CHAPTER 15

CAPITAL PUNISHMENT

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I. OVERVIEW

A. Recent Trends

1. New Death Sentences

The number of death penalties imposed in the United States in 2017 was an estimated 39, the lowest total in four decades except for 2016's 31. Death sentences, after peaking at 315 in 1996, declined over time to 114 in 2010, and then dropped considerably in 2011 to 85, and were 82 in 2012 and 83 in 2013, before a large drop to 73 in 2014 and a bigger drop to 49 in 2015, before falling to 2016's 31.

Two-thirds of all death sentences in 2017 reported by the Death Penalty Information Center ("DPIC") were imposed in just five states (California: 11; Arizona, Nevada, Texas: 4 each; Florida: 3), plus three states at two each, and six states and the federal government at one each.³ This was the tenth straight year in which Texas's total (four) was under a dozen – way below its peak of 48 in 1999.⁴

a. Reasons for Large Declines in Death Sentences

In analyzing why new death sentences have declined so much in recent years it is worth considering what has happened in North Carolina. The *Hickory Daily Report* attributed the plunge in that state's death sentences to cost issues (including the State Attorney General's shifting the cost of appeals to local district attorneys) and improved defense work. The state's five capital defender offices were praised for effective investigations and persuading prosecutors not to insist on a death outcome. Data at the state's Office of Indigent Defense Services showed that from 2007-2015 only 2.2% of capital prosecutions ended in death sentences and almost 60% in convictions for second-degree murder or a lesser charge. District Attorney David Learner from the 25th prosecutorial district called capital punishment "really about worthless," and added that "I wouldn't be

¹ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2017: YEAR END REPORT, at 1, 3 (2017) [hereinafter DPIC 2017 YEAR END REPORT].

² DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, at 3 (2017).

³ DEATH PENALTY INFO. CTR., DEATH SENTENCES IN 2017, at 1 (2017) [hereinafter DPIC 2017 DEATH SENTENCES].

⁴ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2015: YEAR END REPORT, at 4 (2015).

surprised if North Carolina eventually had a moratorium or completely dismantled the death penalty."⁵

A key factor affecting capital case outcomes around the country, according to Professor Brandon Garrett, is that "jurors are increasingly reluctant to impose it." This has been true where effective defense counsel have presented evidence about defendants' mental illness, childhood abuse, and other facts that some juries – but far from all – have viewed as mitigating.⁶

b. Concentration in Relatively Few Counties

Even as new death sentences remain much lower than even in the recent past, they are increasingly concentrated geographically. In 2017, more than 30% of the death sentences imposed in the United States were handed down in only three counties: Riverside, California; Clark, Nevada; and Maricopa, Arizona.⁷

i. Problems Permeating Clark County, Nevada, One of 2017's Top Three Death Sentencing Counties

In one of those counties, Clark County, Nevada, some of the convictions in death penalty cases are being overturned due to prosecutors' racial discrimination in jury selection. On December 18, 2017, *The Open File* reported that in four cases in the last four years (most recently in October 2017), convictions from that county have been overturned by the Nevada Supreme Court due to such discrimination. In three of these cases, the death penalty had been imposed.⁸

Four people were sentenced to death in Clark County in 2017 – the second highest total of any county in the country. It is one of only four counties in the country to have sentenced eight or more people to death in the last five years. And it is responsible for 14 of Nevada's 15 most recent death sentences.⁹

c. Potential for Further Drops

i. Defeats of District Attorneys in Counties Among the Most Prolific in Imposing Death Sentences

One reason to anticipate a further drop in new death sentences in the future is the defeat of several prosecutors who have been especially proficient in securing capital sentences and their replacement by people far more skeptical about seeking death sentences.

⁵ Max Seng, "It's not a game": District Attorney, Capital Defender dive into importance of negotiations, death penalty ineffectiveness, HICKORYRECORD.COM, Sept. 24, 2017.

⁶ Brandon L. Garrett, Why Jurors Are Rejecting the Death Penalty, SLATE.COM, July 11, 2017.

⁷ DPIC 2017 YEAR END REPORT, supra note 1, at 2.

⁸ NV: Clark County DA: Racially Discriminating . . . and Losing Convictions, THE OPEN FILE, Dec. 18, 2017.

⁹ Clark County, Nevada, Losing Capital Convictions Because of Prosecutors' Race Discrimination in Jury Selection, Death Penalty Info. Ctr., Dec. 22, 2017.

Jefferson County, Alabama, elected two district attorneys in different parts of the county in November 2016. From 2010-2015, more death sentences had been imposed in Jefferson County than in any other Alabama county. Two incumbent district attorneys who frequently secured death sentences were defeated by people opposed to the death penalty who said they rarely would seek to secure it. One of the new district attorneys, Charles Todd Henderson, favored reviewing existing death row inmates' cases to see if any of the inmates were innocent. The other new district attorney, former judge Lynneice Washington, is the first African-American female district attorney in Alabama history. She criticized the death penalty for operating in an "unfair and arbitrary and unbalanced" manner. Saying she would seek capital punishment only for the "worst of the worst," Ms. Washington said that "death is not going to be the automatic charge" in potentially capital cases. 11

Similarly, voters in Florida's Duval and Hillsborough Counties defeated long-time prosecutors who were prolific in securing death sentences and replaced them with people far less likely to add people to death row. In Duval County, the new state's attorney, Melissa Nelson, defeated the incumbent, Angela Corey, by a landslide. Local legal commentators said Nelson won in large part due to Corey's aggressive implementation of capital punishment. A further electoral result that likely will reduce new death sentences is the election of a new public defender, retired Judge Charlie Cofer, who replaced Matt Shirk. Shirk had fired the office's most experienced death penalty lawyers and appointed as head of homicide defense a lawyer who had been found ineffective in several cases in which his clients had been sentenced to death. In Hillsborough County, Andrew Warren, the new state's attorney, said, "[W]e are [disturbingly] an extreme outlier in such a critical area Our . . . death penalty [use] needs to be fair, consistent, and rare. [But] for many years it hasn't been." He promised to establish a unit to uncover and deal with wrongful convictions. He promised to establish a unit to uncover and deal with wrongful convictions.

In Harris County, Texas, the voters ousted the incumbent district attorney by a substantial margin in 2016. The new district attorney, Kim Ogg, said that "you will see very few death penalty prosecutions" during her tenure. There were no death sentences imposed there in 2017.

¹⁰ Kent Faulk, New Jefferson County prosecutors 'personally opposed' to death penalty, AL.COM, Nov. 15, 2016.

¹¹ Casey Tolan, The First Black Woman DA in Alabama History Wants to Shake Up the Death Penalty, VICE.COM, Dec. 5, 2016.

 $^{^{12}}$ Larry Hannan & Sebastian Kitchen, Northeast Florida voters kick controversial State Attorney Angela Corey out of office, FLA. TIMES-UNION, Aug. 31, 2016.

¹³ Andrew Pantazi, Former judge Charlie Cofer topples Public Defender Matt Shirk with three times the vote, FLA. TIMES-UNION, Aug. 31, 2016.

¹⁴ Press Release, Andrew Warren Pledges to Fix Unconstitutional Use of Death Penalty in Hillsborough, Oct. 13, 2016, http://www.voteandrewwarren.com/andrew-warren-pledges-to-fix-unconstitutional-use-of-death-penalty-in-hills.

¹⁵ Jon Herskovitz, U.S. death sentences wane, even in Texas county with most executions, Reuters, Nov. 7, 2016.

ii. New Generation of Prosecutors' Skepticism About the Death Penalty May Signal Shift in Death Penalty Policies

In other places, district attorneys who had frequently secured the death sentence left office without running to stay in office. Many of their replacements are far less enamored of, and in some cases outright opposed to, capital punishment.

For example, in Caddo Parish, Louisiana, interim district attorney Dale Cox decided against seeking a full term and was replaced by James E. Stewart, Sr. (an experienced former judge and an African American). Stewart said in late December 2016 that in his first year in office pending death penalty cases declined from six to one, while three death sentences secured by his predecessors were reversed. He has focused on screening cases rather than simply proceeding to seek the death penalty.¹⁶

Philadelphia, Pennsylvania, had a long history of district attorneys who routinely secured death sentences in cases in which judges appointed local defense counsel who were particularly ill-suited to avert the death sentence. This resulted, by 2013, in Philadelphia County's ranking third in the country in people it had prosecuted being on death row. On January 2, 2018, Philadelphia inaugurated Larry Krasner as its new district attorney. Having pledged in his campaign not to seek capital punishment, Krasner spoke in his inaugural address about "trading jails – and death row – for schools."

On July 17, 2017, the *Christian Science Monitor* wrote about a new generation of young prosecutors, "[f]rom Texas to Florida to Illinois, many [of whom] are eschewing the death penalty." However, one of them, Orlando's State's Attorney Aramis D. Ayala, was forced to rescind her policy of never seeking the death penalty, after Florida Governor Rick Scott removed her capital charging decision-making power and defeated her legal challenges to his action. ²⁰

d. Troublesome New Death Sentences in 2017

Even without knowing of problems with death sentences imposed in 2017 that will come to light only in post-conviction proceedings, DPIC concluded in its year-end report that 2017's death sentences "raise serious questions as to the arbitrariness of the process and the reliability of the results." For example, both new death sentences in Alabama involved a phenomenon that could not lawfully happen anywhere else: judges imposed death sentences where the jury did not unanimously conclude that death was the appropriate punishment. Even more egregiously, and with no apparent basis in Missouri law for doing so, a St. Charles County judge imposed the death sentence in October 2017 even though 11 of the 12 jurors had voted for life. On January 11, 2018, another Missouri

¹⁶ Victoria Shirley, Caddo DA believes perceptions of his office have improved, KSLA News 12 (Shreveport), Dec. 27, 2016.

¹⁷ Death Row Inmates by County of Sentencing, Death Penalty Info. Ctr. (data current as of Jan. 1, 2013).

¹⁸ Chris Palmer, Krasner becomes Philly DA: 'A movement was sworn in today', THE INQUIRER, Jan. 2, 2018.

¹⁹ Henry Gass, Meet a new breed of prosecutor, Christian Sci. Monitor, July 17, 2017.

²⁰ Gal Tziperman Lotan, State Attorney Ayala rescinds her death-penalty ban, ORLANDO SENTINEL, Sept. 1, 2017.

²¹ DPIC 2017 YEAR END REPORT, *supra* note 1, at 11.

judge imposed the death penalty after the jury could not reach a unanimous sentencing verdict. No Missouri jury has voted to impose the death penalty in four years.²²

Six of the 39 who were sentenced to death in 2017 were under the age of 21 at the time of the crime and 5 of the 39 "represented" themselves at the guilt or sentencing phase of their trials.²³

2. Continued Low Level in Executions, and Some Issues Raised by Those Executions That Did Occur

a. 2017

The number of executions in the United States dropped from 98 in 1999 to 42 in 2007, when many executions were stayed due to the Supreme Court's pending *Baze* case regarding the manner in which lethal injection was being implemented. In 2008, the year the Court in *Baze* upheld Kentucky's lethal injection system, there were 37 executions. Executions then rose to 52 in 2009, before declining to 46 in 2010, 43 in 2011 and 2012, 39 in 2013, 35 in 2014, 28 in 2015, and 20 in 2016 – the fewest since 1991; executions rose slightly, to 23, in 2017.²⁴ The increase of three executions was more than accounted for by the four executions in eight days in Arkansas in April 2017 – under highly unusual circumstances described in Part I.A.2.c.i.(b) below.

b. Tremendous Concentration Among a Few States

Just four states – Texas (seven), the aforementioned Arkansas (four), Florida (three), and Alabama (three) – accounted for 74% of all the country's executions in 2017. The Texas total matched its 2016 total as the lowest there since 1996.²⁵ Arkansas' ideosyncratic executions in 2017 are discussed in Part I.A.2.c.i.(b) below.

- c. Issues Raised by Executions in 2017
- i. Truncation of Review Process: Rushes to Injustice
- (a) Outrageous Example: Mark A. Christeson

An egregious case ended when Missouri executed Mark A. Christeson on January 31, 2017.²⁶ The Supreme Court had ruled that he needed new counsel after his initial habeas counsel egregiously missed the filing deadline. Yet, the federal district court gave the new counsel only a tiny part of the funding they sought, saying they had to provide free services due to the courts' lack of funding for the anticipated costs. It then dismissed their

²² Esmie Tseng, How Judges Undermine the Missourians who Serve on Juries, MADPMO.ORG, Jan. 12, 2018.

²³ DPIC 2017 YEAR END REPORT, *supra* note 1, at 12.

²⁴ Tracy L. Snell, Bureau of Justice Statistics, Capital Punishment, 2013 – Statistical Tables, at 3, 14 (2014); DPIC 2017 Year End Report, *supra* note 1, at 1.

²⁵ DPIC 2017 YEAR END REPORT, supra note 1, at 2, 4.

²⁶ Jim Salter, Associated Press, *Missouri executes man for killing woman, 2 children in 1998*, Jan. 31, 2017, http://bigstory.ap.org/article/21be648bec09408bab8667cfff9f86c4/missouri-inmate-faces-execution-killing-family-1998.

proposed new pleading as untimely, because it did not show either "extraordinary circumstances" or that Christeson's earlier counsel had abandoned him. But in so ruling, the district judge cited actions the original counsel had taken only after they had badly missed the filing deadline.²⁷ When the new counsel appealed the dismissal to the Eighth Circuit, the ABA filed an amicus brief asserting that a court must appoint adequately compensated counsel with proper time and resources to investigate, hire necessary experts, prepare thorough legal filings, and otherwise comport with the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the ABA Standards for Criminal Justice. The ABA also asserted that pro bono representation should supplement but not supersede defense funding from the State. The district court's reliance on pro bono services was, the ABA said, both improper and impractical, by overestimating the time that pro bono counsel would devote to the case and by incorrectly assuming that these appointed but unpaid lawyers would have appropriate capacity and qualifications. The ABA said forcing appointed counsel to represent clients pro bono or with highly restricted funding in these "uniquely complex and high-stake" cases violates the rules of professional conduct and the standards in the ABA Guidelines.²⁸ On January 18, 2017, the Eighth Circuit again remanded, for a prompt, limited evidentiary hearing on the issue of whether the original lawyers had abandoned their client.²⁹ The district court held that hearing only two days after getting the appeal court's order. This extreme haste prevented Christeson's pro bono counsel from getting witnesses or even themselves to the hearing and from presenting evidence and legal arguments properly. The district court ruled from the bench right after the hearing ended, rejecting Christeson's claims. As Professor Carol Steiker stated, no court "ever fully considered the merits of Mr. Christeson's claims"; instead, there was a "frenzied rush toward his execution." 30

(b) Arkansas: Running Out of Execution Drugs As Basis for Seeking Eight Executions in Two Weeks – Four of Which Occurred

During the week of February 27, 2017, Arkansas Governor Asa Hutchinson signed proclamations ordering that eight death row inmates be executed on four dates between April 17 and April 27, 2017. Explaining why he did so, in a state that had not executed anyone since 2005, Governor Hutchinson said there were doubts that midazolam, one of the three drugs to be used in the executions, would be available after April, given that drug's expiration date. The Governor said, "It is uncertain as to whether another drug can be obtained." His announcement led to widespread criticism and a torrent of litigation and clemency efforts. That led to the number of executions to be conducted in April being gradually reduced to four.

 $^{^{27}}$ Christeson v. Roper, No. 04-CV-08004-W-DW, 2016 WL 8943298 (W.D. Mo. Mar. 8, 2016), aff'd sub nom. Christeson v. Griffith, 860 F.3d 585 (8th Cir. 2017).

²⁸ Brief of Amicus Curiae ABA in Support of Petitioner at 1-2, *Christeson v. Roper*, No. 16-2730 (8th Cir. filed Aug. 17, 2016), http://www.americanbar.org/content/dam/aba/administrative/amicus/christenson_v_roper.authcheckdam.pdf.

²⁹ Christeson v. Griffith, 845 F.3d 1239 (8th Cir. 2017) (per curiam).

³⁰ Carol S. Steiker, Missouri's Unjust Rush To Execute Intellectually Disabled Man Who Was Abandoned By His Attorneys, HUFFINGTON POST, Jan. 31, 2017.

³¹ Matthew Haag & Richard Fausset, Arkansas Rushes to Execute 8 Men in the Space of 10 Days, N.Y. TIMES, Mar. 3, 2017.

First, the Arkansas Parole Board on April 4, 2017, recommended by a 6-1 vote that Jason McGehee be granted clemency. His clemency effort was supported by the judge who presided over his trial and by a former director of the state's corrections department. The judge, Robert McCorkindale, wrote to the Parole Board: "I tried a lot of capital murder cases in my years, and I saw people that I thought were much worse individuals get life without parole as opposed to the death penalty." He later told the press that "I didn't see him as the worst of the worst. As a matter of fact, he was a very young man." Because, under Arkansas law, there must be a 30-day public comment period on a Parole Board clemency recommendation, a federal judge granted a preliminary injunction against executing McGehee during that period. Six months later, in October 2017, Governor Hutchinson commuted McGehee's sentence to life without parole ("LWOP") (see Part I.B.6.e.iii. below).

Next, two pharmaceutical companies, Fresenius Kabi USA and West-Ward Pharmaceuticals Corp., filed amicus briefs in a federal court case. The former had manufactured the potassium chloride that Arkansas planned to use in the executions, and the latter had (according to the Associated Press) manufactured the midazolam that Arkansas planned to use. In their briefing, filed on April 13, 2017, these pharmaceutical companies said that using their drugs in executions would be contrary to the drugs' purposes and would create public health and legal risks, plus risks to the companies' reputations and financial situations. They said, "we can only conclude Arkansas may have obtained this product from an unauthorized seller." Meanwhile, Pfizer, which had acquired Hospira, the likely manufacturer of the third drug to be used in the executions, said a distributor had apparently sold the drug to Arkansas in violation of Pfizer's policy and without the company's knowledge, and that Pfizer had repeatedly asked Arkansas to return the drug.³⁴ The following day, McKesson Medical-Surgical, Inc., distributor of the second drug in the three-drug formulation, sued in state court. It alleged that Arkansas had misled it and breached agreements with it. Although McKesson won in the trial-level court on April 19, the Arkansas Supreme Court stayed the trial court's restraining order on April 20, just hours before the first scheduled execution.³⁵

Meanwhile, on April 14, 2017, the number of Arkansas inmates facing execution in April dropped to six when the Arkansas Supreme Court stayed Bruce Ward's execution, to allow the issue of his competency to be executed to be litigated. The court was mindful of a pending U.S. Supreme Court ruling on a similar issue in *McWilliams v. Dunn*.³⁶ For that same reason, the Arkansas Supreme Court also stayed the execution of Don Davis on April

 $^{^{32}}$ Matthew Haag, Arkansas Parole Board Recommends Clemency for Death-Row Inmate, N.Y. TIMES, Apr. 5, 2017.

³³ James L. White, McGehee's sentence commutation official, HARRISON DAILY TIMES, Oct. 10, 2017.

³⁴ Andrew DeMillo, Associated Press, *2 firms seek to prevent drugs' use in Arkansas executions*, Apr. 14, 2017, https://apnews.com/b3bc20208cae4387ba9d3e78d7981843/2-firms-seek-to-prevent-drugs'-use-in-Arkansas-executions

³⁵ Shawnya Meyers, Arkansas Supreme Court Overturns Lawsuit Blocking Arkansas from Using Execution Drugs, KFSM-5NEWS (Fort Smith/Fayetteville), Apr. 20, 2017.

³⁶ McWilliams v. Dunn, 137 S. Ct. 1790 (2017).

17, 2017, by a 4-3 vote.³⁷ (As discussed in Part II.I. below, the Court ruled in Mr. McWilliams' favor.)

The final stay of execution was handed down on April 19, 2017, by the Arkansas Supreme Court, to permit Stacey E. Johnson to pursue his effort to get DNA testing of evidence not previously the subject of DNA testing.³⁸

Starting the following night, April 20, 2017, Arkansas began executing people: a total of four between then and a week thereafter, April 27, 2017. On April 20, it executed Ledell Lee. The Innocence Project's Nina Morrison said the rush to execute Lee before the state's midazolam's expiration date prevented him from potential exoneration based on DNA testing that could not be done without the kind of stay that Johnson had received the night before. The Supreme Court, by a 5-4 vote, permitted Lee's execution to proceed³⁹ – just as it did the following week when three more executions occurred. In dissenting from the Court's denial of a stay, Justice Breyer discussed the chaotic flurry of litigation in the various cases, stating:

Arkansas set out to execute eight people over the course of 11 days. Why these eight? Why now? The apparent reason has nothing to do with the heinousness of their crimes or with the presence (or absence) of mitigating behavior. It has nothing to do with their mental state. It has nothing to do with the need for speedy punishment. Four have been on death row for over 20 years. All have been housed in solitary confinement for at least 10 years. Apparently the reason the State decided to proceed with these eight executions is that the "use by" date of the State's execution drug is about to expire. In my view, that factor, when considered as a determining factor separating those who live from those who die, is close to random.

. . . .

The ever changing state of affairs with respect to these individuals further cautions against a rush to judgment. A Federal District Court preliminarily enjoined the State's execution protocol; the Eighth Circuit vacated the injunction. The Arkansas Supreme Court has stayed the executions of three of these men based on their individual circumstances. A Federal District Court has stayed one more. An Arkansas Circuit Court temporarily enjoined the State from using one of the necessary drugs; the Arkansas Supreme Court stayed that injunction. These individuals have now come before this Court with a variety of claims. One involves a Circuit split concerning when an alternative method of execution qualifies as available. Another asks whether the State's compressed execution schedule constitutes cruel and

³⁷ Arkansas Supreme Court grants stays for two inmates set to be executed Monday (Updated), TALK BUS. & POLS. (Ark.), Apr. 17, 2017; Alan Blinder, Court Decisions Force Arkansas to Halt Execution, N.Y. TIMES, Apr. 17, 2017.

³⁸ K.K. Rebecca Lai & Jasmine C. Lee, An Array of Legal Challenges Have Stopped Four of the Eight Scheduled Executions in Arkansas, N.Y. Times, Apr. 25, 2017.

³⁹ Alan Blinder & Manny Fernandez, *Arkansas Puts Ledell Lee to Death, in Its First Execution Since 2005*, N.Y. TIMES, Apr. 21, 2017.

unusual punishment. I would grant a stay so that the Court can sort out these various cases and claims. I would also grant the petition as to the compressed execution schedule. It presents one aspect of whether the death penalty is consistent with the Constitution.⁴⁰

On April 24, 2017, Arkansas became the first state to execute two people on the same date since Texas did so in 2000. It executed Jack H. Jones Jr. and Marcel Williams. Arkansas' eight-day execution spree culminated in the execution on April 27, 2017, of Kenneth Williams. 42

ii. Issues Such As Severe Mental Illness, Age at Time of Crime, Intellectual Disability

Executions in 2017 involved numerous cases in which the jury never learned about the defendant's severe delusional disorder at the time of the crime, intellectual disability, brain injury or developmental damage, and significant abuse, neglect, or trauma during childhood, and another case in which there was no exclusion of death consideration for someone who had been under age 21 at the time of the crime. These cases are summarized in DPIC's year-end report.⁴³

iii. Problems Carrying Out Lethal Injections

Among several instances of problems in carrying out lethal injections was Virginia's execution of Ricky Gray in July 2017. An independent pathologist found, based on an autopsy, serious problems with Gray's execution.⁴⁴

Ohio was unable to complete the execution of Alva Campbell on November 15, 2017, due to authorities' inability – which Mr. Campbell's lawyers had predicted – to set an I.V. ⁴⁵ They knew that he did not have long to live due to lung and prostate cancers, seriously

⁴⁰ McGehee v. Hutchinson, 137 S. Ct. 1275, 1276-77 (2017) (Breyer, J., dissenting) (citations omitted).

⁴¹ Julie Turkewitz & Richard Pérez-Peña, *Arkansas Executes 2 Inmates, a First for Any State on One Day Since* 2000, N.Y. TIMES, Apr. 24, 2017.

⁴² Mark Berman, Arkansas carries out fourth execution in eight days, concluding frantic lethal injection schedule, Wash. Post, Apr. 28, 2017.

⁴³ DPIC 2017 YEAR END REPORT, *supra* note 1, at 8-11.

⁴⁴ Frank Green, *Pathologist says Ricky Gray's autopsy suggests problems with Virginia's execution procedure*, RICHMOND TIMES-DISPATCH, July 7, 2017. On June 23, 2016, the ABA filed an amicus curiae brief asking the Court to consider Mr. Gray's case, in which his constitutional challenges were dismissed without an evidentiary hearing. The ABA argued that Virginia's capital postconviction procedures are inadequate because its supreme court, which has exclusive jurisdiction over capital habeas proceedings, regularly denies a real chance to develop evidence to support constitutional claims and often "resolves disputed questions of material fact without an evidentiary hearing." Brief of the ABA as Amicus Curiae in Support of Petitioner at 5, *Gray v. Zook*, No. 15-9473 (U.S. filed June 3, 2016),

http://www.americanbar.org/content/dam/aba/administrative/amicus/gray_v_zook_supreme _court_of_united_states.authcheckdam.pdf. The Supreme Court denied certiorari on October 3, 2016. *Gray v. Zook*, 137 S. Ct. 84 (2016) (mem.).

⁴⁵ Liam Stack, Execution in Ohio Is Halted After No Usable Vein Can Be Found, N.Y. TIMES, Nov. 15, 2017.

obstructive pulmonary disease, and respiratory failure, and that he had several other serious ailments and had to be given oxygen four times daily. He died on March 3, 2018.⁴⁶

Shortly before Mr. Campbell died, Alabama attempted on February 22, 2018, to execute Doyle Lee Hamm, whom it knew had terminal cranial and lymphatic cancer. Hamm's lawyer, Columbia Law Professor Bernard E. Harcourt, had urged the Alabama authorities not to proceed because Hamm's cancers made it impossible to inject lethal drugs into his veins. But only after attempting numerous times over two and a half hours to execute Mr. Hamm did Alabama authorities cease their efforts that night.⁴⁷ On March 26, 2018, attorneys for Mr. Hamm and the State of Alabama entered into a confidential settlement agreement pursuant to which Professor Harcourt and the State jointly moved to dismiss all pending legal actions by Mr. Hamm, and the State agreed to cease any effort to set another execution date.⁴⁸

A more systemic problem was reported on February 20, 2018, by *BuzzFeed News*. It exposed the fact that between 2014 and 2017, Missouri had executed 17 people using pentobarbital that Missouri had procured secretly from a pharmacy that the U.S. Food and Drug Administration had termed "high risk" for its many health violations. Using cash payments, secret meetings, and code names, Missouri had used the compounding pharmacy, Foundation Care, which *BuzzFeed News* reported "ha[d] been repeatedly found to engage in hazardous pharmaceutical procedures."⁴⁹

3. States Ending the Death Penalty

New York achieved *de facto* abolition, between 2004 and 2007. Between December 2007 and March 2013, New Jersey, New Mexico, Illinois, Connecticut, and Maryland became the first five states to abolish the death penalty prospectively by legislative action since the 1960s, and in each of these states those already on death row were subsequently spared from execution. In 2016, Delaware abolished capital punishment via decisions of its highest court.

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.⁵⁰ After

 $^{^{46}}$ Tracey Connor, Alva Campbell, in mate who survived execution try, dies in Ohio prison, NBC NEWS, Mar. 3, 2018.

⁴⁷ Columbia Law Sch., Press Release, *Alabama's Botched Lethal Injection Amounts to "Torture," Columbia Law Professor Argues*, Feb. 24, 2018, http://www.law.columbia.edu/news/2018/02/botched-execution-alabama-doyle-lee-hamm.

⁴⁸ Columbia Law Sch., Press Release, *Bernard Harcourt and the State of Alabama Settle Civil Rights and Habeas Corpus Lawsuits*, Mar. 27, 2018, http://www.law.columbia.edu/news/2018/03/bernard-harcourt-and-state-alabama-settle-civil-rights-and-habeas-corpus-lawsuits.

 $^{^{49}}$ Chris McDaniel, Missouri Fought For Years To Hide Where It Got Its Execution Drugs. Now We Know What They Were Hiding, BuzzFeed News, Feb. 20, 2018.

⁵⁰ People v. LaValle, 817 N.E.2d 341 (N.Y. 2004).

comprehensive hearings, the legislature did not correct the provision.⁵¹ In 2007, New York's highest court vacated the last death sentence.⁵²

b. New Jersey

New Jersey abolished the death penalty in December 2007.53

c. New Mexico

On March 18, 2009, New Mexico abolished the death penalty prospectively, that is, with regard to future cases. 54

d. Illinois

Illinois abolished the death penalty on March 9, 2011.⁵⁵ Governor Patrick Quinn signed the bill and also commuted the sentences of everyone on Illinois' death row to LWOP.⁵⁶ In the years since 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.⁵⁷ On May 26, 2016, by a 5-2 vote in *State v. Peeler*,⁵⁸ the Connecticut Supreme Court reaffirmed its 2015 holding (by 4-3) in *State v. Santiago*⁵⁹ that capital punishment violates the State constitution. This holding prevents executions of those not prospectively exempted from the death penalty by the 2012 law.

f. Maryland

In March 2013, Maryland repealed the death penalty prospectively.⁶⁰ A subsequent effort to seek a reinstatement referendum got too few signatures to be put on the ballot.⁶¹

⁵¹ N.Y. ASSEMBLY COMMS. ON CODES, JUDICIARY & CORRECTIONS, THE DEATH PENALTY IN NEW YORK: A REPORT ON FIVE PUBLIC HEARINGS (2005). An effort in 2006 to revive the New York death penalty law also failed. Yancey Roy, Gannett News Serv., Senate pushes death penalty for cop killers; Assembly resists, June 14, 2006; Michael Gormley, Associated Press, Senate Republicans Say Assembly is Coddling Murderers, June 13, 2006.

⁵² People v. Taylor, 878 N.E.2d 969 (N.Y. 2007).

⁵³ 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.

⁵⁴ Associated Press, *Death Penalty Is Repealed in New Mexico*, Mar. 18, 2009, http://www.nytimes.com/2009/03/19/us/19execute.html.

⁵⁵ John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011.

⁵⁶ Statement from Gov. Pat Quinn on Senate Bill 3539, Mar. 9, 2011, http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265.

⁵⁷ J.C. Reindl, Senate Votes to Abolish the death penalty, The DAY (Conn.), Apr. 5, 2012.

⁵⁸ State v. Peeler, 140 A.3d 811 (Conn. 2016) (per curiam) (mem.).

⁵⁹ State v. Santiago, 122 A.3d 1 (Conn. 2015).

⁶⁰ Maggie Clark, Maryland Repeals Death Penalty, Stateline, May 2, 2013.

⁶¹ John Wagner, Petition drive to halt Maryland's death penalty repeal falls short, WASH. POST, May 31, 2013.

On January 20, 2015, Governor Martin O'Malley, shortly before leaving office, commuted the death sentences of those still on Maryland's death row.⁶²

g. Delaware

On August 2, 2016, the Delaware Supreme Court held, by 4-3 in *Rauf v. State*, that Delaware's capital punishment statute was unconstitutional in light of *Hurst v. Florida*. The court's decision held that the statute unconstitutionally allowed a judge to make findings by a preponderance of the evidence that only a unanimous jury could make, and only if the jury were to so find beyond a reasonable doubt. The State did not seek certiorari from this holding of federal constitutional law. *Hurst*, as well as *Ring v. Arizona*, involved statutory schemes under which the judge's findings that made defendants death eligible *did* have to made beyond a reasonable doubt.

On December 15, 2016, the Delaware Supreme Court unanimously held, in *Powell v. State*, as a matter of Delaware law that *Rauf*'s holding applies to all cases that were final when *Rauf* was decided⁶⁶ – which was true of the cases of all 18 of Delaware's death row inmates. Moreover, unlike what the Florida Supreme Court did later that month (see Part I.A.5.a.i. below), the Delaware Supreme Court did not remand any cases but rather ordered that the death row inmates to whom its holding applied must be sentenced to LWOP. A major reason why it did so was that its holding in *Rauf* had, it said, created "a new watershed procedural rule of criminal procedure."⁶⁷

h. A Potential Downside in Other States from Prospective-Only Repeals That Were Quickly Followed by the Sparing of Those Still on Death Row

An important reason why abolition bills were enacted in five states between 2007 and 2013 was that these laws were prospective only. This enabled the bills' proponents to overcome objections from those who did not mind abolition as long as some notorious death row inmates could still be executed – as they could have been under the enacted laws. The fact that subsequently, in all five states, everyone on death row was spared from execution will make it more difficult to enact abolition laws in other states. This difficulty might be ameliorated by the lack of any serious effort to reinstate capital punishment in any of the five states and by the continuing decline in public support for capital punishment (see Part I.A.10. below).

⁶² Associated Press, Outgoing Gov. O'Malley Officially Commutes Death Sentences, Jan. 20, 2015, http://baltimore.cbslocal.com/2015/01/20/outgoing-gov-omalley-officially-commutes-death-sentences.

⁶³ Hurst v. Florida, 136 S. Ct. 616 (2016).

⁶⁴ Rauf v. State, 145 A.3d 430, 434 (Del. 2016) (per curiam).

⁶⁵ Ring v. Arizona, 536 U.S. 584 (2002).

⁶⁶ Powell v. State, 153 A.3d 69, 70 (Del. Dec. 15, 2016) (per curiam).

⁶⁷ *Id.* at 76.

i. Significance of Post-Abolition Trends/Activities in These States, Including New York City and New York State Murder Trends

On January 3, 2018, the ABA Section of Civil Rights and Social Justice posted on its website a transcribed, edited, and updated version of an August 14, 2017 program cosponsored by several ABA entities and the New York City Bar Association's Capital Punishment Committee. The program, entitled *Life After the Death Penalty: Implications for Retentionist States*, includes detailed discussions of how the death penalty came to an end since 2004 in the aforementioned states. Among the important points made in that part of the program are that experience with the actual – not theoretical – death penalty system, replete with its many real life problems and no practical benefits, were crucial to ending it. Also crucial were the genuine friendships and cooperation between many murder victims' survivors and other people considering how the criminal justice system should work.⁶⁸

The program's speakers also discuss what has happened after the death penalty ceased to be part of the system. One often overlooked but significant post-abolition phenomenon has been the virtually complete lack of any movement to revive capital punishment in these states and the non-existence of any political "price" paid by those who voted for abolition. Thus, whatever lesson people may think they learned from Michael Dukakis' horrendous answer to the capital punishment question at the outset of the final 1988 presidential debate has had no relevance in these states. (I have asserted elsewhere that the "lesson" was "mislearned" in the first place – the real lesson being that if you act and speak as though you would be emotionally unaffected by your wife's brutal rape and murder, you will not be elected dog catcher, no less President.)

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

Perhaps the most important fact for those whose states still have the death penalty is that *none* of the parade of horribles that death penalty proponents assert will transpire if the death penalty is abolished has actually occurred in any of these seven states. There has not been, post-abolition, an upsurge in murders, in police or correction officer or children's murders, or an increase in the cost of the criminal justice system.⁶⁹ As DPIC's Robert Dunham stresses in the conclusion of his remarks, "[N]ational trends are national trends, irrespective of whether a state has long had the death penalty, whether it never had the death penalty, or whether it recently abolished the death penalty"; "there's no apparent correlation between the death penalty and murder rate." So, there is no discernible

⁶⁸ ABA Section of Civil Rights & Social Justice, Life After the Death Penalty: Implications for Retentionist States, Presented at the House of the New York City Bar Ass'n (Aug. 14, 2017), https://www.americanbar.org/content/dam/aba/administrative/crsj/Life-After-Death-Penalty_

Transcript.authcheckdam.pdf.

⁶⁹ *Id.* at 16-33. ⁷⁰ *Id.* at 31.

deterrent effect from having the death penalty and no counter-deterrent effect from ending it.

One way to consider "deterrence" is to look at the data on murders in New York City and State. The annual data since 1990 show that murders in New York City peaked in 1990 at 2,245. That was five years before New York State reinstated capital punishment. By 1994, the last full year before reinstatement, the number of murders had dropped to 1,561. In 2004, when New York's highest court declared a part of the death penalty law unconstitutional, there were 570 murders in New York City. In the subsequent 13 years without the death penalty, murders in New York City have dropped by almost another 50%. With only a few days left in 2017, the total was 286. The trends in statewide murder data are similar.

4. Deterrence Argument Is Not Supported by Other Data Either

It would appear from the DPIC analysis and the New York data that those who have tried mightily to determine whether capital punishment has a discernible deterrent effect have correctly concluded that no such effect can be discerned. Professor Daniel S. Nagin in his "Deterrence" chapter in the Academy of Justice's report *Reforming Criminal Justice*, released in late 2017, analyzed deterrence studies over the last two decades and earlier analyses back to the 1960s. He concluded that "the certainty of punishment is far more convincing and consistent" as a potential deterrent than "the severity of punishment" and that "[t]he consequences need not be draconian, just sufficiently costly, to deter the prohibited behavior."⁷⁴

Moreover, in 2012, the National Research Council of the National Academy of Sciences concluded that "research to date [on the effect of capital punishment on homicide] is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates," and that such research studies should not be considered whether capital punishment has an impact on homicide. ⁷⁵ And the Brennan Center for Justice concluded in February 2015 that capital punishment had no impact on the large drop in crime in the last decade of the 20th Century and the first decade of the 21st Century. ⁷⁶

⁷¹ Compare Crime Rate in New York, New York (NY), CITY-DATA.COM (last visited Jan. 23, 2018), and Seven Major Felony Offenses, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/seven-major-felony-offenses-2000-2016.pdf (last visited Jan. 23, 2018), with PATRICK A. LANGAN ET AL., THE REMARKABLE DROP IN CRIME IN NEW YORK CITY, app. tbl. 1 (2014).

⁷² Ashley Southall, Crime in New York City Plunges to a Level Not Seen Since the 1950s, N.Y. TIMES, Dec. 27, 2017.

⁷³ New York Crime Rates 1960-2016, DISASTERCENTER.COM (last visited Jan. 23, 2018).

⁷⁴ Daniel S. Nagin, *Deterrence*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE, at 19, 34, 24 (Eric Luna ed., 2017).

⁷⁵ COMM. ON LAW & JUSTICE OF THE DIV. OF BEHAVIORAL & SOCIAL SCIENCES & EDUC., REPORT BRIEF, at 2 (2012) (based on COMM. ON DETERRENCE & THE DEATH PENALTY, DETERRENCE AND THE DEATH PENALTY (2012)).

⁷⁶ OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE, at 79 (2015).

- 5. Court Decisions and Statutes That Will Greatly Diminish New Death Sentences and Limit the Number of Executions in Florida, and New Alabama Statute That Will Greatly Reduce the Number of New Death Sentences There
- a. Florida
- i. The Key Holdings

On January 12, 2016, in *Hurst v. Florida*, the U.S. Supreme Court held that Florida's capital punishment system was unconstitutional because a judge, not the jury, was required to make the factual finding that made the defendant eligible for capital punishment. The jury did not make even an advisory finding that any one particular aggravating factor existed. At Hurst's trial, the jury, presented with two aggravating factors, made no findings as to those factors and instead proceeded to recommend, by a 7-5 vote, that the death penalty be imposed. The trial judge, in contrast, did decide that both proffered aggravating factors existed.⁷⁷

The Court's opinion, written by Justice Sotomayor, said that the constitutional infirmity with Florida's system was the same as in the Arizona system held unconstitutional in 2002 in *Ring v. Arizona*. As the Court had said of the Arizona system almost 14 years earlier, the jury under the Florida system "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances." Under the Florida system, the *Hurst* Court stressed, "The trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Accordingly, the Court overruled its holdings that the Florida death penalty system was constitutional in the aspect summarized above. The Court remanded the case to enable the Florida courts to determine whether the constitutional error was "harmless." Justice Alito, dissenting, said that if any holdings should be re-examined they should be those in *Ring* and similar cases.81

On remand, the Florida Supreme Court held that the federal constitutional error was not harmless and that, under the federal and state constitutions, an imposition of the death penalty is constitutional (absent waiver of any jury role in the sentencing process) only if the jury finds unanimously beyond a reasonable doubt that the defendant is eligible for the death penalty and that the death penalty should be imposed.⁸²

⁷⁷ Hurst v. Florida, 136 S. Ct. 616 (2016).

⁷⁸ Ring v. Arizona, 536 U.S. 584 (2002).

⁷⁹ Hurst, 136 S. Ct. at 622 (alterations in original).

⁸⁰ Id. at 624.

⁸¹ Id. at 625-26 (Alito, J., dissenting).

⁸² *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (per curiam) (unless a penalty phase jury is waived, a death penalty is constitutional only if a unanimous jury finds beyond a reasonable doubt that every relied-upon aggravating factor has been proven, that these factors suffice to justify consideration of the death penalty, that "the aggravating factors outweigh the mitigating circumstances," and that the death penalty should be imposed).

Some people would, had Florida not already executed them, have been precluded from execution by these holdings. Their executions occurred because of the courts' failures to hold prior to January 2016 what virtually every legal expert had said for the previous 13 years and 7 months: that *Ring* was inconsistent with Florida's capital punishment system. Indeed, in *Mosley v. State*, the Florida Supreme Court (without recognizing its own responsibility) said that "Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002" and that "fairness strongly favors applying *Hurst*" "to those defendants who were sentenced to death under an invalid statute based solely on the United States Supreme Court's delay in overruling *Hildwin* and *Spaziano*."83

However, anyone whom Florida had already executed prior to the decisions in 2016 would not, had they still been alive, have been able to avoid their executions thereafter if their death sentences were already "final" by June 24, 2002, the date of the *Ring* decision. Nor – absent a future contrary holding by the federal courts or the Florida Supreme Court – will people still on Florida's death row whose death sentences had become final by June 24, 2002. These conclusions arise from the Florida Supreme Court's December 22, 2016 holding in *Asay v. State* that there is no pre-*Ring* retroactive applicability of the Supreme Court and Florida Supreme decisions in *Hurst*.⁸⁴ The Florida Supreme Court reaffirmed the *Asay* holding on August 10, 2017, in *Hitchcock v. State*.⁸⁵

Florida death row inmates in this predicament are making constitutional arguments that, if ultimately successful, would preclude their executions. Meanwhile, the Florida courts ultimately are expected to grant resentencing hearings to about 153 death row inmates whose sentences became final after *Ring*. As of late January 2018, it had already ruled that such hearings should occur in 123 of these cases; at least 18 of these had already been resentenced by trial courts to LWOP.⁸⁶

ii. Some Perspectives on Many of Florida's Past Executions

The analyses summarized immediately below are not limited to the period between *Ring* and *Hurst*. But the data for that time frame will surely be sobering.

An analysis in January 2016 by the *Tampa Bay Times* showed that when Florida judges sentenced people to death after juries had not been unanimous in recommending death, there was a significant risk of innocent people being executed. The *Times* located information about how juries voted in 20 of the 26 cases in which Florida death-row inmates were later exonerated. In 15 of these cases, the jury had not been unanimous; and in three others, judges imposed the death penalty despite a jury's recommendation of life in prison.⁸⁷ In a separate analysis of Florida's 390 prisoners who were then on death row, *The Villages Daily Sun* reported on January 10, 2016, that in 74% of their cases juries had not

⁸³ Mosley v. State, 209 So. 3d 1248, 1280 (Fla. 2016) (per curiam).

⁸⁴ Asay v. State, 210 So. 3d 1, 21-22 (Fla. 2016) (per curiam), cert. denied, 138 S. Ct. 41 (2017).

⁸⁵ Hitchcock v. State, 226 So. 3d 216 (Fla.) (per curiam), cert. denied, 138 S. Ct. 513 (2017).

⁸⁶ Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring, DEATH PENALTY INFO. CTR., Jan. 24, 2018 (updated).

⁸⁷ Anna M. Phillips, *How the nation's lowest bar for the death penalty has shaped death row*, TAMPA BAY TIMES, Jan. 31, 2016.

unanimously recommended death and in 43% of their cases fewer than 10 of the 12 jurors had recommended death.⁸⁸

b. Alabama Statute

On April 11, 2017, Governor Kay Ivey signed into law a bill that Alabama's House of Representatives and Senate had passed earlier in the year. ⁸⁹ This law's enactment was greatly affected both by *Hurst* and by increasing criticism of Alabama's having become the only state to permit judges to make the actual sentencing decisions in capital cases. Especially egregious was the fact that Alabama was the only state in which even if a majority of the jurors – or all of the jurors – voted for a sentence of LWOP, the judge could still override the jury and impose the death penalty.

Under the new law, at least ten jurors most affirmatively vote that the death penalty be imposed, or else it cannot be imposed; and the judge can never override a jury determination to impose LWOP – whether that directly is the jury's vote or effectively is the outcome if fewer than ten jurors vote for the death penalty.⁹⁰

This will make a real difference in Alabama as to those not already under sentence of death. However, unless there were to be a court decision to the contrary, the new statute will have no effect on Alabama's pre-existing death row population – numbering 183.91 This creates yet another situation in which people who could not be sentenced to death under today's death penalty system can still be executed pursuant to death sentences imposed under a prior procedure.

6. 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:

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."92

⁸⁸ Katie Sartoris, Redefining Justice, The VILLAGES DAILY SUN (Fla.), Jan. 10, 2016.

⁸⁹ Kent Faulk, Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases, AL.COM, Apr. 11, 2017; Kim Chandler & Anthony Izaguirre, Associated Press, Lawmakers Bar Alabama Judges From Overriding Juries, Apr. 5, 2017, https://www.usnews.com/

news/best-states/alabama/articles/2017-04-04/alabama-house-to-vote-on-ending-judicial-override.

⁹⁰ Faulk, supra note 89; Chandler & Izaguirre, supra note 89.

⁹¹ Chandler & Izaguirre, *supra* note 89.

⁹² Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013) (second alteration in original), http://www.cofpd.org/docs-dun/governor-executive-order.pdf.

On August 17, 2014, Governor Hickenlooper, while seeking re-election, said he opposed the death penalty, whereas in 2010 he had publicly supported it. He said he changed his view because he got new facts, such as that "it costs 10 times, maybe 15 times more money" and does not deter "homicides or grisly murders." He now realized there were "good reasons" why no country in Europe (except Belarus) or South America, or Mexico, Australia, or Israel supports it.⁹³ Hickenlooper was re-elected.

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, Kitzhaber, once again governor, said he would prevent executions while governor, pointing out that the 1990s executions had neither "made us safer" nor "more noble as a society."⁹⁴ The Oregon Supreme Court in 2013 upheld the moratorium.⁹⁵ During the 2014 election, this policy was an issue,⁹⁶ but Kitzhaber was re-elected. After Kitzhaber resigned for unrelated reasons, Kate Brown, the new governor, said in February 2015 that she would continue the moratorium.⁹⁷ She did,⁹⁸ and was re-elected in 2016.

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 that the state "ought to have a moratorium on capital punishment cases," due to doubts the system was functioning properly or having a positive impact.⁹⁹ Wolf defeated Corbett. 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 issued its report, Governor Wolf reviewed it, and "any recommendations contained therein are satisfactorily addressed." On December 21, 2015, the Pennsylvania Supreme Court unanimously held that Governor Wolf was entitled to impose the moratorium while the legislative commission continued its work. It is still working on it as of March 2018.

⁹³ Eli Stokols, *In interview, Hickenlooper offers new anti-death penalty stance, light support for Keystone*, KDVR-TV (Denver), Aug. 18, 2014, http://kdvr.com/2014/08/18/in-interview-hickenlooper-offers-new-anti-death-penalty-stance-light-support-for-keystone/ (quoting from online video clip).

⁹⁴ William Yardley, Oregon Governor Says He Will Block Executions, N.Y. TIMES, Nov. 22, 2011.

⁹⁵ Haugen v. Kitzhaber, 306 P.3d 592 (Or. 2013) (en banc).

⁹⁶ Laura Gunderson, Tough Question Tuesday: Kitzhaber on death penalty decision; Richardson says he won't impose personal convictions, OREGONIAN, Oct. 21, 2014.

 $^{^{97}}$ Jonathan J. Cooper, Associated Press, New Oregon Governor Will Continue Death Penalty Moratorium, Feb. 20, 2015, http://abcnews.go.com/Politics/print?id=29114589.

⁹⁸ Tony Hernandez, Brown to maintain death penalty moratorium, OREGONIAN, Oct. 19, 2016.

⁹⁹ Nick Field, PA-Gov: The Third Gubernatorial Debate, POLITICSPA.COM, Oct. 8, 2014.

¹⁰⁰ Memorandum from Gov. Tom Wolf, Feb. 13, 2015, at 1, 4, http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration.

¹⁰¹ Commonwealth v. Williams, 129 A.3d 1199 (Pa. 2015).

d. Washington

On February 11, 2014, Washington Governor Jay Inslee (previously pro-death penalty) announced a moratorium on executions. He expressed doubt that "equal justice is being served," said there are "too many flaws" in the capital punishment system, and criticized its application to people with intellectual disability or substantial mental illness. The *Seattle Times*' editorial board, which had supported the death penalty, said the Governor's announcement had caused it to call for capital punishment's abolition. ¹⁰² Governor Inslee was re-elected in 2016.

On January 16, 2017, Attorney General Bob Ferguson, joined by Governor Inslee, Republican former Attorney General Rob McKenna, and two Republican members of the Republican-controlled State Senate, announced legislation to abolish the death penalty.¹⁰³

e. Executions Precluded Due to Lack of Court-Approved Execution Drug Protocols

In Montana, District Court Judge Jeffrey M. Sherlock, on October 6, 2015, permanently enjoined the use of pentobarbital in Montana's lethal injection protocol unless and until the statute authorizing lethal injection is modified in conformance with his decision. On December 12, 2017, Judge James P. Reynolds sanctioned Montana for not providing discovery concerning the changes between its expert's testimony at trial and his earlier statements. On December 12, 2017, Judge James P. Reynolds sanctioned Montana for not providing discovery concerning the changes between its expert's testimony at trial and his earlier statements.

7. Broad-Based Oklahoma Death Penalty Review Commission Urges Indefinite Moratorium on Executions Until the Seriously Flawed Capital Punishment System Is Significantly Reformed

Oklahoma has not executed anyone since a controversial execution in early 2015 was followed by a grand jury report in May 2016 that raised serious questions about the actions of key governmental officials with regard to executions. Then, in November 2016, Oklahoma voters passed a constitutional amendment making it easier to uphold specific execution methods.¹⁰⁶

Meanwhile, a broad-based group, the Oklahoma Death Penalty Review Commission was formed, co-chaired by former Oklahoma Governor Brad Henry, distinguished lawyer Andy Lester, and former Oklahoma Court of Criminal Appeals Presiding Justice Reta M. Strubhar. Its members included people from urban and rural areas, Republicans and

¹⁰² Governor Jay Inslee, Remarks Announcing a Capital Punishment Moratorium, Feb. 11, 2014, 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.

 $^{^{103}}$ Editorial, Republicans join Inslee, Ferguson in call to abolish Washington's death penalty, Seattle Times, Jan. 16, 2017.

¹⁰⁴ Smith v. State, No. BDV-2008-303, slip op. at 2, 11 (Mont. 1st Jud. Dist. Ct. Oct. 6, 2015), http://loblow3gfudf14kwjzalxg618a5.wpengine.netdna-cdn.com/wp-content/uploads/2015/10/FFCL.pdf.

 $^{^{105}}$ Smith v. State, No. BDV-2008-303, slip op. at 7-8 (Mont. 1st Jud. Dist. Ct. Dec. 12, 2017),

 $https://www.aclumontana.org/sites/default/files/field_documents/171212_order.pdf.$

¹⁰⁶ Oklahoma voters approve ballot measure affirming death penalty, CHI. TRIB., Nov. 8, 2016.

Democrats, death penalty proponents and opponents, prosecutors and defense lawyers, people who have held positions in all three governmental branches, law school professors and deans, victims' advocates, and advocates for Native Americans.

On April 25, 2017, the Commission, issued its unanimous report after more than a year's intensive work. 107 It unanimously recommended "that the current moratorium on the death penalty be extended." Stressing that it "did not come to this decision lightly," the Commission stated that "[d]ue to the volume and seriousness of the flaws in Oklahoma's capital punishment system, Commission members recommend that the moratorium on executions be extended until significant reforms are accomplished." Among the Commission's "disturbing" findings was that Oklahoma's capital punishment system "has not always been imposed and carried out fairly, consistently, and humanely, as required by the federal and state constitutions." The Commission said it hoped that by highlighting "such issues" it would engender serious consideration of "urgent questions about . . . whether the death penalty in our state can be implemented in a way that eliminates the unacceptable risk of executing the innocent, as well as the unacceptable risks of inconsistent, discriminatory, and inhumane application of the death penalty." 108

The Commission's numerous recommendations included (1) providing a way in postconviction cases to grant relief in light of changes in science that raise doubt on a conviction's validity or on the accuracy of evidence used in securing a death sentence; (2) permitting "qualified expert testimony on the limitations and use of eyewitness testimony"; (3) adoption of best practices by law enforcement, including techniques designed to avoid tipping off eyewitnesses about the person whom law enforcement considers to be the leading suspect; (4) measures designed to enhance prosecutors' performance and impartial carrying out of their duties; (5) steps to enhance the quality of the performance of defense counsel, including the issuance of advisory defense counsel guidelines by the Oklahoma Bar Association, which would consider in what respects unique characteristics of Oklahoma capital representation might lead to modifications of the ABA's national guidelines for capital defense work; (6) permitting discovery on direct appeal or in a postconviction proceeding upon a showing of "good cause" rather than the much more draconian requirement now used; (7) use of a preponderance standard for an intellectual disability claim, and permitting intellectual disability to be considered and found where there is at least one IQ score of 75 or lower; (8) enabling many more people to have standing to assert that a death row inmate is incompetent to be executed; (9) providing for many due process reforms with regard to consideration of clemency; and (10) adopting many reforms with respect to the execution process. 109

The Commission also recommended various steps that would provide greater education for prosecutors, defense counsel, and judges with regard to what forensic science can and cannot determine; work to enhance the independence of public forensic laboratories and seek to preclude the use of "junk science"; seek to avoid false confessions, misuse of

¹⁰⁷ OKLA. DEATH PENALTY REVIEW COMM'N, THE REPORT OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION (2017).

¹⁰⁸ Id. at vii, viii.

¹⁰⁹ *Id.* at ix-xv.

jailhouse "informants," and other causes of erroneous convictions; and ensure the independence and proper funding of defense counsel. 110

A study prepared for the Commission by two criminal justice professors and a law professor from the University of Seattle found, consistent with every prior credible study they examined regarding other states, that when capital punishment is sought in Oklahoma, "significantly more time, effort, and costs [are incurred] on average, as compared to when the death penalty is not sought in first degree murder cases." The study, which is Appendix IB to the Commission's report, found that on average, costs in Oklahoma capital cases are 3.2 times greater than in Oklahoma non-capital cases.¹¹¹

But instead of seeking to make reforms advocated by the Commission, Oklahoma's Attorney General Mike Hunter and its Corrections Director Joe M. Allbaugh stated on March 14, 2018, that Oklahoma will shift from lethal injection to asphyxiation by nitrogen gas as its execution method. This method has never been tried anywhere. So, apparently it will — if courts permit such executions to proceed — be used in "real death" experimentations. 112

8. Kentucky Considering Reform of the Death Penalty

Governor Matt Bevin appointed in 2016 a Criminal Justice Policy Assessment Council to review Kentucky's criminal code, including capital punishment. It includes members of the legislature, judges, experts on criminal law, and religious leaders. One of the judges, Circuit Judge Jay Wethington, who as a prosecutor handled capital punishment matters, said, "We need to get rid of the death penalty We spend too much money for the results." The Council's proposals thus far have not dealt with capital punishment.

9. Overarching Analyses of Capital Punishment

a. Statement by Four Supreme Court Justices in March 2018

On March 19, 2018, the Supreme Court unanimously denied certiorari in $Hidalgo\ v$. Arizona, in which the petitioner sought to have the Court consider the constitutionality of a capital punishment system under which there are so many aggravating circumstances that almost all people convicted of first-degree murder could be sentenced to death. 114

Justice Breyer, in a statement joined by Justices Ginsburg, Kagan, and Sotomayor, noted that the certiorari petition did not address the process by which decisions are made regarding which of those people who are eligible for imposition of the death penalty are actually sentenced to death. Instead, the petition dealt only with the process by which the

¹¹¹ Samantha Vincent, Costly death penalty cases strain state resources, report says, Tulsa World, Apr. 29, 2017; Peter Collins et al., An Analysis of the Economic Costs of Capital Punishment in Oklahoma, in The Report of the Oklahoma Death Penalty Review Commission, supra note 107, app. IB.

¹¹⁰ Id. passim.

¹¹² Mark Berman, Oklahoma says it will begin using nitrogen for all executions in an unprecedented move, WASH. POST, Mar. 14, 2018.

¹¹³ James Mayse, Judges voice opinions on how to improve state's penal code, Ky. New Era, July 25,

¹¹⁴ Hidalgo v. Arizona, No. 17-251, 2017 WL 3536644 (U.S. Mar. 19, 2018) (mem.).

state is supposed under Supreme Court precedents to "circumscribe" through legislation "the class of persons eligible for the death penalty." The statement noted that Arizona had conceded that its statute had not accomplished the required narrowing in one of the two ways it could have done so -i.e., through a circumscribed definition of capital murder. This, the statement said, meant that the constitutionality of Arizona capital punishment's system depended on the state's effort to achieve narrowing in the other possible way -i.e., by setting forth statutory aggravating factors that the jury could use to achieve the constitutionally required narrowing. 116

The statement found unpersuasive the Arizona Supreme Court's various bases for concluding that the necessary narrowing had been achieved. However, because there had been no evidentiary hearing, no empirical study, and no expert testimony, the statement said that certiorari was properly denied. Instead, it would be far more appropriate to grant certiorari in the context of a "fully developed record with the kind of empirical evidence that the petitioner points to here." 117

If a majority of the Court had been prepared, if there were a properly developed record, to consider seriously the constitutional challenge to the Arizona capital punishment system, it could have granted certiorari and remanded for the purpose of developing such a record. It is reasonable to conclude that a majority of the Court as currently constituted is not prepared to make such a holding even if there were a fully developed record supporting the constitutional claim.

b. Federal District Judge Crawford's Factual Conclusions

On December 13, 2016, after conducting a lengthy evidentiary hearing about the workings of the federal death penalty law, Judge Geoffrey Crawford made findings that strongly implied that if he were a Supreme Court Justice rather than a federal district judge bound by Supreme Court precedent, he would hold the law unconstitutional in practice. He felt constrained to follow Supreme Court precedent, and so permitted the federal capital case of Donald Fell to proceed towards trial in the District of Vermont. But he said he was "setting the table for further review." 118

Judge Crawford focused on whether capital punishment as practiced is consistent with the Court's expectations in *Gregg v. Georgia*. He felt he could not focus on a national consensus regarding capital punishment, since — despite lower support for capital punishment — he did not find a widespread consensus favoring capital punishment's abolition.

¹¹⁵ *Id.* at *1 (statement of Breyer, J., joined by Ginsburg, Kagan, and Sotomayor, JJ.) (quoting *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

¹¹⁶ *Id.* at *2-3.

¹¹⁷ Id. at *5. See also Adam Liptak, Justices Decline to Hear Death Penalty Challenge, N.Y. TIMES, Mar. 20, 2018, at A19.

¹¹⁸ United States v. Fell, 224 F. Supp. 3d 327, 357 (D. Vt. 2016).

¹¹⁹ Gregg v. Georgia, 428 U.S. 153, 187 (1976).

Among Judge Crawford's most significant findings were these:

- The Supreme Court's numerous efforts starting with *Gregg* to ameliorate the arbitrariness that underlay its holding the prior capital punishment regimes unconstitutional in *Furman v. Georgia*¹²⁰ have "largely failed." ¹²¹
- "The more carefully one reviews . . . the underlying case summaries, the more arbitrary the distinctions between cases become." When one reads the narratives about different cases, in some of which death is imposed and in others of which it is not imposed, one cannot in any principled way tell which is which. Accordingly, as implemented, the Federal Death Penalty Act ("FDPA") falls short of the [constitutional] standard . . . for identifying defendants who meet objective criteria for imposition of the death penalty." 124
- The FDPA is implemented "in an arbitrary manner in which chance and bias play leading roles." The locale where the "crime occurs is the strongest predictor of whether a death sentence will result," and another important predictor is whether the victim was white. 126
- With regard to jury selection in capital cases: "The exclusion of many people opposed to the death penalty on religious or moral grounds and the implicit process of persuasion at voir dire that death is the likely outcome create jury populations which stack the deck against defendants... The studies brought to the court's attention supported the position of the defense that jury selection since *Gregg* is not the solution to inherent jury bias but rather a substantial part of the problem." 127
- On the crucial issue: "Has actual experience borne out the promise for a more reliable system of capital punishment expressed in the *Gregg* decision? The evidence . . . answers the question in the negative." 128

c. Leading Legal Scholars

i. Carol and Jordan Steiker

Eminent death penalty experts, Carol and Jordan Steiker, wrote in their "Capital Punishment" chapter in the Academy of Justice's *Reforming Criminal Justice* that the death penalty in the United States "is at a crossroads, " in which "state capital systems are still fraught with arbitrariness, inaccuracy, and unfairness" – with "intractable" problems

¹²³ 18 U.S.C. §§ 3591 et seq.

¹²⁰ Furman v. Georgia, 408 U.S. 238 (1972).

¹²¹ Fell, 224 F. Supp. 3d at 359.

 $^{^{122}}$ *Id.* at 341.

¹²⁴ Fell, 224 F. Supp. 3d at 329 (citation omitted).

 $^{^{125}}$ *Id*.

 $^{^{126}}$ Id. at 345.

¹²⁷ Id. at 338.

¹²⁸ *Id.* at 358.

that are probably impervious to reform.¹²⁹ They describe three overarching problem areas: Unfairness – typified by overbroad death penalty statutes giving local prosecutors such enormous discretion that there are "wildly divergent capital charging decisions even within states" – this unfairness is aggravated by jurors' tremendous discretion; Inaccuracy – an estimated 4% of people sentenced to die are innocent, apparently a higher percentage than in other cases, due to particular factors affecting their investigation and disposition; and Ineffectiveness at accomplishing either of the purposes cited by the Supreme Court in upholding capital punishment's constitutionality: retribution and deterrence. Particularly egregious is the failure to exempt from capital punishment people (constituting a disproportionate percentage of those on death row) whose mental illness "likely . . . reduced culpability for their behavior . . . [and made them] less likely to be able to rationally consider the costs and benefits of their actions."¹³⁰

For these and other reasons, the Steikers urge repeal of capital punishment or a moratorium on its use. But to the extent this may not be feasible in particular states, they urge greatly improved defense services at all stages of capital punishment proceedings. They feel this is especially important because prosecutors are probably even more likely than before to pursue capital punishment for "those defendants with mediocre or poor representation." They next recommend that local prosecutors be forbidden to seek capital punishment without approval by a statewide entity – which would not have the obverse power to force local prosecutors to seek death when they have decided not to do so. The Steikers say this limitation is warranted, because so few prosecutors are responsible for such a huge percentage of all death sentences. Finally, they emphatically urge adoption of a mental illness exclusion such as that proposed by the ABA (discussed in Part I.B.6.d.ii. below).¹³¹

ii. Frank Baumgartner et al.

In their new book released in December 2017, Professor Frank Baumgartner and a group of researchers assess capital punishment since its reinstatement in the 1970s, using four decades of data. They conclude that the post-Furman system not only "flunks the Furman test but [also] surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application." After reviewing numerous issues and extensive data, they find that the modern system is as arbitrary, biased, and flawed as the pre-Furman system while being much more geographically concentrated in fewer jurisdictions and far more expensive. 132

10. Public Opinion Poll Results

On March 22, 2018, Quinnipiac University released the results of a national poll. When pollsters gave no alternative to the death penalty, the results were 58% in favor of the death penalty for murder and 33% opposed. But when the same people were given a

¹²⁹ Carol S. Steiker & Jordan M. Steiker, *Capital Punishment*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note 74, at 147, 150.

¹³⁰ Id. at 149-54.

¹³¹ Id. at 156-66.

¹³² Frank R. Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty (2017).

choice between the death penalty and LWOP, 51% favored LWOP and only 37% favored the death penalty. Quinnipiac stated that this was the first time since it began asking that question in 2004 that a majority (not just a plurality) favored LWOP. However, by a large margin, those polled opposed nationwide abolition of capital punishment.¹³³

On October 26, 2017, Gallup released the results of a poll in which death penalty support dropped to its lowest level, 55% – since 1972; 41% were opposed. In this poll, no alternative to the death penalty was offered. The Gallup poll also found a 5% drop in death penalty support since Gallup's October 2016 poll. A significant reason for this drop was a plunge from 82% to 72% in Republican support for capital punishment.¹³⁴

11. Possible Influences on Public Opinion

Among the possible influences on public opinion (in addition to the particular issues discussed later in this chapter) are the views expressed by people and organizations that have not traditionally been recognized in public discourse as deeply critical or even unequivocally opposed to capital punishment.

a. Conservatives

On January 19, 2017, a new group, Georgia Conservatives Concerned About the Death Penalty, held a press conference to call for a reconsideration of capital punishment, but not now advocating abolition. State Representative Brett Harrell, a member of the group, stated days earlier: "I am skeptical of our government's ability to implement efficient and effective programs, and so a healthy skepticism of our state's death penalty is warranted. Many individuals have been convicted and sentenced to die. Meanwhile, taxpayers are forced to pay for this risky government program, even though it costs far more than [LWOP]."¹³⁵

In October 2017, a national group, Conservatives Concerned About the Death Penalty, issued a report that included data on what the report said was "the dramatic rise in Republican sponsorship of bills to end the death penalty." ¹³⁶

In July 2017, an article by Ben Jones that will be published in the *Journal of Criminal Law & Criminology* became available online. Its title is *The Republican Party, Conservatives, and the Future of Capital Punishment*. Jones pointed out that many more conservatives *could* – but he did not predict that they necessarily *would* – base opposition to capital punishment on traditional conservative values, such as, for example, by arguing

 $^{^{133}}$ Most U.S. Voters Back Life Over Death Penalty, Quinnipiac University National Poll Finds, Quinnipiac Univ. Poll, Mar. 22, 2018.

¹³⁴ Jeffrey M. Jones, U.S. Death Penalty Support Lowest Since 1972, GALLUP, Oct. 26, 2017.

¹³⁵ Aaron Gould Sheinin, *Georgia conservatives want to 're-think' death penalty*, ATLANTA J.-CONST., Jan. 17, 2017.

¹³⁶ Conservatives Concerned About the Death Penalty, The Right Way, at 5 (2017).

that the death penalty "is incompatible with limited government, fiscal responsibility, and promoting a culture of life." ¹³⁷

b. Religious Leaders and Groups

i. Pope Francis

On October 11, 2017, Pope Francis delivered extensive remarks that should – if the Catholic Church's Catechism is revised in keeping with his statement – eliminate any doubt about the Catholic Church's complete, unequivocal opposition to capital punishment. Vatican Radio published the text of his prepared remarks. ¹³⁸

Before discussing the death penalty, the Pope stressed that the Catechism "should . . help illumine with the light of faith the new situations and problems which had not yet emerged in the past" and should help the Church "to present the faith as the meaningful answer to human existence at this moment of history."

The Pope began his discussion of capital punishment by saying the Catechism should deal with this in a "more adequate and coherent" way. He stated:

This issue cannot be reduced to a mere résumé of traditional teaching without taking into account not only the doctrine as it has developed in the teaching of recent Popes, but also the change in the awareness of the Christian people which rejects an attitude of complacency before a punishment deeply injurious of human dignity. It must be clearly stated that the death penalty is an inhumane measure that, regardless of how it is carried out, abases human dignity. It is per se contrary to the Gospel, because it entails the willful suppression of a human life that never ceases to be sacred in the eyes of its Creator and of which – ultimately – only God is the true judge and guarantor. . . . God is a Father who always awaits the return of his children who, knowing that they have made mistakes, ask for forgiveness and begin a new life. No one ought to be deprived not only of life, but also of the chance for a moral and existential redemption that in turn can benefit the community.

The Pope acknowledged that in prior times "when means of [defense] were scarce and society had yet to develop and mature as it has," the death penalty seemed to be an appropriate way to apply justice, and that "[s]adly, even in the Papal States" capital punishment had been used. However, the Pope stated, the Church could not be precluded by its prior actions from acting on the basis of its current understanding:

¹³⁷ Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 J. CRIM. L. & CRIMINOLOGY (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3002188 (follow "Download this Paper" hyperlink).

¹³⁸ Pope Francis: The dynamic word of God cannot be moth-balled, VATICAN RADIO, Oct. 11, 2017, http://en.radiovaticana.va/news/2017/10/11/pope_francis_the_dynamic_word_of_god_cannot_be_moth-balled/1342352 (containing English language translation of Pope Francis' prepared remarks).

Let us take responsibility for the past and recognize that the imposition of the death penalty was dictated by a mentality more legalistic than Christian. Concern for preserving power and material wealth led to an over-estimation of the value of the law and prevented a deeper understanding of the Gospel. Nowadays, however, were we to remain neutral before the new demands of upholding personal dignity, we would be even more guilty.

The Pope said the Church does not "contradict[] past teaching" by developing doctrines that stop defending "arguments that now appear clearly contrary to the new understanding of Christian truth." Since there must be "all possible progress" of religion in the Church, "[i]t is necessary, therefore, to reaffirm that no matter how serious the crime that has been committed, the death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person."

The Pope then returned to his basic theme, which in the context of Church doctrine is quite different from the "originalist" view of the U.S. Constitution. He said:

Tradition is a living reality and only a partial vision regards the "deposit of faith" as something static. The word of God cannot be moth-balled like some old blanket in an attempt to keep insects at bay! No. The word of God is a dynamic and living reality that develops and grows because it is aimed at a fulfilment that none can halt. The law of progress, in the happy formulation of Saint Vincent of Lérins, "consolidated by years, enlarged by time, refined by age" (Commonitorium, 23.9: PL 50), is a distinguishing mark of revealed truth as it is handed down by the Church, and in no way represents a change in doctrine.

Doctrine cannot be preserved without allowing it to develop, nor can it be tied to an interpretation that is rigid and immutable without demeaning the working of the Holy Spirit. . . . We are called to make [God's] voice our own by [hearing it reverently], so that our life as a Church may progress with the same enthusiasm as in the beginning, towards those new horizons to which the Lord wishes to guide us.

ii. Evangelical Christians

In October 2015, the National Association of Evangelicals, whose membership includes congregations with millions of American evangelical Christians, passed a resolution retreating from its prior solid support of capital punishment. The resolution "affirm[ed] the conscientious commitment of both [anti-and pro-death penalty] streams of Christian ethical thought, noting that "Nonpartisan studies of the death penalty have identified systemic problems in the United States," and "the alarming frequency of post-conviction exonerations." Shane Claiborne, an activist author from the Evangelical

 $^{^{139}}$ Nat'l Ass'n of Evangelicals, Resolution, $Capital\ Punishment\ 2015$ (Oct. 15, 2015), http://nae.net/capital-punishment-2/.

community, said the new position was "a big deal" reflecting concern about the implications of capital punishment for a core evangelical tenet: "[T]hat no one is beyond redemption." ¹⁴⁰

Seven months earlier, the National Latino Evangelical Coalition, a major "coalition of Latin American evangelicals," called upon its 3,000 congregations to support abolition of the death penalty.¹⁴¹

c. Latinos

In June 2016, the National Hispanic Leadership Agenda called for repeal of the death penalty. Then, in August 2016, the National Hispanic Caucus of State Legislators passed a resolution urging repeal of capital punishment.¹⁴²

d. (Mostly Former) Judges, Prosecutors, FBI Agent, and Corrections Leaders

In a May 18, 2016 op-ed, former North Carolina Chief Justice I. Beverly Lake, Jr. said that he had changed his longstanding pro-death penalty position because, despite various reform efforts to try to prevent innocent people getting the death penalty, "we did not adequate address [the fact] that individuals with intellectual disabilities, mental illness, and other impairments are more likely to be wrongfully convicted." Moreover, in light of the fact that more than half of those executed in 2015 "had severe mental impairments," the judicial system is imperfect at identifying "the worst of the worst." He said this has been particularly exacerbated by North Carolina's indigent defense system being "woefully underfunded" (although as noted above in Part I.A.1.a., the work of the state's five capital defender offices in the last decade has been praised). Among other problems he cited was this: "[E]ven when evidence of diminished culpability exists, some jurors have problems emotionally separating the characteristic of the offender from the details of the crime." In light of these and other factors, Chief Judge Lake now believes the death penalty "probably cannot" ever be constitutional pursuant to the Eighth Amendment.¹⁴³

On November 5, 2017, Terry Goddard, who was Arizona's Attorney General from 2003-2011, stated in an op-ed in the *Arizona Daily Star* that the state's death penalty "has failed . . . in fundamental ways," including its being applicable to virtually every first-degree murder – so that capital punishment is not "only imposed on the worst offenders." In addition, at least nine innocent people had been sentenced to die, and there are "unsettling racial disparities" and "spiraling costs." Goddard concluded that Arizona should abolish capital punishment.¹⁴⁴

¹⁴⁰ Sarah Pulliam Bailey, *The National Association of Evangelicals has changed its position on the death penalty*, Wash. Post, Oct. 19, 2015.

 $^{^{141}}$ Ruth Gledhill, NaLEC becomes first major evangelical group to oppose death penalty, Christian Today, Mar. 28, 2015.

¹⁴² Juan Cartagena, Latinos join call to end Florida's death penalty, ORLANDO SENTINEL, Dec. 10, 2016.

¹⁴³ I. Beverly Lake, Jr., Opinion, Why Protecting the Innocent From a Death Sentence Isn't Enough, HUFFINGTON POST, May 18, 2016.

¹⁴⁴ Terry Goddard, Opinion, *Arizona's 40-year experiment with the death penalty has failed*, ARIZ. DAILY STAR, Nov. 5, 2017.

That same month, Rudy Gerber, who at the request of then-State Senator Sandra Day O'Connor had in 1972 drafted Arizona's new capital punishment statute in the wake of *Furman*, said that numerous expansions of death eligible crimes after the law's 1973 enactment had "turn[ed] on its head" the key goal of limiting death eligibility to the "worst of the worst." Gerber (a former judge on the Arizona Court of Appeals) said that this increase over time in death eligibility had led to a surge in death sentences, especially in Maricopa County, and to ineffective representation and racial disparities. For such reasons, Gerber said he had joined with more than 20 other retired judges and prosecutors to urge the U.S. Supreme Court to hold unconstitutional "the overbroad death penalty." 145

In a September 10, 2016 op-ed in the *Columbus Dispatch*, former Ohio Attorney General Jim Petro explained why he had changed his position and now opposes Ohio's death penalty system. He said he now knows it is not a deterrent, is more costly than the alternative, is sought inconsistently by different counties, and is inordinately affected by the prosecutor's views.¹⁴⁶

On August 2, 2016, three former Kentucky prosecutors (who also had served in other capacities, one of them as a judge) wrote an op-ed in the *Courier-Journal* that cited recent polls showing increasing worry over the criminal justice system's fairness. They stated that replacing capital punishment with LWOP would be Kentucky's best option, by "protecting public safety, providing justice to the families of victims, removing the possibility that an innocent man will be executed and saving limited tax dollars." They supported their conclusion by discussing numerous problems with the fairness and accuracy of capital punishment.¹⁴⁷

Creighton Horton's March 7, 2016 op-ed in the *Salt Lake Tribune* was succinctly titled *I put people on death row, and I know it's time to end capital punishment*. Horton was a state and federal prosecutor for over 30 years, and worked on over a dozen capital murder cases. He now strongly opposes capital punishment, which he states is not a deterrent and is unfair to victim's families (whom prosecutors often do not provide with anything remotely like full disclosure). He is also troubled by the impossibility of undoing a wrongful execution.¹⁴⁸

Tom Parker rose through the FBI's ranks until retiring in 1994 as the assistant special agent in charge of the Los Angeles field office. During his career, he put Mafia people in jail, worked on dozens of murder investigations, and helped get capital punishment for two people who were executed. He said in 2016 that his position has changed: he now supports LWOP rather than capital punishment. One key reason is that in 45 years in law enforcement, he knew of "too many corrupt homicide investigations." He is now working against the death penalty and assisting defense teams where there are serious allegations of police corruption and/or faulty investigations. ¹⁴⁹

¹⁴⁵ Rudy Gerber, Opinion, Arizona Death Penalty Law Flouts Constitution, NAT'L L.J., Nov. 14, 2017.

¹⁴⁶ Jim Petro, Opinion, Death penalty is in decline, but problems remain, COLUMBUS DISPATCH, Sept. 10, 2016.

¹⁴⁷ Joseph P. Gutmann et al., Opinion, Support grows for suspending Ky. death penalty, Courier-J., Aug. 2, 2016.

¹⁴⁸ Creighton Horton, Opinion, *I put people on death row, and I know it's time to end capital punishment*, Salt Lake Trib., Mar. 7, 2016.

¹⁴⁹ Melinda Burns, From FBI Boss to Death Penalty Foe, SANTA BARBARA INDEP., July 7, 2016.

Former Kansas Secretary of Corrections Roger Werholtz wrote an op-ed published on October 31, 2017, in the *Topeka Capital-Journal* urging death penalty abolition. He said this would save money that Kansas could use instead to improve its correction system in ways that would enhance corrections officers' and inmates' safety and otherwise help diminish crime. He said Kansas should "acknowledge that the return on our investment in the death penalty has been abysmal," that it doesn't diminish murders, and "siphons away . . . crime prevention dollars." ¹⁵⁰

e. American Nurses Association

On February 21, 2017, the American Nurses Association, which had long opposed nurses' participation in executions, announced that it had decided to oppose capital punishment. The Association had recently concluded that the death penalty is a violation of human rights in view of how the capital punishment "system" is administered in the United States.¹⁵¹

12. Continuing International Trend Versus Capital Punishment, with Some Actual and Potential New Exceptions

Most of Latin America, Canada, and Western Europe abolished capital punishment by the early 1980s, as did South Africa when it ended apartheid. Following the fall of the Iron Curtain, all European portions of the former Soviet Union, except Belarus, either abolished capital punishment or, as did Russia, implemented moratoriums on execution that remain in effect.¹⁵²

a. 2016-early 2018

In April 2017, Amnesty International reported that in 2016, 87% of all recorded executions (other than in China) were in Iran (which recorded 55% of them), Saudi Arabia, Iraq, and Pakistan. The total number of executions that Amnesty recorded (absent China) decreased by 37% after rising in 2015 by more than half. There were notable decreases in executions compared to the prior year in Iran, Pakistan, Indonesia, Somalia, and the United States (which was not among the world's top five executing countries for the first year since 2006), whereas executions more than tripled in Iraq and rose 100% in Egypt and Bangladesh. In September and December 2017, Iraq and Egypt carried out mass executions.

On January 9, 2018, the leader of Iran's "hard-line judiciary," Sadegh Amoli Larijani, said that a person sentenced to death for a drug-related crime for which the

¹⁵⁰ Roger Werholtz, Opinion, End the death penalty in Kansas, Topeka Cap.-J., Oct. 31, 2017.

¹⁵¹ Am. Nurses Ass'n, Press Release, ANA Releases New Position Statement Opposing Capital Punishment, Feb. 21, 2017, http://www.nursingworld.org/MainMenuCategories/EthicsStandards/

Resources/SocialJustice/ANA-Releases-New-Position-Statement.html.

¹⁵² AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2009, at 11, 18 (2010).

¹⁵³ AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2016, at 4 (2017) [hereinafter DEATH SENTENCES AND EXECUTIONS 2016].

¹⁵⁴ UN human rights chief "appalled" at Iraq mass execution, OHCHR.ORG, Sept. 27, 2017; Nour Youssef, Egypt Hangs 15 for Terrorism, Stoking Fears Among Islamists, N.Y. TIMES, Dec. 26, 2017.

sentence had been changed by Parliament to life imprisonment or a fine could have his case completely re-examined. The Guardian Council concurred with this. As a result of the judiciary's enforcement of the autumn 2017 legislation, an estimated 5,000 death row inmates could be spared execution. This change is part of an overhaul being planned since 2016, with the goal of decreasing Iran's executions – which have been second in the world, trailing only China. *The New York Times* described the overhaul as "remarkable as the country's hard-line dominated judiciary in most cases does not amend laws it considers crucial, such as the one for capital punishment." ¹⁵⁵

In other positive news for abolitionists, Amnesty International reported in 2017 that Benin and Nauru abolished capital punishment for every crime. On September 21, 2017, The Gambia's President signed and the Second Protocol to the International Covenant on Civil and Political Rights and thereby committed The Gambia to abolish capital punishment. On the same day, Madagascar completed ratifying the same human rights protocol.

In December 2017, Kenya's highest court held that the country's mandatory death penalty violates Kenya's Constitution. This decision could affect all of the nearly 7,000 death-sentenced people in Kenya. 159

In India – which, like Kenya, The Gambia, and Madagascar, has not executed anyone in many years – the Death Penalty Research Project at the National Law University, Delhi, issued an extensive report on capital punishment in 2017. It encouraged "a rigorous and frank evaluation of the criminal justice system . . . used to administer the death penalty and a recognition of the structural realities that operate within it." This preliminary analysis found "flagrant violations of . . . basic protections like those against torture and self-incrimination" and "the systematic" lack of "competent representation [and] . . . effective sentencing procedures." The report also found that the system fails to provide a mechanism to take advantage of improvements in the basic natures of many death row inmates during their time on the row. 160

On December 19, 2016, the U.N. General Assembly voted by 117 to 40 with 31 abstentions for a resolution advocating a moratorium on executions and encouraging countries not to execute people with mental or intellectual disabilities and to use procedural protections. This was the sixth such vote. The next month, Philippines President Rodrigo Duterte proposed reinstating capital punishment, which the Philippines had most recently abolished in 2006. So far, no such action has been taken.

¹⁵⁵ Thomas Erdbrink, Iran Relaxes Death Penalty in Drug Cases, N.Y. TIMES, Jan. 11, 2018.

¹⁵⁶ DEATH SENTENCES AND EXECUTIONS 2016, *supra* note 153, at 9.

¹⁵⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1642 U.N.T.S. 414 (entered into force on July 11, 1991); Aurelie Placais, Gambia and Madagascar commit to irreversible abolition, WORLD COALITION AGAINST THE DEATH PENALTY, Sept. 22, 2017.

¹⁵⁸ Maureen Kakah, Mandatory death sentence now unconstitutional in Kenya, DAILY NATION, Dec. 14, 2017.

¹⁵⁹ Sam Kiplagat, What Supreme Court ruling on death sentence means, DAILY NATION, Dec. 18, 2017.

¹⁶⁰ NAT'L LAW UNIV., DELHI, DEATH PENALTY INDIA REPORT SUMMARY, intro. & conclusion (2016).

¹⁶¹ Elise Guillot & Aurélie Plaçais, *The UN General Assembly voted overwhelmingly for a 6th resolution calling for a universal moratorium on executions*, WORLD COALITION AGAINST THE DEATH PENALTY, Dec. 20, 2016; *see generally* G.A. Res. 71/187, Moratorium on the Use of the Death Penalty (Dec. 19, 2016).

¹⁶² Tomasito Villarin, Duterte Wants the Death Penalty Back, N.Y. TIMES, Jan. 29, 2017.

Capital punishment has also not been reinstated in Turkey, despite President Recep Tayyip Erdoğan's repeatedly saying in 2017 (after raising the issue in 2016) that he might hold a referendum on restoring the death penalty. This, however, led to warnings that Turkey's implementing capital punishment could lead to an end to its increasingly tenuous relationships with the Europe Union. German Foreign Minister Sigmar Gabriel, on August 3, 2017, was among those making this warning. In late December 2017, President Erdoğan, without specifically referring to capital punishment, "signaled a rapprochement with European leaders in an interview with Turkish reporters."

B. Important Issues

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

1. Ability to Have Capable Counsel, and Their Ability to Raise and Secure Well-Considered Rulings on the Merits of Meritorious Federal Constitutional Claims

a. AEDPA (Overview)

Any analysis of capital punishment as applied must consider various barriers that preclude the federal courts from ruling on the merits of meritorious federal constitutional claims. Many are set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Professor Anthony G. Amsterdam discussed AEDPA in a 2004 talk, selectively excerpted as follows:

[T]he so-called Antiterrorism and Effective Death Penalty Act, [built] on issue preclusion and review-curbing ideas that the Court had initiated and ratchet[ed] them up so as to make federal habeas relief for constitutional violations still more difficult to obtain.

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

¹⁶³ Death penalty calls spell end of current EU-Turkey relations – German FM, RT NEWS, Aug. 3, 2017.

¹⁶⁴ Patrick Kingsley, Turkey's President Tries to Play Nice After Year of Bashing Europe, N.Y. Times, Dec. 29, 2017

¹⁶⁵ Pub. L. 104-132, 110 Stat. 1214 (1996).

Congress . . . further . . . provided that if a state court has rejected a criminal defendant's claim of federal constitutional error on the merits, federal habeas corpus relief . . . can be granted only if the state court's decision involves an "unreasonable application" of federal constitutional law — an application so strained that it cannot be regarded as within the bounds of reason. . . . Federal habeas corpus courts . . . [now] ask only whether any errors that the state courts may have committed in rejecting a defendant's federal constitutional claims were outside the range of honest bungling or were close enough to it for government work. 166

b. AEDPA's Interpretation by the Supreme Court

In a non-capital decision in 2016, the U.S. Supreme Court considered an assertion that a state court decision could be reviewed on the merits because it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court said: "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." The state court decision must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." 169

c. Change in Way of Determining Opt-In to Prosecution Friendlier AEDPA Provisions

In 2006, Congress enacted a law intended to make it easier for a state to be found to have "opted-in" to "special Habeas Corpus Procedures in Capital Cases." In an opt-in state, there could be a far shorter deadline than AEDPA's one year for filing a federal habeas petition and new, draconian deadlines for resolving such cases. To opt-in, a state would have to establish "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings" and "standards of competency for the appointment of counsel in [such] proceedings." Any decision on whether a state qualifies for opt-in would be made initially by the U.S. Attorney General, subject to *de novo* review by the Court of Appeals for the District of Columbia, which could then be reviewed by the Supreme Court. Opponents of this change (including the ABA) say any 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

¹⁶⁶ 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).

¹⁶⁷ 28 U.S.C. §2254(d)(1).

¹⁶⁸ Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quoting Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004))).

¹⁶⁹ Id. (quoting White v. Woodall, 134 S. Ct. 1697, 1702 (2014)).

¹⁷⁰ Pub. L. No. 109-177, 120 Stat. 192 (2006).

¹⁷¹ RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at 153-56 (7th ed. 2015) (quoting 28 U.S.C. § 2265(a)(1)(A),(C); discussing 28 U.S.C. § 2265 (c)(1)-(3) (2006)).

experience with the determinative issue regarding "opt-in": the quality of postconviction counsel in state court proceedings in capital cases.

In 2016, the Ninth Circuit reversed, for lack of standing, a challenge to the Justice Department's regulations on implementing "opt-in." Rehearing and certiorari were denied.¹⁷²

d. Trump Administration's Possible Impacts

President Trump will affect capital punishment jurisprudence via appointments to the federal courts — most notably, if Justice Kennedy retires.¹⁷³ If Attorney General Sessions remains in office, he would likely implement the AEDPA's opt-in provision and take other actions consistent with his long history of favoring the actions of pro-death penalty prosecutors and opposing funding to enhance the defense function.

e. California Referenda

On November 8, 2016, California voters, by about 53-47%, defeated a referendum that would have changed the state's constitution to replace the death penalty with LWOP.¹⁷⁴ The voters passed, with about 51% support, Proposition 66, which if fully implemented would, *inter alia*, force state courts to complete a review of death sentences within five years, move from the California Supreme Court to the trial-level court consideration of state habeas corpus petitions in capital cases, limit the grounds for appealing a death sentence, and compel all appellate attorneys – even if they lack death penalty experience or training – to take death penalty cases.¹⁷⁵ Five days before the referendum, ABA President Linda Klein wrote in the *Sacramento Bee* that Proposition 66 could lead to inexperienced and ineffective defense counsel taking on complex capital cases, an increase in procedural mistakes due to strict deadlines, and longer, more expensive trials We should not cut corners in the administration of the death penalty. Unfortunately, that is what Proposition 66 would do."¹⁷⁶

¹⁷² Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, 816 F.3d 1241 (9th Cir. 2016), cert. denied, 137 S. Ct. 1338 (2017). The ABA filed an amicus brief in support of granting certiorari. The brief argued, inter alia, that the Ninth Circuit had failed to recognize that the Justice Department's Final Rule did not come anywhere close to ensuring that an opt-in state would provide effective counsel for state post-conviction proceedings. Motion to File Brief Amicus Curiae and Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-4, Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, No. 16-880,

https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/HCRC-v-DOJ_ABA-Amicus-Brief-FINAL.authcheckdam.pdf.

¹⁷³ Joseph P. Williams, *All Eyes Are on Justice Anthony Kennedy's Retirement Plans*, U.S. NEWS & WORLD REP., July 10, 2017. In December 2017, Justice Kennedy hired a full complement of law clerks for the 2018 term, "a development that may indicate he is not planning to retire in the near future." Kevin Daley, *Will Justice Kennedy Stick Around Next Year? He Just Dropped A Hint*, DAILY CALLER, Dec. 22, 2017.

¹⁷⁴ California Proposition 62, Repeal of the Death Penalty (2016), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016).

¹⁷⁵ California Proposition 66, Death Penalty Procedures (2016), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016).

¹⁷⁶ Linda A. Klein, Opinion, Could Prop. 66 increase risk of executing an innocent inmate?, Sacramento Bee, Nov. 3, 2016.

On August 24, 2017, in *Briggs v. Brown*, the California Supreme Court upheld many of Proposition 66's provisions but held that the requirement that state courts complete their review of capital punishment cases within five years was "directive rather than mandatory," and could be relaxed in particular cases depending on the situation facing the courts.¹⁷⁷

There is substantial disagreement about what the proposition's impact will be. One view, articulated by Santa Clara University law professor Gerald Uelmen, is that the proposition contained several provisions that could lengthen further the delays in adjudicating capital cases. Kent Scheidegger, an author of Proposition 66 and perhaps its leading proponent, says that if courts decide appeals more quickly, there should be "a very substantial speedup." ¹⁷⁸

f. New Alabama Law Seeking to Truncate Death Penalty Judicial Review Process

In May 2017, Alabama enacted the Fair Justice Act, which was designed to favor speed over considered review of properly litigated appeals in death penalty cases. ¹⁷⁹ On May 12, 2017, ABA President Linda Klein wrote a letter to the Alabama Legislature objecting to key provisions in the bill. ¹⁸⁰ Anthony Ray Hinton, who was exonerated only after three decades on Alabama's death row (see discussion at Part I.B.4.a.i. below), said in April 2017 that if the Fair Justice Act had been the law earlier, "I would have been executed despite my innocence." ¹⁸¹

2. Pervasive Problem of Prosecutorial or Other Law Enforcement Misconduct or Serious Error

a. FBI and Other Forensic Errors

i. Hair "Matches" and Other FBI Crime Lab Errors

In April 2015, the FBI publicly acknowledged that witnesses from its laboratory's microscopic hair comparison unit had provided inaccurate "expert" testimony in 32 cases that had ended in death sentences – including nine in which the defendants had been executed. FBI "experts" had testified that crime scene hair evidence matched the defendant's hair to a wildly exaggerated degree of certainty. Their testimony's impact in securing convictions and death sentences is not certain – but as discussed two paragraphs below, it may have helped lead to an innocent person's execution. 182

¹⁷⁷ Briggs v. Brown, 400 P.3d 29, 34 (Cal. 2017) (as modified on denial of rehearing).

¹⁷⁸ Maura Dolan, Executions could resume after California Supreme Court leaves most of Proposition 66 intact, L.A. TIMES, Aug. 24, 2017.

¹⁷⁹ Mike Cason, Gov. Kay Ivey signs bill intended to shorten death penalty appeals, AL.COM, May 26, 2017.

¹⁸⁰ Letter from Linda Klein to Hon. Del Marsh, Hon. Mac McCutcheon, and Members of the Alabama Legislature, May 12, 2017, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABALtrtoALLegreSB187withattachments.authcheckdam.pdf.

¹⁸¹ Anthony Ray Hinton, Opinion, I was released from death row. Under the Fair Justice Act, I'd be dead, AL.COM, Apr. 27, 2017.

¹⁸² Spencer S. Hsu, FBI admits flaws in hair analysis over decades, WASH. POST, Apr. 18, 2015.

The FBI's April 2015 statement resulted from a review announced in July 2012 after the *Washington Post* revealed that "authorities had known for years that flawed forensic work by FBI hair examiners may have led to convictions of potentially innocent people, but . . . had not aggressively investigated problems or notified defendants." The FBI Laboratory said internally in the 1970s that although hair association could not yield positive identifications, "some FBI experts exaggerated the significance of 'matches' drawn from microscopic analysis of hair found at crime scenes." The impact of flawed "hair matches" extended far beyond cases in which FBI "experts" had testified. Whereas 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." ¹⁸³

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 generally (not just its hair examiners). In April 1997, the Inspector General's office criticized 13 FBI crime lab examiners for having used scientifically unsupportable analysis and for 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 these 13 examiners. The Justice Department still failed to notify state authorities, who thus "had no basis to consider delaying scheduled executions." Benjamin Herbert Boyle was executed based on scientifically unsupportable and overstated, inaccurate "expert" testimony after the April 1997 report's publication but before the Task Force focused on his case. "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." ¹⁸⁴

ii. State Evidence Credibility Issues in Florida and Arizona

In February 2017, the Orange-Osceola State Attorney's Office informed defense counsel of "clerical errors, failure to identify [finger]prints of value and the mislabeling of print cards," by an 18-year employee of the Orange County, Florida's Sheriff's Office. This could have adversely affected defendants in over 2,600 cases, including at least one of a death row inmate.¹⁸⁵

A few months earlier, the credibility of medical examiner testimony in many cases in one of Arizona's leading death penalty counties, Maricopa, was significantly undermined. KPNX reported that the county medical examiner's former lab director and chief toxicologist had – unbeknownst to Arizona defense counsel – been convicted of a felony for having stolen a gun that had been an exhibit in a case where he had previously worked. 186

¹⁸³ Spencer S. Hsu, U.S. reviewing 27 death penalty convictions for FBI forensic testimony errors, Wash. Post, July 17, 2013.

¹⁸⁴ U.S. Dep't of Justice Office of the Inspector Gen., An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory, at i-ii (2014).

¹⁸⁵ Rene Stutzman & Gal Tziperman Lotan, More than 2,600 Orlando-area lawyers get letters warning about fingerprint expert, ORLANDO SENTINEL, Feb. 6, 2017.

¹⁸⁶ Wendy Halloran & Elizabeth Wiley, Lab director's criminal record uncovered; what does it mean?, KPNX-12NEWS (Phoenix), Nov. 19, 2016.

iii. Bitemark Comparisons

On April 12, 2016, the Texas Forensic Science Commission approved its final report on a case concerning bitemark comparisons. It relied greatly on a Bitemark Investigation Panel that reviewed the extant scientific literature and data, and sought input from the American Board of Forensic Odontology and others in the field. The Commission's "two threshold observations based upon its review" were:

1) there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition; and 2) there is no scientific basis for assigning probability or statistical weight to an association, regardless of whether such probability or weight is expressed numerically (e.g., "one in a million"). Though these claims were once thought to be acceptable and have been admitted into evidence in criminal cases in and outside of Texas, it is now clear they lack any credible supporting data.¹⁸⁷

The Commission concluded that the vast preponderance of research fails to support any use of bitemark comparisons, that there are "significant quality control and infrastructure differences between forensic odontology and other patterned and impression disciplines," and that bitemark comparison evidence should be inadmissible in Texas criminal cases "unless and until" two types of criteria are established and there is "rigorous and appropriately validated proficiency testing." It formed a "multidisciplinary team of forensic odontologists and attorneys to review criminal cases potentially impacted by bitemark comparison evidence." ¹⁸⁸

The FBI does not use and the American Dental Association does not recognize bitemark analysis. 189

b. Prosecutorial Misconduct and Bad Science Make Wrongful Convictions More Likely the More Serious the Crime Is

University of Denver professors Scott Phillips and Jamie Richardson released a study in 2016 arising from their review of over 1,500 cases in which convicted prisoners were ultimately exonerated. They determined that those who prosecuted the most serious offenses, including death penalty cases, were "most apt" — as compared with prosecutors in less serious cases — "to participate in the production of erroneous evidence . . . from false confession to untruthful snitches, government misconduct and bad science." In particular, they found that false confessions were substantially greater in murder cases and notably more in death penalty cases than in less heinous murder cases. ¹⁹⁰

¹⁸⁷ TEX. FORENSIC SCI. COMM'N, FIFTH ANNUAL REPORT, at 14-15 (2016).

¹⁸⁸ *Id.* at 15.

¹⁸⁹ Amanda Lee Myers, Associated Press, *Once key in some cases, bite-mark evidence now derided as unreliable*, June 17, 2013, http://www.denverpost.com/ci_23474835/once-key-some-cases-bite-mark-evidence-now.

¹⁹⁰ Scott Phillips & Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*, 45 HOFSTRA L. REV. 417, 448 (2016).

c. Why People "Confess" to Crimes They Did Not Commit

In The New Yorker's June 19, 2017 issue, Rachel Aviv wrote about Remembering the Murder You Didn't Commit, with the subheading DNA evidence exonerated six killers. So why do some of them recall the crime so clearly?" Her article described the phenomenon of the "malleability of memory: an implausible notion . . . grows into a firmly held belief"191 that is wrong. In 2009, a Nebraska Assistant Attorney General said that the six people who had been convicted (five of them via plea deals) for the murder of a woman in 1989 were innocent "beyond all doubt." Some had been sentenced to life terms. In describing what had happened, Aviv highlighted the role of a charismatic psychologist Wayne Price, who simultaneously was a reserve deputy with the sheriff's office. Aviv said that Price "seemed to lose sight of the vulnerabilities of his former patients." She described how people can become convinced of their guilt of crimes they never committed, including the finding of a Psychology Today study published in 2015 that found that 70% of those interviewed in a "highly suggestive and repetitive" way would come to believe they had committed a crime. The study said they ended up with "rich false memories," whereby "imagined memory elements regarding what something *could* have been like can turn into elements of what it would have been like, which can become elements of what it was like." 192

d. High Level of Prosecutorial Misconduct in Four Counties Sending Large Numbers of People to Death Row in Recent Years

In July 2017, the Fair Punishment Project at Harvard Law School issued a report finding high levels of prosecutorial misconduct in four counties that have sent large numbers of people to death row in recent years: Orange County, California (see Section e.i. immediately below); Orleans Parish, Louisiana; St. Louis County, Missouri; and Shelby County, Tennessee.¹⁹³

e. Rare Instances of Consequences for Prosecutors or Police for Misconduct

Tangible adverse consequences for prosecutors or police found by courts to have engaged in misconduct are extremely rare. But there have been a few recent example of consequences.

i. Orange County, California

In March 2015, Superior Court Judge Thomas Goethals disqualified the entire Orange County District Attorney's Office (which then had 250 prosecutors) from continuing to prosecute a high-profile capital case in which the defendant had pled guilty to killing eight people. He did so because of the office's years of misusing jailhouse informants, prosecutors' propensity not to provide defense counsel with exculpatory information, and

¹⁹¹ Rachel Aviv, Remembering the Murder You Didn't Commit, NEW YORKER, June 19, 2017.

 $^{^{193}}$ Fair Punishment Project, The Recidivists: Four Prosecutors Who Repeatedly Violate the Constitution (2017).

the discovery that the sheriff's office had a massive, secret database containing much information that he had been actively seeking.¹⁹⁴

On November 22, 2016, the California Court of Appeal, citing "[t]he magnitude of the systemic problems" in Orange County and the "cozy relationship" between local prosecutors and the sheriff's office, upheld Judge Goethals's order. ¹⁹⁵ In doing so, it responded as follows to the state attorney general's assertion that Judge Goethals had imposed "a remedy in search of a conflict":

Nonsense. The court recused the OCDA only after lengthy evidentiary hearings where it heard a steady stream of evidence regarding improper conduct by the prosecution team. To suggest the trial judge prejudged the case is reckless and grossly unfair. These proceedings were a search for the truth. 196

The defendant was sentenced to LWOP in September 2017.¹⁹⁷ The abortive prosecution by the Orange County prosecutor's office cost over \$2.5 million.¹⁹⁸

Judge Goethals' order led to the enactment of a California law giving judges greater authority to remove prosecutors from cases in which they have committed misconduct, and to report misconduct to the state bar. It also led to a special committee report on the Orange County District Attorney's Office. The report concluded that a "failure of leadership" underlay the misconduct, along with a "win at all costs mentality." 199

ii. Charles Sebesta of Texas

On February 8, 2016, the Texas State Bar's disciplinary board upheld the disbarment of Charles Sebesta, who had been in charge of the prosecution of Anthony Graves. Graves served 12 years on death row and a total of 18 years in prison before being released. The disciplinary board termed Sebesta's misconduct "egregious." In 2010, the Fifth Circuit had reversed Graves' conviction, due to prosecutorial misconduct that included failing to disclose crucial evidence to the defense and suborning perjury. 200

 197 Tony Saavedra, Scott Dekraai, Orange County's worst mass killer, gets life without parole for eight Seal Beach murders, Orange County Reg., Sept. 22, 2017.

 $^{^{194}}$ People v. Dekraai, No. 12ZF0128, 2015 WL 4384450 (Cal. Super. Ct. Mar. 12, 2015), $\it aff'd$, 210 Cal. Rptr. 3d 523 (Ct. App. 2016).

¹⁹⁵ Dekraai, 210 Cal. Rptr. 3d at 555-56.

 $^{^{196}}$ Id. at 528.

¹⁹⁸ Tony Saavedra, Taxpayer cost for mass murderer Scott Dekraai's case tops \$2.5 million, ORANGE COUNTY REG., Sept. 17, 2017.

¹⁹⁹ PATRICK DIX ET AL., ORANGE COUNTY DISTRICT ATTORNEY INFORMANT POLICIES & PRACTICES EVALUATION COMMITTEE REPORT, at 7, 8 (2015).

 $^{^{200}}$ Brandi Grissom, State Bar board affirms disbarment of prosecutor who sent innocent man to death row, Dall. Morning News, Feb. 8, 2016.

f. Commutation to LWOP Due to Prosecutor's Reliance on False Information About a Non-Existent Murder and on Unsupported Hearsay

On April 20, 2017, Virginia Governor Terry McAuliffe commuted Ivan Teleguz's death sentence to LWOP. He did so for two reasons: First, the prosecutor, in seeking capital punishment, presented evidence that, the prosecutor argued, showed that Teleguz had taken part in another murder. But, the Governor said, "[w]e now know that no such murder occurred, much less with any involvement by Mr. Teleguz. It was false information, plain and simple" Second, there were many hearsay suggestions that Teleguz was a Russian mafia member — without any evidentiary support. A tertiary factor was that the actual killer (Michael Hetrick) in the murder for which Teleguz was convicted had negotiated a deal whereby in return for testifying against Teleguz he was sentenced to LWOP, not death. 201

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. An improvement in the quality of defense counsel in certain states has also been discussed above, in the context of the decline in new death sentences in those states. This section focuses on one other recent development regarding counsel.

Missouri has sent a greater proportion of its federal capital defendants to death row than any other state. A November 2016 analysis by *The Guardian* found that the likely reason for this was that four of the nine people sentenced to death in Missouri federal courts had the same lawyer: Frederick Duchardt. In three of these cases, Duchardt did not use a mitigation specialist – contrary to the ABA's capital case counsel guidelines.²⁰²

- 4. The Continuing Danger of Executing Innocent People
- a. People in the News in 2016-2018 Due to Innocence Findings or Considerations, After Years on Death Row
- i. Anthony Ray Hinton

In 2014, the Supreme Court remanded Anthony Ray Hinton's case, due to his counsel's ineffective assistance. The most egregious ineffectiveness was counsel's failure – in part due to his mistaken belief that he could spend only \$1,000 for experts – to use a qualified gun expert (he instead used a sight-impaired civil engineer without much

²⁰¹ Gov. Terry McAuliffe, Press Release, Governor McAuliffe Commutes Sentence of Ivan Teleguz to Life Imprisonment, Apr. 20, 2017, https://governor.virginia.gov/newsroom/newsarticle?articleId= 20103

²⁰² David Rose, *Death row: the lawyer who keeps losing*, THE GUARDIAN, Nov. 24, 2016.

experience with firearms).²⁰³ After remand, the prosecution asked government experts to review the evidence. "[T]hey could not conclusively determine that any of the six bullets were or were not fired through the same firearm or that they were fired through the firearm recovered from the defendant's home." On April 2, 2015, the case was dismissed at the request of the Jefferson County District Attorney's Office. Hinton was freed the next day.²⁰⁴

On January 10, 2016, CBS News' 60 Minutes reported:

Ray Hinton's life was never what he thought it would be after 1985 when he was misidentified by a witness who picked him out of a mug shot book. His picture was [put] there after a theft conviction. When police found a gun in his mother's house, a lieutenant told him that he'd been arrested in three shootings including the murders of two restaurant managers.

Ray Hinton: I said, "You got the wrong guy." And he said, "I don't care whether you did it or don't." He said, "But you gonna be convicted for it. And you know why?" I said, "No." He said, "You got a white man. They gonna say you shot him. Gonna have a white D.A. We gonna have a white judge. You gonna have a white jury more than likely." And he said, "All of that spell conviction, conviction, conviction." I said, "Well, does it matter that I didn't do it?" He said, "Not to me." The lieutenant denied saying that. But Hinton was convicted at age $30.^{205}$

ii. George Martin

George Martin's indictment was dismissed with prejudice in March 2016. *Pro bono* counsel from Gibson, Dunn & Crutcher had presented evidence at an evidentiary hearing that had led to his being granted a new trial – a decision affirmed by the Alabama Court of Criminal Appeals in December 2014. Mr. Martin served 15 years on death row.²⁰⁶

iii. Gary Tyler

After a very dubious conviction by an all-white jury, Gary Tyler was sentenced to death. But after the Supreme Court overturned Louisiana's mandatory death sentence statute in 1976, his death sentence was vacated. He was released on April 29, 2016, after the district attorney's office agreed to vacate his murder conviction and let him plead guilty to manslaughter and receive the maximum sentence for that crime, 21 years – less than half the time he had spent in prison.²⁰⁷

²⁰³ *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam).

²⁰⁴ Alan Blinder, Alabama Man Freed After Decade on Death Row, N.Y. TIMES, Apr. 3, 2015.

²⁰⁵ Scott Pelley, Life After Death Row, CBS NEWS: 60 MINUTES, Jan. 10, 2016.

²⁰⁶ Jared Boyd, Judge dismisses capital murder indictment for former Alabama trooper accused of killing wife, AL.COM, Mar. 25, 2016.

²⁰⁷ Associated Press, *Gary Tyler a free man after more than 4 decades in Angola*, Apr. 29, 2016, http://www.nola.com/crime/index.ssf/2016/04/gary_tyler_a_free_man_after_mo.htm.

New York Times columnist Bob Herbert brought great public attention to Mr. Tyler's plight in three devastating February 2007 op-eds titled A Death in Destrehan, Gary Tyler's Lost Decades, and 'They Beat Gary So Bad'. 208

iv. Nathson Fields

On December 15, 2016, a federal jury awarded \$22 million to former death row inmate Nathson Fields, who alleged that two Chicago police detectives had framed him for a 1984 double murder that put him on death row. Part of this criminal case's bizarre history was that Circuit Judge Thomas Maloney, who conducted the bench trial at which a co-defendant and Fields were sentenced to death, turned out to have taken \$10,000 to acquit them before giving back the money mid-trial because he grew concerned that the FBI knew about the bribe. Judge Vincent Gaughan acquitted Fields on the two murders in 2009. Later, in another startling development, Fields' police "street file" was discovered in 2011 in an old filing cabinet in a police station's basement. The file contained notes from early in the police investigation about other suspects, plus lineup cards that the prosecution had withheld from the defense. In 1994, Maloney was sentenced to 15 years and 9 months in prison and fined \$200,000 for fixing Fields' case and two others murder trials in the 1980s.

v., vi. Tyrone "Kareem" Moore and James Dennis

Two former Pennsylvania death row inmates, Tyrone "Kareem" Moore and James Dennis, were released from prison after pleading no contest to third-degree murder after prosecutors dropped the first-degree charges against them. During his 22 years on death row, Moore was in solitary confinement. Dennis had been on death row of almost a quarter century when the *en banc* Third Circuit ordered a new trial because, as his *pro bono* lawyers from Arnold & Porter showed, prosecutors had failed to produce evidence tending to exonerate him and implicate another person.²¹¹

Dennis was released several months after Moore, on May 13, 2017, after waiting to be paroled in an unrelated case. This marked the apparent end to the last of three wrongful capital prosecutions in unrelated cases that all involved the same two Philadelphia detectives, Manuel Santiago and Frank Jastrzembski. They were implicated in misconduct in all three cases — in which only Dennis was sentenced to death. In his case, the two detectives withheld exculpatory evidence. 213

²⁰⁸ Bob Herbert, Opinion, *A Death in Destrehan*, N.Y. TIMES, Feb. 1, 2007; Bob Herbert, Opinion, *Gary Tyler's Lost Decades*, N.Y. TIMES, Feb. 5, 2007; Bob Herbert, Opinion, *They Beat Gary So Bad'*, N.Y. TIMES, Feb. 8, 2007.

²⁰⁹ John Meisner & Elyssa Cherney, *Jury awards \$22 million in damages to wrongly convicted ex-El Rukn*, CHI. TRIB., Dec. 15, 2016.

²¹⁰ Matt O'Connor, Ex-judge Gets Final Fix: 15 Years, CHI. TRIB., July 22, 1994.

²¹¹ Travis Kellar, Man convicted in deadly 1982 shooting in Forty Fort to be released from prison, TIMES LEADER (Wilkes-Barre), Dec. 22, 2016; Jon Schuppe, To End Decades on Death Row, Inmate Makes an Agonizing Choice, NBC News, Dec. 24, 2016.

²¹² Jon Schuppe, From Death Row to Freedom: The Long Journey of James Dennis, NBC NEWS, May 16, 2017. ²¹³ Mark Bookman, Three Murders in Philadelphia, SLATE.COM, May 12, 2017.

vii. Isaiah McCoy

On January 19, 2017, former Delaware death row inmate Isaiah McCoy was acquitted by the judge at his retrial and released. Having been sent to death row when he was 25 years old, he was set free at age 29 thanks to the work of his lawyers, including Erek Barron, and an investigator. The Delaware Supreme Court had ordered the new trial because of several instances of misconduct by the lead trial prosecutor – including his lying to the trial judge during the sentencing trial.²¹⁴

This outcome brought to 82 the total of people who have been on death row who, after being assisted by $pro\ bono$ counsel, secured a lesser sentence or – as with Mr. McCoy – acquittal.²¹⁵

viii. Rodricus Crawford

On April 17, 2017, the Caddo Parish District Attorney's Office announced that it was formally dropping all charges against Rodricus Crawford, saying it could not secure a new conviction in view of evidence tending to show that when Crawford's son died he had pneumonia as well as bacteria in his blood that was suggestive of sepsis. ²¹⁶ Dale Cox, in securing Mr. Crawford's death sentence, had attacked the defense's expert testimony about pneumonia and sepsis, and had relied on a local doctor whose contention that the baby had been suffocated was inconsistent with the autopsy results. Cox later requested that Crawford, while on death row, be compelled to experience "as much physical suffering as it is humanly possible to endure before he dies." ²¹⁷

At oral argument in 2016, the Louisiana Supreme Court "seemed bewildered that Crawford had ever been charged with a capital crime." On November 16, 2016, the court overturned Crawford's conviction, because the trial judge did not force Caddo Parish prosecutor Dale Cox to give "race neutral reasons" for using five peremptory challenges to keep blacks off the jury. Two justices would have overturned the conviction due to insufficient evidence that Crawford intended to kill the boy; they felt he should have been acquitted. 219

ix. Ralph Daniel Wright, Jr.

On May 11, 2017, the Florida Supreme Court ordered that Ralph Daniel Wright, Jr.'s murder convictions be vacated and acquitted him, because the evidence supporting the convictions and his death sentence was "purely circumstantial" and not enough for any

²¹⁴ Jessica Masulli Reyes, Former death row inmate goes free after acquittal, NEWS J. (Wilmington), Jan. 19, 2017.

²¹⁵ Email from Emily Olson-Gault to Ronald Tabak, Jan. 26, 2017 (on file with author).

²¹⁶ Jonah Engel Bromwich, Louisiana Man Who Spent Three Years on Death Row Has Murder Charge Dismissed, N.Y. TIMES, Apr. 20, 2017.

²¹⁷ Rachel Aviv, *A Death Sentence Overturned in Louisiana*, New Yorker, Nov. 23, 2016. ²¹⁸ *Id.*

²¹⁹ State v. Crawford, 218 So. 3d 13 (La. 2016); John Simerman, La. Supreme Court vacates conviction, death sentence for Caddo Parish man in death of toddler son, New Orleans Advocate, Nov. 16, 2016.

conviction.²²⁰ A majority of the court, in a concurring opinion, said that no reasonable juror would have found Wright guilty beyond a reasonable doubt.²²¹

Wright's death sentence had already become invalid as a result of *Hurst* and the subsequent decisions discussed above in Part I.A.5.a.i. At his trial, the jury had recommended death by only a 7-5 vote.

x. Jerry Hartfield

Jerry Hartfield was convicted of murder and sentenced to death, but on direct appeal, the Texas Court of Criminal Appeals vacated his conviction and death sentence due to the incorrect rejection of a potential juror who had expressed doubts concerning capital punishment.²²² A few years thereafter, in 1983, that ruling – including its order that a new trial be held – became effective. However, although Hartfield – who is developmentally disabled – stayed in prison, he was not retried until 32 years later, in 2015, by which time most of the evidence could not be found and some witnesses were dead. The death penalty was not sought, but he was again convicted. Yet, his developmental disability made use of his confession questionable. A Texas appeals court ruled on January 19, 2017, that his right to a speedy trial had been violated by the extremely long delay and said he had endured "a criminal justice nightmare."²²³ He was released on June 12, 2017.²²⁴

xi. Charles Robins (the Court's Name for Ha'im Al Matin Sharif)

On June 7, 2017, Charles Robins (the name the court used for Ha'im Al Matin Sharif) was freed after 29 years on death row, after agreeing with the Clark County, Nevada district attorney to change his first-degree murder conviction to second-degree murder with his time served credited.²²⁵ This followed the Nevada Supreme Court's unanimous holding on September 22, 2016, that his successive state habeas petition should proceed because he "ha[d] presented specific factual allegations that, if true, would show that it is more likely than not that no reasonable juror would have convicted him of first-degree murder and child abuse beyond a reasonable doubt or found the single aggravating circumstance used to make him death eligible."²²⁶ This holding was made in light of newly-found evidence that the victim, 11 months old, had infantile scurvy – which explained why she had all her injuries and then died. The prosecutor's office retained a doctor who later concurred that she had had scurvy.²²⁷

²²⁰ Wright v. State, 221 So. 3d 512, 525 (Fla. 2017).

²²¹ Id. at 526 (Canady, J., concurring).

²²² Hartfield v. State, 645 S.W.2d 436 (Tex. Crim. App. 1980) (en banc).

 $^{^{223}}$ Hartfield v. State, 516 S.W.3d 57, 68 (Tex. App.), $cert.\ denied,$ 138 S. Ct. 473 (2017); Richard Pérez-Peña,

^{&#}x27;Justice Nightmare': 32 Years in Texas Prisons After Conviction Voided, N.Y. TIMES, Jan. 19, 2017.

²²⁴ Jerry Hartfield Released from Texas Prison After 35 Years Without Valid Conviction, EJI.ORG, June 22, 2017.

²²⁵ Michael Kiefer, The long journey from death row to freedom: Arizona lawyer's sleuthing frees murder convict, ARIZ. REPUBLIC, June 15, 2017.

²²⁶ Robins v. State, 385 P.3d 57, 2016 WL 5801204, at *4 (Nev. 2016) (unpublished table decision).

²²⁷ Use of the Death Penalty for Killing a Child Victim, DEATH PENALTY INFO. CTR., Aug 6, 2017.

xii. Rickey Dale Newman

On October 11, 2017, an Arkansas trial judge dismissed all charges against Rickey Dale Newman, who had come perilously close to being executed in July 2005. Newman, who was freed on October 11, 2017, had "represented" himself at his 2002 trial, at which he had told the jury he was guilty of murder and should be sentenced to death. Newman, an ex-Marine, had chronic post-traumatic stress disorder since childhood and an IQ in the intellectual disability range. When arrested, he was homeless, severely mentally ill, and suffered from major depression. At his one-day trial, the prosecution, in the absence of physical evidence that actually linked Newman to the crime, presented an "expert" who inaccurately testified that hair on Newman's clothing was the victim's. 229

Initially, the Arkansas Supreme Court had upheld Newman's attempt to waive all appeals. But just four days before his scheduled execution, he permitted counsel to seek a stay of execution. They presented DNA results excluding Newman as a source of DNA evidence on the blanket on which the victim had been found and that debunked the hair "match" presented at trial. Counsel also showed that prosecutors had withheld evidence that contradicted Newman's "confession" and that the state doctor upon whose testimony the trial court had relied in finding Newman competent to stand trial had made important errors. In January 2014, the Arkansas Supreme Court vacated his convictions and ordered a new trial.²³⁰ Newman thereafter was removed from death row. Then, in September 2017, the Arkansas Supreme Court precluded use of his "confessions" at retrial.²³¹ This led special prosecutor Ron Fields to request that the charges against Newman to be dismissed, since without the "confessions," there was insufficient evidence for a conviction and that a retrial would therefore waste the taxpayers' money.²³²

xiii. Gabriel Solache

Gabriel Solache, a Mexican national, was convicted and sentenced to death in Illinois for fatally stabbing a couple while robbing their home. A co-defendant, also a Mexican national, was also convicted but sentenced to a lesser sentence. Solache remained imprisoned after being one of the 157 Illinois death row inmates whose death sentences were commuted by Governor George Ryan in 2003.²³³

He and his co-defendant were exonerated on December 21, 2017, after Circuit Court Judge James Obbish vacated their convictions because now-disgraced Chicago detective Reynaldo Guevara had lied in testifying that he had no recollection of questioning them and had not "beaten false confessions" out them. The Cook County prosecutors, in light of Judge Obbish's decision, dropped all charges against both. ICE then immediately seized both.

²²⁸ Dave Hughes, Former Arkansas death row inmate freed after 16 years in custody; charges dropped in mutilation case, ARK. DEMOCRAT-GAZETTE, Oct. 12, 2017.

²²⁹ Newman v. State, No. CR-12-118, 2014 WL 197789, at *2-3, *4 n.1, *11 (Ark. Jan 16, 2014).

²³⁰ Id. at *29.

²³¹ State v. Newman, 525 S.W.3d 457 (Ark. 2017).

²³² Krystle Sherrell & Kate Jordan, Arkansas Death Row Inmate Walks Free After Nearly 17 Years In Prison, KFSM 5News (Fort Smith), Oct. 11, 2017.

²³³ Former Death-Row Prisoner Exonerated in Illinois, Seized by ICE, DEATH PENALTY NEWS, Jan. 3, 2018.

There had been no physical or biological evidence against either. Solache said that his "confession" was written in English by an assistant state attorney, even though the latter did not speak Spanish. Solache spoke only Spanish, and Guevara never had the "confession" translated into Spanish. Solache also stated that he had undergone three days of coercive questioning during which he was sleep deprived, denied consular assistance, and given only minimal food or drink.²³⁴

xiv. Alfred Dewayne Brown

On June 8, 2015, Harris County District Attorney Devon Anderson dismissed the capital murder case against Alfred Dewayne Brown due to insufficient evidence to corroborate his co-defendant's testimony.²³⁵ In 2014, the Texas Court of Criminal Appeals had overturned Brown's conviction and death sentence because the prosecution had failed to produce a telephone record that may have supported his alibi.²³⁶ Numerous additional troubling aspects of Brown's prosecution and the underlying police investigation were discussed in Pulitzer Prize-winning columns by the *Houston Chronicle*'s Lia Falkenberg.²³⁷

In April 2016, Texas Comptroller Glenn Hegar denied Brown's compensation application because Brown had never been formally determined to be "actually innocent." ²³⁸

But then on March 2, 2018, the Harris County District Attorney's office released evidence showing that the trial prosecutor had known at the time and withheld from the defense telephone records that supported Brown's innocence claim. The prosecutor had intimidated a witness whose original account was consistent with the phone records into falsely changing her account and implicating Brown. Harris County's new district attorney, Kim Ogg, said that her office would report what it had found to the State Bar of Texas so that "it may investigate the prosecutor's professional conduct." ²³⁹

xv. Vicente Benavides Figueroa

On March 12, 2018, the California Supreme Court vacated Vicente Benavides Figueroa's conviction for murdering his girlfriend's toddler after raping and anally sodomizing her. He was sentenced to death in 1993. The court said the forensic evidence was "extensive," "pervasive," "impactful," and "false." It found that medical evidence showed the girl was never raped or sodomized and may not have been murdered at all. Instead, she may have died from complications from having been struck by a car. 241

²³⁴ Id.

²³⁵ Brian Rogers, DA drops charges against Alfred Brown, Hous. Chron., June 8, 2015.

 $^{^{236}}$ Ex parte Brown, No. WR-68,876-01, 2014 WL 5745499 (Tex. Crim. App. Nov. 5, 2014) (per curiam); Jessica Glenza, Texas court overturns man's death sentence due to withheld evidence, The Guardian, Nov. 5, 2014.

 $^{^{237}}$ E.g., Lisa Falkenberg, Evidence mounts that wrong man on death row for killing HPD officer, Hous. Chron., Apr. 20, 2015.

²³⁸ Brian Rogers, Comptroller: Former death row inmate not eligible for exoneration funds, Hous. Chron., Apr. 7, 2016.

²³⁹ St. John Barned-Smith & Keri Blakinger, *DA: Former prosecutor withheld key email in death row case*, Hous. Chron., Mar. 3, 2018; Margaret Downing, *DA Ogg Finds Email Evidence That Prosecutor Did Know About Phone Records in Alfred Brown Case*, Hous. Press, Mar. 2, 2018.

²⁴⁰ In re Figueroa, 412 P.3d 356, 367 (Cal. 2018).

²⁴¹ *Id.* at 360-62, 367.

Eventually, "[a]fter reviewing the medical records and photographs that I should have been provided in 1993," a state trial expert withdrew his assessment of rape. 242 The defense also presented evidence from Dr. Astrid Heger, a leading expert on child abuse, who said that the other state expert at trial had given testimony "so unlikely to the point of being absurd. No such mechanism of injury has ever been reported in any literature of child abuse or child assault." She added that the internal injuries the child sustained were commonly seen in victims of automobile accidents. During oral argument, Associate Justice Carol Corrigan, a former prosecutor, described Dibdin's testimony as being "among the most hair-raising false evidence that I've encountered in all the time that I've been looking at criminal cases." Chief Justice Tani Cantil-Sakauye compared the sexual assault allegations to "a bomb dropped on the jury" that prevented consideration of the evidence that a car may have hit the girl. Prosecutors admitted that the forensic evidence they used to convict Benavides Figueroa was false, but unsuccessfully asked the state court to sustain a conviction for second-degree murder. After the court's decision, Kern County District Attorney Lisa Green said a retrial was improbable.

xvi. William T. Montgomery (see Part I.B.6.e.ii. below)

b. Significant Doubts About the Guilt of People Still or Until Recently on Death Row, or Who Died While on Death Row; None Have Gotten Final Relief Regarding Their Convictions, and Most Have Not Gotten Sentencing Relief

i. Kevin Cooper

There is substantial doubt about the guilt of California death row inmate Kevin Cooper. In 2009, Judge William A. Fletcher, dissenting, said Cooper could be innocent. He stressed the government's failure to disclose some evidence and its tampering with other evidence.²⁴⁷

Mr. Cooper filed a clemency petition with Governor Jerry Brown in March 2016. On March 14, 2016, ABA President Paulette Brown wrote to the Governor urging an executive reprieve to permit a "thorough" investigation into Cooper's guilt or innocence. President Brown expressed particular concerns about "evidence of racial bias, police misconduct, evidence tampering, suppression of exculpatory information, lack of quality defense counsel, and a hamstrung court system."²⁴⁸

²⁴⁴ Jose Gaspar, With 'hair-raising false evidence' exposed, Delano man gets a second chance, BAKERSFIELD CALIFORNIAN, Mar. 9, 2018.

²⁴² Chloe Carlson, *BREAKING NEWS: Death penalty reversed; "false evidence" used in trial, court rules*, KGET-TV (Bakersfield), Mar. 12, 2018.

 $^{^{243}}$ *Id*.

²⁴⁵ Figueroa, 412 P.3d at 359.

 $^{^{246}}$ Carlson, supra note 242.

²⁴⁷ 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.

²⁴⁸ Letter from Paulette Brown to Hon. Edmund "Jerry" Brown, Mar. 14, 2016, http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016mar14_kevincooper_l.authcheckdam.pdf.

ii. Max Soffar

Texas death row inmate Max Soffar died of liver cancer on April 24, 2016, four days before the Fifth Circuit was to have heard oral arguments on his appeal from Federal District Judge Sim Lake's December 2014 ruling that the conduct of Soffar's trial counsel and the trial judge's rulings were (in the AEDPA's words) "not unreasonable." His conviction and death sentence were based solely on a "confession" that is contradicted by facts about the crime and by the recollections of a man who survived (although with brain damage) after being shot during the crime. The "confession" was obtained after three days of unrecorded questioning. Soffar's counsel were going to stress at oral argument that no physical evidence connected him to the crime and to focus on evidence they said indicated that a serial killer was far likelier to be the perpetrator.²⁴⁹

iii. Kerry Max Cook

On June 6, 2016, a Texas judge dismissed murder charges against Cook, due to the prosecution's admission that their predecessors presented false testimony from someone whom DNA tests now strongly suggest may have been the actual perpetrator. In 1999, Cook plead no contest on lower charges and thereby secured his release and averted a fourth trial. Now, he is far closer to formal exoneration.²⁵⁰

iv. Clemente Aguirre

On October 27, 2016, the Florida Supreme Court unanimously vacated the conviction of death row inmate Clemente Aguirre-Jarquin. Newly discovered confessions and DNA evidence strongly suggested that the real killer was the prosecution's chief witness. At trial, the jury had voted 7-5 for the death penalty for one murder and 9-3 for the death penalty for the other murder. Under the Florida Supreme Court's December 2016 *Mosley* decision, such non-unanimous votes would not lead to a death sentence. The prosecutor's office said it would seek a retrial.²⁵¹

v. Kevin Keith

In 2010, Ohio Governor Ted Strickland granted clemency to Kevin Keith that changed his death sentence to LWOP for crimes (including three murders) in 1994. Governor Strickland was troubled principally by the use of otherwise unexplained circumstantial evidence to link Keith to the crimes -i.e., "certain eyewitness testimony with certain forensic evidence about which important questions have been raised." ²⁵² In late October 2016, Keith filed a motion for a new trial, asserting that the Ohio Bureau of Investigation analyst who testified for the prosecution at trial had been suspected by her superiors of having shaded her testimony to improperly favor the prosecution and allegedly

²⁴⁹ Allan Turner, Twice-convicted Houston killer Max Soffar dies days before federal appeals argument, Hous. Chron., May 4, 2016; Michael Berryhill, The lost appeals of Max Soffar, Hous. Chron., Apr. 3, 2015.

²⁵⁰ Brandi Grissom, After nearly 40 years, murder charges dropped against Kerry Max Cook in East Texas case, Dall. Morning News, June 6, 2016.

²⁵¹ Aguirre-Jarquin v. State, 202 So. 3d 785 (Fla. 2016) (per curiam); Rene Stutzman, Court overturns death sentence, conviction in double homicide, ORLANDO SENTINEL, Oct. 27, 2016.

²⁵² Governor Removes Ohio Man From Death Row, Reduces Sentence, INNOCENCE PROJECT, Sept. 2, 2010.

was "mentally unstable." Lee Price, Ohio's Attorney General at the time of the trial, reportedly said after reviewing the new evidence presented by Keith's counsel that if he had had this evidence and had it been his decision to make, he would not have permitted her to testify.²⁵³ Keith's motion was denied, and on June 26, 2017, the Court of Appeals for the Third Appellate District affirmed.²⁵⁴

vi. William Ernest Kuenzel

Former U.S. Attorney General Edwin Meese III and former Manhattan District Attorney and U.S. Attorney Robert Morgenthau sought certiorari for Alabama death row inmate William Ernest Kuenzel, whom procedural rules barred from having a court consider new evidence supporting his innocence claim. Certiorari was denied on October 31, 2016.²⁵⁵

vii. Tyrone Noling

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

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

On May 2, 2013, the Ohio Supreme Court held that a judge must reconsider whether to allow DNA testing.²⁵⁷ But new DNA tests on a cigarette butt found in the driveway at the victims' home²⁵⁸ did not produce "hits." Noling's lawyers then sought DNA testing of other items by a private lab.

²⁵³ Motion for New Trial Based on Newly Discovered Evidence and/or Post-conviction Relief Under Ohio Rev. Code § 2953.23 at 3, *State v. Keith*, Case No. 94 CR 0042 (Ohio Ct. Com. Pl. filed Oct. 28, 2016),

http://www.otse.org/wp-content/uploads/2016/11/Mtn.-for-New-Trial-Based-on-New-Evidence.pdf; see also Peter Krouse, Former death-row inmate Kevin Keith seeks new trial, cites testimony of "mentally unstable" BCI agent, Cleveland.Com, Dec. 27, 2016.

²⁵⁴ State v. Keith, No. 3-17-01, 2017 WL 2729625 (Ohio Ct. App. June 26, 2017), appeal not allowed, 87 N.E.3d 223 (Ohio 2017).

²⁵⁵ Jess Bravin, Law-Enforcement Legends Team Up in Death-Penalty Fight, WALL St. J. L. Blog, Oct. 17, 2016; Kuenzel v. Alabama, 137 S. Ct. 375 (2016).

²⁵⁶ Andrew Cohen, Is Ohio Keeping Another Innocent Man on Death Row?, THE 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 J. (Ohio), Dec. 19, 2013.

On March 6, 2018, the Ohio Supreme Court held that while Noling could have the full DNA profile from the cigarette butt, his counsel could not have DNA testing done on shell casings from a handgun the killer would probably have touched while handling it and jewelry boxes that the killer probably handled. The court deferred to the state's lab's view that too many people had touched these things to make DNA testing possible.²⁵⁹

viii. Rodney Reed

In November 2014, *The Intercept* ran an extensive article on Rodney Reed's case, titled *Is Texas Getting Ready to Kill An Innocent Man*?²⁶⁰ On April 12, 2017, the Texas Court of Criminal Appeals denied Mr. Reed's effort to secure additional DNA testing, principally because it held that "Reed failed to show by a preponderance of the evidence a reasonable probability that exculpatory DNA test results would change the outcome of his trial."²⁶¹ Mr. Reed continues to have a habeas appeal in the Court of Criminal Appeals and continues to have a stay of execution. There was an evidentiary hearing in October 2017,²⁶² with no decision as of January 2018.

ix. Walter Ogrod

Despite a jury's having voted in 1993 to acquit him of having murdered a four-year-old girl in 1988, Walter Ogrod was retried in 1996 due to the first trial's ending in a mistrial after one juror said he had changed his mind. In the period before the retrial, a jailhouse informant – whom many called a "snitch" for having induced "confessions" from so many inmates – was placed with Ogrod. At the 1996 retrial, this cellmate, John Hall, testified that Ogrod had admitted to committing the murder – an "admission" dramatically inconsistent with the "confession" used against Ogrod at his original trial. Ogrod was convicted and sentenced to death. Ogrod was, and is, developmentally disabled with autism spectrum disorder. 263

In a comprehensive book about Ogrod's case published in 2017, *The Trials of Walter Ogrod*, Tom Lowenstein presents a harrowing account – including the Philadelphia District Attorney's office's decades opposing DNA testing, trying to avoid questioning of its tactics, and seeking to preclude consideration of Hall's having been discredited in another highly publicized case. Lowenstein said he hoped the district attorney being elected in 2017 (who turned out to be Larry Krasner, discussed in Part I.A.1.c.ii. above) would review thoroughly "death-penalty and life imprisonment cases from the 1990s," when "[t]here was a systemic problem with how that DA's office was prosecuting people." 264

²⁵⁹ State v. Noling, No. 2014-1377, 2018 WL 1193740 (Ohio Mar. 6, 2018).

²⁶⁰ Jordan Smith, Is Texas Getting Ready to Kill An Innocent Man?, THE INTERCEPT, Nov. 17, 2014.

²⁶¹ Reed v. State, No. AP-77,054, 2017 WL 1337661, at *15 (Tex. Crim. App. Apr. 12, 2017).

²⁶² Chuck Lindell, Rodney Reed hearing ends with sharp disagreements aired, Austin Am.-Statesman, Oct. 13, 2017.

 $^{^{263}}$ Will Bunch, A death row inmate, a murder victim's son, and a 16-year quest for justice, The Inquirer, Mar. 30, 2017.

²⁶⁴ Thomas Lowenstein, The Trials of Walter Ogrod (2017).

x. Marcellus Williams (see Part I.B.6.e.ii. below)

xi. Sherwood Brown

On October 26, 2017, the Mississippi Supreme Court ordered a new trial for Sherwood Brown, who had been convicted and sentenced to death in 1995 for the sexual assault and murder of a 13-year-old girl, and convicted and sentenced to life for killing her mother and grandmother. These convictions and sentences were premised largely on claims that blood on Brown's shoe was from the victims and that a surviving victim's saliva had material from Brown, and on bitemark "expert" testimony that Brown's wrist had a bitemark matching the girl's bite pattern. 265

The Mississippi Supreme Court held in 2012 that there should be DNA testing. The testing showed the DNA in the blood on the shoe was from a male, and thus could not have come from any of the victims, and that saliva taken from a surviving victim had no indication of DNA from Brown. The court issued its October 2017 order vacating Brown's convictions without requiring an evidentiary hearing on the DNA results. It described its decision as "extraordinary and extremely rare in the context of a petition for leave to pursue post-conviction collateral relief." ²⁶⁶

xii. Daniel Dougherty

Former death row inmate Daniel Dougherty was granted the right to a third trial by the Pennsylvania Superior Court on October 31, 2017. The court's holding was based on the facts that at Dougherty's 2016 retrial the prosecution had relied on the same dubious testimony about arson by a former fire marshal whose testimony at the original trial in 2000 had led to the retrial being ordered, and had also used the testimony of a second fire marshal who relied on and further purported to support the improperly repeated testimony. The jury at the 2016 retrial had acquitted Dougherty of first-degree murder (due to insufficient proof of intent) but convicted him of arson and second-degree murder.²⁶⁷

c. Significant Doubts About Past Executions

i. Carlos DeLuna

A lengthy article in the May 2012 *Columbia Human Rights Law Review* (later expanded into a book) concluded that Texas executed Carlos DeLuna in 1989 for a murder committed by Carlos Hernandez.²⁶⁸ The authors determined, after a five-year investigation, that DeLuna had been executed solely based on contradictory eyewitness accounts that

²⁶⁵ Therese Apel, *Death row inmate's triple killing conviction overturned*, Clarion-Ledger (Jackson), Oct. 26, 2017.

 $^{^{266}\} Brown\ v.\ State,$ No. 2017-DR-00206-SCT, slip op. at 2 (Miss. Oct. 26, 2017) (en banc), https://deathpenaltyinfo.org/files/pdf/2017.10.26_SherwoodBrownEnBancOrder.pdf.

²⁶⁷ Commonwealth v. Dougherty, No. 1648 EDA 2016 (Pa. Super. Ct. Oct. 31, 2017), https://death.penaltyinfo.org/files/pdf/DanielDoughertyPaSuperior2017Opinion.pdf.

²⁶⁸ James S. Liebman et al., *Los Tacayos Carlos: Anatomy of a Wrongful Execution*, 43 Colum. Hum. Rights L. Rev. 711 (2012); James S. Liebman & the Columbia DeLuna Project, The Wrong Carlos: Anatomy of a Wrongful Execution (2014).

mistakenly identified him, whereas the witnesses actually saw his "spitting image," Hernandez. The authors said law enforcement's investigation was fatally flawed by many mistakes and omissions, including not following up on clues. Whereas DeLuna's court-appointed lawyer ineptly said it was unlikely anyone named Hernandez was involved and the lead prosecutor said Hernandez was a "phantom" made up by DeLuna, Hernandez existed, had a history of using a knife in attacking people, and was once jailed for killing a woman using the same knife used in this case's killing.²⁶⁹

Chicago Tribune reporters, investigating in 2006, found five people to whom Hernandez had admitted killing both (a) the victim for whose killing DeLuna had been executed and (b) another woman four years earlier for whose murder he had been indicted but not tried. One of the reporters said that whereas crime scene photos showed tremendous amounts of blood, DeLuna, when arrested nearby soon after the crime, did not have on him any blood, the victim's hair, or fibers. His fingerprints were not found at the crime scene. Andrew Cohen said the crimes' only eyewitness "identified DeLuna [when he] was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene."

ii. Ruben Cantu

Texas executed Ruben Cantu in 1993 for a 1984 murder. Sam Millsap, Jr., who had a perfect record in seeking death sentences as San Antonio's district attorney, never had qualms over his cases until the *Houston Chronicle*'s Lise Olsen interviewed him in 2005 and raised serious questions about Cantu's guilt. Millsap was stunned by Olsen's findings. He felt he had over-relied on a purported eyewitness identification and later said that if he could redo things, he would not seek the death penalty for Cantu. Olsen's story led then-District Attorney Susan Reed to re-examine the case in 2007. Reed concluded that Cantu was guilty. Millsap now advocates the death penalty's abolition due to systemic imperfections. Lise Olsen "feels little vindication for her work," since "Ruben Cantu is dead. There is no victory in this story."²⁷¹ Cantu, because he was only 17 at the time of the crime, could not constitutionally receive the death penalty today.

iii. Benjamin Herbert Boyle

As noted above (in Part I.B.2.a.i.), the Justice Department Inspector General's office reported in July 2014 that Texas' 1997 execution of Benjamin Herbert Boyle occurred *after* that office had concluded that his conviction was based in substantial part on scientifically baseless "expert" testimony.

iv. Claude Jones

New DNA tests completed in November 2010 raised significant doubts about the guilt of Claude Jones, whom Texas had executed in December 2000. His conviction was

²⁶⁹ Chantal Valery, AFP, *Wrong man was executed in Texas, probe says*, May 14, 2012, http://www.google.com/hostednews/afp/article/ALeqM5gKjcKUa17t1CXiTjPw8tN-V6fNSg?docid=CNG.37ab293d08346aa6f7c1d1bfbdd5758f.491.

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

²⁷¹ Stephanie Gallman, From seeking the death penalty to fighting it, CNN, Aug. 7, 2015.

based principally on a strand of hair recovered from the crime scene – hair the prosecution asserted was his. That was the only *physical* evidence supposedly tying him to the scene. The only other evidence was later-recanted testimony by an alleged accomplice. Under Texas law, that testimony had never been sufficient for conviction, absent independent corroborating evidence.

The technology to do proper DNA testing did not exist at the time of Jones' trial. Before his execution, he unsuccessfully asked the Texas courts and Governor George W. Bush for a stay to permit DNA hair testing. The Governor's office's lawyers never told Bush about the request or that DNA testing might tend to exonerate Jones. Bush had stayed another execution to permit DNA testing. When the testing was finally done a decade later, it showed that the hair was the victim's. The Innocence Project's Barry Scheck said this proved the hair sample testimony "on which this entire case rests was just wrong Unreliable forensic science and a completely inadequate post-conviction review process cost Claude Jones his life." The *Texas Observer* said this was "a highly questionable execution — a case that may not have resulted in a conviction were it tried with modern forensic science." 272

v., vi., vii. John Hardy Rose, Desmond Carter, Joseph Timothy Keel

In 2010, former FBI agents completed an audit of North Carolina's State Bureau of Investigation (the "SBI") at State Attorney General Roy Cooper's request. They found that SBI agents repeatedly helped prosecutors secure convictions, but sometimes "information . . [possibly] material and even favorable to the defense . . . was withheld or misrepresented." They recommended that 190 criminal cases in which SBI reports were, at best, incomplete be thoroughly reviewed. These included three cases where defendants who had confessed were executed and four cases of people still on death row. Although the audit did not determine that any innocent person had been convicted, the audit report said that defendants' confessions and guilty pleas may have been affected by tainted SBI reports.²⁷³

Counsel for John Hardy Rose, who was executed on November 30, 2001, said that if they had known about the undisclosed negative results from a test for blood, Rose's sentence might not have been death – since there already was a question whether the crime was premeditated or impulsive. Desmond Carter, executed on December 10, 2002, had inexperienced counsel who assumed that the SBI lab evidence was accurate. Counsel for Joseph Timothy Keel, executed on November 7, 2003, began considering the undisclosed evidence's possible impact but said: "[T]here are no do-overs with the death penalty. We can't go back and fix these errors." 274

viii. Cameron T. Willingham

Controversy over Texas' 2004 execution of Cameron T. Willingham for arson/murder continues. Governor Rick Perry failed in 2004 to grant a 30-day reprieve despite – as later

²⁷² Dave Mann, DNA Tests Undermine Evidence in Texas Execution, Tex. Observer, Nov. 11, 2010.

²⁷³ Associated Press, *Outside Review Finds Flaws in 190 SBI Prosecutions*, Aug. 19, 2010, http://www.wral.com/news/state/story/8153666/.

²⁷⁴ Joseph Neff & Mandy Locke, For Executed Men, Audit's Too Late, NEWS & OBSERVER, Aug. 19, 2010.

revealed – receiving material from a renowned arson expert (retained by Willingham's lawyers) who found major problems with the prosecution's trial evidence about arson. It was unclear whether Governor Perry reviewed that material. In 2009, shortly before the State Forensic Science Commission was to hold hearings at which its arson expert, Craig L. Beyler, was to testify, Governor Perry replaced the Commission's chair and two other members. The hearings were cancelled.²⁷⁵ Beyler, "a nationally known fire scientist," had prepared "a withering critique" concluding – as did *Chicago Tribune* reporters in 2004 – there was no proof that the fire was set and it may have been an accident. His report said the state Fire Marshal's findings "are nothing more than a collection of personal beliefs that have nothing to do with science-based fire investigation." ²⁷⁶

The Commission's new chair John Bradley tried to have the Commission close the case and say there had been no professional misconduct. But other Commission members disagreed. After lengthy delay, the Commission held a special hearing on January 7, 2011, at which it heard from several arson experts, including Beyler (then chair of the International Association of Fire Safety Science). Although the state Fire Marshal's Office and some others from Texas supported the arson finding, John DeHaan, author of Kirk's Fire Investigation, "the most widely used textbook in the field," stated, "Everything that was documented post-fire was consistent with accidental rather than intentional fire. There was no basis for concluding that this was arson."²⁷⁷ Texas Attorney General Greg Abbott ruled in July 2011 that the Commission could not investigate evidence collected or tested prior to 2005.²⁷⁸ 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 that arson investigators who testified for the prosecution had relied on common beliefs that by 2011 were generally recognized to be incorrect.²⁷⁹

On September 23, 2013, the Innocence Project, plus an exoneree and several Willingham relatives, asked Governor Perry to open an investigation into whether Willingham should be pardoned – in light of (in addition to everything else) "new evidence that the prosecutor in the case paid favors to" Johnny Webb, the jailhouse informant who testified that Willingham had confessed to him.²⁸⁰

On March 9, 2015, the *Washington Post* reported on a newly discovered letter from Webb to Jackson imploring Jackson to follow through on a promise to get Webb's conviction downgraded. Within days after getting that letter, Jackson secured an order from Willingham's trial judge that changed "the record of Webb's robbery conviction to make him

²⁷⁵ James C. McKinley, Jr., Controversy Builds in Texas Over an Execution, N.Y. TIMES, Oct. 20, 2009.

²⁷⁶ Steve Mills, Cameron Todd Willingham case: Expert Says Fire for Which Father Was Executed Was Not Arson, CHI. TRIB., Aug. 25, 2009.

²⁷⁷ Erin Mulvaney, National experts criticize state's study of fatal '91 fire, DALL. MORNING NEWS, Jan. 8, 2011; see also Michael Graczyk, Associated Press, Texas panel re-examines arson execution case, Jan. 8, 2011, http://www.nbcdfw.com/news/local/Texas-Panel-Re-Examines-Arson-Execution-Case-113129784.html; Charles Lindell, Experts criticize, defend Willingham arson investigators, Austin Am.-Statesman, Jan. 7, 2011; Yamil Berard, Arson experts testify that Willingham investigators violate standards, Star-Telegram, Jan. 7, 2011.

²⁷⁸ Claire Cardona, Forensic Science Panel Recommends Arson Probe, Tex. Trib., Oct. 28, 2011.

²⁷⁹ Chuck Lindell, Willingham inquiry ends, but effects linger, Austin Am. Statesman, Oct. 28, 2011.

²⁸⁰ Jason Heid, Innocence Project Asks Governor Perry to Pardon Cameron Todd Willingham, D MAG. FRONT/BURNER BLOG, Sept. 27, 2013.

immediately eligible for parole." The *Post* reported that Jackson never disclosed to the defense even the possibility of a deal with Webb. The *Post* also reported that Jackson had recently admitted – after long denying it – that he had intervened to try to get Webb's conviction changed to be for the lower charge. It further reported that in two days of recent interviews, Webb said Jackson had threatened him with a life sentence if he did not implicate Willingham. Webb also reportedly said, "I did not want to see Willingham go to death row and die for something I damn well knew was a lie and something I didn't initiate." He said he had been forced into lying by Jackson's pressure.²⁸¹

ix. Troy Davis

Georgia's execution of Troy Davis on September 21, 2011, was the most controversial in the United States in many years. On August 17, 2009, the Supreme Court transferred his petition for an original writ of habeas corpus to a Georgia federal district court, instructing it to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence." The district judge found that Davis had not met that extremely high burden. And he questioned the credibility of several witnesses who had, in whole or part, recanted trial testimony before the hearing. 400 parts of the several witnesses who had, in whole or part, recanted trial testimony before the hearing.

x. Thomas Arthur

Alabama death row inmate Thomas Arthur was convicted and sentenced to death for a 1982 murder. In 2012, Andrew Cohen noted many similarities between the problems with Arthur's case and those in Tyrone Noling's case (discussed above at Part I.B.4.b.vii.). 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." ²⁸⁵

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

Arthur's counsel then sought "more advanced DNA testing on the wig" that Gilbert's statement said Arthur used during the killing. Arthur's counsel, saying all agreed the perpetrator wore this wig during the crime, offered to pay for the additional DNA testing.

²⁸¹ Maurice Possley, A dad was executed for deaths of his 3 girls. Now a letter casts more doubts, Wash. Post, Mar. 9, 2015.

²⁸² In re Davis, 557 U.S. 952, 952 (2009) (mem.).

²⁸³ Greg Bluestein, Associated Press, *Ga. execution leaves debate over guilt unresolved*, Sept. 22, 2011, https://www.highbeam.com/doc/1A1-1d250a317f5743e7a54e67be56571e86.html.

²⁸⁴ In re Davis, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

²⁸⁵ Andrew Cohen, Another Death Row Debacle: The Case Against Thomas Arthur, The Atlantic, Feb. 27, 2012.

The State said this would be no better than prior testing and that the wig had no additional DNA that could be tested.²⁸⁶ On January 6, 2014, the Eleventh Circuit held that Arthur had not shown an "extraordinary circumstance" permitting him to seek federal court relief again.²⁸⁷

On January 23, 2017, the Supreme Court denied certiorari on Arthur's challenge to Alabama's method of sentencing.²⁸⁸ Approximately one month later, on February 21, the Court denied certiorari on Arthur's lethal injection challenge.²⁸⁹ In a lengthy dissent, Justice Sotomayor, with whom Justice Breyer joined, urged the Court to reconsider the standard it uses in deciding lethal injection cases.

Mr. Arthur was executed by lethal injection on May 26, 2017.²⁹⁰

- 5. Geographic, Racial, and Economic Disparities, and Other Arbitrary Factors, in Implementing Capital Punishment
- a. Study Regarding Disparities Where Victim Was White Female, in Oklahoma

A study published in the Fall 2017 issue of the *Journal of Criminal Law & Criminology* reported the results of a sophisticated examination of more than 4,600 Oklahoma homicide cases between 1990 and 2012. The study's very experienced leaders, research scientist Glenn L. Pierce and professors Michael L. Radelet and Susan Sharp, concluded that the odds of a death sentence for those with white female victims were nearly ten times higher than in cases with minority male victims. They also found significant race of the victim disparities even without considering the victim's gender.²⁹¹

b. Study Regarding Disparities by Race of the Victim in North Carolina

In a comprehensive study published in September 2016, a team led by Michigan State University College of Law associate professor Catherine Grosso and Barbara O'Brien found that from 1990-2009, defendants prosecuted for capital murder in North Carolina had greater than twice the likelihood of being sentenced to death if their victims were white than otherwise.²⁹²

²⁸⁶ Radley Balko, Opinion, *The outrageous conviction of Montez Spradley*, WASH. POST, Sept. 21, 2015.

²⁸⁷ Arthur v. Thomas, 739 F.3d 611 (11th Cir.), cert. denied, 135 S. Ct. 106 (2014).

²⁸⁸ Arthur v. Alabama, 137 S. Ct. 831 (2017) (mem.).

²⁸⁹ Arthur v. Dunn, 137 S. Ct. 725 (2017) (mem.)

²⁹⁰ Kent Faulk, Alabama executes Tommy Arthur, AL.COM, May 26, 2017.

²⁹¹ Glenn L. Pierce et al., Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012, 107 J. CRIM. L. & CRIMINOLOGY 733 (2017).

²⁹² Barbara O'Brien et al., Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009, 94 N.C. L. REV. 1997, 1998 (2016).

c. Alleged Batson Violations

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

On May 23, 2016, the Supreme Court dealt with blatant evidence of intentional violations of *Batson v. Kentucky*²⁹³ by the Georgia prosecutors – District Attorney Stephen Lanier and Assistant District Attorney Douglas Pullen – who handled the 1987 trial of Timothy Foster. The evidence was the prosecution's trial file – which Foster's state postconviction counsel secured via the Georgia Open Records Act. Materials in the file concerning *voir dire* included, among other race-based notations, the jury venire list, on which "the names of black prospective jurors were highlighted in bright green" – which a legend said represented "Blacks"; "notes with 'N' (for 'no') appearing next to the names of all prospective black jurors"; a list titled "[D]efinite NO's," containing six names, including all of the qualified black prospective jurors; a document containing these annotations regarding the Church of Christ: "NO. No Black Church"; and an investigator's draft affidavit saying, "If it comes down to picking one of the black jurors, [this one] might be okay."²⁹⁴ Chief Justice Roberts wrote the majority opinion, for six members of the Court. Justice Alito wrote a concurrence, and Justice Thomas dissented.

Earlier, after the state habeas court denied relief, the Georgia Supreme Court refused to issue a certificate of probable cause for an appeal, but certiorari was granted. The majority held that the Court had subject matter jurisdiction, since the Georgia Supreme Court's order did not depend on "an independent and adequate state law ground." It next rejected the State's assertion that the discovered documents could not be considered absent a showing that the lead prosecutors wrote them. The Court disagreed since "[a]t a minimum, we are comfortable that all documents in the file were authored by *someone* in the district attorney's office."²⁹⁵

On the merits, the Court said the prosecutor's justifications for striking one prospective black juror largely had "no grounding in fact" and were replete with "misrepresentations." As to another peremptory strike for which the State provided eight justifications — many of which were different from justifications the State had earlier asserted — the Court concluded that "many of these justifications cannot be credited." After thoroughly reviewing the record with regard to these two strikes, the Court said these strikes could not be distinguished, as the State tried to do, from the State's failure to strike certain white jurors, and held they were "motivated in substantial part by discriminatory intent." 297

Infuriated by the State's indignant refusal to admit what its file made obvious, and by its seeking an apology, the Court said there clearly was "a concerted effort to keep blacks off of the jury. . . . [P]rosecutors were motivated in substantial part by race when they

²⁹³ Batson v. Kentucky, 476 U.S. 79 (1986).

²⁹⁴ Foster v. Chatman, 136 S. Ct. 1737, 1744 (2016).

²⁹⁵ Id. at 1746 n.3, 1748.

²⁹⁶ *Id.* at 1749, 1751.

²⁹⁷ Id. at 1754 (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008)).

struck [these two jurors] \dots Two peremptory strikes on the basis of race are two more than the Constitution allows." ²⁹⁸

ii. Supreme Court Remands in Light of Foster

On June 20, 2016, the Court granted certiorari, vacated the prior decisions, and remanded to courts in three other states three different cases in which prosecutors' peremptory challenges had removed black prospective jurors.²⁹⁹ The lower courts in *Floyd v. Alabama*, *Williams v. Louisiana*, and *Flowers v. Mississippi* were ordered to review each case in light of the *Foster* decision.

iii. North Carolina's Appellate Rejections of Every Batson Claim

In September 2016, Daniel R. Pollitt and Brittany P. Warren released their analysis of North Carolina appellate courts' actions on *Batson* claims in the 30 years since *Batson* – but prior to the Supreme Court's holding in *Foster*. In every case where these courts ruled on the merits of *Batson* claims in which prosecutors "justified" peremptory strikes against black prospective jurors, the claims were rejected; the North Carolina Supreme Court has never granted relief in any *Batson* case. This is not true of the appellate courts in any other state within the federal Fourth Circuit. The authors attribute this to the North Carolina appellate courts' incorrect application of the first and third parts of the three-part *Batson* analysis.³⁰⁰ This record is especially notable in light of the Supreme Court's thorough application of that three-part analysis in *Foster*.

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

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

In a 6-2 decision, Chief Justice Roberts, writing for the Court, after finding inapplicable a variety of procedural points that could have prevented the Court from reaching the merits, held that Texas death row inmate Duane Buck had received unconstitutionally ineffective assistance of counsel. The Court held that defense counsel at the penalty phase of Mr. Buck's trial had been so ineffective that there was a reasonable probability that absent the ineffectiveness, the outcome – the death penalty – would have been different.

The ineffectiveness consisted of the defense's presenting an "expert" witness, Dr. Walter Quijano, who – although saying that Buck would not be likely to act dangerously in the future – testified that the fact that Buck was black meant that he was likely to be more

²⁹⁹ Floyd v. Alabama, 136 S. Ct. 2484 (2016) (mem.); Williams v. Louisiana, 136 S. Ct. 2156 (2016) (mem.); Flowers v. Mississippi, 136 S. Ct. 2157 (2016) (mem.). And, as discussed above, the Louisiana Supreme Court vacated the conviction and death sentence of Rodricus Crawford due to the trial judge's failure to require the prosecutor to give race-neutral reasons for using five of his seven peremptory challenges against black prospective jurors.

²⁹⁸ Id. at 1755.

³⁰⁰ Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolinas Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016).

dangerous in the future than were he not black. This same "expert" had given similar testimony about the impact of the defendant's race on future dangerousness in other trials – in those instances, as a *prosecution* witness. Although the then-Texas Attorney General (now Senator) John Cornyn had promised that Texas would agree to vacate the death penalties in all the cases (subject to re-imposition after new sentencing hearings), his successor declined to do so in this one case.³⁰¹

At Buck's sentencing phase, the State relied on the "expert's" testimony as showing that there was no assurance that Buck would not pose a future danger. During its two days of deliberations, the jury asked in one of its four notes for "the psychology reports" in the record – one of which was Dr. Quijano's.³⁰²

In addressing the quality of defense counsel's performance, the Court held that Buck had cleared the "high bar" of showing that his lawyer had fallen "outside the bounds of competent representation." Chief Justice Roberts said:

Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano's report said, in effect, that the color of Buck's skin made him more deserving of execution. . . . [Just as a prosecutor would be clearly violating the Constitution by making that contention], [n]o competent defense attorney would introduce such evidence about his own client.³⁰³

In next considering the prejudice prong of Buck's ineffective assistance claim, the Court held that he had cleared that hurdle as well, by showing that there was a reasonable probability that one or more jurors would have had a reasonable doubt about Buck's future dangerousness if Dr. Quijano had not testified. The Court reached this conclusion despite the nature of the crime and how Buck had acted immediately thereafter. The Court reasoned as follows: the key issue at the sentencing proceeding was future dangerousness – so, the jury had to do some speculating as to the future. A factor against a finding of future dangerousness was that if Buck were to serve life in prison, he would be very unlikely to be in a romantic heterosexual relationship – the context of his previously violent crimes. "But," the Court said, "one thing would never change: the color of Buck's skin. Buck would always be black. And according to Dr. Quijano, that immutable characteristic carried with it an '[i]ncreased probability' of future violence." This was "hard statistical evidence – from an expert – to guide an otherwise speculative inquiry." The Court describe this evidence as "potent" because it "appealed to a powerful racial stereotype – that of black men as 'violence prone." "304

Chief Justice Roberts said that as a result of these things and the jury's question, "something of a perfect storm" was created. He added:

³⁰¹ Buck v. Davis, 137 S. Ct. 759, 768-70 (2017).

³⁰² Id. at 769.

³⁰³ *Id.* at 775.

³⁰⁴ *Id.* at 776 (alteration in original) (citation omitted).

Dr. Quijano's opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.³⁰⁵

The Court rejected the State's assertion that any error was harmless because Dr. Quijano was the defense's witness. That, the Court said, may well have increased the chance that the jury would give credence to Quijano's testimony.

Finally, the Court addressed a final procedural point: in order to get relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, Buck had to demonstrate that "extraordinary circumstances" existed. In holding that such circumstances indeed did exist, the Court said:

[O]ur holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.³⁰⁶

This was even more egregious, the Court said, "because it concerned race," as to which discrimination is particularly egregious in the criminal justice system. Consideration of race in that context "injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." 307 Moreover, the Court said that the State, in recognizing the problem with Dr. Quijano's testimony in all the cases in which he gave such testimony, essentially recognized that Texas' citizens have no "interest in enforcing a capital sentence obtained on so flawed a basis." 308

The Court's willingness in *Buck* to find ways to reject the numerous procedural hurdles that a majority of the Court so often relies on to deny consideration of the merits of meritorious claims is notable. So is the highly principled language of the Chief Justice's majority decision – which in so many ways is inconsistent with the logic and wording of the Court's controversial decision 20 years earlier in *McCleskey v. Kemp.*³⁰⁹

ii. Concurrence by Eleventh Circuit Judge Beverly Martin in Waldrop v.
 Commissioner, Alabama Department of Corrections, 711 Fed. Appx.
 900 (11th Cir. 2017)

Eleventh Circuit Judge Beverly Martin felt bound by Supreme Court precedent to concur in the panel's refusal to consider the merits of Alabama death row inmate Bobby

³⁰⁵ *Id.* at 776.

³⁰⁶ *Id.* at 778.

³⁰⁷ *Id.* (alterations in original) (citation omitted).

³⁰⁸ *Id.* at 779.

³⁰⁹ McCleskey v. Kemp, 481 U.S. 279 (1987).

Waldrop's claim that his trial judge had unconstitutionally overridden the jury's life sentence recommendation because of Waldrop's race. However, Judge Martin pointed out the apparent incongruity of this outcome with the Court's strong wording in *Buck* and bemoaned the then-imminent execution of Keith Tharpe (not knowing that several months later, the Court would remand Tharpe's case – as discussed immediately below). Judge Martin's concurrence says, in pertinent part:

Mr. Waldrop puts forward the seemingly uncontroversial argument that "imposing the death penalty based on the defendant's race constitutes a 'fundamental miscarriage of justice."

However, U.S. Supreme Court precedent confines the miscarriage of justice exception to cases in which a capital defendant claims he is "actually innocent" of the crime of conviction or the penalty imposed. See Schlup v. Delo, 513 U.S. 298, 321-23 (1995); Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (holding that "to show 'actual innocence' [of the death penalty] one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law"). The facts of Mr. Waldrop's case do not allow an argument that he is actually innocent, and he does not make one.

I must therefore agree with my colleagues that Mr. Waldrop has not met the legal standard for showing there has been a fundamental miscarriage of justice. But I am at a loss to otherwise explain how a person being sentenced to death based on his race could be anything other than a fundamental miscarriage of justice. We know, for example, that the Supreme Court recently characterized race discrimination in criminal sentencing as "a disturbing departure from a basic premise of our criminal justice system" that people are punished "for what they do, not who they are." Buck v. Davis, 137 S. Ct. 759, 778 (2017). And the Court has also recently ruled (not in the context of a death sentence) that the no-impeachment rule precluding a court's review of the merits of a juror bias claim must give way when there is clear evidence that a juror relied on racial stereotypes or animus to convict a criminal defendant. See Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869-70 (2017). But even in light of these clear pronouncements from our highest court, Mr. Waldrop is not the first capital defendant to face procedural obstacles in making a claim that racial bias played a part in his being sentenced to death.[FN] I fear he will not be the last.

[[]FN] In 2014, this Court concluded that Kenneth Fults's claim of juror racial bias was procedurally defaulted and thus barred from federal habeas review. Fults v. GCDP Warden, 764 F.3d 1311, 1315 (11th Cir. 2014). Tonight, the State of Georgia intends to execute Keith Tharpe, who also has a procedurally defaulted claim that one of his jurors was racially biased. See

Tharpe v. Warden, No. 5:10-cv-00433-CAR, slip op. at 5-6 (M.D. Ga. Sept. 5, 2017).³¹⁰

iii. Tharpe v. Sellers, 138 S. Ct. 545 (2018) (per curiam)

Georgia death row inmate Keith Tharpe attempted to get a stay of execution despite not having raised his claim when Georgia procedure said he should have raised it. His claim was supported by a never-recanted sworn affidavit by a now-deceased juror from his trial, Barney Gattie. As the Supreme Court viewed things, the Eleventh Circuit had refused to grant Tharpe a certificate of appealability because Tharpe had not shown that Gattie's actions had "substantial and injurious effect or influence in determining the jury's verdict." The Supreme Court said that the Eleventh Circuit should instead have focused on the real basis for the state court default – which in the Court's view was that the state court felt that Gattie's own vote for death had not been affected by Tharpe's race. As to that precise point, the Court said that Gattie's "remarkable affidavit . . . presents a strong factual basis" for concluding that Gattie's vote was affected by Tharpe's race. Indeed, the affidavit can hardly be read any other way. The Court held that the Eleventh Circuit had erred by concluding that reasonable jurists could not debate whether the state court ruling – as interpreted by the Court – had been shown to be wrong by clear and convincing evidence.

The Court did not address Tharpe's other arguments for getting a certificate of appealability under Federal Rule of Civil Procedure 60(b), under which relief can be granted only under extraordinary circumstances. The Court emphasized that Tharpe faced a high obstacle in attempting to show by clear and convincing evidence that jurists of reason could disagree on whether the federal district court had abused its discretion in denying Tharpe's motion.³¹²

In dissent, Justice Thomas, joined by Justices Alito and Gorsuch, attacked the majority for misreading the decision in question and for failing to consider alternative grounds for denying Tharpe's Rule 60(b) motion. The dissent assailed the majority for delaying the inevitable due to its abhorrence of the racist sentiments in Gattie's affidavit.³¹³

6. Failure to Limit Executions to People Materially More Culpable Than the Average Murderer

The Supreme Court repeatedly has held that the Eighth Amendment permits application of capital punishment only to those among the people convicted of "a narrow category of the most serious crimes" who have such extreme "culpability" that they are "the most deserving of execution."³¹⁴ In holding capital punishment categorically unconstitutional for those below age 18 at the time of the crime, as well as for people with what is now called intellectual disability, the Court said:

³¹⁰ Waldrop v. Commissioner, 711 Fed. Appx. 900, No. 15-10881, 2017 WL 4271115, at *21-22, *22 n.2 (11th Cir. Sept. 26, 2017) (Martin, J., concurring) (first alteration in original).

³¹¹ Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018) (per curiam).

³¹² *Id*.

³¹³ Id. at 547, 553 (Thomas, J., dissenting, joined by Alito and Gorsuch, JJ.).

³¹⁴ E.g., Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[W]e remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." The same conclusions follow from the lesser culpability of the juvenile offender.³¹⁵

However, the Court has thus far not ensured that this constitutional bar applies to everyone with intellectual disability, nor applied this bar to those whose severe mental illness at the time of the crime or other substantial mitigating factors make their culpability well below that of the "average murderer."

a. Intellectual Disability (Formerly Called Mental Retardation)

Despite *Atkins*' categorical bar to executing people with intellectual disability (formerly referred to as mental retardation), people with intellectual disability have been, and likely will continue to be, executed. Only in 2014, 12 years after *Atkins*, did the Court start addressing ways in which *Atkins* has been undermined.

i. Texas' Misapplications of Atkins

Texas carried out executions for many years after *Atkins* based on its unique way of determining intellectual disability claims. Rather than using the generally accepted manner of assessing whether someone has intellectual disability, Texas used its self-created *Briseño* standard, which is unsupported by the medical community's assessments of intellectual disability. For example, using the *Briseño* standard, the Texas Court of Criminal Appeals upheld Marvin Wilson's death sentence despite his 61 IQ and diagnosis of "mild mental retardation by a court-appointed specialist, the only expert in the case." He was executed on August 6, 2012. And on January 29, 2015, Texas executed Robert Ladd, who had been diagnosed in 1970 as "obviously retarded," with a 67 IQ, because Texas' courts applied the *Briseño* standard to deny relief. 316

On March 28, 2017, in *Moore v. Texas*, the Supreme Court held unconstitutional Texas' use of the *Briseño* standard, as well as other aspects of the Texas Court of Criminal Appeals' manner of dealing with intellectual disability claims. ³¹⁷ Among the major problems the Court found with the Court of Criminal Appeals' ("CCA's") approach were the following – each of which the Court held was incompatible with the Court's jurisprudence since *Atkins*, including its 2014 holding in *Hall v. Florida*:

 $^{^{315}}$ Roper v. Simmons, 543 U.S. 551, 571 (2005) (second alteration in original) (quoting Atkins, 536 U.S. at 319). The Court also held, for similar reasons, that the other constitutional rationale for capital punishment – deterrence – was also inapplicable.

³¹⁶ Amicus Curiae Brief of American Ass'n on Intellectual and Developmental Disabilities in Support of Petitioner at 2, *Wilson v. Thaler*, No. 12-5349 (U.S. filed Aug. 7, 2012), 2012 WL 3277046, at *2; Ned Resnikoff, *Texas set to execute "intellectually disabled" inmate*, ALJAZEERA AM., Jan. 28, 2015.

³¹⁷ Moore v. Texas, 137 S. Ct. 1039 (2017) (discussing Atkins v. Virginia, 536 U.S. 304 (2002), and Hall v. Florida, 134 S. Ct. 1986 (2014)).

- In deciding that Mr. Moore's IQ scores in and of themselves precluded a finding of intellectual disability, the CCA made the same error that Florida had made in *Hall*, by ignoring the range of the standard error of measurement in IQ testing. It therefore had erred by viewing analysis of adaptive behavior as irrelevant.
- To the extent that the CCA nonetheless addressed Moore's adaptive functioning, it did so in a manner inconsistent with "prevailing clinical standards" and also inconsistent with "the older clinical standards" that the CCA "claimed to apply." In particular, the CCA, contrary to the medical community's long-held consensus, gave great weight to Moore's perceived adaptive strengths rather than focusing on his adaptive deficits.
- The CCA turned on their head various traumatic experiences in his life which clinicians consider to be "risk factors" for intellectual disability by viewing them as reasons to doubt that his intellectual and adaptive deficits were related. It similarly "departed from clinical practice" by forcing Moore to show that his personality disorder(s) were unrelated to his adaptive deficits even though such co-existing conditions are common.³¹⁸
- The *Briseño* factors are "an invention of the CCA untied to any acknowledged source" and inconsistent with "the medical community's information" as well as with the Court's precedents and thereby make it unacceptably possible to execute people with intellectual disability.³¹⁹
- The CCA justified its invention as an attempt to reflect the consensus of the state's citizens on who should be exempted from execution by virtue of their intellectual disability. But, the Court said, even if "[m]ild levels of intellectual disability . . . fall outside Texas citizens' consensus, [they] nevertheless remain intellectual disabilities" and those who have them cannot constitutionally be executed. Indeed, in applying the *Briseño* factors, the CCA relied on "lay stereotypes of the intellectually disabled."
- The *Briseño* factors which the Court said are "wholly nonclinical" are inconsistent with what other states do and with what Texas itself does in other respects, including within its criminal justice system. The Court stated: "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake."

Accordingly, the Court held, "Because *Briseño* pervasively infected the CCA's analysis, the decision of that court cannot stand."³²⁰ Sadly, because the Supreme Court did not take up this constitutional issue sooner, Texas has executed many people, including Marvin Wilson and Robert Ladd, under that medically and legally bankrupt standard.

On November 1, 2017, Harris County prosecutors, in a brief filed in the Texas Court of Criminal Appeals, to which the Supreme Court had remanded Bobby James Moore's

 $^{^{318}}$ See id. at 1050-51.

³¹⁹ *Id.* at 1044.

³²⁰ See id. at 1051, 1052, 1053.

case, acknowledged that he fell within the established intellectual disability standard and accordingly could not be executed.³²¹

On October 18, 2017, the Texas Court of Criminal Appeals decided on its own motion to reconsider Carnell Petetan, Jr.'s *Atkins* claim in light of *Moore*. It ordered the parties to submit briefs on the issue.³²²

Another Texas death row inmate, Robert James Campbell, had already been resentenced to life in light of *Moore*.³²³

ii. Texas' Execution of Coy Wesbrook on March 9, 2016

Texas executed Coy Wesbrook on March 9, 2016. Prosecutors relied on George Denkowski, who after reporting in 2006 that Wesbrook's IQ was 66, revised his report soon thereafter to say that based on "non-intellectual factors," Wesbrook's "actual adult general intelligence functioning is estimated to be of about 84 IQ quality." Denkowski, who found all 16 death penalty defendants he assessed to be mentally qualified for execution, "was later reprimanded by the Texas State Board of Examiners of Psychologists for ignoring standard testing practices." In 2011, he paid a fine and agreed never to testify in a criminal case again. "There's absolutely no scientific basis to his procedure," Marc Tassé, an Ohio State professor, told the *New York Times*. Nonetheless, when the trial court considered Wesbrook's mental capacity in 2014, it refused to permit a new psychiatric evaluation. 324

iii. After Supreme Court Remand, Louisiana Death Row Inmate Gets Life Sentence

In the summer of 2016, Louisiana death row inmate Kevan Brumfield was finally given an LWOP sentence. He originally was to have gotten this changed sentence after the federal district court held an *Atkins* hearing and found him to be intellectually disabled. But the Fifth Circuit reversed, holding that the district court should not have held the hearing and that, considering only what had been presented at trial, he did not have intellectual disability. The Supreme Court vacated and remanded, holding the state court's rulings on the *Atkins* claim to be "unreasonable" and saying there was ample reason to feel he would satisfy the adaptive behavior prong of an intellectual disability claim. On remand, the Fifth Circuit *did* consider evidence from the district court's *Atkins* hearing and affirmed the district court's finding of intellectual disability, then vacated Mr. Brumfield's

³²¹ Respondent's Brief at 27-28, *Moore v. State*, No. 0314483 (Tex. Crim. App. filed Nov. 1, 2017), https://deathpenaltyinfo.org/files/pdf/ExParteMooreCCAStatesBrief.pdf. On that same day, members of the Texas Capital Punishment Assessment Team formed under the auspices of the ABA's Death Penalty Due Process Review Project filed an amicus brief urging that Moore be found intellectually disabled. Brief of Amici Curiae Members of the Texas Capital Punishment Assessment Team at 13-14, *Ex parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2017), https://deathpenaltyinfo.org/files/pdf/ExParteMooreCCAAmicusBriefTXDPAssessmentTeam.pdf.

³²² Petetan v. State, No. AP-77,038, 2017 WL 4678670 (Tex. Crim. App. Oct. 18, 2017) (per curiam).

³²³ Jolie McCullough, Texan on death row will face parole review instead of execution, Tex. Trib., May 10, 2017.

³²⁴ Casey Tolan, Texas is about to execute a man who calls himself 'Elvis' and may be mentally disabled, FUSION, Mar. 7, 2016.

³²⁵ ABA DEATH PENALTY REPRESENTATION PROJECT, 2016 YEAR-END REPORT & NEWSLETTER, at 9 (2016).

³²⁶ Brumfield v. Cain, 135 S. Ct. 2269 (2015), rev'g 744 F.3d 918 (5th Cir. 2014).

death sentence and resentenced him to LWOP.³²⁷ In the summer of 2016, the State chose not to seek rehearing. This finalized his LWOP sentence. Jenner & Block represented Brumfield in the Court and the Fifth Circuit on remand, and earlier.

iv. Supreme Court Remands to Alabama Court of Criminal Appeals, Florida Supreme Court, and the Fifth Circuit

On May 1, 2017, the Supreme Court remanded Taurus Carroll's case to the Alabama Court of Criminal Appeals for further consideration in light of *Moore*. It similarly remanded Tavares Wright's case to the Florida Supreme Court on October 16, 2017. Earlier that month, it had vacated and remanded to the Fifth Circuit the cases of Texas death row inmates Obie Weathers and Steven Long. 328

- b. Substantial Number of People with Severe Mental Illness Executed or Still Facing Execution
- i. 21st Century Executions Disproportionately Involve People with Mental Illness, and Often Are Effectively "Assisted Suicides"

On April 3, 2017, Professor Frank Baumgartner and the University of North Carolina's Betsy Neill wrote in the *Washington Post* about their new analysis of the case records of those executed between 2000 and 2015 in the United States. Whereas 18% of the general population has ever been diagnosed with a mental illness, 43% of those executed had received that diagnosis. Executed inmates had notably higher rates of diagnosed schizophrenia, posttraumatic stress disorder, and bipolar disorder. Those death row inmates who waived their appeals and "volunteered" to be executed had much higher rates of diagnosed mental illness than others who were executed, and in particular 26% of volunteers had been diagnosed with depression, 37% had been documented to have suicidal tendencies, and 32% had tried to commit suicide. Baumgartner and Neill wrote, "If suicidal tendencies are evidence of mental illness, then death penalty states actively assist suicide." They also found that the mental illness risk factor of childhood trauma was extremely more likely in those executed than in the general population.³²⁹

ii. Most Ohio Death Row Inmates Facing Execution Through 2020 Have Mental, Emotional, or Cognitive Impairments or Limitations

On August 30, 2017, Harvard's Fair Punishment Project reported that most of those with a scheduled execution in Ohio in the next three years had mental, emotional, or cognitive impairments or limitations. Instead of being among the "worst of the worst," they "are among the most impaired and traumatized among us." The Project found that at least 17 of the 26 had serious childhood trauma, at least 11 showed evidence of "intellectual disability, borderline intellectual disability, or a cognitive impairment, including brain

³²⁷ Brumfield v. Cain, 808 F.3d 1041 (5th Cir. 2015), cert. denied, 136 S. Ct. 2411 (2016).

³²⁸ Carroll v. Alabama, 137 S. Ct. 2093 (2017) (mem.); Wright v. Florida, 138 S. Ct. 360 (2017) (mem.); Weathers v. Davis, 138 S. Ct. 315 (2017) (mem.); Long v. Davis, 138 S. Ct. 72 (2017) (mem.).

³²⁹ Frank R. Baumgartner & Betsy Neill, *Does the death penalty target people who are mentally ill? We checked.*, WASH. POST, Apr. 3, 2017.

injury," and at least six apparently "suffer from a mental illness." The Project's Legal Director, Jessica Brand, said that "people who are the most impaired received some poor representation at some time in their cases and then are facing the most severe penalty possible" – which she termed a "horrible trifecta." 331

Also noteworthy is DPIC's finding that more than 60% of these inmates slated for execution were sentenced prior to Ohio's adding LWOP as an alternative to the death penalty. In these cases, each jury's choice was between capital punishment and a sentence under which release from prison was possible. After LWOP became a sentencing alternative, Ohio death sentenced declined by over two-thirds in the next decade. As DPIC wrote, there is a good chance that in many of the cases of those scheduled to be executed in the next three years, juries would have reacted "very differently" to "evidence of intellectual disability, mental illness, or behavioral problems arising from chronic abuse and trauma" if their choice were between capital punishment and LWOP.³³²

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

Numerous mentally ill people have been executed without their sentencers' considering their mental illness, due to errors or omissions by their counsel. And in many other cases, their sentencers *do* consider serious mental illness – but as aggravating. This is often due to jurors' implicit biases, compounded by misleading or otherwise inadequate jury instructions.³³³ Following trial, procedural obstacles or unreasonable burdens often doom efforts to seek relief. Moreover, in clemency proceedings, serious mental illness is usually deemed unimportant.

On March 22, 2016, Texas executed Adam Ward, although the federal district court judge recognized that he "has been afflicted with mental illness his entire life" and "interpreted neutral things as a personal attack." A psychiatrist testified at trial that a psychotic disorder led him to "suffer paranoid delusions such that he believes there might be a conspiracy against him and that people might be after him or trying to harm him."³³⁴ When the Texas Court of Criminal Appeals denied his last petition, Judge Elsa Alcala, concurring, said, "As is the case with intellectual disability, the preferred course would be for legislatures rather than courts to set standards defining the level at which a mental

³³⁰ Fair Punishment Project, Prisoners on Ohio's Execution List Defined by Intellectual Impairment, Mental Illness. Trauma. and Young Age (2017).

³³¹ Karen Kasler, *Harvard Report Finds Majority of Ohio Death Row Inmates Likely Have Mental Impairments*, WKSU RADIO (Kent State Univ.), Aug. 30, 2017.

³³² REPORT: Most of the 26 Prisoners Facing Execution in Ohio Through 2020 Severely Abused, Impaired, or Mentally Ill, DEATH PENALTY INFO. CTR. (last visited Jan. 30, 2018).

³³³ Mona Lynch & Craig Haney, Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury, 2011 Mich. St. L. Rev. 573, 583-586; Mona Lynch & Craig Haney, Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations, 40 L. & Soc. Inquiry 377, 378, 401-403 (2015); Justin D. Levinson et al., Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, 89 N.Y.U. L. Rev. 513, 518, 564, 567, 571, 573 (2014); John Robert Barner, Life or death decision making: Qualitative analysis of death penalty jurors, 13 QUALITATIVE Soc. Work 842, 846, 855 (2014).

³³⁴ Jolie McCullough, Texas Executes Man Courts Recognized as Mentally Ill, Tex. Trib., Mar. 22, 2016.

illness is so severe that it should result in a defendant being categorically exempt from the death penalty."335

On June 28, 2017, ABA President Linda Klein wrote a letter to Virginia Governor Terry McAuliffe about the case of death row inmate William Morva, whose clemency petition was then pending with the Governor. Klein expressed concern about Morva's extensive history of severe mental illness – which was not raised at trial. Investigation in preparation for the state postconviction proceeding led to a clinical expert to conclude that Morva had a delusional disorder that made him unable to distinguish between reality and delusions and that he likely was deluded at the time of the crime into believing that people were trying to kill him and was therefore unable to control his actions.³³⁶ However, clemency was denied, and Morva was executed on July 6, 2017.³³⁷

On October 25, 2017, the next ABA President, Hilarie Bass, wrote to Arkansas Governor Asa Hutchinson to raise concerns over the scheduled November 9, 2017 execution of Jack Greene. Greene's lengthy, significant mental illness had deteriorated further during his years on death row.³³⁸ On November 8, 2017, the Arkansas Supreme Court granted Greene a stay of execution.³³⁹ The State did not seek certiorari.

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

i. Policies Supported by Leading Professional Organizations

The ABA, American Psychiatric Association, and American Psychological Association all have three policies on mental disability and capital punishment.³⁴⁰ The first would implement *Atkins* to comport with the positions of the American Association on Intellectual and Developmental Disabilities ("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 often to not come within its definition since they always (dementia) or usually (head injury) arise after age 18.

The second policy would prohibit executing someone with severe mental disability where demonstrated impairment of mental and emotional functioning at the time of the offense makes execution disproportionate to culpability.³⁴¹

³³⁵ Ex parte Ward, 502 S.W.3d 795, 799 (Tex. Crim. App. 2016) (Alcala, J., concurring).

³³⁶ Letter from Linda Klein to Hon. Terry McAuliffe, June 28, 2017, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/62817Kleinlettert%20McAulifferMorva.authcheckdam.pdf.

³³⁷ Tracy Connor & Phil Helsel, Virginia Executes William Morva for 2006 Killings, NBC NEWS, July 6, 2017.

 $^{^{338}}$ Letter from Hilarie Bass to Hon. Asa Hutchinson, Oct. 25, 2017, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABAH%20BasstoHutchinsonGreene.authcheckdam.pdf.

 $^{^{339}}$ John Moritz, Arkansas Supreme Court halts execution set for Thursday, ARK. Democrat-Gazette, Nov. 8, 2017.

³⁴⁰ Recommendations and Report on the Death Penalty and Persons with Mental Disabilities, 30 Mental & Physical Disability L. Rep. 668 (2006).

³⁴¹ For detailed discussion of the first and second policies, see *id.* and Christopher Slobogin, *Mental Disorder As an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005).

The third policy deals with a death-sentenced prisoner whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly impaired by a mental disorder or disability; or whose mental illness impairs his ability to assist counsel or otherwise take part meaningfully in postconviction proceedings regarding one or more specific issues on which his participation is necessary; or whose understanding of the nature and purpose of the punishment is so impaired as to render him incompetent for execution.³⁴² 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.³⁴³

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

There has been increased support in recent years for the second policy of the three leading professional organizations. In 2014, the final report of the Ohio's Joint Task Force to Review the Administration of Ohio's Death Penalty proposed excluding from death penalty eligibility people who had a diagnosable "serious mental illness" at the time of the crime.³⁴⁴ This has not yet led to the enactment of legislation, but efforts continue.

In September 2015, the ABA's Death Penalty Due Process Review Project launched the Severe Mental Illness Initiative, "to educate legal professionals, policy makers, and the public on the subject of severe mental illness and the death penalty and to support policy reform efforts to exempt individuals with severe mental illness from the death penalty."³⁴⁵ The Initiative issued in December 2016 a thorough report, Severe Mental Illness and the Death Penalty, regarding how mental illness is now dealt with vis-a-vis the death penalty, what "severe mental illness" refers to, ways to reform present laws, and why people with severe mental illness should be exempt from capital punishment.³⁴⁶ This report was issued in conjunction with a "national summit" at Georgetown University which the Initiative co-hosted with the Equitas Foundation and Georgetown University's Prisons and Justice Initiative.³⁴⁷

In 2017, the Initiative continued to educate the legal profession, policy makers, and the public, and supported policy reform efforts that comported with one or more of the ABA policies summarized above in Section i. These activities included participation in a June 30,

³⁴² For detailed discussion of the third policy, see *Recommendations and Report*, supra note 340, and Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

³⁴³ Ryan v. Gonzales, 133 S. Ct. 696, 708-09 (2013).

 $^{^{344}}$ Joint Task Force to Review the Administration of Ohio's Death Penalty, Final Report & Recommendations, at 6 (2014).

³⁴⁵ Information and resources regarding the ABA's Severe Mental Illness Initiative are available at http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-.html.

³⁴⁶ ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016).

³⁴⁷ A compendium of resources on this subject is available at http://www.merage-equitas.org/events/national-summit-severe-mental-illness-death-penalty/compendium-national-summit-severe-mental-illness-death-penalty/.

2017 panel discussion at the National Alliance on Mental Illness national convention.³⁴⁸ Moreover, the ABA, through particular ABA members, testified in 2017 in favor of legislation containing severe mental illness exemptions in Virginia³⁴⁹ and South Dakota.³⁵⁰ These are two of the nine states in which such legislation was introduced by bipartisan groups of legislators in 2017 or 2018 – the others being Ohio and Texas (in both of which there were favorable committee votes), North Carolina, Tennessee, Indiana, Kentucky, and Arizona.

Former Ohio Governor Bob Taft and former Indiana Governor Joseph E. Kernan, in a March 28, 2017 op-ed, urged enactment of legislation that would preclude capital punishment for people with serious mental illness.³⁵¹ A month earlier, former Tennessee Attorney General W.J. Michael Cody reached the same conclusion in an op-ed in the Commercial Appeal.³⁵²

Two other op-eds focused on veterans in advocating a serious mental illness exemption. First, in a November 10, 2017 op-ed, former Florida death row psychiatrist Dr. Joseph Thornton called for moratorium on executions for all death row inmates in Florida. He cited data showing that 18% of those on Florida's death row were veterans of our armed services. He said these veterans on death row typically have endured "childhood trauma, drug use and more."353 Then in a January 2, 2018 op-ed in the Commercial Appeal, Marine Corps Lieutenant General John Castellaw urged Tennessee to enact a bill that would exclude capital punishment "for those with severe mental illness, including those people with illnesses [such as PTSD] connected with their military service." General Castellaw particularly assailed Georgia for having executed Andrew Brannan in 2015. Brannan, decorated for his Vietnam service later received service-related diagnoses for PTSD and bipolar disorder. Despite his stellar history and his lacking any criminal record, Brannan was executed for killing a deputy sheriff after a traffic stop to which Brannan had reacted erratically and during which he had urged the deputy sheriff to kill him. General Castellaw said "we can do better by staying tough on crime but becoming smarter on sentencing those whose actions are impacted by severe mental illness."354

³⁴⁸ For information and resources regarding the convention, see the ABA's announcement, available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/death_penalty_due_process_review_project.html.

³⁴⁹ Testimony of W. Lawrence Fitch on Behalf of the ABA for the Hearing on House Bill 1522 Before the Va. Gen. Assemb. H. Courts of Justice Comm., Criminal Law Subcomm. (Jan. 30, 2017), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABATestimonyonVAHB1522. authcheckdam.pdf.

³⁵⁰ Testimony of Richard L. Travis on Behalf of the ABA for the Hearing on House Bill 1099 Before the 92nd Session of the S.D. Legis. Assemb. (Feb. 13, 2017), https://www.americanbar.org/content/dam/aba/uncategorized/ABATestimonyonHB1099.authcheckdam.pdf.

³⁵¹ Bob Taft & Joe Kernan, Opinion, *End inhumane capital punishment for mentally ill*, THE BLADE (Toledo), Mar. 28, 2017.

W.J. Michael Cody, Opinion, Exclude mentally ill defendants from death penalty, Com. Appeal, Feb. 12, 2017.
 Joseph Thornton, Opinion, Former Florida Death Row doctor with a Veterans' Day message, Fla. Pol., Nov. 10, 2017.

³⁵⁴ John Castellaw, Opinion, Exclude mentally ill vets from death penalty, Com. Appeal, Jan. 2, 2018.

iii. Agreement on Incompetence for Execution Leads to Sparing, for Now, Marcus Druery's Life

On April 4, 2016, prosecutors and defense counsel agreed that Texas death row inmate Marcus Druery was mentally incompetent to be executed. The judge signed an order in accordance with that agreement, but – contrary to the third policy adopted by the ABA and other organizations in 2006 (see Part I.B.6.d.i. above) – kept open the possibility of Druery's being re-examined and executed if the State later asserts an improvement making him competent to be executed. Druery's counsel had submitted extensive reports from mental health experts. One concluded that Druery's substantial mental illness "deprives him of a rational understanding of the connection between his crime and punishment." 355

e. 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 these proceedings have become much further away from being fail-safes than before *Furman*. The death penalty became much more politicized, and securing clemency became much more difficult – as reflected in many of the 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 LWOP 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."

³⁵⁵ Jake Walker, Inmate spared execution: Lawyers agree on Druery's mental incompetence, BRYAN-COLL. STATION EAGLE, Apr. 6, 2016.

³⁵⁶ Bob Taft, Opinion, No going back, U. DAYTON MAG., Dec. 29, 2014.

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

One of the few contexts in which some death row inmates have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt (as in the Virginia case of Ivan Teleguz, discussed in Part I.B.2.f. above).

On August 22, 2017, Missouri Governor Eric R. Greitens granted a reprieve to death row inmate Marcellus Williams, only hours before his scheduled execution. Governor Greitens simultaneously used his clemency powers to appoint (for the first time since the early 1990s) a gubernatorial Board of Inquiry. It is charged with considering Williams' claims of innocence and his clemency petition and with issuing a report and recommendation. The Board is comprised of five retired Missouri judges, with subpoena power. Williams' conviction was based in substantial part on the testimony of two jailhouse "informants" and on the fact that some of the victim's items were found a year after her death in a car Williams drove but did not own. No DNA or other physical evidence tied him to the crime scene. In 2015, the Missouri Supreme Court issued a stay so DNA testing could be pursued. DNA testing of the knife used to stab the victim found DNA that was from neither Williams nor the victim. Yet, that court did not order an evidentiary hearing. The supreme of the victim of the victim. Yet, that court did not order an evidentiary hearing.

On March 26, 2018, Ohio Governor John Kasich, following the Ohio Parole Board's 6-4 recommendation, gave executive clemency to William T. Montgomery, who was scheduled to be executed on April 11 for two 1986 murders. In 2007, an Ohio federal district court threw out his conviction and a Sixth Circuit panel affirmed, but the *en banc* Sixth Circuit reversed, with five judges dissenting.³⁵⁹

At trial, the prosecution asserted that Montgomery murdered first Debra Ogle and then her roommate (to stop her from testifying), and thereafter dumped Ms. Ogle's body in the woods where it was found four days later. But many witnesses said they saw Ogle alive four days after her alleged murder – something the prosecution never told the defense. An independent review of the autopsy report showed that her body probably had been found only hours after her death and did not show various indicia that would have been present if she had died four days earlier. Only after telling the police five different stories did the codefendant provide a story consistent with the prosecution's theory. The co-defendant got a sentence of a term of years with parole eligibility. Beyond all this, the parole board was troubled by three jurors' affidavits. Phyllis Crocker, Dean of the University of Detroit Mercy School of Law, who had served on the Ohio Supreme Court Joint Task on the Administration of Ohio's Death Penalty, said: "At best, Montgomery was convicted on a

³⁵⁷ Exec. Order 17-20 (Mo. Aug. 22, 2017), http://on.mo.gov/2vVU6Hj.

³⁵⁸ Tricia Bushnell, Greitens must delay Marcellus Williams execution to assure justice is served, Kan. City Star, Aug. 22, 2017.

³⁵⁹ Jim Provance, Governor commutes death sentence of convicted murderer, The Blade (Toledo), Mar. 26, 2018; Jim Provance, Parole board recommends clemency for William T. Montgomery, The Blade (Toledo), Mar. 16, 2018.

false set of facts and at worst, he may be actually innocent. In death penalty cases there must be no doubt whatsoever. There is too much doubt to allow this execution."360

Unlike Marcellus Williams' and William T. Montgomery's cases, in most cases where serious doubt about guilt should exist, governors, pardons and paroles boards, and other clemency bodies usually deny relief (as reflected in several cases discussed above in Part I.B.). When doing so, they often cite the number of times the inmate unsuccessfully attempted to get relief in the courts. These recitations almost never mention that the courts either completely failed to consider the new evidence bearing on guilt/innocence, or considered the evidence under such an extraordinarily difficult standard that only a conclusive DNA exclusion or other 100% proof of innocence might lead to relief.

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

On January 17, 2017, President Obama granted clemency to federal death row inmate Abelardo Ortiz and military death row inmate Dwight Loving. Ortiz's lawyers had asserted that he was intellectually disabled, was not present during the murder, had ineffective counsel, and was without consular help to which he was entitled. Loving's lawyers had asserted ineffective counsel, racial and gender discrimination in the selection of his military tribunal, and open constitutional issues about how the military handles capital punishment cases. However, the President never acted on numerous other clemency requests from federal death row inmates, despite the serious issues that many of them asserted.³⁶¹

One of the eight inmates whom Arkansas sought to execute in April 2017, Jason McGehee, was granted clemency by Governor Asa Hutchinson that, effective in October 2017, changed his death sentence to LWOP. 362 McGehee had received woefully poor representation at trial, and his clemency lawyers showed that he was no more culpable than two co-defendants who got lesser sentences. Unbeknownst to his jury, McGehee had bi-polar disorder and as a child had endured severe abuse and neglect. 363

A particularly bizarre case, that of Virginia's William Burns, finally was resolved on December 29, 2017, when his death sentence was commuted to LWOP because of his incompetence to be executed. He had been repeatedly found over almost two decades to be incompetent to stand trial with regard to his claim of intellectual disability. And experts agreed that he was not likely ever to be restored to competence to stand trial.³⁶⁴

³⁶⁰ Phyllis L. Crocker, Opinion, Next Ohio execution raises too much doubt, THE BLADE (Toledo), Mar. 10, 2018.

³⁶¹ Maurice Chammah, How Obama Disappointed on the Death Penalty, THE MARSHALL PROJECT, Jan. 18, 2017.

³⁶² Gov. Asa Hutchinson, Press Release, Gov. Hutchinson Announces Intent to Grant Clemency to Jason

McGehee, Aug. 25, 2017, https://governor.arkansas.gov/press-releases/detail/gov.-hutchinson-announces-intent-to-grant-clemency-to-jason-mcgehee; White, *supra* note 33.

³⁶³ Jessica Brand, Arkansas Is About to Execute Eight Men in Eleven Days, FAIR PUNISHMENT PROJECT, Mar. 30, 2017.

³⁶⁴ Andrew Cain, McAuliffe commutes death sentence of killer found mentally incompetent to be executed, RICHMOND TIMES-DISPATCH, Dec. 29, 2017.

On February 22, 2018, less than an hour before his scheduled execution, Texas death row inmate Thomas "Bart" Whitaker learned that Governor Greg Abbott had commuted his sentence to life in prison. Governor Abbott, who followed the unanimous recommendation of the state parole board, cited the facts that the actual triggerman had not gotten the death sentence, that the sole living victim of the crime favored commutation, and that Whitaker had waived any effort to seek parole.³⁶⁵

iv. Possible Court Relief After Parole Board Refusal to Consider Case

In a letter made public in December 2017, Kerr County, Texas District Attorney Lucy Wilke supported clemency for Jeffery Wood, whose conviction and death sentence she had secured almost two decades earlier. Although he had not been present when the murder occurred and denied knowing that his fellow robber would kill anyone, Wood was convicted and sentenced to death under the "law of parties," making him legally responsible for his fellow robber's actions. District Attorney Wilke supported her clemency request by citing Wood's non-participation in the killing, his IQ of 80, the highly dubious "expert" testimony that he would be dangerous in the future, and his history of non-violence. Signing the same letter were Chief of Police David Knight and District Court Judge N. Keith Williams, who was presiding over a challenge to the use of the "expert" testimony about future dangerousness.³⁶⁶

Although the parole board refused to consider clemency, the district court on March 20, 2018, approved a new set of findings and recommended that relief be granted. One of the key new findings was that government trial "expert" Dr. James Grigson (a.k.a. "Dr. Death") had given false and misleading testimony about Wood's supposed future dangerousness. These findings are now awaiting review by the Texas Court of Criminal Appeals.³⁶⁷

iv. Potential Equitable Argument for Clemency

As discussed above with regard to Ohio (see Part I.B.6.b.ii.), LWOP was not an available alternative to the death penalty for capital murder at the time of the trials of many people now coming up for execution. If it had been available, it is likely that many people would have received LWOP instead of death and that in some cases death would not even have been sought. Interviews of actual jurors by the Capital Jury Project have revealed that many voted for death for people they did not believe should be executed. They did so because they incorrectly thought the alternative was parole eligibility in as little as seven years.³⁶⁸ Now that LWOP is – and is believed by many jurors to be – an alternative in which there is no chance of parole, many juries have voted for LWOP instead of the death penalty. This likely happens most often when jurors have lingering doubt about guilt, or

³⁶⁵ Jolie McCullough, *Minutes before execution, Texas Gov. Greg Abbott commutes the sentence of Thomas Whitaker*, Tex. Trib., Feb. 22, 2018.

 $^{^{366}}$ Letter from Lucy Wilke to Texas Board of Pardons and Parole, Aug. 3, 2017, https://static.texas tribune.org/media/documents/WoodJefferyLeeLtrfromDAsoffice.pdf?_ga=2.235713986.217083783.1512681080-1988673696.1491600194.

³⁶⁷ Keri Blakinger, Court findings offer hope for death row inmate in case tainted by 'Dr. Death', Hous. Chron., Mar. 20, 2018.

³⁶⁸ Hannah Gorman, The Jury System on Trial: Do Jurors Execute Justice?, 15 AMICUS J. 13 (2006).

believe the defendant should be severely punished but not executed. 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 LWOP really exists and really means "without possibility of parole."

The fact that LWOP is now, but was not at trial, an available alternative to the death penalty is one of numerous reasons to believe that if death row inmates' cases had arisen in recent years, many would not have received the death sentence. Yet, this is usually ignored in clemency proceedings.

It was considered by Cuyahoga County Chief Prosecutor Timothy McGinty, who wrote the Ohio Parole Board in 2013 to ask it to recommend changing Billy Slagle's death sentence to LWOP. McGinty pointed to changes in Ohio law and in how he and his team now assess potential death penalty cases. He said these changes "would likely have led a jury to recommend a sentence of life without the possibility of parole had that been an option." But on July 16, 2013, the Parole Board voted 6-4 not to recommend clemency. Governor John Kasich denied clemency. Slagle was found hanged in his cell on August 3, 2013, three days before his execution date. He did not know about a recent revelation that the prosecutor's office had been ready in 1988 to enter into a plea deal averting imposition of the death penalty. The service of the death penalty.

A particular example of the impact of LWOP's being a recognized sentencing alternative is Brian G. Nichols' case. He was convicted in Georgia of murdering four government employees, including a judge and a 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.³⁷¹

The Supreme Court has repeatedly limited the categories of cases in which capital punishment may be implemented, by pointing to "evolving standards of decency." It seems utterly at odds with today's standards of decency, and with actual prosecutorial and juror practices, plus improved performance by defense counsel in many jurisdictions, to execute a person for whom death most likely would *not* be sought or 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.

³⁶⁹ Robert Higgs, Parole board recommends against clemency for murderer, despite urgings of Cuyahoga prosecutor, CLEV. Plain Dealer, July 16, 2013.

³⁷⁰ Alan Johnson, Death-row inmate who killed self didn't know of new hope, COLUMBUS DISPATCH, Aug. 6, 2013. ³⁷¹ Associated Press, Multiple Life Terms for Courthouse Killings in Atlanta, Dec. 13, 2008,

http://www.nytimes.com/2008/12/14/us/14atlanta.html.

- 7. 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.³⁷²

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

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

When it is impossible either to satisfy that provision of AEDPA or a court finds the provision inapplicable, a prisoner may attempt to secure relief by filing a petition to the Supreme Court for an original writ of habeas corpus. That is far more difficult to seek – as in *Davis*, where the Court required "evidence that could not have been obtained at the time of trial [to] clearly establish . . . innocence."³⁷⁴ That standard can virtually never be met. Many who would not have been convicted if the new evidence had been presented cannot "clearly" prove their innocence via evidence that could not have been secured for the trial. As to a claim of "innocence of the death penalty," for example where evidence that could not

³⁷² Pub. L. No. 104-132, 110 Stat. 1214.

³⁷³ 28 U.S.C. § 2244(b)(2)(B)(ii).

³⁷⁴ In re Davis, 557 U.S. 952, 952 (2009) (mem.).

have been obtained for trial clearly establishes intellectual disability, the Court has not squarely said whether it might consider the claim even if the incredible Davis hurdle were met.

Some of the Court's decisions considering these barriers to relief in 2017 are discussed below in Part II and above in Part I.B.5.

8. Costs of the Capital Punishment System

As is apparent throughout this chapter, the costs of the death penalty system are increasingly part of discourse on capital punishment. The following is the *Reading Eagle*'s June 2016 updated conclusion about Pennsylvania's death penalty: "Contrary to a persistent belief that capital punishment is more cost-effective than life imprisonment . . . a death sentence adds about \$2 million to a murder case."³⁷⁵

II. SIGNIFICANT LEGAL DEVELOPMENTS NOT DISCUSSED ABOVE

A. Brooks v. Alabama, 136 S. Ct. 708 (2016) (mem.)

On January 21, 2016, the Court denied a stay of execution.³⁷⁶ Justice Breyer wrote a dissent, focusing on his and two other justices' belief that in light of *Hurst* Alabama's death penalty system (as it then existed) was unconstitutional.³⁷⁷ Those two others, Sotomayor and Ginsburg, concurred in the result because they believed the Court could not have granted relief due to procedural problems.³⁷⁸

B. Kansas v. Carr, 136 S. Ct. 633 (2016)

In a case decided 8-1, the Court first held there is no constitutional requirement to instruct jurors they need not find a mitigating factor to exist beyond a reasonable doubt. The Court said, "[W]e doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination." The question of whether there is mitigation "is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not." And the "ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy – the quality of which, as we know, is not strained." The Court also rejected the factual premise behind Carr's constitutional claim – by pointing to four instances in which the jury was instructed about mitigating factors "found to exist." The jury was also instructed that aggravating circumstances and their outweighing mitigating factors must be proven beyond a reasonable doubt.³⁷⁹

³⁷⁵ Nicole C. Brambila & Liam Migdail-Smith, *Executing Justice: A look at the cost of Pennsylvania's death penalty*, READING EAGLE, June 19, 2016.

³⁷⁶ Brooks v. Alabama, 136 S. Ct. 708, 708 (2016) (mem.).

³⁷⁷ *Id.* (Breyer, J., dissenting).

³⁷⁸ *Id.* (Sotomayor and Ginsburg, JJ., concurring in denial of certiorari).

³⁷⁹ Kansas v. Carr, 136 S. Ct. 633, 642-43 (2016).

The Court also rejected Carr's contention that it was unconstitutional to have capital sentencing of multiple defendants determined by the same jury at the same sentencing proceeding. The Court said that to preclude this from occurring "would, perversely, *increase* the odds of 'wanto[n] and freakis[h]' imposition of death sentences. Better that two defendants who have together committed the same crimes be placed side-by-side to have their fates determined by a single jury."³⁸⁰

Even if one agrees with the Court's holdings, the majority opinion's comments about mitigation instructions are worthy of critical examination. For one thing, the opinion ignores the extensive evidence that most such instructions are misunderstood by juries, and often lead them to consider as aggravating things that properly can only be considered as mitigating. Yet, in the majority opinion's view, there seems to be nothing that – if factually established – can clearly be said to be mitigating rather than aggravating. Similarly, the majority opinion completely assumes away the likelihood that trying multiple defendants together in a capital sentencing phase will make it much more likely that the mitigating evidence each offers will be rendered useless by the impression that any defendant will come up with something he claims to be mitigating. Even Justice Sotomayor's dissent, which said certiorari should not have been granted, did not squarely deal with these points – saying only that state courts should not be discouraged from overprotecting federal constitutional rights, lest "the Federal Constitution [be turned] into a ceiling, rather than a floor, for the protection of individual liberties." 381

C. Wearry v. Cain, 136 S. Ct. 1002 (2016) (per curiam)

The Court held, 6-2, that "the prosecution's failure to disclose material evidence violated Wearry's due process rights."³⁸² The Court's holding was based on its application of *Smith v. Cain*,³⁸³ under which Wearry could win on his claim of a *Brady v. Maryland*³⁸⁴ violation by showing that the evidence withheld by the prosecution "undermined confidence" in the verdict.³⁸⁵

The Court held that there was no doubt that this was so. "The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." On the charge of capital murder, "the only evidence directly tying him to that crime was Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown." Even if the jury having heard all of the improperly withheld evidence could still have convicted Wearry, "we have 'no confidence that it would have done so." The Court said that the state postconviction court had incorrectly considered each piece of withheld "evidence in isolation rather than cumulatively" and should not have ignored the reasons why jurors could have believed the now disclosed evidence. Finally, the Court held that it had more than enough before it to dispose of the case without full briefing and argument,

³⁸⁰ *Id.* at 646 (alterations in original) (citation omitted).

³⁸¹ *Id.* at 649 (Sotomayor, J., dissenting).

³⁸² Wearry v. Cain, 136 S. Ct. 1002, 1002 (2016) (per curiam).

³⁸³ Smith v. Cain, 132 S. Ct. 627 (2012).

³⁸⁴ Brady v. Maryland, 373 U.S. 83 (1963).

³⁸⁵ Wearry, 136 S. Ct. at 1006.

 $^{^{386}}$ Id.

³⁸⁷ *Id.* at 1007 (citation omitted).

particularly given the detailed nature of the State's brief in opposition to certiorari. To not have acted, the Court said, would have "forc[ed] Wearry to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed."³⁸⁸ (Mr. Wearry was aided in the Supreme Court and the court below by volunteer lawyers from Fredrikson & Byron and the Capital Post-conviction Project of Louisiana.)

D. Lynch v. Arizona, 136 S. Ct. 1818 (2016) (per curiam)

In another 6-2 summary reversal, the Court held that the Arizona Supreme Court, in upholding the death verdict at Lynch's third sentencing phase proceeding, had erred in upholding the trial court's refusal to allow defense counsel to inform the jury that the only alternative to the death penalty was LWOP – where the prosecution had put the defendant's future dangerousness at issue. The Court rejected, as inconsistent with Simmons v. South Carolina, 389 the State's attempts to salvage the Arizona Supreme Court's holding by pointing to the possibility of executive clemency or speculating that the statute might later be changed to provide another sentencing option. 390

E. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016)

In a 5-3 decision, the Court, through Justice Kennedy's majority opinion, held that Terrance Williams' right to due process was violated by Pennsylvania Supreme Court Chief Justice Ronald Castille's refusal to recuse himself from participating in the court's consideration of a case in which, as district attorney, Castille had approved the trial prosecutor's decision to seek capital punishment. Applying its precedents' "objective standard that requires recusal when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerable," the Court held that "due process compelled the justice's recusal." In so holding, the Court followed the truism that "no man can be a judge in his own case" in this case in which the Castille had a "significant, personal involvement in a critical decision."

The Court held that the fact that Castille did not cast the decisive vote did not change the consequences of the "structural error." The Court stressed that "[t]he fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party."³⁹³

F. Bosse v. Oklahoma, 137 S. Ct. 1 (2016) (per curiam)

In a unanimous summary reversal, six justices joined in an opinion holding the lower court erred in not recognizing that the portion of *Booth v. Maryland*³⁹⁴ precluding

³⁸⁸ Id. at 1007, 1008.

³⁸⁹ Simmons v. South Carolina, 512 U.S. 154 (1994).

³⁹⁰ Lynch v. Arizona, 136 S. Ct. 1818, 1818-20 (2016) (per curiam).

³⁹¹ Williams v. Pennsylvania, 136 S. Ct. 1899, 1903-04 (2016) (citation omitted).

³⁹² Id. at 1905, 1908.

³⁹³ Id. at 1909.

³⁹⁴ Booth v. Maryland, 482 U.S. 496 (1987).

"characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence" is binding precedent.³⁹⁵

G. Rippo v. Baker, 137 S. Ct. 905 (2017) (per curiam)

In a unanimous decision, the Court vacated the Nevada Supreme Court's decision that had denied Rippo discovery and a hearing with respect to his assertion that there was an appearance of bias in that the prosecutor was criminally investigating the trial judge. The Court said Rippo need not allege or show actual bias, since the "Due Process Clause may sometimes demand recusal" even in the absence of actual bias. The Court remanded the case in order for the state court to determine if, under all the alleged circumstances, "the risk of bias was too high to be constitutionally tolerable." 396

H. Jenkins v. Hutton, 137 S. Ct. 1769 (2017) (per curiam)

In a unanimous opinion, the Court held that the Sixth Circuit had erred in applying the "miscarriage of justice" exception to the procedural default bar. First, the Court said that the trial court's failure to charge the jury correctly in the penalty phase about the necessity of finding aggravating circumstances that are pre-requisites to death eligibility was irrelevant because the jury had already found these pre-requisites in its guilt phase decision. Second, the Court stated that the Sixth Circuit had used the wrong test for the exception, which it said should have been whether "but for a constitutional error, no reasonable jury would have found the [defendant] eligible for the death penalty." The Court, in remanding the case, stressed that "[n]either Hutton nor the Sixth Circuit has 'show[n] by clear and convincing evidence' that – if properly instructed – 'no reasonable juror would have' concluded that no aggravating circumstances in Hutton's case outweigh the mitigating circumstances."³⁹⁷

I. McWilliams v. Dunn, 137 S. Ct. 1790 (2017)

The Court, in a decision written by Justice Breyer, held that Alabama had denied McWilliams his constitutional right to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." McWilliams had a history of many severe head injuries. The court appointed an expert who was a colleague of the two prosecution experts, was unavailable to talk with defense counsel, and wrote a report to which defense counsel only got access two days before the sentencing proceeding – and defense counsel also did not get to see mental health records until two days before the sentencing. The Court ordered that on remand the Eleventh Circuit determine whether the constitutional violation had a substantial and injurious impact on the sentencing proceeding. The four dissenters asserted that the

³⁹⁵ Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam).

³⁹⁶ Rippo v. Baker, 137 S. Ct. 905, 907 (2017) (per curiam).

³⁹⁷ Jenkins v. Hutton, 137 S. Ct. 1769, 1772-73 (2017) (per curiam) (second alteration in original) (citation omitted).

³⁹⁸ McWilliams v. Dunn, 137 S. Ct. 1790, 1800 (2017) (citation omitted).

majority had not answered the question of whether the defendant was entitled to an expert who was a member of the defense team.³⁹⁹

J. Davila v. Davis, 137 S. Ct. 2058 (2017)

In *Martinez v. Ryan*⁴⁰⁰ and *Trevino v. Thaler*,⁴⁰¹ the Court recognized an equitable exception to the procedural default bar, for ineffective assistance of trial counsel claims where, as a practical matter under state law, the first real opportunity to assert such claims was in state postconviction. The equitable exception applies where state postconviction counsel is ineffective in not raising the trial counsel ineffectiveness claim. Under those circumstances, the claim is cognizable in federal habeas.

In *Davila v. Davis*, by a 5-4 vote, the Court declined to extend the exception to defaulted claims of ineffectiveness of appellate counsel. The majority stressed the more fundamental nature of trials as compared with direct appeals – for which there is no constitutional right. It also reasoned that in many situations of ineffective appellate counsel there is also ineffective trial counsel, so that the *Martinez/Trevino* exception might apply anyway. If further expressed concern that extending the exception to ineffectiveness of appellate counsel claims could increase the burden on federal courts greatly, by forcing them to rule on usually meritless claims of appellate ineffectiveness.⁴⁰²

Writing for the four dissenters, Justice Breyer, stressing that there is a constitutional right to effective direct appeal counsel, said the equities justify a similar exception as in *Martinez/Trevino*. He said this is especially true in death penalty cases, where a very significant percentage of death row inmates (if not defaulted out of merits rulings) secure relief somewhere along the way.⁴⁰³

K. Dunn v. Madison, 138 S. Ct. 9 (2017) (per curiam)

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

³⁹⁹ *Id.* at 1801-02 (Alito, J., dissenting).

⁴⁰⁰ Martinez v. Ryan, 566 U.S. 1 (2012).

⁴⁰¹ Trevino v. Thaler, 569 U.S. 413 (2013).

⁴⁰² Davila v. Davis, 137 S. Ct. 2058, 2065-69 (2017).

⁴⁰³ *Id.* at 2071-75 (Breyer, J., dissenting).

⁴⁰⁴ Dunn v. Madison, 138 S. Ct. 9, 11-12 (2017) (per curiam).

⁴⁰⁵ Madison v. Commissioner, 851 F.3d 1173, 1179 (11th Cir.), rev'd sub nom. Dunn v. Madison, 138 S. Ct. 9 (2017).

⁴⁰⁶ Dunn, 138 S. Ct. at 12 (Ginsburg, J., dissenting, joined by Breyer and Sotomayor, JJ.).

L. Ayestas v. Davis, No. 16-6795, 2018 WL 1402425 (U.S. Mar. 21, 2018)

Texas death row inmate Carlos Manuel Ayestas was entitled, under the Supreme Court holdings in *Martinez v. Ryan* and *Trevino v. Thaler*, to develop and assert a claim in a federal habeas corpus proceeding that he had been denied his constitutional right to the effective assistance of counsel by his trial counsel's failure to investigate and then present in the trial's penalty phase substantial evidence regarding his mental health problems and the effects of drug and alcohol abuse. His state habeas counsel's failure to rectify these failures entitled Ayestas under *Trevino* to develop and present these claims.⁴⁰⁷

The issue before the Supreme Court arose from the Fifth Circuit's denial of Mr. Ayestas' effort to seek funding to investigate and pursue his ineffective assistance claim, pursuant to 18 U.S.C. § 3599(f). The Fifth Circuit denial was based on two factors: its holding that the ineffectiveness claim was barred by procedural default for not having been raised earlier; and its view that under § 3599(f) Ayestas had to show – and had failed to show – "a substantial need" for investigative or other services. Under Fifth Circuit precedent, this showing could not be made unless the petitioner presented "a viable constitutional claim that is not procedurally barred." 408

In an opinion for a unanimous Court, written by Justice Alito, the Court reversed. It first made short shrift of the State's contention that the decision denying funds was merely an administrative decision that could not be appealed. It then turned to the key issue: the statute's requirement that the requested expert and investigative services were "reasonably necessary for the representation of the [applicant]."409 The Court rejected the Fifth Circuit's view that something more than "reasonable necessity" was required. It held that the proper test for a district court exercising reasonable discretion to use is "whether a reasonable attorney would regard the services as sufficient important" in light of factors the Court proceeded to discuss. Before discussing those factors, the Court found that the Fifth Circuit had aggravated the problem by including in its test the requirement of the petitioner's advancing "a viable constitutional claim that is not procedurally barred." ⁴¹⁰ The Court said that this part of the Fifth Circuit test, first articulated prior to Trevino, was too harsh. The Court stressed that in exercising its discretion to determine whether the funding being sought was "reasonably necessary," a court should consider the potential merit of the claim the petitioner seeks to make, the likelihood that the requested services will "generate useful and admissible evidence," and the chance that the petitioner can overcome any procedural barriers.411

Finally, the Court addressed the State's very belated attempt to secure affirmance based on an argument that the "reasonably necessary" test can never be satisfied where the claim the petitioner is seeking to make is a procedurally barred ineffective assistance claim that depends on facts not in the state court record. Because this argument had never

⁴⁰⁷ Ayestas v. Davis, No. 16-6795, 2018 WL 1402425, at *4-5 (U.S. Mar. 21, 2018).

⁴⁰⁸ *Id.* at *5-6 (citation omitted).

⁴⁰⁹ *Id.* at *9 (alteration in original) (citation omitted).

⁴¹⁰ *Id*. at *10.

⁴¹¹ *Id.* at *11.

previously been advanced in the case, the Court held that the Fifth Circuit could deal with it on remand. 412

There was a concurring opinion by Justice Sotomayor, in which Justice Ginsburg joined. The concurrence said it was apparent that there was little reason to doubt that the petitioner had satisfied § 3599(f). Indeed, in the concurrence's view, the state postconviction counsel may have been even more ineffective than trial counsel, in that the postconviction counsel "ignored his own mitigation specialist," who had alerted him to the "serious failings" that the jury "heard virtually no mitigation" and that trial counsel "fail[ed] to conduct a social history investigation" of Ayestas. "Even after Ayestas' psychotic episode, schizophrenia diagnosis, and documented tendencies of 'delusional thinking' during the course of the representation, state postconviction counsel did nothing." The concurrence also said it was likely that the prejudice prong of the ineffectiveness test could be met, particularly since only two minutes of mitigation testimony had been presented at trial. 413

III. ABA ACTIVITIES NOT DISCUSSED ABOVE

A. Amicus Briefing in Hurst, and Statements and Letter After the Holding

The ABA filed an amicus curiae brief in *Hurst v. Florida*. The brief argued that, as the Court later held in January 2016, the Florida capital sentencing scheme was inconsistent with *Ring*. Among other things, the brief stressed that Florida did not require a jury majority to determine which aggravating factor(s) existed or even to agree that one particular aggravating factor existed.⁴¹⁴

ABA President Paulette Brown issued a statement on January 12, 2016, the day *Hurst* was issued, calling on the Florida legislature to revise Florida law to comply with the holding, and urging Florida not to execute people until corrective action is taken concerning their unconstitutionally imposed death sentences. ⁴¹⁵ Later, the ABA successfully urged that Florida preclude a death sentence unless a unanimous jury concludes that the sentence should be death.

B. ABA Amicus Briefs and Presidential Statements in Other Situations

Some of the ABA's other amicus briefs and Presidential statements have been discussed above.

The ABA also filed an amicus brief in *Ayestas v. Davis*, asking the Supreme Court to reverse – as it did – the Fifth Circuit's holding that before a postconviction counsel can be granted funding for investigation and experts, counsel must establish a "substantial need" for the funding. The ABA brief stated that the Fifth Circuit had created a "Catch 22"-like

⁴¹² *Id.* at *12

⁴¹³ *Id.* at *17 (Sotomayor, J., concurring, joined by Ginsburg, J.).

⁴¹⁴ Brief of Amicus Curiae ABA in Support of Petitioner, *Hurst v. Florida*, No. 14-7505 (U.S. filed June 4, 2015), 2015 WL 3623139.

⁴¹⁵ ABA, Press Release, Statement of Paulette Brown, president, American Bar Association Re: Supreme Court decision in Hurst v. Florida, Jan. 12, 2016, http://www.americanbar.org/news/aba-news-archives/2016/01/statement_of_paulett0.html.

situation, since in the absence of funding, counsel would almost always find it impossible to show what the investigators and experts whom counsel lacked the funds to hire would have discovered and concluded. 416

One pending U.S. Supreme Court case in which the ABA filed an amicus brief is $McCoy\ v.\ Louisiana$, which was argued on January 17, 2018. The Supreme Court will decide whether the defendant's Sixth Amendment right to counsel was violated when his counsel unilaterally decided – against the defendant's explicit wishes – to concede the defendant's guilt throughout the trial, which ended in a death sentence. The ABA brief argues that if the defendant is mentally competent, his counsel is obligated to abide by the defendant's decision on whether to concede or contest guilt.⁴¹⁷

C. Representation Project

The ABA Death Penalty Representation Project (the "Representation Project") was created in 1986 to address a growing problem with the quality and availability of defense counsel for death row prisoners. In the last 31 years, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and resentencing proceedings. Volunteer firms have also written amicus briefs on behalf of the ABA or other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation. In dozens of cases placed with volunteer counsel, inmates have been exonerated or had their death sentences commuted or overturned.⁴¹⁸

A recent victory by Representation Project-recruited counsel occurred on November 15, 2017, when lawyers from Maslon LLP secured a 5-4 ruling by the Texas Court of Criminal Appeals vacating Douglas Armstrong's death sentence and ordering a new sentencing trial. The Court held that Armstrong's trial counsel were prejudicially ineffective in not investigating adequately the wealth of mitigation evidence that was available – including "a squalid and dangerous home life" and expert testimony about Armstrong's mental and physical health.⁴¹⁹

Another victory by Representation Project-recruited counsel took place on February 27, 2017, when Winston and Strawn secured a Sixth Circuit decision vacating the conviction and death sentence of its client and ordering a new trial. The Sixth Circuit holding arose from the State's failure to disclose that it had paid the defendant's ex-wife \$750 for testifying against him in federal habeas.⁴²⁰

⁴¹⁶ Brief for the ABA as Amicus Curiae in Support of Petitioner at 28, *Ayestas v. Davis*, No. 16-6795 (U.S. filed June 16, 2017), 2017 WL 2682002, at *28.

⁴¹⁷ Brief of the ABA as Amicus Curiae in Support of Petitioner at 3-4, *McCoy v. Louisiana*, No. 16-8255 (U.S. filed Nov. 20, 2017), 2017 WL 5714609, at *4.

⁴¹⁸ For information and resources regarding the Representation Project, see the ABA's Death Penalty Representation Project website, available at https://www.americanbar.org/groups/committees/death_penalty_representation.html.

⁴¹⁹ ABA DEATH PENALTY REPRESENTATION PROJECT, 2017 YEAR-END REPORT & NEWSLETTER, at 13 (2017) [hereinafter ABA 2017 YEAR-END REPORT & NEWSLETTER].

⁴²⁰ ABA DEATH PENALTY REPRESENTATION PROJECT, SPRING 2017 NEWSLETTER (2017).

Ten days earlier, on February 17, 2017, Representation Project-recruited counsel from Sullivan & Cromwell secured – with the prosecution's agreement – the vacating of Georgia death row inmate Norris Speed's conviction and death penalty and his resentencing to LWOP. 421 In 2010, Sullivan & Cromwell had persuaded a Georgia judge to vacate Speed's sentence (a ruling affirmed by the Georgia Supreme Court in 2011). The 2010 order had arisen from Sullivan & Cromwell's discovery that the bailiff at his trial had improperly communicated with the jury and had discussed with the jury a biblical verse relating to capital punishment.

The Representation Project plays a vital role with regard to ABA amicus briefs and Presidential statements and letters concerning the subjects of its expertise. Moreover, it provides technical assistance, expert testimony, training, and resources to the capital defender community and *pro bono* counsel.⁴²² It also is home to the new ABA clemency initiative discussed immediately below. Each autumn, the Representation Project honors outstanding *pro bono* performance in capital cases.

The Representation Project organizes coalitions of judges, bar associations, civil law firms, and government lawyers in jurisdictions that use the death penalty to champion meaningful systemic reforms designed to ensure that all capital defendants and death row prisoners have the assistance of effective, well-trained, and adequately resourced lawyers. In particular, it works to secure the widespread implementation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The 2003 revision of these Guidelines was approved as ABA policy in 2003 (the "ABA Guidelines"). 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. They are the widely accepted standard of care for the capital defense effort and have been cited in more than 500 state and federal cases, including decisions by the Supreme Court.

In 2017-2018, the Representation Project has been working with the Idaho Public Defender Commission and several Idaho capital defense practitioners to draft new standards for appointment of capital defense counsel (trial, appellate, and post-conviction) based on the ABA Guidelines. These proposed new standards will soon be presented to a legislative committee.

The Representation Project participates as faculty in state and national training seminars for judges and defense counsel, regarding the elements of capital defense and the

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

 $^{^{421}} Id$

⁴²³ ABA, ABA Guidelines (revised Feb. 2003), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

⁴²⁴ ABA Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (updated Aug. 2016), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/guidelines-fact-sheet.authcheckdam.pdf.

importance of an effective capital defense function. It has also organized training seminars for capital defenders and judges in other countries and participated as faculty at international conferences.

The Representation Project also provides testimony on behalf of the ABA. One example is the February 18, 2016 testimony of Representation Project Director Emily Olson-Gault at a hearing of the Judicial Conference of the United States' Ad Hoc Committee to Review the Criminal Justice Act (the "CJA"). In what was in a sense a precursor to the ABA amicus brief in *Christeson* (see Part I.A.2.c.i.(a) above), Ms. Olson-Gault testified about the CJA's administration to the extent it affects the availability and quality of counsel in capital cases.⁴²⁵

She urged proper funding for counsel and non-attorney defense team members at every phase of death penalty cases – "from pre-trial through clemency" – eliminating fee caps and flat fees, a shift in CJA criteria for appointed counsel away from quantitative and towards qualitative criteria, removing the CJA presumption that state postconviction counsel will continue in federal habeas even if the client cannot get advice on potential conflicts from independent counsel, and using a well-defined mechanism to regularly monitor and enforce the ABA counsel guidelines. The ABA Guidelines urge that this mechanism be an entity independent of the judiciary, such as a defender organization or an independent authority run by defense attorneys. It should recruit, appoint, and train defense attorneys for all stages of a capital case, seriously investigate complaints regarding counsel, and remove attorneys who do not meet qualification and performance standards. Ms. Olson-Gault also discussed the challenges of relying too much on *pro bono* counsel for people facing the death penalty. She praised such *pro bono* work but stressed its inability to replace a robust indigent defense system.

Another example is Ms. Olson-Gault's November 13, 2017 testimony as a subject matter expert on the ABA Guidelines, in a Guantanamo Military Proceeding involving the alleged key actor in the 2000 bombing of the U.S.S. Cole. 426 The defendant's civilian capital defense attorneys had resigned due to concern over preservation of the attorney-client privilege, leaving only one defense attorney, a junior military officer with no previous death penalty experience or training. This lawyer sought reconsideration of the judge's denial of a stay until qualified counsel could be found – a decision premised on the judge's view that qualified counsel is unnecessary for pretrial proceedings. The court requested Ms. Olson-Gault to testify as an expert on the ABA Guidelines and their relevance in military commission proceedings. Ms. Olson-Gault testified that the ABA Guidelines require that the defense effort in every part of the proceedings be led by qualified capital counsel. She supported her testimony with discussions of lower federal court decisions concerning the ABA Guidelines and of legislative history indicative of Congressional intent that military commissions take guidance from the ABA Guidelines in appointing capital case counsel.

Thereafter, the court issued findings that found her testimony to be credible. And it recognized based on her testimony about the legislative history that military commissions

 ⁴²⁵ Ms. Olson-Gault's written testimony is available at https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/emilyolson-gaultbirminghamwrittentestimony-done.pdf.
 426 ABA 2017 YEAR-END REPORT & NEWSLETTER, supra note 419, at 12.

must take into account the ABA Guidelines. It specifically pointed to Congress' directive, in the National Defense Authorization Act for 2010 that explicitly required the Secretary of Defense to consider the ABA Guidelines when creating the rules for appointment of capital case defense counsel.⁴²⁷

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

The CCRI, a recent ABA initiative, seeks to improve resources and information available to attorneys and governmental decision-makers involved in the capital clemency process. By assessing current clemency practices, collecting and creating training materials and other resources, and providing state-specific guidance where feasible, the CCRI seeks to ensure more meaningful processes and reasoned decisions regarding capital clemency. All publicizes are resourced for about March 2018, the CCRI will publish and the ABA will publicize representing Death-Sentence Prisoners in Clemency: A Guide for Practitioners, and innovative resource for lawyers handling or otherwise interested in clemency petitions. The ABA also has created and maintained a website, www.capitalclemency.org, with extensive materials available for the public and a number of secure databases aimed at helping lawyers handling clemency petitions. On January 23, 2018, the CCRI held its first training webinar, concerning fundamental ways to represent people effectively in seeking clemency from death sentences. Also

The CCRI has provided support and guidance to counsel in some of the clemency cases discussed above, such as those of Jason McGehee and Billy Moore. In the case of Texas death row inmate Juan Castillo, it recruited *pro bono* clemency counsel, whose investigation revealed many guilt/innocence issues that had never been investigated or raised. The CCRI informed the Texas Defender Services about these overlooked issues. The Texas Defender Services then, in October 2017, filed a state postconviction petition raising an unexhausted claim concerning allegedly false witness testimony at trial.⁴³¹ On November 28, 2017, the Texas Court of Criminal Appeals stayed Castillo's execution and remanded his case to the trial court for further consideration.⁴³²

E. The Due Process Review Project

In 2001, the ABA established the Death Penalty Due Process Review Project (the "Due Process Project") to conduct research and educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes. It urges legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA's Protocols on the Fair Administration of the Death Penalty; provides technical

 $^{^{427}}$ *Id*.

⁴²⁸ For information and resources regarding the CCRI, see the ABA's Capital Clemency Resource Initiative ("CCRI") website, available at https://www.americanbar.org/groups/committees/death_penalty_representation/training_reform/capital-clemency-resource-initiative.html.

⁴²⁹ Email from Aurélie Tabuteau Mangels, Mental Illness Initiative Fellow, to Ronald Tabak, Jan. 31, 2018 (on file with author).

⁴³⁰ For information about the webinar, Fundamentals of Zealous Capital Clemency Representation, see http://www.publicdefenders.us/ev_calendar_day.asp?date=1/23/2018&eventid=78.

⁴³¹ ABA 2017 YEAR-END REPORT & NEWSLETTER, *supra* note 419, at 14.

⁴³² Ex parte Castillo, No. WR-70,510-04, 2017 WL 5783355 (Tex. Crim. App. Nov. 28, 2017) (per curiam).

assistance to state, federal, and international stakeholders; and collaborates with individuals and organizations on new initiatives to reform death penalty processes. As discussed in detail above (in Part I.B.6.d.ii.), the Due Process Project hosts the ABA's Severe Mental Illness Initiative. Moreover, the Due Process Project plays a vital role with regard to ABA amicus briefs and Presidential statements and letters concerning the subjects of its expertise.

1. The Assessments Under ABA Auspices of 12 States' Implementation of the Death Penalty

From 2004-2012, the Due Process Project assessed the extent to which the death penalty systems in 12 states comported with ABA policies designed to promote fairness and due process. The assessment reports were prepared by in-state assessment teams and Due Process Project staff for Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. Serious problems were found in every state's system. To the extent these problems continue to fester, there are strong reasons for imposing moratoriums and otherwise curtailing the death penalty's use.

2. The Assessments' Continuing Impact

These assessments and their recommendations are still relied on and cited to by policymakers, the press, and other commentators. For example, a major reason why Pennsylvania's Governor began a moratorium on executions in March 2015 was the failure to address the systemic flaws in death penalty implementation detailed in the Pennsylvania's assessment team's 2007 recommendations.

3. ABA Policy Opposing Death Penalty's Application to Anyone Aged 21 or Younger at the Time of the Crime

In light of substantially improved scientific understanding of the adolescent brain, court decisions involving LWOP, other criminal and civil law reforms, and societal evolving standards of decency, the Due Process Project prepared a resolution that the ABA House of Delegates adopted on February 5, 2018. Whereas prior ABA policy opposed death penalty eligibility for anyone below age 18 at the time of the crime – which became a constitutional bar via the Supreme Court's decision in $Roper\ v.\ Simmons^{435}$ – under the new policy the ABA opposes the execution of anyone who was aged 21 or younger at the time of the crime. 436

4. Considering Restorative Justice in the Death Penalty Context

⁴³³ Each state assessment report can be found on the ABA's State Death Penalty Assessments website, available at http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html.

⁴³⁴ See Motion for New Trial Based on Newly Discovered Evidence and/or Post-conviction Relief Under Ohio Rev. Code § 2953.23, supra note 253, at 3; see also Krouse, supra note 253.

⁴³⁵ Roper v. Simmons, 543 U.S. 551 (2005).

⁴³⁶ ABA Death Penalty Due Process Review Project, Res. 111 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf

In December 2017, the Due Process Project steering committee's newly formed subcommittee on restorative justice and the death penalty began to consider existing research and practice on this subject. Of particular interest is the Defense-Initiative Victim Outreach – a federal and state initiative that facilitates communication between murder victims' families and defense teams. It is intended to alleviate the families' suffering. The Due Process Project is now consulting experts on restorative justice in the context of capital punishment regarding what the Project may do in this regard.

F. Human Rights Magazine's Death Penalty Issue

In late January 2017, the Section of Civil Rights and Social Justice published an issue of its Human Rights magazine devoted entirely to matters relating to capital punishment. 437 Subtitled The Death Penalty: how far have we come?, the issue includes an overview of developments in the 40 years since Gregg; an article by the Steikers on "The Racial Origins of the Supreme Court's Death Penalty Oversight"; John Blume's analysis of post-Atkins cases that "reveal deeper structural problems with the death penalty as a whole"; Richard Bonnie's discussion of the "next frontier" beyond intellectual disability: serious mental illness; Brandon Garrett's discussion of the tremendous diminution in the number of counties seeking and imposing death sentences; Gregory Parks' and Hon. Andre Davis' discussion of why judges should take the lead in dealing with the numerous manifestations of implicit bias in capital cases; Laura Schaefer's and Michael Radelet's reflections on why changing public opinion has led to "new opportunities for commutations in death penalty cases" - opportunities not yet realized due to vestigial political cowardice; the starkly different actions of governors who have imposed moratoriums on executions; Gerald Galloway's discussion of public safety officials' concerns regarding capital punishment; and Megan McCracken's and Jennifer Moreno's analysis on "What Oklahoma's Lethal Injection Regime Tells Us about Secrecy, Incompetence, Disregard, Experimentation Nationwide."

G. Timely Programs (Beyond Those of the ABA Severe Mental Illness Initiative, Discussed Above in Part I.B.6.d.ii.)

The Due Process Project co-sponsored with the ABA Section of Civil Rights and Social Justice, and planned with the University of Texas School of Law Capital Punishment Center, a March 31 to April 2, 2016 conference titled Forty Years After Gregg v. Georgia: A National Conference on the Death Penalty. Capital punishment experts, journalists, advocates, and practitioners shared their diverse perspectives, reflected on the dynamic history of capital punishment in the United States over the past four decades, and discussed current issues. 438

On February 3, 2017, the Due Process Project, the Representation Project, and the Section of Civil Rights and Social Justice sponsored a program titled *The Constitutional Crisis with Florida's Death Penalty Post-Hurst and Its Implications for Additional States.*

⁴³⁷ The issue was published as volume 42, number 2, in January 2017.

⁴³⁸ For information and resources regarding the conference, see the ABA's Welcome to the "40 Years After Gregg" Conference website, available at http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/events_meetings/40.html.

Held in Miami during the ABA's midyear meeting and moderated by former ABA President Martha Barnett, the program highlighted (among many other things) the courts' failures to acknowledge for way too many years the obvious applicability of *Ring* to Florida – and the many executions resulting from this head-in-the-sand approach, as well as the egregious unfairness of not making the Florida Supreme Court's post-*Hurst* holdings applicable to death row inmates whose direct appeals became final prior to *Ring*.⁴³⁹

On April 27, 2017, the Due Process Project and the Section of Civil Rights and Social Justice presented a program at the St. Louis University School of Law, entitled *Rushing to Execution – Ethical Issues and Procedural Barriers in* Christeson v. Roper. The program featured remarks by former Missouri Supreme Court Chief Justice Michael A. Wolff and a distinguished panel.⁴⁴⁰

During the ABA's annual meeting in New York on August 14, 2017 (discussed above at Part I.A.3.i.), the Section of Civil Rights and Social Justice, along with other ABA entities, co-sponsored with the New York City Bar Association a program concerning key lessons to be learned from what has *not* happened since many states abolished or otherwise completely stopped using the death penalty.

IV. THE FUTURE

There is accelerating recognition of major systemic problems with capital punishment. In recent years, this has led to abolition or discontinuation of capital punishment and to statewide moratoria in many states. Court decisions in 2016 have emptied Delaware's death row and should substantially decrease the size of Florida's. The report by the Oklahoma commission issued on April 25, 2017, advocates continuation of the moratorium there due to the many systemic problems the commission describes in critiquing the state's capital punishment system.

New death sentences, while increasing in 2017, remained below 40. The number could decrease based on new approaches of newly elected prosecutors, particularly if defense counsel performance improves. And the new Alabama law enacted in April 2017 forbidding judicial overrides of juries to impose death sentences should reduce the number of new death sentences in Alabama.

The slight increase in executions in 2017 was due entirely to Arkansas' four executions in April. Executions in future years would decline if clemency decision-makers were to recognize that most death row inmates would not be sentenced to death if their cases arose today. The national execution total might, however, increase noticeably over time depending on how California's Proposition 66 is implemented. California has not executed anyone since 2006 and has the nation's largest death row.

⁴³⁹ For information regarding the program, see the ABA's announcement, available at http://www.americanbar.org/content/dam/aba/images/abanews/2017MYM_Constitutional_Crisis.pdf.

⁴⁴⁰ For information and resources regarding the program, see the ABA's Relevant Resources for "Rushing to Execution – Ethical Issues and Procedural Barriers in *Christeson v. Roper*" website, available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/resources/relevant-resources-for-rushing-to-execution--ethical-issues-and-.html.

There is ever greater appreciation of serious problems with the death penalty's implementation. Increasingly, the death penalty *in practice* has been attacked by people who have served in the judiciary or law enforcement, taken part in executions, written death penalty laws, or are politically conservative. A growing number of conservatives say that capital punishment is a failed, inefficient, expensive government program that accomplishes nothing. And religious-based support for executions has dropped significantly and should further decrease in view of Pope Francis' emphatic statement in 2017. It is unsurprising that even before the most recent of these developments, polls in 2017 (as well as in March 2018) showed much lower support for the death penalty than in the past, even when the actual alternative – LWOP – was not included in polls.

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 also crucial to focus on the roles that race and inadequate jury instructions play in capital sentencing decisions.

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

Unfortunately, the Supreme Court and lower courts continue to use procedural technicalities and deference to erroneous state court rulings to bar deciding the merits of many meritorious federal constitutional claims. Attorney General Sessions will, if past is prologue, strive to exacerbate this situation. And most clemency authorities seem likely to keep hiding behind the fiction that somewhere along the way, judges or juries already have fully considered all facts relevant to a fair determination of whether a person should be executed. Reality belies that fiction. All too often, key evidence relating to guilt or sentence has been – prior to clemency proceedings – hidden by prosecutors, never found by defense counsel, rendered meaningless by confusing and misleading jury instructions, or barred from meaningful consideration by various procedural technicalities. Yet, when such crucial evidence *is* finally raised in clemency proceedings, most clemency authorities utterly fail to fulfill their duty to be "fail-safes" against unfairness.

In these and many other respects, it is vital that the legal profession and the public be better informed about how capital punishment really "works." The more that people know about the death penalty as actually implemented, the more they oppose it. The actual capital punishment in the United States can be justified only if one believes in arbitrarily and capriciously applied, highly erratic vengeance. More and more people are realizing that the typical pro death penalty arguments, which focus on a theoretical but non-existent capital punishment system, are completely irrelevant.

Ultimately, our society must decide whether to continue with a penalty implemented in ways that cannot survive any serious cost/benefit analysis. As more and more people recognize that capital punishment in this country is inconsistent with both conservative and liberal principles, and with common sense, the opportunity for its abolition throughout the United States will arrive. Those who already realize that our actual death penalty is

like "the emperor's new clothes" should do everything with a reasonable chance of accelerating its demise.