL COSTS OF THE DEATH PENALTY, at iii, v-vi (2014), available at <http://www.legislature.idaho.gov/ope/publications/reports/r1402.pdf>.

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 in court, and take substantially longer to resolve than non-death-prosecuted first degree murder cases that result in ... life imprisonment without parole"; (2) "the 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, "Colorado's death penalty imposes a major cost without yielding any measurable benefits."³¹⁵

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.³¹⁶

Particularly in New York, federal judges have frequently criticized federal prosecutors when they make predictably unsuccessful but costly efforts to secure federal death sentences. For example, in his 2012 book, Judge Frederic Block of the Eastern District of New York said that during Kenneth McGriff's guilt phase, he asked the prosecutors to tell the Attorney General "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. It ended up taking "the jurors less than an hour – over lunch – to do what everyone following the case believed would happen. They rejected the death penalty in favor of life imprisonment."³¹⁷ Only one federal death sentence has been imposed in New York as of February 2015.

8. *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 report said, "[R]esearch 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."³¹⁸

³¹⁵ Justin F. Marceau and Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. DENVER CRIM. L. REV. 145 (2013).

³¹⁶ Brooke Adams, *Utah's death penalty costs \$1.6M more per inmate*, SALT LAKE TRIB., Nov. 15, 2012.

³¹⁷ FREDERIC BLOCK, *DISROBED: AN INSIDE LOOK AT THE LIFE AND WORK OF A FEDERAL TRIAL JUDGE*, at 260-61, 263 (2012).

³¹⁸ 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 report, 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." Noting the "lockstep" movement of homicide rates across states and with Canada, they said the data justify a "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."³¹⁹ Columbia Law Professor Jeffrey Fagan noted in January 2014, that the committee found no difference relating to the extent of publicity about executions, the number of executions, whether there were years without executions, or other factors.³²⁰

II. SIGNIFICANT LEGAL DEVELOPMENTS

A. *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 offered in an effort to prove voluntary intoxication as a defense. The Court unanimously held the Kansas Supreme Court erred in reversing the trial court for permitting the government's rebuttal expert testimony. 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 distinguish the prior ruling as applicable only to a "mental disease or defect" and in any event not to a "temporary" condition.³²¹

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

In a unanimous *per curiam* decision, the Court held that trial counsel for Alabama death row inmate Anthony Ray Hinton had "rendered constitutionally deficient performance." 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 he realized "was not a good expert" on this crucial issue, due to his erroneous belief – which the trial judge shared – that available funding for experts was capped at \$1,000. But 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 to do so, trial counsel did not correct "the trial judge's mistaken belief that a \$1,000 limit applied" and thus did not follow up on the trial judge's "invitation to file a motion for additional funds."³²²

Instead, the trial attorney used an expert whom "the prosecutor badly discredited" in cross-examination and closing argument – due to his inexperience on the subject, his

³¹⁹ 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>.

³²⁰ 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).

³²¹ *Kansas v. Cheever*, 134 S. Ct. 596, 601-02 (2013).

³²² *Hinton v. Alabama*, 134 S. Ct. 1081, 1083, 1085, 1088 (2014) (*per curiam*).

difficulty in using the state forensic lab's microscope, his having only one eye, and his lack of expertise in firearms and toolmark identification – all of which compared negatively to the training and experience of the State's experts.

Counsel later 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 examiners at the Dallas County Crime Laboratory.” All testified they could not conclude that any bullet was fired from Hinton's revolver.³²³

The Court's holding was simply that: “[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.” The Court said it was “deficient performance” for a lawyer recognizing he needed more money to present a viable defense to fail “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.’”³²⁴

The Court emphasized that it was *not* holding that anything unconstitutional would have occurred if everything else were the same but Alabama still had a \$1,000 cap on expert expenses. The Court stressed 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.”³²⁵

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 the defense trial expert, Payne, had “said all that Hinton could have hoped for from a toolmark expert,” the Court said: “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.”³²⁶ 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.”³²⁷

³²³ *Id.* at 1085-86.

³²⁴ *Id.* at 1088-89.

³²⁵ *Id.* at 1089.

³²⁶ *Id.* at 1089-90.

³²⁷ *Id.* at 1090 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)) (citation to study omitted).

C. *White v. Woodall*, 134 S. Ct. 1697 (2014)

The Court decided that the AEDPA's deference provision precluded a federal court from granting habeas relief to a Kentucky death row inmate. He asserted that the Kentucky Supreme Court had erroneously upheld the trial judge's refusal to instruct the jury against drawing an adverse inference from his not testifying in the penalty phase. The Kentucky courts held that his guilty plea waived his entitlement to such an instruction in the penalty phase.

Writing for a 6-3 majority, Justice Scalia noted that the AEDPA's deference provision³²⁸ precludes habeas relief unless the state court decision is "objectively unreasonable" – "not merely wrong" or even "clear error" – in applying a Supreme Court holding. The Court expressed "no view" on the merits of the inmate's constitutional claim. It held that relief was precluded because "the issue was, at a minimum, not 'beyond any possibility for fairminded disagreement.'"³²⁹

The dissent, by Justice Breyer, concluded that the Kentucky Supreme Court "unreasonably failed to recognize" that read together, two prior Supreme Court holdings "compel a requested no-adverse-inference instruction at the penalty phase of a capital trial" and that the Kentucky Supreme Court made an "unreasonable *retraction* of clearly established law, not a proper failure to 'extend' it."³³⁰

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

In a 5-4 decision, the Court held that Florida unconstitutionally "create[d] an unaccepted risk that persons with intellectually disability will be executed" by foreclosing an intellectual disability determination "[i]f from test scores, a person is deemed to have an IQ above 70." Before considering "its own" judgment, the Court first took "essential instruction" from what other States had done and the Court's precedents. The Court said its key precedent, *Atkins*, had a "fundamental premise" based on "clinical definitions of intellectual disability": "IQ scores represent a range, not a fixed number ... And those clinic definitions have long included the [Standard Error of Measurement ("SEM")." Each "test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself." Someone's IQ score on a particular administration of a test may vary for many reasons, including "the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing."³³¹

Florida's rigid cutoff of an IQ of 70 was, the Court said, not only inconsistent with *Atkins*. It was also inconsistent with the practices of most States, the "vast majority" of which rejected "the strict 70 cutoff," and a "significant majority" of which considered the SEM, with a "consistency in the trend" towards considering it.³³²

The Court then exercised its independent judgment. In doing so, it considered, much to the dissenters' dismay, "the views of medical [experts]" – particularly "the medical community's diagnostic framework." The Court said, "[T]he professional community's

³²⁸ 28 U.S.C. § 2254(d).

³²⁹ *White v. Woodall*, 134 S. Ct. 1697, 1702, 1703 (2014) (citation omitted).

³³⁰ *Id.* at 1710 (Breyer, J., dissenting).

³³¹ *Hall v. Florida*, 134 S. Ct. 1986, 1990, 1995, 1999 (2014).

³³² *Id.* at 1998.

teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.” The Court agreed with the American Psychiatric Association that in ignoring the SEM and using a strict IQ cutoff of 70, Florida “goes against the unanimous professional consensus.” The Court said its “independent assessment [was] that an individual with an IQ test score ‘between 70 and 75 or lower,’ may show intellectual disability by presenting additional evidence regarding intellectual functioning.”³³³ As discussed earlier in the opinion, the additional evidence that most clinicians would consider in such circumstances would include “the defendant’s failure or inability to adapt to his social and cultural environment,” as indicated by “medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.”³³⁴

E. *Williams v. Johnson*, 134 S. Ct. 2659 (2014) (*per curiam*) (mem.)

Acting *per curiam*, the Court vacated the Ninth Circuit’s judgment and remanded for further consideration under the AEDPA’s deference standard of Williams’ claim about the discharge of the lone juror holding out against conviction.³³⁵ When the Ninth Circuit ruled against Williams’ petition after the Court reversed it for not giving sufficient AEDPA deference,³³⁶ two judges who rarely agree on habeas issues – Chief Judge Alex Kozinski and Judge Stephen Reinhardt – both expressed doubt that the Circuit had ever actually decided the deference issue.³³⁷

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

A death row inmate sought federal habeas relief based on three theories of ineffective assistance of counsel, and won in district court on two of them. When the State appealed, he argued all three theories without cross-appealing or getting a “certificate of appealability.” The Fifth Circuit reversed his victory on two theories and held it lacked jurisdiction on the third – “[i]mplicitly concluding that raising this argument required taking a cross-appeal” and a certificate of appealability.³³⁸

The Court reversed, 6-3. The majority opinion said the rules permitting an appellee who does not cross-appeal to defend a decree on the basis of anything in the record – even a basis attacking the lower courts’ reasoning – “are familiar, though this case shows that familiarity and clarity do not go hand-in-hand.”³³⁹

³³³ *Id.* at 2000. The dissent, written by Justice Alito, attacked the Court’s reliance on “positions adopted by private professional associations” – views that have changed over time and were not, the dissent said, consistent as to the extent of an SEM adjustment. It accused the Court of relying on “the evolving standards of *professional societies*.” *Id.* at 2002 (Alito, J., dissenting).

³³⁴ *Id.* at 1994 (majority opinion).

³³⁵ *Williams v. Johnson*, 134 S. Ct. 2659 (2014) (*per curiam*) (mem.).

³³⁶ *See Johnson v. Williams*, 133 S. Ct. 1088 (2013).

³³⁷ *Williams v. Johnson*, 720 F.3d 1212, 1212-14 (9th Cir. 2013) (Reinhardt and Kozinski, JJ., concurring separately), *vacated*, 134 S. Ct. 2659 (2014) (*per curiam*) (mem.).

³³⁸ *Jennings v. Stephens*, 135 S. Ct. 793, 796, 798 (2015).

³³⁹ *Id.* at 798.

G. *Christeson v. Roper*, No. 14-6873, 2015 WL 232187 (U.S. Jan. 20, 2015) (*per curiam*)

In a 7-2 *per curiam* decision, the Court held the lower federal courts erred in denying a death row inmate's request that new counsel be permitted to argue that his existing counsel's egregious failures justified equitable tolling of the statute of limitations. Mark Christeson's existing, appointed habeas counsel filed his federal habeas petition 117 days after the statute of limitations cut-off, and admittedly did not even meet with him (or apparently otherwise communicate with him) until over six weeks after the deadline. The counsel who sought to be substituted in wished to seek relief under Federal Rule of Civil Procedure 60(b) – a motion necessarily “premised on [existing counsel's] malfeasance in failing to file timely the habeas petition.” The federal district court disallowed the substitution.³⁴⁰

The Court held that the district court had failed to “adequately account for all of the factors” regarding the “interests of justice” standard articulated in *Martel v. Clair*.³⁴¹ The district court's main error was its refusal to recognize the existing counsel's glaring conflict of interest – in that the type of tolling being sought was available only where there was “serious ... attorney misconduct.” In the district court, the existing counsel called the possible equitable tolling arguments “ludicrous” and defended their conduct. Their “contentions ... were directly and concededly contrary to their client's interest, and manifestly served their own professional and reputational interests.” After rejecting the district court's other rationales, the Court said it was not “plain that any ... motion that substitute counsel might file ... would be futile ... [despite] a host of procedural obstacles.” It said Christeson should have the chance to show that the statute of limitations should have been tolled, and held that he “is entitled to the assistance of substitute counsel in doing so.”³⁴²

H. *Noteworthy Lower Court Developments*

Besides 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 were three other notable lower court opinions.

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 the death penalty violates both the U.S. 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.” He said it “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 2011.³⁴³ Almost four years later, Broom is still on death row.

On July 16, 2014, U.S. District Judge Cormac J. Carney, of the Central District of California, issued an order holding California's capital punishment system

³⁴⁰ *Christeson v. Roper*, No. 14-6873, 2015 WL 232187, at *1 (U.S. Jan. 20, 2015) (*per curiam*).

³⁴¹ 132 S. Ct. 1276 (2012).

³⁴² *Christeson*, 2015 WL 232187, at *3-5 (citations omitted).

³⁴³ *State v. Wogenstahl*, 134 Ohio St. 3d 1437, 1437-38 (2013) (O'Neill, J., dissenting).

unconstitutional. The judge said that for almost all death row inmates, “the dysfunctional administration of California’s death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay” and “has made their execution so unlikely that the death sentence ... has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.”³⁴⁴ Judge Carney added that the average 25 years of delay “are inherent in California’s dysfunctional death penalty system, not the result of individual inmates’ delay tactics, except perhaps in isolated cases.” The judge pointed out that the recommended reforms suggested in 2008 by the California Commission on the Fair Administration of Justice “and the experience of other states across the country ... demonstrate that the inordinate delay in California’s death penalty system is not reasonably necessary to protect an inmate’s life” and is mostly “attributable to California’s own system, not the inmates themselves.”³⁴⁵ The State has appealed to the Ninth Circuit. It would surprise most observers if the holding survives review in both the Ninth Circuit and (if it survives there) the Supreme Court.

On August 26, 2014, the Eleventh Circuit held procedurally defaulted a claim based on a handwritten, signed, and notarized affidavit in which a juror said eight years after sentencing: “I don’t know if [the defendant] ever killed anybody, but that nigger got just what should have happened” and “[o]nce he pled guilty, I knew I would vote for the death penalty because that’s what that nigger deserved.” In finding the claim defaulted, the Eleventh Circuit cited the juror’s assertions during the pre-trial *voir dire* in 1997 that he didn’t have racial prejudices and that it didn’t matter that the defendant was black and the victim white.³⁴⁶

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

A. *ABA President’s Opposition to Attacks on Debo Adebile 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 Adebile’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. Adebile’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. Adebile’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.”³⁴⁷ Another letter to the Committee noted that Chief Justice

³⁴⁴ Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014).

³⁴⁵ *Id.* at 1066-67.

³⁴⁶ Fults v. GDCP Warden, 764 F.3d 1311, 1315, 1316 (11th Cir. 2014).

³⁴⁷ Letter from James R. Silkenat to Senate Judiciary Committee, Jan. 13, 2014, *available at*

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014jan13_adebile_noms_1.authcheckdam.pdf.

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.³⁴⁸

On March 5, 2014, the Senate rejected Mr. Adebile'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."³⁴⁹

Commenting on this rejected nomination, three leading *pro bono* lawyers said, "Death row inmates need *pro bono* lawyers if they are to have any meaningful access to the courts Large U.S. law firms ... are particularly well positioned to take ... post-conviction appeals in death penalty cases" ³⁵⁰

B. ABA Presidents Comment on Botched Oklahoma Execution and Potential Texas Execution

After Oklahoma's botched execution of Clayton Lockett, ABA President James R. Silkenat stated on April 30, 2014 that "there appear to be abundant reasons for concern" there was a "substantial risk of pain and suffering." He said Oklahoma should not attempt another execution until after "a robust, independent investigation ... and steps are taken to prevent another occurrence of this kind."

On November 6, 2014, in light of the impending Texas execution of Scott Panetti, a severely mentally ill inmate, Silkenat's successor, ABA President William Hubbard, wrote a letter to Governor Perry urging a complete, updated evaluation of his mental condition and citing relevant ABA policies. Although the Governor denied a stay, the Fifth Circuit on December 3, 2014, issued a stay to consider such issues. Briefing in the Fifth Circuit began early in 2015.

C. ABA Amicus Briefs

As noted above, the ABA filed an *amicus* brief supporting the petitioner in *Hall v. Florida*, in which the Supreme Court held unconstitutional Florida's rigid IQ cutoff limitation in determining whether a person facing the death penalty has intellectual disability.³⁵¹

On February 4, 2014, the ABA filed an *amicus* 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

³⁴⁸ Tony Mauro, *Prominent Defenders for Nominee to Head Civil Rights Division*, LEGAL TIMES, Jan. 28, 2014.

³⁴⁹ Jonathan Weisman, *Senate Rejects Obama Nominee Linked to Abu-Jamal Case*, N.Y. TIMES, Mar. 5, 2014.

³⁵⁰ Heidi Naasko, Steven H. Schulman, and Derek S. Whitefield, *Pro Bono May Be Collateral Damage of Blocking DOJ Nominee*, LAW 360, Mar. 19, 2014.

³⁵¹ 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.

that the Eleventh Circuit should have found that Rule 60(b) relief was justified because the Court's decision in *Holland v. Florida*³⁵² was an "extraordinary circumstance" with regard to equitable tolling of the AEDPA's statute of limitations.³⁵³ The Court denied certiorari and a motion to stay execution.³⁵⁴ As noted above, Howell was executed on February 26, 2014.³⁵⁵

D. New ABA Policies

On February 9, 2015, the ABA adopted these two policies.

1. Jury Unanimity on Death Penalty and on Prerequisites for Its Imposition and Aggravating Factors

One policy states that a court should not be able to impose a death sentence unless the jury unanimously agrees upon that sentence. It further provides that the jury must unanimously agree upon the existence of all facts that are prerequisites for imposing the death penalty, and must all agree beyond a reasonable doubt regarding any aggravating factor it uses as a basis for voting for a death sentence.

Based on this policy, the ABA likely will (among other things) comment unfavorably on Florida, Alabama, and Delaware's death penalty laws. These allow a non-unanimous jury vote to suffice for a death sentence, permit a judge or a panel of judges to override a jury recommendation of life, or provide for a combination of these approaches.

2. Lethal Injection Transparency

This policy addresses the recent trend (discussed above in Part I.A.8) of states' deliberately refusing to disclose various aspects of their lethal injection processes. The ABA, having adopted this policy, maintains that a state must (a) disclose the mix of lethal injection drugs and doses it plans to use, (b) permit the media to view each execution in its entirety, (c) require that records of every execution be prepared and kept; and (d) mandate a thorough, independent investigation when an execution is prolonged or otherwise unusual.

E. 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 resentencing proceedings. Volunteer firms have also written *amicus* briefs on behalf of the ABA and other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation at the state level. As of 2012, the thousands of lawyers whom the

³⁵² 130 S. Ct. 2549 (2010).

³⁵³ 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>.

³⁵⁴ *Howell v. Crews*, 134 S. Ct. 1376 (2014) (mem.).

³⁵⁵ Farrington, *supra* note 40.

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.³⁵⁶ The Project honors outstanding pro bono representation in capital cases at an annual event each autumn. At its September 2014 event, the guest speaker was Debo Adegbile, who after being denied confirmation as Assistant Attorney General for Civil Rights became a partner at Wilmer, Cutler, Pickering, Hale & Dorr, where he handles civil rights matters.

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 widespread implementation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Its 2003 revision of these Guidelines was approved as ABA policy in 2003 (the "ABA Guidelines"). The ABA Guidelines have now been adopted in many death penalty jurisdictions by court rule and state statute – although the extent to which they have been implemented in practice varies. They have also been widely adopted by state bar associations, indigent defense commissions, and judicial conferences.³⁵⁷ The ABA Guidelines are now the widely accepted standard of care for the capital defense effort and have been cited in more than 500 state and federal cases, including decisions by the U.S. Supreme Court.³⁵⁸ In 2014, the Ohio Joint Task Force (discussed in Part I.A.4.a above), before which the Representation Project's Director had testified, recommended that Ohio adopt and implement the revised Guidelines. (But as also discussed in that same section, the Ohio Supreme Court issued rules on February 1, 2015, that made compliance with the revised Guidelines optional.) The Representation Project has 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 Hofstra Law School symposium marking the revised Guidelines' tenth anniversary. Symposium-related articles were spread over two issues of the *Hofstra Law Review*.

³⁵⁶ 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.

³⁵⁷ See Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (updated Mar. 2014), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Implementation%20Facit%20Sheet%20March%202014.authcheckdam.pdf.

³⁵⁸ See generally American Bar Association, ABA Guidelines, available at http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html.

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.G 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 *Howell* and *Hall* (see Part III.C above).

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

1. The 12 State Assessments

From 2004-2012, 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 12 states comported with ABA policies designed to promote fairness and due process. These assessments were not intended as substitutes for comprehensive studies the ABA hopes will be undertaken during moratoriums on executions. Rather, they were intended to provide insights 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, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. Serious problems were found in every state death penalty system, although the problems were not precisely the same in each state.³⁵⁹

Even though the Review Project does not currently plan on doing assessments in additional states, its past assessments and their recommendations continue to be considered by and cited to by policymakers, the press, and other commentators on the ways in which the death penalty system operates in the evaluated states. A notable example is the Ohio Joint Task Force report (discussed in Part I.A.4.a above). The Task Force was appointed in 2011 to review Ohio's death penalty system in light of the problem identified in the ABA's 2007 Ohio assessment report,³⁶⁰ and many of the Task Force's recommendations drew upon the assessment report. Moreover, a major reason Pennsylvania's new Governor gave for his intention to have a moratorium on executions was the failure to implement the 2007 ABA assessment team's recommendations for Pennsylvania.

³⁵⁹ 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.

³⁶⁰ Chris Davey, *Death Penalty Task Force Releases Final Report*, COURT NEWS OHIO, May 21, 2014, available at http://www.courtnewsohio.gov/happening/2014/deathPenaltyTFReport_052114.asp#.VNKsiNJOXOU.

2. *Symposium and Key Findings Report from the 12 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.³⁶¹ At the symposium, the Review Project released an overview of its 12 assessment reports.³⁶²

G. *International Activities*

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 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.³⁶³ In September 2013, the ABA Death Penalty Due Process Review Project met with a group of Japanese death penalty lawyers to discuss the work done by the Due Process Review Project. The Japanese lawyers group that participated in the meeting thereafter decided to call itself the “death penalty due process group.”³⁶⁴

Maiko Tagusari, who long has been a key leader of Japanese bar efforts on the death penalty, spoke at the October 21, 2013 conference marking the tenth anniversary of the revised ABA capital punishment capital defense guidelines. Noting that after reading the revised ABA Guidelines in 2004 she 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 had not focused on capital defense in their trainings until 2010, when a working team concerning capital defense was formed. She said it has been very hard to find counsel willing to represent defendants in capital cases.³⁶⁵ She also noted that Japanese capital defense counsel historically have not contradicted any purported facts presented by the prosecutor. They have, as to penalty, merely interviewed and presented the defendant’s close relatives and begged for mercy. She said a bare majority, a 5-4 vote, suffices to impose the death penalty (if one career judge is in the majority, with lay jurors). Japan has no system permitting defense appeals of death sentences, whereas prosecutors can appeal from non-death outcomes.

³⁶¹ 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.

³⁶² 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.

³⁶³ 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 Feb. 4, 2015).

³⁶⁴ ABA Death Penalty Due Process Review Project, internal ABA planning document at 2, Nov. 21, 2013 (on file with author).

³⁶⁵ 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).

Given this history, Ms. Tagusari said the August 2013 training marked real progress. She called the ABA Death Penalty Representation Project the Japanese Federation of Bar Associations' ("JFBA") best model. She also stated that the JFBA planned to hold seminars in eight cities nationwide. In August 2014, Robin Maher, shortly before ending her great service as the ABA Death Penalty Representation Project's director, took part in a training in Japan. The next month, in September 2014, the JFBA said it was preparing national standards and would take into account the ABA's Guidelines for the Appointment and Performance of Capital Defense Counsel.³⁶⁶ Earlier that year, Ms. Maher took part in a training in Taiwan. Shortly after that April 2014 training, the Taiwanese Bar Association expressed interest in drafting its own set of counsel guidelines.³⁶⁷

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.³⁶⁸

IV. THE FUTURE

There is increasing recognition of major, systemic problems with capital punishment. In six states – most recently Maryland – this has led in recent years to abolition or discontinuation of capital punishment. Elsewhere, four Governors have ordered moratoria on executions and a joint court/bar task force has recommended fundamental reforms in Ohio.

New death sentences dropped further in 2014. If efforts to improve the quality of defense representation in capital cases succeed, there would likely be even fewer new death sentences.

Due to a variety of factors mostly relating to lethal injection including several botched legal injections, executions remained at a low level in 2014. This might change, particularly if the Court upholds Oklahoma's new lethal injection protocol. But the trend would not change if people in position to grant relief begin focusing on the fact that most of those who face execution would not be sentenced to death if their cases arose today.

There is ever greater appreciation of serious problems with the death penalty's implementation. Increasingly, death penalty implementation has been attacked by people who have served in the judiciary or law enforcement, taken part in executions, written death penalty laws, or are politically conservative. A growing number of conservatives aptly say that capital punishment is a failed, inefficient, expensive government program that accomplishes nothing.

Given all these developments, it is unsurprising that polls show much lower support for the death penalty than in the past, particularly when the actual alternative – life without parole – is included in the poll question.

³⁶⁶ *Japan bar association to create guidelines for defense counsel in death penalty cases*, MAINICHI, Sep. 13, 2014, available at <http://lists.washlaw.edu/pipermail/deathpenalty/2014-September/013179.html>.

³⁶⁷ Email from Robin Maher to author (Jan. 29, 2015) (on file with author).

³⁶⁸ ABA Death Penalty Due Process Review Project, *supra* note 364, at 2-3.

Increased attention is being paid to analyses showing that a very small number of counties are responsible for very disproportionate percentages of capital punishment prosecutions and executions. It is vital also to focus on the role that implicit bias and inadequate jury instructions play in causing disparities in capital sentencing decisions – including disparities arising from the differing ways that jurors react to mitigation evidence depending on the defendant’s race.

It has been shown repeatedly that providing competent counsel reduces drastically the number of death outcomes. This should – but is not likely to – lead to a systematic re-examination of the quality of representation received by those already on death row. Nor is much apparently going to be done in most places to deal with the reasons why so many innocent people have been sentenced to death.

Unfortunately, the Supreme Court’s 2014 decision in *White v. Woodall* about deferring to erroneous state habeas court rulings on federal constitutional issues will further encourage courts to use procedural technicalities to bar consideration of the merits of meritorious constitutional claims. And most clemency authorities will continue to hide behind the fiction that judges or juries already fully considered all facts relevant to a fair determination of whether an execution should be carried out. Usually, they will fail to act as the “fail-safes” against unfairness that clemency authorities are supposed to be.

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

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