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CHAPTER 19

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 2018 was an estimated 42. The number of death sentences imposed between 2015 and 2018 was half the number imposed in the preceding four years. To put this in context, 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, and then fell to 31 in 2016, before rising to 2017's 39 and 2018's 42.¹

For the first year since the death penalty resumed after *Furman v. Georgia*,² there was not in 2018 a single county in the entire United States in which more than two death sentences were imposed.³

Some states that used to be among the annual leaders in imposing death sentences have now gone years without any new death sentences.

One notable state in this regard, Georgia, as of March 2019 has gone five full years without a new death penalty. In explaining why, Bill Rankin of the *Atlanta Journal-Constitution* pointed to the facts that life without parole (“LWOP”) can now be imposed in Georgia without the prosecutor’s having sought capital punishment and is now recognized by jurors to really mean a life sentence with no chance of parole; that the quality of trial-level defense lawyers’ performance has greatly increased; and that it is now far more difficult to get juries to vote for death sentences – even when the crimes are especially aggravated.⁴

North Carolina for the second consecutive year imposed no death sentences, with all three capital trials ending in LWOP verdicts.⁵

¹ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2018: YEAR END REPORT, at 1, 3 (2018) [hereinafter DPIC 2018 YEAR END REPORT]; DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, at 3 (2018).

² *Furman v. Georgia* 408 U.S. 238 (1972).

³ DPIC 2018 YEAR END REPORT, *supra* note 1, at 4.

⁴ Bill Rankin, *Death penalty on the wane in Georgia*, ATLANTA J.-CONST., Jan. 11, 2019.

⁵ Editorial, *As death sentences decline, NC should end them*, NEWS & OBSERVER, Dec. 27, 2018.

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In California, a long-standing leader in imposing new death sentences, the numbers dropped from eleven in 2017 to five in 2018. Some of California's leading death penalty counties have had large declines in recent years, with significant decreases in the counties of Riverside (twenty-one from 2012-2015, down to six from 2016-2018), Los Angeles (twenty from 2012-2015, down to seven from 2016-2018), Orange (five from 2012-2015, down to three from 2016-2018), and Kern (five from 2012-2015, down to one from 2016-2018).⁶ How (if at all) Governor Newsom's March 13, 2019 announcement that he will not permit any executions in California during his tenure as governor will affect the number of new death sentences remains to be seen.

Even states whose new death sentences rose in 2018 above their 2017 levels were far below their peak levels. Thus, Nebraska rose from one to two (its peak was four in 1978). Rises from one to two also occurred in Arkansas (whose peak was 12 in 1981) and Mississippi (whose peak was 13 in 1981); and two states that increased from zero to one death penalty, Louisiana and Tennessee, were well below their peak years in which there were 12 new death sentences. Also way under their peaks were Texas and Florida, both at seven death sentences in 2018 (up from four and three, respectively, in 2017), and Ohio at five (up from one in 2017). And Alabama's three death sentences in 2018 were only one more than Alabama's post-*Furman* low of two (in 2017).⁷

a. Concentration in Relatively Few States and Counties

As in other recent years, new death sentences were geographically concentrated. As in 2017, there were new death sentences in 2018 in only 14 of the 30 states that still had capital punishment (although there were some changes in which 14 states these were).⁸ And half of the new death sentences in 2018 were imposed in just four states: Texas, Florida, California, and Ohio.⁹

There continued to be a concentration of capital sentences in a very small percentage of the counties in states having capital punishment. In 2017-2018, some of the counties that had been leaders in imposing new death sentences earlier in the decade had notable decreases, and there were increases (sometimes after recent years with no death sentences) in other, mostly rural, counties.

One likely reason for fewer new death sentences in certain counties in the past two years than in the five preceding years combined was the replacement of prosecutors who had been particularly apt to seek and secure death sentences.

In November 2016, long-time prosecutors who were prolific in securing death sentences in Florida's Duval and Hillsborough Counties were defeated and replaced with people far less likely to add people to death row. In Duval County, Melissa Nelson defeated

⁶ *Executions by County*, DEATH PENALTY INFO. CTR. (last visited Jan. 31, 2019) (follow hyperlinks for years under discussion); *Death Sentences in 2018*, DEATH PENALTY INFO. CTR. (last visited Jan. 31, 2019).

⁷ *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CTR., (last visited Jan. 31, 2019).

⁸ *Id.*

⁹ Richard A. Oppel Jr., *After Decades, a Death Sentence Depends (a Little) Less on Where You Live*, N.Y. TIMES, Dec. 14, 2018; DPIC 2018 YEAR END REPORT, *supra* note 1, at 4.

incumbent Angela Corey, by a landslide. Local legal commentators said Nelson won in large part due to Corey's aggressive implementation of capital punishment.¹⁰ 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."¹¹ There was only one new death sentence in Duval County in 2017-2018, down from seven from 2012-2016; and in Hillsborough County, there were no new death sentences from 2017-2018, down from five from 2012-2016.¹²

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.¹³ The number of new death sentences in 2017-2018 was one, down from five from 2012-2016.¹⁴

In Caddo Parish, Louisiana, interim district attorney Dale Cox decided against seeking a full term and was replaced in 2016 by James E. Stewart, Sr. (an experienced former judge and an African American). As of late December 2018, Stewart was seeking what would, if imposed, be the first death sentence in the parish in four years.¹⁵ He has focused on screening cases rather than quickly 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.¹⁷ 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."¹⁸ No one was sentenced to death in Philadelphia in 2017-2018, down from three from 2012-2016.¹⁹

b. Potential for Further Drops in Certain Counties

i. Further Replacement of District Attorneys in Counties Prolific in Imposing Death Sentences

¹⁰ Larry Hannan & Sebastian Kitchen, *Northeast Florida voters kick controversial State Attorney Angela Corey out of office*, FLA. TIMES-UNION, Aug. 31, 2016.

¹¹ 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>.

¹² *Executions by County*, *supra* note 6 (follow hyperlinks for years under discussion); *Death Sentences in 2018*, *supra* note 6.

¹³ Jon Herskovitz, *U.S. death sentences wane, even in Texas county with most executions*, REUTERS, Nov. 7, 2016.

¹⁴ *Executions by County*, *supra* note 6 (follow hyperlinks for years under discussion); *Death Sentences in 2018*, *supra* note 6.

¹⁵ Oppel, *supra* note 9.

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) (last visited Jan. 30, 2018).

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

¹⁹ *Executions by County*, *supra* note 6 (follow hyperlinks for years under discussion); *Death Sentences in 2018*, *supra* note 6.

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Results of elections in 2018 may lead to a decline in new death sentences, as compared with most years in this decade, in a number of other counties that have been national leaders in imposing new death sentences.

Four of these were Orange and San Bernardino Counties in California, and Dallas and Bexar Counties in Texas, in all of which pro-death penalty district attorneys were defeated in November 2018.²⁰

In August 2018, St. Louis County, Missouri Democrats nominated for prosecuting attorney Wesley Bell, who opposes the death penalty. He defeated Robert McCulloch, one of the top death penalty prosecutors in the state.²¹ There was no Republican candidate in the general election, in which Bell was elected.

In May 2018, several North Carolina counties selected, in Democratic primaries, candidates much less likely to seek capital punishment than their predecessors,²² and they went on to be elected.

And in November 2018, Nevada and Colorado elected attorneys general who oppose capital punishment.²³

c. Troublesome New Death Sentences in 2018

Even without knowing of problems that will come to light only after subsequent investigation, serious concerns with many of the year's new death sentences are already apparent.

In Nebraska, when juries in two cases did not agree unanimously regarding the sentence, three-judge panels imposed the death penalty. In one of these cases, the defendant represented himself, and neither presented any mitigating evidence nor challenged most of the State's questionable aggravating evidence. In the other case, the three-judge panel imposed the death sentence on Anthony Garcia despite evidence that his history of severe mental illness had included hospitalization and shock therapy.²⁴

Alabama's Derrick Dearman was permitted to fire his attorney, plead guilty, and ask the judge to impose the death penalty – which the judge did. And at an Ohio trial, defendant

²⁰ DPIC 2018 YEAR END REPORT, *supra* note 1, at 14.

²¹ Joel Currier, *Wesley Bell ousts longtime St. Louis County prosecuting attorney*, ST. LOUIS POST-DISPATCH, Aug. 8, 2018.

²² *E.g.*, Sarah Willets, *Incumbents Out in Durham Sheriff, District Attorney Races*, INDY WEEK (Durham), May 8, 2018.

²³ DPIC 2018 YEAR END REPORT, *supra* note 1, at 16.

²⁴ *Id.* at 8. In a Missouri case in which the trial judge imposed the death sentence on Marvin D. Rice in 2017, notwithstanding the fact that 11 of the 12 jurors had voted for a life sentence, the Supreme Court of Missouri unanimously reversed the sentence on April 2, 2019 because of improper prosecutorial argument in the penalty phase. *State v. Rice*, No. SC96737 (Mo. Apr. 2, 2019) (en banc), <https://cases.justia.com/missouri/supreme-court/2019-sc96737.pdf?ts=1554228140>.

George Brinkman, Jr. pled guilty, waived the right to be sentenced by a jury, and was sentenced to death by a three-judge panel on December 28, 2018.²⁵

Three of those sentenced to death in 2018 were 21 years old or younger at the time of the crime. These sentences are inconsistent with the policies of the ABA and many others which, in light of the most recent studies regarding brain development, say that the death penalty should be excluded for those under age 22 at the time of the crime.²⁶

And according to the Death Penalty Information Center (“DPIC”) a number of those sentenced to death in 2018, in addition to Mr. Garcia, had serious mental illness or impaired intellectual functioning.²⁷

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

a. 2018

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,²⁸ 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 to 23 in 2017 and 25 in 2018 – still below the numbers in 2015 and earlier years. 2018 was the fourth straight year with less than 30 executions, the first time this has happened since 1988-1991.²⁹

Two of those executed in 2018, Edmund Zagorski and David Miller in Tennessee, chose to be killed by electrocution rather than lethal injection. Mr. Zagorski thought that electrocution would be less agonizing than lethal injection,³⁰ and Mr. Miller believed that the state’s three-drug lethal injection method would lead to his enduring a prolonged tortured death.³¹ These were the first two electrocutions in the country since January 2013.³² Nine states permit electrocution as a secondary method, with lethal injection being the primary method. Georgia’s and Nebraska’s supreme courts held (in 2001 and 2008, respectively) that electrocution is unconstitutional, as a cruel and unusual punishment.³³

²⁵ *Id.*; Cory Shaffer, *Judges impose death sentence on North Royalton triple-murderer George Brinkman Jr.*, CLEV.COM, Dec. 28, 2018.

²⁶ Beth Schwartzapfel, *The Right Age to Die?*, THE MARSHALL PROJECT, Aug. 12, 2018; ABA Death Penalty Due Process Review Project, Res. 111 (Feb. 5, 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>.

²⁷ DPIC 2018 YEAR END REPORT, *supra* note 1, at 8.

²⁸ *Baze v. Rees*, 553 U.S. 35 (2008).

²⁹ *Id.*

³⁰ Oppel, *supra* note 9.

³¹ Jordan S. Rubin, *Another Electric Chair Execution Proceeds Over Sotomayor Dissent*, BLOOMBERG L., Dec. 7, 2018.

³² Otilia Steadman, *A Man Was Just Executed By Electric Chair For The First Time Since 2013*, BUZZFEED NEWS, Nov. 2, 2018.

³³ DEATH PENALTY INFORMATION CENTER, METHODS OF EXECUTION (2019).

b. *Tremendous Concentration Among a Few States*

Just five states – Texas (thirteen, up from seven in 2017), Tennessee (three, up from zero in 2017), Alabama and Florida (both two, down from three in 2017), and Georgia (two, up from one in 2017) – accounted for 88% of all the country’s executions in 2018. Texas alone was responsible for over half the national total. Three states executed one person each: Nebraska and South Dakota, both up from zero in 2017; and Ohio, down from two in 2017.³⁴

c. *Issues Raised by Executions in 2018 and Potential Executions in 2019*

i. *Truncation of Review Process: Rushes to Injustice*

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

ii. *Texas’s Continued Use of the Law of Parties to Execute People Who Did Not Kill, Intend to Kill, or Reasonably Expect a Killing*

Texas’s execution of Joseph Garcia on December 4, 2018 illustrates the continuing pernicious effect of permitting Texas to use the “law of parties” to convict and sentence to death people who neither killed nor intended to kill nor reasonably believed that a killing would occur.³⁵

iii. *Executions Despite Serious Issues Regarding Mental Illness, Brain Damage, Intellectual Disability, Guilt, Age at Time of Crime, Serious Trauma, and “Volunteering” to Waive All Constitutional Issues*

The year-end report by DPIC pointed to these problems affecting, in the aggregate, most of the 25 executions in 2018:

- executing at least eleven people with significant evidence of having mental illness;
- executing at least nine people with brain injury, developmental brain damage, or a real possibility of being intellectually disabled;
- executing at least eleven people affected by a seriously traumatic childhood, neglect, or abuse;

³⁴ DPIC 2018 YEAR END REPORT, *supra* note 1, at 2.

³⁵ Hannah Wiley, *Texas executes Joseph Garcia, one of the “Texas Seven” prison escapees*, TEX. TRIB., Dec. 4, 2018.

- executing at least four people as to whom there was significant doubt about their guilt;
- executing six people who were 21 years or younger at the time of the crime; and
- executing at least three people who had “volunteered” to be executed by waiving some or all of their appeals.³⁶

iv. Problems Carrying Out Lethal Injections

Probably the worst of several instances of problems in carrying out lethal injections was Alabama’s attempt on February 22, 2018 to execute Doyle Lee Hamm. Hamm’s lawyer, Columbia Law Professor Bernard E. Harcourt, had urged Alabama not to proceed because Hamm’s terminal cranial and lymphatic cancer made it impossible to inject lethal drugs into his veins. But only after attempting numerous times over two and a half hours to execute him did Alabama authorities cease their efforts that night.³⁷ 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.³⁸

A more systemic problem was reported on February 20, 2018 by *BuzzFeed News*. It exposed Missouri’s use in 17 executions between 2014 and 2017 of pentobarbital that it had secretly bought from a pharmacy termed “high risk” (due to many health violations) by the U.S. Food and Drug Administration. Using cash payments, secret meetings, and code names, Missouri used the compounding pharmacy Foundation Care, which “ha[d] been repeatedly found to engage in hazardous pharmaceutical procedures.”³⁹

The same *BuzzFeed* reporter wrote in late November 2018 that Texas had bought drugs for executions from Greenpark Compounding Pharmacy, whose license was on probation. It had been cited for 48 safety violations in the last eight years. Witnesses to Texas executions said that five of the thirteen people whom Texas executed in 2018 using high power pentobarbital complained of burning or pain after the drug was injected.⁴⁰

In July 2018, Alvogen sued Nevada, alleging that the State had “intentionally defrauded” the company’s distributor when it purchased midazolam for use in an execution.⁴¹

³⁶ DPIC 2018 YEAR END REPORT, *supra* note 1, at 12, 13.

³⁷ 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>.

³⁸ 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>.

³⁹ 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.

⁴⁰ Chris McDaniel, *Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs*, BUZZFEED NEWS, Nov. 28, 2018.

⁴¹ DPIC 2018 YEAR END REPORT, *supra* note 1, at 9-10.

The trial judge found that Nevada had engaged in “subterfuge” and preliminarily enjoined it from using midazolam in an execution.⁴²

On August 9, 2018, dissenting in *Irick v. Tennessee*, Justice Sotomayor said that Tennessee had been in a “rush to execute” Billy Ray Irick, whom it executed on that date while a challenge to its use of midazolam was pending.⁴³ Following the execution, anesthesiologist Dr. David Lubarsky read various witness reports and concluded that Irick had been “tortured” to death. He said Irick would have felt that he was “choking, drowning in his own fluids, suffocating [and] burning alive.”⁴⁴ Irick’s execution likely affected the decisions by two Tennessee death row inmates (discussed above) to choose electrocution over lethal injection later in 2018.

Two Tennessee death row inmates with execution dates in 2019 have sued, seeking to be killed by a firing squad. NBC News reported in February 2019 that such an execution could only take place if Tennessee becomes unable to secure lethal injection drugs *and* electrocution is held unconstitutional. NBC News said that only Utah, Mississippi and Oklahoma presently permit execution by firing squad, and only Utah has executed anyone that way – three times – since 1977.⁴⁵

v. Ohio’s Governor’s Actions Designed to Avert Potential Systemic Problems with Lethal Injections

On January 25, 2019, Ohio’s new Governor, Mike DeWine, ordered that Warren Henness’ execution be delayed from February 13 to September 12, and that Ohio’s prison officials consider the state’s execution drug alternatives and assess possible changes in its lethal injection protocol.⁴⁶ Eleven days earlier, U.S. Magistrate Judge Michael Merz, although saying precedent precluded granting relief, found that midazolam has no analgesic effect and that the state’s three-drug protocol almost surely would cause “severe pain and needless suffering.”⁴⁷

On February 19, 2019, Governor DeWine announced there would be no more executions in Ohio until the state adopts a new protocol that is upheld by the courts. As a State Senator, DeWine had sponsored Ohio’s death penalty statute in 1981. As Ohio’s Attorney General, he defended death sentences imposed under that statute. Before February 19, Ohio had set execution dates for six inmates in 2019 and for 23 others through 2023.⁴⁸ On March 7, 2019, Governor DeWine pushed back three of 2019’s scheduled execution dates by about six months each, because it was “highly unlikely” that a new protocol could be adopted

⁴² *Alvogen, Inc. v. State*, No. A-18-777312-B (Nev. Dist. Ct. Sept. 28, 2018), https://deathpenaltyinfo.org/files/pdf/Gonzalez_Dozier_Injunction.pdf.

⁴³ *Irick v. Tennessee*, 139 S. Ct. 1 (2018) (Sotomayor, J., dissenting) (mem.).

⁴⁴ Steven Hale, *Medical Expert: Billy Ray Irick Was Tortured During Execution*, NASHVILLE SCENE, Sept. 7, 2018.

⁴⁵ Jon Schuppe, *As U.S. executions wane, Tennessee moves to put more inmates to death*, NBC NEWS, Feb. 3, 2019.

⁴⁶ Jeremy Pelzer, *Gov. Mike DeWine delays killer’s execution, orders review of lethal-injection drugs*, CLEV.COM, Jan. 25, 2019.

⁴⁷ *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 244488, at *70-71 (S.D. Ohio Jan. 14, 2019).

⁴⁸ Jessie Balmert, *Gov. Mike DeWine: Ohio won’t execute prisoners until method gets court’s OK*, CIN. ENQUIRER, Feb. 19, 2019.

and upheld by the original execution dates. During the preceding week, Ohio prisons director Annette Chambers-Smith said there was no reason to act expeditiously in coming up with a new protocol, stating: “This is a dignified process – this is human life we’re talking about. So, the department will take the time that we need to do a good job.”⁴⁹

Governor DeWine’s actions put Ohio’s death penalty in essentially the same status as Montana’s has been since October 6, 2015, when District Court Judge Jeffrey M. Sherlock permanently enjoined the use of pentobarbital in the lethal injection protocol unless and until the law authorizing lethal injection is modified in conformance with his decision.⁵⁰ 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.⁵¹ According to DPIC, Montana’s lethal injection protocol has yet to be updated, with litigation ongoing.⁵²

vi. Supreme Court’s April 2019 Decision Regarding a Death Row Inmate’s Claim That Missouri’s Execution Method, Although Generally Constitutional, Would Be Unconstitutional in His Unusual Case

On April 1, 2019, the Supreme Court held that it would be constitutional for Missouri to execute Russell Bucklew, who had asserted that his execution by Missouri’s usual method would cause him an unconstitutionally unacceptable level of pain in light of his having an unusual disease. The Court said that Bucklew had failed to show that there was “a feasible and readily implemented alternative” execution method that “would significantly reduce his risk of pain” which the state had lacked a valid reason for not adopting.⁵³ The Court noted that Bucklew’s proffered alternative method, in which nitrogen gas would be used, had never been used to execute anyone – despite becoming part of several states’ protocols – and held it was reasonable for Missouri not to adopt such a novel execution method. Yet, the Court gave no indication that there would be a constitutional problem if these other states were to execute people using nitrogen gas.

The Court emphasized that its holding should not mislead people into thinking that it would be hard to point to another viable execution method – which could be a method used in another jurisdiction. The Court said, “[W]e see little likelihood that an inmate [who, unlike the Court’s characterization of Bucklew, showed that he was] facing a serious risk of pain will be unable to identify an available alternative.”⁵⁴ The four dissenting justices believed

⁴⁹ Jeremy Pelzer, *Gov. Mike DeWine delays three more executions as review of death drugs continues*, CLEV.COM, Mar. 7, 2019.

⁵⁰ *Smith v. State*, No. BDV-2008-303, 2015 WL 5827252, at *6 (Mont. Dist. Ct. Oct. 6, 2015).

⁵¹ *Smith v. State*, No. BDV-2008-303, slip op. at 7-8 (Mont. Dist. Ct. Dec. 12, 2017), https://www.aclumontana.org/sites/default/files/field_documents/171212_order.pdf.

⁵² DEATH PENALTY INFORMATION CENTER, STATE BY STATE LETHAL INJECTION (2019).

⁵³ *Bucklew v. Precythe*, No. 17-8151, slip op. at 28 (U.S. Apr. 1, 2019), https://www.supremecourt.gov/opinions/18pdf/17-8151_1qm2.pdf.

⁵⁴ *Id.* at 20. The Court’s opinion ended by bemoaning delays in constitutional executions. It did not set forth new law in doing so. In that part of the opinion, the Court discussed the February 7, 2019 lifting of a stay of execution in *Dunn v. Ray*. But neither it nor Justice Breyer’s dissent mentioned that on March 28, 2019, under relatively similar circumstances, the Court had stayed Texas’s execution of Patrick Murphy (see discussion below in Part II.J.). Less than two weeks thereafter, there was a remarkable clash on April 12, 2019, concerning supposed manipulation by death row inmates of ways to delay their executions and what four

that Bucklew had established more than enough of a basis to avoid summary judgment on his challenge to the established execution method's being used in his case, and explained why in detail.⁵⁵

3. Nine 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, *i.e.*, with regard to future cases, 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. In 2018, the Washington Supreme Court held the death penalty unconstitutional under the state constitution. As of April 11, 2019, both houses of the New Hampshire legislature had voted to abolish the death penalty prospectively by margins exceeding the 2/3 majorities necessary to override Governor Sununu's anticipated veto. On May 30, 2019, New Hampshire repealed its death penalty.⁵⁶

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.⁵⁷ After comprehensive hearings, the legislature did not correct the provision.⁵⁸ In 2007, New York's highest court vacated the state's last death sentence.⁵⁹

b. New Jersey

New Jersey abolished the death penalty in December 2007.⁶⁰

c. New Mexico

On March 18, 2009, New Mexico abolished the death penalty prospectively, as New Jersey had done.⁶¹

dissenting justices asserted, in a 3 a.m. dissent, was the majority's unseemly haste in precluding reasonable consideration by the Justices regarding whether to vacate a stay of execution (see discussion below in Part II.K.).

⁵⁵ *Bucklew*, No. 17-8151 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.).

⁵⁶ Mark Berman, *New Hampshire abolishes death penalty after lawmakers override governor*, WASH. POST, May 30, 2019.

⁵⁷ *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

⁵⁸ 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.

⁵⁹ *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007).

⁶⁰ 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.

⁶¹ Associated Press, *Death Penalty Is Repealed in New Mexico*, Mar. 18, 2009, <http://www.nytimes.com/2009/03/19/us/19execute.html>.

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d. Illinois

Illinois abolished the death penalty prospectively on March 9, 2011.⁶² Governor Patrick Quinn signed the bill and also commuted the sentences of everyone on Illinois' death row to LWOP.⁶³ In the years after Quinn lost his 2014 re-election effort, there was no discernible effort to bring back the death penalty. In the 2018 election, Governor Bruce Launer unsuccessfully attempted to salvage his re-election campaign by urging reinstatement of capital punishment.

e. Connecticut

In April 2012, Connecticut repealed the death penalty prospectively.⁶⁴ On May 26, 2016, by a 5-2 vote in *State v. Peeler*,⁶⁵ the Connecticut Supreme Court reaffirmed its 2015 holding (by 4-3) in *State v. Santiago*⁶⁶ that capital punishment violates the State constitution. These decisions prevent executions of those not prospectively exempted from the death penalty by the 2012 law.

On December 18, 2018, Connecticut's next Governor, Ned Lamont, said he wanted more criminal justice reforms. The *Hartford Courant* reported that one reform already implemented was repeal of the death penalty.⁶⁷

f. Maryland

In March 2013, Maryland repealed the death penalty prospectively.⁶⁸ A subsequent effort to seek a reinstatement referendum got too few signatures to be put on the ballot.⁶⁹ On January 20, 2015, Governor Martin O'Malley, shortly before leaving office, commuted the death sentences of those still on Maryland's death row.⁷⁰ Larry Hogan, a Republican, made no discernible effort to reinstate the death penalty during his first gubernatorial term, and it was not an issue in his successful 2018 re-election campaign.

g. Delaware

On August 2, 2016, the Delaware Supreme Court held, by 4-3 in *Rauf v. State*,⁷¹ that Delaware's capital punishment statute was unconstitutional in light of *Hurst v. Florida*.⁷²

⁶² John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011.

⁶³ Statement from Gov. Pat Quinn on Senate Bill 3539, Mar. 9, 2011, <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

⁶⁴ J.C. Reindl, *Senate Votes to Abolish the death penalty*, THE DAY (Conn.), Apr. 5, 2012.

⁶⁵ *State v. Peeler*, 140 A.3d 811 (Conn. 2016) (per curiam) (mem.).

⁶⁶ *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

⁶⁷ Daniela Altamari, *Gov.-elect Ned Lamont signals support for criminal justice overhaul*, HARTFORD COURANT, Dec. 18, 2018.

⁶⁸ Maggie Clark, *Maryland Repeals Death Penalty*, STATELINE, May 2, 2013.

⁶⁹ John Wagner, *Petition drive to halt Maryland's death penalty repeal falls short*, WASH. POST, May 31, 2013.

⁷⁰ 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>.

⁷¹ *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam).

⁷² *Hurst v. Florida*, 136 S. Ct. 616 (2016).

The court's decision held that the statute unconstitutionally allowed a judge to make findings by a preponderance of the evidence that only a unanimous jury could find if persuaded beyond a reasonable doubt.⁷³ The State did not seek certiorari from this holding of federal constitutional law. The Delaware statute was even more problematic than the statutory schemes in *Hurst* and *Ring v. Arizona*,⁷⁴ under both of which the judge's findings making defendants death eligible had to be 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 decided – which was true of the cases of all 18 of Delaware's death row inmates.⁷⁵ The Delaware Supreme Court ordered that the death row inmates to whom its holding applied must be sentenced to LWOP. It said its *Rauf* holding had created “a new watershed procedural rule of criminal procedure.”⁷⁶ On March 13, 2018, Delaware's final two death row inmates' sentences were changed to LWOP.⁷⁷

h. Washington

Washington's Supreme Court unanimously held on October 11, 2018 that the state's death penalty was imposed “in an arbitrary and racially biased manner” in violation of the state constitution's prohibition of cruel punishment.⁷⁸ The holding in *State v. Gregory* was based on a study showing that if one controlled for non-racial factors, a black person was more than three times as likely to be sentenced to death, and on the Court's “judicial notice of implicit and overt racial bias against black defendants in this state.”⁷⁹ The Court changed the death sentences of all eight death row inmates to LWOP.

i. New Hampshire

On May 30, 2019, New Hampshire repealed its death penalty prospectively, when the Senate joined the House in overriding Governor Sununu's veto.⁸⁰ Earlier in the session, the two legislative bodies had passed the abolition bill by large margins, making a successful override effort likely.⁸¹

⁷³ *Rauf*, 145 A.3d at 434.

⁷⁴ *Ring v. Arizona*, 536 U.S. 584 (2002).

⁷⁵ *Powell v. State*, 153 A.3d 69, 70 (Del. Dec. 15, 2016) (per curiam).

⁷⁶ *Id.* at 76.

⁷⁷ Esteban Parra, *Delaware's last two death row inmates resentenced to life in prison*, NEWS J. (Wilmington), Mar. 13, 2018.

⁷⁸ *State v. Gregory*, 427 P.3d 621, 633 (Wash. 2018) (en banc).

⁷⁹ *Id.* at 635.

⁸⁰ *Supra* note 56.

⁸¹ Associated Press, *Death penalty repeal bill passes NH House with veto-proof majority*, Mar. 7, 2019, <https://www.wmur.com/article/death-penalty-repeal-bill-passes-nh-house-with-veto-proof-majority/26750445>. Holly Ramer, Associated Press, *New Hampshire poised to repeal death penalty*, Apr. 11, 2019, <https://www.pressherald.com/2019/04/11/new-hampshire-poised-to-repeal-death-penalty>.

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

An important reason why abolition bills were enacted in five states between 2007 and 2013 was that they 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 may 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 – or in New York, Delaware, and Washington – and by the continuing decline in public support for capital punishment (see Part I.A.13. below).

4. Significance of Post-Abolition Trends/Activities in The Eight States that Ended the Death Penalty, 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 co-sponsored 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*, included detailed discussions of how the death penalty came to an end since 2004 in the seven states that had, as of then, either abolished it or ended it via judicial holdings (the Washington Supreme Court decision was handed down later, in October 2018 (discussed above)). 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.⁸²

The program's speakers also discussed what 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

⁸² ABA Section of Civil Rights & Social Justice, *Life After the Death Penalty: Implications for Retentionist States*, Presented at the House of the New York City Bar Ass'n (Aug. 14, 2017) [hereinafter ABA, *Life After the Death Penalty*], https://deathpenaltyinfo.org/files/pdf/Life-After-Death-Penalty_Transcript.pdf.

reformers have found it much easier to work together productively on a whole variety of criminal justice system, re-entry, and victims' survivors' situations, and many other issues. To be sure, progress sometimes can be made on such issues even without abolishing the death penalty, as in the federal legislation enacted in late 2018.

Perhaps the most important fact for those whose states still have the death penalty is that *none* of the parade of horrors that death penalty proponents assert will transpire if the death penalty is abolished has actually occurred in any of the eight states that have ceased to have the death penalty in recent years. There has not been, post-abolition, an upsurge in murders, in police or correction officer or children's murders, or in the cost of the criminal justice system.⁸³ As DPIC's Robert Dunham stressed in the conclusion of his August 14, 2017 program 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."⁸⁴ So, there is no discernible 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 dropped by almost another 50%.⁸⁵ In 2017, the total was 292; in 2018, the total was 289.⁸⁶ The trends in statewide murder data are similar.⁸⁷ There were 546 murders in 2017, the lowest number since statewide reporting began in 1975.⁸⁸

5. Deterrence Argument Is Not Supported by Other Data Either

It appears 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 effects 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

⁸³ *Id.* at 16-33.

⁸⁴ *Id.* at 31.

⁸⁵ *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).

⁸⁶ Zolan Kanno-Youngs, *New York City's Murder Rate Hit New Low in 2018*, WALL ST. J., Jan. 3, 2019.

⁸⁷ *New York Crime Rates 1960-2016*, DISASTERCENTER.COM (last visited Jan. 23, 2018).

⁸⁸ DIV. OF CRIMINAL JUSTICE SERVS., *CRIME IN NEW YORK STATE*, at 3 (2018).

consequences need not be draconian, just sufficiently costly, to deter the prohibited behavior.”⁸⁹

In a January 10, 2019 op-ed titled *Why Conservatives Should Oppose the Death Penalty*, Arthur Rizer and Mark Hyden, apparently relying on Nagin’s chapter, said that since New Mexico abolished capital punishment in 2009, its homicide rate “steadily decreased” from 9.9 per 100,000 citizens to 6.7 per 100,000 citizens in 2016. They called this “especially stunning” since during the same time frame there had been a slight increase in murders per capita nationally. They added that the homicide rate has decreased “in virtually every state that has repealed capital punishment with the exception of Maryland and Illinois,” where it increased due to greater “gang violence isolated in neighborhoods of Baltimore and Chicago.”⁹⁰

In 2012, the National Research Council of the National Academy of Sciences concluded, based on a thorough analysis by Professor Nagin and John Pepper, that “research to date [on the effect of capital punishment on homicides] is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates,” and that such research studies should not be considered with regard to whether capital punishment has an impact on homicides.⁹¹

6. States with Moratoriums on Executions

a. Colorado

On May 22, 2013, Colorado Governor John W. Hickenlooper, when granting a temporary reprieve of Nathan J. Dunlap’s execution, said that capital punishment is “arbitrary” and not “fairly or equitably imposed,” as illustrated by the fact that people whose crimes were as bad or worse than Dunlap’s had gotten life sentences.⁹²

On August 17, 2014, Governor Hickenlooper, while seeking re-election, said he opposed the death penalty, whereas in 2010 he had publicly supported it. His view changed due to the much greater cost of having a death penalty system and its failure to deter “homicides or grisly murders.”⁹³ Hickenlooper was re-elected and continued the moratorium on executions that began with Dunlap’s case until he left office in January 2019. The new governor, Jared Polis, said during the campaign that he would sign a bill phasing out or abolishing the death penalty.⁹⁴

⁸⁹ Daniel S. Nagin, *Deterrence*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE, at 19, 34, 24 (Eric Luna ed., 2017).

⁹⁰ Arthur Rizer & Marc Hyden, Opinion, *Why Conservatives Should Oppose the Death Penalty*, AM. CONSERVATIVE, Jan. 10, 2019.

⁹¹ 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)).

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>.

⁹³ Eli Stokols, *In interview, Hickenlooper offers new anti-death penalty stance, light support for Keystone*, KDVR-TV (Den.), 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 Saja Hindi, *Death penalty: How likely is it to be imposed with a new Colorado governor?*, FORT COLLINS COLORADOAN, Dec. 16, 2018.

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 now prevent executions, and noted that the 1990s executions had neither “made us safer” nor “more noble as a society.”⁹⁵ The Oregon Supreme Court in 2013 upheld the moratorium.⁹⁶ During the 2014 election, in which this policy was an issue,⁹⁷ Kitzhaber was re-elected. After his resignation for unrelated reasons, Kate Brown, the new governor, continued the moratorium.⁹⁸ She was re-elected in 2016 and 2018 after pledging to continue the moratorium. Heading into 2019, legislators had considerable hope of limiting capital punishment to terrorist acts. Oregon can repeal the death penalty completely only by a voter referendum.⁹⁹

c. Pennsylvania

In an October 8, 2014 debate, Pennsylvania Governor Tom Corbett said he supported the death penalty and had recently signed several execution warrants. Democratic candidate Tom Wolf said, “[W]e ought to have a moratorium on capital punishment cases,” due to doubts the system was functioning properly or having a positive impact.¹⁰⁰ Wolf defeated Corbett. On February 13, 2015, Governor Wolf announced a moratorium on executions until a bipartisan 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.”¹⁰¹ 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.¹⁰²

The commission issued its report on June 25, 2018. The report recommended many changes to the capital punishment system, including a publicly funded state capital defender office, a guilty but mentally ill verdict under which the death penalty would be precluded, and regularly gathering data that could be used to determine whether the death penalty was being unfairly, arbitrarily, or discriminatorily implemented.¹⁰³ Governor Wolf continued the moratorium after the commission’s report was issued.

In November 2018, Governor Wolf defeated Scott Wagner, who opposed and promised to end the moratorium.

⁹⁵ William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011.

⁹⁶ *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013) (en banc).

⁹⁷ Laura Gunderson, *Tough Question Tuesday: Kitzhaber on death penalty decision; Richardson says he won’t impose personal convictions*, OREGONIAN, Oct. 21, 2014.

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

⁹⁹ Dirk VanderHart, *Oregon Lawmakers Mull Big Changes To Death Penalty, No Election Required*, OPB TV (Salem), Dec. 13, 2018.

¹⁰⁰ Nick Field, *PA-Gov: The Third Gubernatorial Debate*, POLITICSPA.COM, Oct. 8, 2014.

¹⁰¹ Memorandum from Gov. Tom Wolf, Feb. 13, 2015, at 1, 4, <http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>.

¹⁰² *Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015).

¹⁰³ JOINT STATE GOV’T COMM’N CAPITAL PUNISHMENT IN PENNSYLVANIA: THE REPORT OF THE TASK FORCE AND ADVISORY COMMITTEE, at 30-31 (2018).

d. Ohio

As discussed above, on February 19, 2019, Ohio Governor Michael DeWine announced that he would not permit any executions in that state until Ohio comes up with a lethal injection method which is upheld in the courts (and, in particular, the federal courts).

e. California

On March 13, 2019, California's new Governor, Gavin Newsom, issued an executive order (i) providing reprieves for all California death row inmates, such that they will not be subject to execution for as long as Newsom remains Governor, (ii) closing the execution chamber at San Quentin prison, and (iii) withdrawing the execution protocol that (were it to have been approved by the courts) would have governed the carrying out of executions in California. The executive order includes numerous reasons for the Governor's actions. Among these are capital punishment's being "unfair, unjust, wasteful, protracted" and not enhancing safety; its unfair and unequal application to "people of color, people with mental disabilities, and people who cannot afford costly legal representation"; the risk of executing innocent people; the capital punishment system's high cost; and the fact that 25 California death row inmates have already exhausted all state and federal avenues for relief.¹⁰⁴

When the California Supreme Court next dealt with a capital punishment case after Governor Newsom's announcement, it unanimously upheld Thomas Potts' conviction and death sentence on March 28, 2019. What made the case newsworthy was the concurrence of Justices Goodwin Liu and Mariano-Florentino Cuéllar, who took the relatively unusual step of stating in a court opinion things that many California Supreme Court justices repeatedly have said in other forums. The concurrence described California's capital punishment system as "expensive and dysfunctional," achieving neither justice nor even remotely timely resolution of cases. It said nothing meaningful had been done about these problems for decades. Moreover, the problems continued after passage in 2016 of a supposedly execution-accelerating proposition, due to the failure to increase funding for death penalty implementation. The current California Chief Justice, Tani Cantil-Sakauye, and her immediate predecessor, Ronald M. George (both appointed by Republican governors) have publicly described the state's death penalty system as broken.¹⁰⁵

On March 15, 2019, legal scholars Carol S. Steiker and Jordan M. Steiker said Newsom's actions were more likely "a harbinger of further decline and perhaps even abolition of the death penalty" than "just a small roadblock to the continued use of capital punishment."¹⁰⁶ They noted that although California had not had any executions in over a decade, the resumption of executions there had seemed quite possible after the passage of the 2016 proposition and the adoption of a new execution protocol. However, they said, "Newsom's decision brings into focus the extraordinary pathologies of the American death penalty – its arbitrariness, discrimination, extravagant costs, and proneness to error" – in a way that could lead to reconsideration of capital punishment by legislators and executive

¹⁰⁴ Exec. Order No. N-09-19, at 1 (Cal. Mar. 13, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf>.

¹⁰⁵ Maura Dolan, *2 California Supreme Court justices say the state's death penalty system doesn't work*, L.A. TIMES, Mar. 28, 2019.

¹⁰⁶ Carol S. Steiker & Jordan M. Steiker, *Will the U.S. Finally End the Death Penalty?*, THE ATLANTIC, Mar. 15, 2019.

branch officials and increase the chances of judicial action against the death penalty. The Steikers said it is unlikely that Newsom's announcement will lead to the same type of backlash as followed the United States Supreme Court's and California Supreme Court's anti-death penalty decisions in the 1970s. Why not? The courts' four-plus decades of strenuous but unsuccessful efforts to end the problems identified in those decisions. Despite these efforts, the death penalty system continued to be plagued by "wrongful convictions, racial discrimination, and unfairness in capital cases across the country." We have now lived with more than four decades of extensive judicial and legislative attempts to improve the death penalty's administration along several dimensions: narrowing the death penalty to the "worst of the worst" offenders, limiting arbitrariness and racial discrimination in choosing who should live and die, and ensuring the accuracy of capital verdicts. Virtually no one thinks these efforts have been successful. The practice of capital punishment has proved resistant to the regulatory efforts of courts and legislatures, with stark evidence of continued wrongful convictions, racial discrimination, and unfairness in capital cases across the country.

7. *Court Decisions and Statutes Make Imposing New Florida Death Sentences More Difficult and Limiting the Number of Florida Executions, and New Alabama Statute That Should Reduce the Number of New Death Sentences There*

a. *Florida*

i. *The Key Holdings*

On January 12, 2016, in *Hurst v. Florida*, the Supreme Court held that Florida's capital punishment system was unconstitutional. At Hurst's trial, the jury, although presented with evidence regarding two aggravating factors, made no findings (even advisory ones) regarding those factors. The jury proceeded to recommend, 7-5, that the death penalty be imposed. The trial judge decided that both proffered aggravating factors existed and imposed the death sentence.¹⁰⁷

The Court held that the constitutional infirmity with Florida's system was the same as in the Arizona system held unconstitutional in 2002 in *Ring v. Arizona*.¹⁰⁸ In both systems, the jury did "not make specific factual findings with regard to the existence of mitigating or aggravating circumstances." The trial judge acted alone in finding "the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."¹⁰⁹ The Court overruled its holdings that the Florida death penalty system was constitutional and remanded the case to enable the Florida courts to determine whether the constitutional error was "harmless."¹¹⁰

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

¹⁰⁷ *Hurst v. Florida*, 136 S. Ct. 616 (2016).

¹⁰⁸ *Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁰⁹ *Hurst*, 136 S. Ct. at 622 (alterations in original).

¹¹⁰ *Id.* at 624.

jury finds unanimously beyond a reasonable doubt that the defendant is eligible for the death penalty and that the death penalty should be imposed.¹¹¹

Some people would, if Florida had 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: *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*."¹¹²

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, because the Florida Supreme Court held in *Asay v. State* that there is no pre-*Ring* retroactive applicability of the Supreme Court and Florida court decisions in *Hurst*.¹¹³ The Florida Supreme Court reaffirmed the *Asay* holding on August 10, 2017 in *Hitchcock v. State*.¹¹⁴

ii. The Impact of These Holdings

The life or death effects of happenstances of timing were starkly illustrated by the Florida Supreme Court's December 20, 2018 holdings in the cases of two men who had been tried separately for the same murder and who both had been unconstitutionally sentenced to death after 11-1 and 10-2 jury recommendations of death: Gerald Murray's death sentence was vacated because his appeal became final after the June 2002 date of the *Ring* decision;¹¹⁵ but Steven Taylor's death sentence was not vacated because his appeal became final before *Ring* was decided.¹¹⁶

Karen Gottlieb, co-director of the Florida Center for Capital Representation, stated in late 2018, in an edited and expanded version of a talk she had given at an August 2, 2018 ABA panel discussion, that the Florida courts had provided relief for 158 inmates whose non-unanimous death sentences became final after *Ring*, denied relief to 167 inmates with death

¹¹¹ *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).

¹¹² *Mosley v. State*, 209 So. 3d 1248, 1280 (Fla. 2016) (per curiam).

¹¹³ *Asay v. State*, 210 So. 3d 1, 21-22 (Fla. 2016) (per curiam), cert. denied, 138 S. Ct. 41 (2017).

¹¹⁴ *Hitchcock v. State*, 226 So. 3d 216 (Fla.) (per curiam), cert. denied, 138 S. Ct. 513 (2017).

¹¹⁵ *State v. Murray*, Nos. SC17-707 et seq., 2018 WL 6695986, at *3 (Fla. Dec. 20, 2018) (per curiam).

¹¹⁶ *Taylor v. State*, No. SC18-520, 2018 WL 6695985, at *11-12 (Fla. Dec. 20, 2018) (per curiam) (Pariente, J., concurring).

sentences that became final before *Ring*, and barred relief to 58 prisoners with death sentences that became final after *Ring* who had either waived having an advisory jury proceeding regarding penalty or whose juries had unanimously recommended death. Ms. Gottlieb said that it is “rare” for someone whose death sentence is vacated under *Hurst* to receive a new death sentence, either because prosecutors do not insist on asking for such sentences or because juries do not unanimously vote to impose them.¹¹⁷

On October 25, 2018, the Florida Supreme Court refused to consider a meritorious *Hurst* claim because the state postconviction judge had permitted William Roger Davis III to waive the claim (which was not barred by the cutoff date). Davis waived the claim because he wanted to volunteer to be executed. At his trial, five jurors had recommended a life sentence. But Davis’s waiver procedurally barred his *Hurst* claim.¹¹⁸

At least in the short run, the applicability of the new procedures to new potential capital cases is diminishing the likelihood of receiving the death penalty in some particular cases. For example, in July 2018, two Broward County juries considering the fate of four men they had convicted of capital murder (three of them for killing a police officer) received life sentences “where capital punishment would have seemed likely just a few years ago.” The only death sentence imposed in Broward County under the new procedures was for Peter Avsenew, who fired his lawyers after his conviction and “represented” himself in a penalty phase in which he made “no effort to plead for his life or show a hint of remorse.”¹¹⁹

iii. Some Perspectives on Past Florida Executions

After the *Ring* certiorari petition was granted, the U.S. Supreme Court granted stays to two Florida inmates with pending death warrants. After ruling in Mr. Ring’s favor, the Supreme Court denied certiorari in the two Florida cases and vacated the stays. Although a denial of certiorari is not a ruling on the merits, the Florida Supreme Court considered these certiorari denials as a sign that the pre-existing Florida system was still constitutional after *Ring*. The two death row inmates, Linroy Bottoson and Amos King, were executed. Between the Supreme Court holdings in *Ring* and in *Hurst*, a total of 41 Florida death row inmates were executed – notwithstanding frequent arguments that their death sentences were inconsistent with *Ring*.¹²⁰

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

¹¹⁷ ABA Section of Civil Rights & Social Justice, Proceedings of the ABA Annual Conference Session on Has the Death Penalty Become an Anachronism? A Discussion of Changing Laws, Practices and Religion on Our Shared Standards of Decency, at 12-13, 15 (Aug. 2, 2018) [hereinafter ABA Conference on the Death Penalty], https://deathpenaltyinfo.org/files/pdf/ABA_Has_The_Death_Penalty_Become_An_Anacronism.pdf.

¹¹⁸ *Davis v. State*, 257 So. 3d 100, 107-08 (Fla. 2018) (per curiam).

¹¹⁹ Rafael Olmeda & Marc Freeman, *South Florida killers avoiding death row under new law*, S. FLA. SUN SENTINEL, July 20, 2018.

¹²⁰ ABA Conference on the Death Penalty, *supra* note 117, at 10-12 (remarks of Karen Gottlieb).

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.¹²¹

Karen Gottlieb stated at the August 2, 2018 ABA program that the executions between *Ring* and *Hurst* were not the first Florida executions that seemed obviously at odds with a Supreme Court holding whose applicability to Florida was rejected by the Florida courts and lower federal courts until, after years of delay, the Supreme Court finally addressed the issue and held the Florida system unconstitutional.

After the Supreme Court held in *Lockett v. Ohio* in 1978 that the Constitution requires consideration in capital sentencing of all mitigating factors in the case,¹²² it was obvious to any objective observer that the Florida sentencing system, which limited the mitigating factors that could be considered to those set forth in the statute, was unconstitutional. How did the Florida Supreme Court react? By egregiously mischaracterizing its prior decisions and inaccurately stating that consideration of all mitigating factors had always been permitted in Florida. The Florida Supreme Court permitted numerous executions, notwithstanding arguments that these were inconsistent with *Lockett*.¹²³ Finally, in 1987, the Supreme Court, in *Hitchcock v. Dugger*, considered the constitutional issue and unanimously held that the standard jury instructions given in every Florida sentencing phase unconstitutionally limited consideration of mitigation to the seven statutory mitigation factors.¹²⁴ By that time, Florida had executed 16 people, all of whom had been sentenced under the system declared unconstitutional in *Hitchcock*. All had raised a *Lockett* claim.¹²⁵

It is more than a little ironic that Mr. Hitchcock is still on death row and has so far lost in his efforts to gain relief under *Hurst* because his post-*Hitchcock* death sentence became final prior to the Court's decision in *Hurst*.

b. Alabama Statute

On April 11, 2017, Governor Kay Ivey signed into law a bill¹²⁶ whose enactment was greatly affected by Alabama's having become the only state to permit judges to make the actual sentencing decisions in capital cases in which defendants did not waive their rights to jury sentencing. 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 must affirmatively vote that the death penalty be imposed, or else it cannot be imposed. And the judge can never override a jury

¹²¹ Anna M. Phillips, *How the nation's lowest bar for the death penalty has shaped death row*, TAMPA BAY TIMES, Jan. 31, 2016.

¹²² *Lockett v. Ohio*, 438 U.S. 586 (1978).

¹²³ ABA Conference on the Death Penalty, *supra* note 117, at 8-9 (remarks of Karen Gottlieb).

¹²⁴ *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

¹²⁵ ABA Conference on the Death Penalty, *supra* note 117, at 10 (remarks of Karen Gottlieb).

¹²⁶ 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>.

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.¹²⁷

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 183.¹²⁸ 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 – as several have been since the new law’s enactment – pursuant to death sentences imposed under a prior procedure.

8. *Oklahoma: Broad-Based Death Penalty Review Commission Urged 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.¹²⁹

By the time of that referendum, a broad-based group, the Oklahoma Death Penalty Review Commission, co-chaired by former Oklahoma Governor Brad Henry, distinguished lawyer Andy Lester, and former Oklahoma Court of Criminal Appeals Presiding Justice Reta M. Strubhar, was already well along into what ultimately was more than a year’s intensive work. Its members included people from urban and rural areas, Republicans and Democrats, death penalty proponents and opponents, prosecutors and defense lawyers, people whose collective experience included 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.¹³⁰ It recommended that “[d]ue to the volume and seriousness of the flaws in Oklahoma’s capital punishment system, . . . the moratorium on executions be extended until significant reforms are accomplished.” The Commission said it hoped to 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.”¹³¹

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

¹²⁷ Faulk, *supra* note 126; Chandler & Izaguirre, *supra* note 126.

¹²⁸ Chandler & Izaguirre, *supra* note 126.

¹²⁹ *Oklahoma voters approve ballot measure affirming death penalty*, CHI. TRIB., Nov. 8, 2016.

¹³⁰ OKLA. DEATH PENALTY REVIEW COMM’N, THE REPORT OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION (2017).

¹³¹ *Id.* at vii, viii.

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.¹³²

The Commission also recommended 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"; measures to avoid false confessions, misuse of jailhouse "informants," and other causes of erroneous convictions; and actions to ensure the independence and proper funding of defense counsel.¹³³

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 would shift from lethal injection to asphyxiation by nitrogen gas – which had never been attempted anywhere – as its execution method.¹³⁴

On January 27, 2019, *The Oklahoman* reported that although the Oklahoma legislature had authorized the use of nitrogen gas, the state Attorney General's office and the corrections department had not yet agreed on a protocol for its use.¹³⁵

9. Study of Tennessee's Death Penalty

The summer 2018 issue of the *Tennessee Journal on Law and Policy* includes the results of a study of Tennessee's system by H.E. Miller, Jr. and Bradley A. MacLean.¹³⁶ After reviewing every first-degree murder case in Tennessee since 1977, they concluded that the state's death penalty system is "a cruel lottery entrenching the very problems that [the Supreme Court] sought to eradicate."¹³⁷ They found that the best predictors of whether the death sentence would be imposed did not include the facts of the crime, but instead were

¹³² *Id.* at ix-xv.

¹³³ *Id.* passim.

¹³⁴ Mark Berman, *Oklahoma says it will begin using nitrogen for all executions in an unprecedented move*, WASH. POST, Mar. 14, 2018.

¹³⁵ Nolan Clay, *"It's just going to take some time": State not yet ready for executions as officials mull over gas protocols*, THE OKLAHOMAN, Jan. 27, 2019.

¹³⁶ Bradley A. MacLean & H.E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J. ON L. & POL'Y 84 (2018).

¹³⁷ *Id.* at 180.

arbitrary factors such as where the murder occurred, the race of the defendant, the quality of the defense, and the views of the prosecutors and judges working on the case.¹³⁸

10. Kentucky's Consideration of Criminal Justice Reforms

Governor Matt Bevin appointed in 2016 a Criminal Justice Policy Assessment Council to review Kentucky's criminal code, including capital punishment. Its members included legislators, 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."¹³⁹ The Council's proposals did not deal with capital punishment.

Governor Bevin, in September 2017, created the Justice Reinvestment Work Group as a continuation of the Criminal Justice Policy Assessment Council. The work group was charged with addressing Kentucky's growing prison population, high recidivism rate, and escalating correctional costs.

11. 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.¹⁴⁰

Justice Breyer, in a statement joined by Justices Ginsburg, Kagan, and Sotomayor, noted that the certiorari petition did not address the process by which decisions are made regarding which of the people eligible for imposition of the death penalty are actually sentenced to death. Instead, the petition dealt only with the process by which the state is supposed under Supreme Court precedents to "circumscribe" through legislation "the class of persons *eligible* for the death penalty."¹⁴¹ Arizona conceded that its statute had not accomplished the required narrowing in one of the two possible ways – *i.e.*, through a circumscribed definition of capital murder. This, the statement said, meant that the constitutionality of Arizona 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.¹⁴²

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

¹³⁸ *Id.* at 179-80.

¹³⁹ James Mayse, *Judges voice opinions on how to improve state's penal code*, KY. NEW ERA, July 25, 2016.

¹⁴⁰ *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018) (mem.).

¹⁴¹ *Id.* (statement of Breyer, J., joined by Ginsburg, Kagan, and Sotomayor, JJ.) (emphasis added) (quoting *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

¹⁴² *Id.* at 1055-56.

that certiorari was properly denied. Instead, would be far more appropriately granted in the context of a “fully developed record with the kind of empirical evidence that the petitioner points to here.”¹⁴³

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

b. Legal Scholars

i. Rob Warden and Daniel Lennard, *Death in America Under Color or Law: Our Long Inglorious Experience with Capital Punishment*

A spring 2018 law review article by Rob Warden, Executive Director Emeritus of the Center on Wrongful Convictions at Northwestern University Pritzker School of Law’s Bluhm Legal Clinic, and attorney Daniel Lennard discusses, in chronological order, summaries of more than 300 milestones beginning in 1608.¹⁴⁴ This “history of blunders” in the death penalty’s actual functioning will, the authors believe, shock the conscience and sense of justice of average Americans who read the article.¹⁴⁵

Many readers will need some context about the numerous subjects discussed in the milestone summaries in order to reach conclusions about capital punishment. The chronological format necessarily leads to readers’ having to engage in some mental gymnastics to keep track of the pertinent issues.

Nonetheless, the article is invaluable for summarizing so many important events in the death penalty’s history in the United States (and before the Revolutionary War, its predecessor governments). If readers create their own issue outlines in the article’s margins, the article could indeed affect readers’ understandings of the fundamental problems with the actual death penalty system.

ii. Frank Baumgartner et al.

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

¹⁴³ *Id.* at 1057.

¹⁴⁴ Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J. L. & SOC. POL’Y 194 (2018).

¹⁴⁵ *Id.* at 197.

being much more geographically concentrated in fewer jurisdictions and far more expensive.¹⁴⁶

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

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

Speaking at the same ABA program at which Karen Gottlieb spoke, DPIC Executive Director Robert Dunham said that his analysis shows that capital punishment is now being mostly imposed in counties that, while not having the highest murder rates, often “have a combination of overaggressive prosecutors, a history of discriminatory policing practices, inadequate and underfunded defense services, and courts that tolerate all this.” He added that all available data show that those being sentenced to death in recent years are no more morally culpable on average than the much greater number of people sentenced to death in the mid-1990s.¹⁴⁷ Dunham also said that as the number of new death sentences has plunged, there has been an increase in the percentage of those newly death-sentenced who are African American or Latino, and executions are even more likely in recent years than earlier to be affected by “an inappropriate race-based conception of what constitutes the ‘worst of the worst’ killings.”¹⁴⁸

12. 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 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.¹⁴⁹

A Pew Research poll released on June 11, 2018 and taken between April 25 and May 1 (a month after President Trump said he favored capital punishment for drug trafficking) gave no alternative to the death penalty, which those polled favored by a margin of just under 54%, as compared with 39% who were opposed. This was the second lowest percentage favoring capital punishment in the Pew Research poll since *Furman*, with the lowest being 49% in its most recent preceding poll – in 2016.¹⁵⁰

¹⁴⁶ FRANK R. BAUMGARTNER ET AL., *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* (2017).

¹⁴⁷ ABA Conference on the Death Penalty, *supra* note 117, at 27 (remarks of Robert Dunham).

¹⁴⁸ *Id.* at 35, 37.

¹⁴⁹ *Most U.S. Voters Back Life Over Death Penalty, Quinnipiac University National Poll Finds*, QUINNIPIAC UNIV. POLL, Mar. 22, 2018.

¹⁵⁰ Baxter Oliphant, *Public support for the death penalty ticks up*, PEW RES. CTR., June 11, 2018.

On October 22, 2018, Gallup released the results of a poll taken between October 1 and 10. Again giving no alternative, the poll found that 56% favored the death penalty as compared with 41% opposed. This was the second lowest percentage to favor capital punishment since 1972 – the lowest being in 2017, when 55% were in favor and 41% were opposed. Gallup’s press release led with the poll’s finding that for the first time since Gallup began asking the question in 2000, fewer than half (49%) said the death penalty was being applied fairly, compared to 45% who said it was being applied unfairly. The results in 2017 were 51% to 43%.¹⁵¹

13. Some of the Possible Influences on Public Opinion

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

On April 26, 2018, the National Memorial for Peace and Justice and the Legacy Museum: From Enslavement to Mass Incarceration opened in Montgomery, Alabama. Conceived of and implemented by the Equal Justice Initiative and its extraordinary executive director Bryan Stevenson, the openings received enormous national attention. And as more and more visitors and organizations visit the National Memorial and Legacy Museum, their underlying messages – underscored by Mr. Stevenson’s numerous public appearances and interviews – is growing.¹⁵²

The key educational message of these remarkable places is that we are still feeling the effects of the dreadful legacy of lynchings and other terrorism in rendering the post-slavery constitutional amendments and federal civil rights laws a practical nullity as late as the mid-twentieth century. In this context, capital punishment played a crucial role, as a seemingly more tasteful version of lynchings and other terrorist acts.

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

The National Memorial, the Legacy Museum, and Mr. Stevenson emphasize the frequently embarrassing role our legal system has played and to a large extent still plays. Many people believe that after the Supreme Court cleared out America’s death rows in 1972 and then in 1976 upheld new statutes, it has ensured careful individualized consideration of the appropriate punishment for those found guilty, with thorough investigation and presentation by defense counsel. But the actual history of the revived death penalty system fails to justify that belief – most egregiously in the Court’s abysmal decision in *McCleskey v. Kemp*, in which the Supreme Court refused to grant constitutional relief despite assuming the validity of a sophisticated study showing that, after holding other factors constant,

¹⁵¹ Justin McCarthy, *New Low of 49% in U.S. Say Death Penalty Applied Fairly*, GALLUP, Oct. 22, 2018.

¹⁵² For information and resources regarding the National Memorial for Peace and Justice and the Legacy Museum, see the Equal Justice Initiative’s Museum and Memorial website, available at <https://museumandmemorial.eji.org/>.

African Americans' odds of receiving the death penalty in Georgia were greater than the odds for white people and showing an even greater disparity where the victim was white as compared to where the victim was African American.¹⁵³

The National Memorial, the Legacy Museum, and Mr. Stevenson are beginning to bring national attention to the appalling role that capital punishment still plays in preserving the awful legacy of white supremacy and its other progeny.

b. *Conservatives*

As Ben Jones said might happen, in a 2017 article in the *Journal of Criminal Law & Criminology*, many more conservatives have based opposition to capital punishment on traditional conservative values, such as, for example, by arguing that the death penalty “is incompatible with limited government, fiscal responsibility, and promoting a culture of life.”¹⁵⁴ Examples of such opposition are Arthur Rizer and Mark Hyden’s January 10, 2019 op-ed *Why Conservatives Should Oppose the Death Penalty* and Stephen Beale’s August 9, 2018 article *The Conservative Case Against the Death Penalty* in the *American Conservative*.¹⁵⁵

c. *The Catholic Church*

i. *Change in the Catechism*

On August 2, 2018, Pope Francis announced that the Catholic Church had revised its Catechism – the Church’s official compilation of teachings – to oppose unambiguously capital punishment. The Pope also committed the Church to work “with determination” to abolish the death penalty worldwide. Prior to the revision, the Catechism used softer language on the death penalty, allowing it “if this is the only possible way of effectively defending human lives against the unjust aggressor,” while noting that “the cases in which the execution of the offender is an absolute necessity ‘are very rare, if not practically nonexistent.’”¹⁵⁶

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

[T]he change in the awareness of the Christian people which rejects an attitude of complacency before a punishment deeply injurious of human dignity. . . . [The death penalty] is per se contrary to the Gospel, because it entails the willful suppression of a human life that never ceases to be sacred in the eyes of its Creator and of which – ultimately – only God is the true judge and guarantor. . . . God is a Father who always awaits the return of his children who, knowing that they have made mistakes, ask for forgiveness and begin a new life. No one

¹⁵³ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹⁵⁴ Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 223, 250 (2018).

¹⁵⁵ Rizer & Hyden, *supra* note 90; Stephen Beale, *The Conservative Case Against the Death Penalty*, AM. CONSERVATIVE, Aug. 9, 2018.

¹⁵⁶ Linda Bordoni, *Pope Francis: ‘death penalty inadmissible’*, VATICAN NEWS, Aug. 2, 2018.

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.¹⁵⁷

The Pope's October 11, 2017 discussion stressed that the Church could not be precluded by its prior actions from acting on the basis of its current understanding:

Let us . . . 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.

Pope Francis further stressed:

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. . . . 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. Contrasts with Justice Scalia's Views

In light of President Trump's and other Republicans' repeated pronouncements that the late Justice Antonin Scalia exemplifies their view of an ideal Supreme Court justice, it is instructive to contrast his views with Pope Francis' views.

One contrast is between Justice Scalia's views on Constitutional interpretation and the Pope's discussion of how Church doctrine can change. Justice Scalia said the Constitution is not a "living document" whose interpretation can evolve as society's consensus changes under new circumstances. Opposing consideration of "the evolving standards of decency that mark the progress of a maturing society," he called the Constitution "dead – or, as I prefer to call it – enduring" with its meaning frozen in the 1790s. This view made it easy for Scalia to hold capital punishment constitutional since it was permitted when the Constitution was adopted "not merely for murder, by the way, but for all felonies, including, for example, horse thieving, as anyone can verify by watching a western movie." He said that if standards of decency evolve, Congress and legislatures can "restrict or abolish the death penalty as they wish," but courts have no such power. If a judge "feels strongly enough" that capital punishment must be limited or eliminated, he can "lead a revolution. But rewrite the laws he cannot do."¹⁵⁸

¹⁵⁷ *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).

¹⁵⁸ Justice Antonin Scalia, Remarks at the University of Chicago Divinity School Conference: A Call for Reckoning: Religion and the Death Penalty (Jan. 25, 2002), <http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/>.

In contrast, Pope Francis said that Church doctrines must be revised in light of the Church's enhanced understanding of capital punishment's actual impacts.

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

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

[T]he more Christian a country is, the *less* likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe and has least support in the church-going United States. I attribute that to the fact that for the believing Christian, death is no big deal. Intentionally killing an innocent person is a big deal, a grave sin which causes one to lose his soul, but losing this physical life in exchange for the next? The Christian attitude is reflected in the words [a] play has Thomas More saying to the headsman: "Friend, be not afraid of your office. You send me to God. . . . He will not refuse one who is so blithe to go to Him." For the nonbeliever, on the other hand, to deprive a man of his life is to end his existence – what a horrible act! . . . [Abolition's] current predominance is the handiwork of Napoleon, Hegel and Freud rather than of St. Thomas and St. Augustine.¹⁵⁹

At the ABA's August 2, 2018 program, Chicago's Cardinal Blase J. Cupich was asked to comment on this last portion of Justice Scalia's remarks. Cardinal Cupich stated:

Would that he had lived to be here today, to see what the Pope has done, because I think it would maybe cause him to rethink that.

I think that his understanding of salvation has great limitations. It is an atomistic view of salvation, that is, as individuals. . . . [W]hat the Second Vatican Council has brought to our attention is that God saves a people; God doesn't just save by individuals. So, how is it that we integrate human beings into society, especially those who are on the margins? That's the question we should be posing here.

¹⁵⁹ *Id.*

Yes, it's true that we all who are of the Christian faith believe in an afterlife, the immortal gift of life that God gives us. As we live our life here today, our task is not just thinking about me in terms of my own personal salvation, but how is it that I am cooperating with God to create a people where everyone feels that they are included. So I think he misses that point and he has a narrow view of what salvation means in the Christian tradition.¹⁶⁰

d. Former Corrections Leaders, Attorney General, Judge

On December 31, 2018, Vernon Keenan, on his last day of 16 years as head of the Georgia Bureau of Investigation, predicted capital punishment's abolition – which he called “outdated” even for heinous crimes. Saying he had never supported capital punishment, Keenan stated that he did not believe it was a deterrent.¹⁶¹

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.”¹⁶²

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.¹⁶³

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.”¹⁶⁴

¹⁶⁰ ABA Conference on the Death Penalty, *supra* note 117, at 47-48 (remarks of Cardinal Cupich).

¹⁶¹ Vernon Keenan, *Retiring GBI director predicts demise of death penalty*, WXIA-TV (Atlanta), Dec. 31, 2018.

¹⁶² Roger Werholtz, Opinion, *End the death penalty in Kansas*, TOPEKA CAP.-J., Oct. 31, 2017.

¹⁶³ Terry Goddard, Opinion, *Arizona's 40-year experiment with the death penalty has failed*, ARIZ. DAILY STAR, Nov. 5, 2017.

¹⁶⁴ Rudy Gerber, Opinion, *Arizona Death Penalty Law Flouts Constitution*, NAT'L L.J., Nov. 14, 2017.

e. Senator Diane Feinstein

On May 23, 2018, Senator Diane Feinstein, who had throughout her career strongly supported capital punishment, announced that she now opposed capital punishment “as it exists today.” She said that she had *sub silentio* changed her position several years ago privately.¹⁶⁵

f. 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.¹⁶⁶

14. Continuing International Trend Versus Capital Punishment

Most of Latin America, Canada, and Western Europe abolished capital punishment by the early 1980s, as did South Africa when it ended apartheid. Following the fall of the Iron Curtain, all European portions of the former Soviet Union, except Belarus, either abolished capital punishment or, as did Russia, implemented moratoriums on execution that remain in effect.¹⁶⁷

a. 2018

On April 10, 2019, Amnesty International reported that in 2018 the number of executions in countries other than China (for which it cannot make a reasonable estimate) had decreased almost 31% since 2017 levels – to its lowest level in a decade, with particularly dramatic drops in Iran, Iraq, Pakistan, and Somalia. There were substantial increases in executions in Japan, Singapore, and South Sudan. Many countries that had executed in 2017 did not do so in 2018, while some others resumed executions.¹⁶⁸

Burkina Faso abolished the death penalty for ordinary crimes, and Gambia and Malaysia declared moratoriums on executions (the former as a step towards abolition and the latter in anticipation of reforming the capital punishment system).¹⁶⁹

By the end of 2018, 142 countries had abolished capital punishment “in law or practice” and 106 had abolished it for all crimes.¹⁷⁰

¹⁶⁵ John Woolfolk, *When did Dianne Feinstein start opposing the death penalty?*, MERCURY NEWS (San Jose), May 23, 2018.

¹⁶⁶ 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>.

¹⁶⁷ AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2009, at 11, 18 (2010).

¹⁶⁸ AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2018, at 7-8 (2019).

¹⁶⁹ *Id.* at 19, 42.

¹⁷⁰ *Id.* at 48.

A total of 20 countries executed people in 2018, as compared with 23 in 2017 and 31 in 1999. The top five in executions were China, Iran, Saudi Arabia, Vietnam, and Iraq. The United States was in the top 10 – although whether it was 10th or lower depended on totals that Amnesty International could not verify for North Korea and Pakistan. For the tenth consecutive year, the United States was the only country in the Americas to execute anyone.¹⁷¹

On December 17, 2018, the U.N. General Assembly voted to call for a worldwide moratorium on executions and to urge countries retaining the death penalty to seek to ensure that it is not implemented in an arbitrary or discriminatory fashion. After correcting for Pakistan’s erroneous inclusion in the yes total, the results were 120 in favor, 36 against, and 32 abstaining. The 120 countries voting in favor were the most ever to vote for such a resolution. The previous record, in 2016, was 117 in favor. Amnesty International said, “For the first time, Dominica, Libya, [and] Malaysia changed their vote to support the resolution, while Antigua and Barbuda, Guyana and South Sudan moved from opposition to abstention.”¹⁷²

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

B. Important Issues

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

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

a. AEDPA (Overview)

Any analysis of capital punishment *as applied* must consider various barriers that preclude the federal courts from ruling on the merits of meritorious federal constitutional claims. Many are set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).¹⁷⁴ 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.

¹⁷¹ *Id.* at 9-10.

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

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

¹⁷⁴ Pub. L. 104-132, 110 Stat. 1214 (1996).

[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

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.¹⁷⁵

b. AEDPA's Interpretation by the Supreme Court

In a non-capital decision in 2016, the Supreme Court considered an assertion that a state court decision could be reviewed on the merits because it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."¹⁷⁶ 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."¹⁷⁷ "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."¹⁷⁸

c. Possible Opt-Ins to Prosecution Friendlier AEDPA Provisions

In 2006, Congress enacted a law that could make it easier for a state to be found to have "opted-in" to "special Habeas Corpus Procedures in Capital Cases."¹⁷⁹ 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

¹⁷⁵ 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).

¹⁷⁶ 28 U.S.C. §2254(d)(1).

¹⁷⁷ *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))).

¹⁷⁸ *Id.* (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

¹⁷⁹ Pub. L. No. 109-177, 120 Stat. 192 (2006).

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.¹⁸⁰ 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* 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.¹⁸¹ No state’s effort to opt-in has thus far secured Attorney General approval.

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

a. Serious Forensic Errors

On January 14, 2019, the Texas Court of Criminal Appeals stayed the execution of Blaine Milam and remanded for consideration of developments in the science relating to bite mark evidence (plus changes in the Supreme Court’s dealing with intellectual disability). A month earlier, in December 2018, the Texas Court of Criminal Appeals vacated Steven Chaney’s murder conviction and said he was innocent, because he had been convicted “based on bite-mark science that ‘has since been undermined or completely invalidated.’”¹⁸²

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

¹⁸⁰ 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)).

¹⁸¹ *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, 816 F.3d 1241 (9th Cir. 2016). The ABA filed an amicus brief in support of granting certiorari. The brief argued, *inter alia*, that the Ninth Circuit had failed to recognize that the Justice Department’s Final Rule did not come anywhere close to ensuring that an opt-in state would provide effective counsel for state postconviction proceedings. Motion to File Brief Amicus Curiae and Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-4, *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. 16-880 (U.S. filed Feb. 13, 2017), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/HCRC-v-DOJ_ABA-Amicus-Brief-FINAL.authcheckdam.pdf.

¹⁸² Jolie McCullough, *Texas court stops first execution of 2019, citing changes in intellectual disability law and bite-mark science*, TEX. TRIB., Jan. 14, 2019. On April 12, 2016, the Texas Forensic Science Commission approved its final report on a case concerning bitemark comparisons. It relied greatly on a Bitemark Investigation Panel that reviewed the extant scientific literature and data, and sought input from the American Board of Forensic Odontologists and others in the field. The Commission’s “two threshold observations based upon its review” were: “1) there is no scientific basis for stating that a particular patterned injury can be associated to an individual’s dentition; and 2) there is no scientific basis for assigning probability or statistical weight to an association, regardless of whether such probability or weight is expressed numerically (e.g., ‘one in a million’). Though these claims were once thought to be acceptable and have been admitted into evidence in criminal cases in and outside of Texas, it is now clear they lack any credible supporting data.” TEX. FORENSIC SCI. COMM’N, FIFTH ANNUAL REPORT, at 14-15 (2016).

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

The rigorously researched and peer-reviewed newcomer to forensics, DNA matching, has thrown into sharp relief the lack of scientific rigor in many other forensic disciplines. According to data gathered by the National Registry of Exonerations, of the 2,363 inmates exonerated of murder or other serious felonies since 1989 (most commonly through DNA), 553 were convicted with flawed or misleading forensic evidence – nearly one out of four.

Forensic science’s shortcomings have left the justice system alternately in a quiet panic or massive denial. The issue was first brought into the spotlight by a highly critical report from the National Academy of Sciences in 2009, which found a dearth of scientific backing for most forensics methods other than DNA. It cited evidence that “faulty forensic science analyses may have contributed to wrongful convictions of innocent people.” That report was followed by an even more blistering presidential commission report in 2016, which found serious errors and junk science in a host of commonly used forensic methods tying suspects to crimes.

Even the seeming infallibility of fingerprint evidence took a big hit. Multiple experts at the FBI’s vaunted Latent Print Unit incorrectly matched a Portland, Ore., attorney to prints found at the scene of the 2004 Madrid train station bombing. The prints actually belonged to an Algerian terrorist. A form of cognitive bias – finding what you expect to find – has been blamed because the FBI examiners had received extraneous information about the lawyer converting to Islam, and they were also told that a respected senior agent had already declared a match.

. . . [Many cases show] the profound difficulty the justice system has in separating good science from bad. The National Academy of Sciences has suggested raising the bar for expert testimony by requiring hard data and error rates for all forensic disciplines.

Right now the bar is shockingly low. One expert in the recent Parks hearing testified that his analysis of door hinges showed that she had barricaded her child in a closet, using a technique he had never attempted before and for which he cited no scientific data. This lack of scientific rigor in the courtroom has to change.

A commission formed by President Obama to study solutions to flawed forensics was disbanded by the Trump administration. It may be time for the

states, individually or in partnership, to undertake this effort. The stakes are too high to maintain the status quo.¹⁸³

Unfortunately, as NBC News reported on January 23, 2019, many judges and people in law enforcement are reluctant to disapprove of continuing use of forensic methods that the scientific community now feels are generally invalid.¹⁸⁴

b. Prosecutorial or Other Law Enforcement or Judicial Misconduct

i. State Postconviction “Factfindings” by Harris County, Texas Judges Rubberstamp Prosecutors’ Submissions

Since the resumption of executions after *Gregg v. Georgia*,¹⁸⁵ more people convicted in Harris County, Texas have been executed than those convicted in any other county in the country. A study of Harris County, Texas’s capital punishment postconviction proceedings published in the May 2018 issue of the *Houston Law Review* provides a partial explanation for why this is so. The study found that judges’ factfindings are “a sham” in these cases because the judges simply “rubberstamp” the submissions of county prosecutors. Researchers reviewed fact finding orders in 191 Harris County capital postconviction proceedings in which factual issues were contested. They discovered that in 96% of the cases, and with regard to 96% of the 21,275 factual findings, county prosecutors’ proposed findings of fact were adopted verbatim. Indeed, in a very high percentage of the cases, judges did not bother to change the heading before signing the document submitted by the prosecution.¹⁸⁶ The article criticizes the postconviction judges for their usual unwillingness to hold evidentiary hearings regarding contested issues of fact, as well as their “wholesale adoption of proposed state fact-finding” instead of carrying out their duties to engage in “independent state court decision-making.”¹⁸⁷

The disputed facts are often potentially very significant. They frequently turn on fact witness and expert affidavits regarding evidence that might have been, but was not, introduced at the trial. These may relate “to the accuracy of the conviction, including forensic, alibi, or eyewitness testimony; or . . . might highlight important [penalty-phase] mitigating evidence regarding the inmate’s psychiatric or psychological impairments, abused background, or redeeming qualities.”¹⁸⁸

The study’s leaders say that the “inadequate development of facts” caused by this “one-sided consideration of contested factual issues” “prevents Harris County post-conviction courts from enforcing federal constitutional norms.” When the cases then proceed to federal habeas corpus proceedings, “even rubber-stamped findings receive deference in federal

¹⁸³ Edward Humes, Opinion, *Bad forensic science is putting innocent people in prison*, L.A. TIMES, Jan. 13, 2019.

¹⁸⁴ Jon Schuppe, ‘We are going backward’: How the justice system ignores science in the pursuit of convictions, NBC NEWS, Jan. 23, 2019.

¹⁸⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁸⁶ Jordan M. Steiker, James W. Marcus & Thea J. Posel, *The Problem of “Rubber-Stamping” in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUS. L. REV. 889, 900-01 (2018).

¹⁸⁷ *Id.* at 893.

¹⁸⁸ *Id.*

court.” So, there is never a “meaningful consideration of the inmate’s constitutional claims.” This, the authors, say, “undermines the legitimacy of Harris County executions.”¹⁸⁹

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.¹⁹⁰

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.¹⁹¹

c. 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.¹⁹²

d. 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”¹⁹³ 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

¹⁸⁹ *Id.* at 895.

¹⁹⁰ Rene Stutzman & Gal Tziperman Lotan, *More than 2,600 Orlando-area lawyers get letters warning about fingerprint expert*, ORLANDO SENTINEL, Feb. 6, 2017.

¹⁹¹ Wendy Halloran & Elizabeth Wiley, *Lab director’s criminal record uncovered; what does it mean?*, KPNX-12NEWS (Phoenix), Nov. 19, 2016.

¹⁹² Scott Phillips & Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*, 45 HOFSTRA L. REV. 417, 448 (2016).

¹⁹³ Rachel Aviv, *Remembering the Murder You Didn’t Commit*, NEW YORKER, June 19, 2017.

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.”¹⁹⁴

e. 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 had sent large numbers of people to death row in recent years: Orange County, California; Orleans Parish, Louisiana; St. Louis County, Missouri; and Shelby County, Tennessee.¹⁹⁵

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 on April 20, 2017 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.¹⁹⁶

3. Inadequacies of Trial Counsel for People Now Facing Execution

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

¹⁹⁴ *Id.*

¹⁹⁵ FAIR PUNISHMENT PROJECT, THE RECIDIVISTS: FOUR PROSECUTORS WHO REPEATEDLY VIOLATE THE CONSTITUTION (2017).

¹⁹⁶ 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>.

The same January 11, 2019 story in which the *Atlanta Journal-Constitution* reported that in new cases “capital punishment in 2019 seems to be going the way of the guillotine and the gallows: [i]t’s disappearing,” and attributed this in part to the effective work of the state’s capital defender office, also reported that Georgia would soon set execution dates for death row inmates sentenced years ago. The article noted that on January 7, 2019 Justice Sotomayor, dissenting from the Court’s 6-3 refusal to consider Donnie Lance’s case, said that Lance’s trial lawyers “failed even to look into, much less to put on, a case for sparing Lance’s life.” Stephen Bright, a renowned capital defense lawyer and a Georgia State, Georgetown, and Yale Law School professor, told the *Journal-Constitution* that people facing execution now “were sentenced some time ago often with lawyers who were not qualified to try a death-penalty case. They are also people who would not be sentenced to death today.”¹⁹⁷

Unfortunately, despite Georgia’s improvements, new miscarriages of justice can still happen there. For example, on December 6, 2018, the Georgia Supreme Court refused to reverse the trial court’s decision to permit Tiffany Moss to represent herself at her upcoming capital trial, at which she will be accused of starving her step-daughter to death. Ms. Moss had said, despite the trial judge’s strenuous urgings to have attorneys represent her, that she would rather rely on divine guidance than on qualified defense counsel. The girl’s father, rather than relying on divine guidance, made a deal in which he agreed to testify against Ms. Moss in return for receiving a LWOP sentence.¹⁹⁸

The situation in North Carolina is similar to that in Georgia. A report issued on October 3, 2018 by The Center for Death Penalty Litigation is aptly titled *Unequal Justice: How Obsolete Laws and Unfair Trials Created North Carolina’s Outsized Death Row*. The report, written by Kristin Collins, says that difficult-to-secure reforms, starting with the creation in 2001 of an office that coordinates the representation of people facing capital punishment, has over time led to a huge drop in death sentences in North Carolina.¹⁹⁹ Indeed, only one new death sentence has been imposed in the last four years, and there are very few capital trials. But whereas for new cases, the death penalty is “all but extinct,” the majority of those on North Carolina’s death row were sentenced under a “rigged” system – with 73% of death row inmates having been sentenced before even the first reform, the creation of the statewide indigent defense office.

One death row inmate, Nathan Bowie, was “represented” in state postconviction by Tom Portwood, a dentist-turned-attorney who had a severe drinking problem and whose failure to do any work outside the courtroom for his client Ronald Frye had led the North Carolina Academy of Trial Lawyers for the first time to urge clemency for a death row inmate. Frye was executed in 2001. Portwood was appointed along with a lawyer with no death penalty experience to represent Mr. Bowie. During the time he “represented” Bowie, Portwood was involved in a car crash and found to have an alcohol level sufficient to kill him. The report issued in October 2018 details numerous egregious failures by Bowie’s counsel as well as what appears to have been serious misconduct by the trial prosecutor.²⁰⁰

¹⁹⁷ Rankin, *supra* note 4.

¹⁹⁸ Bill Rankin, *Woman accused of starving stepdaughter to represent herself in death penalty trial*, ATLANTA J.-CONST., Dec. 7, 2018.

¹⁹⁹ KRISTIN COLLINS, UNEQUAL JUSTICE: HOW OBSOLETE LAWS AND UNFAIR TRIALS CREATED NORTH CAROLINA’S OUTSIZED DEATH ROW (2018).

²⁰⁰ See Liliana Segura, “Relic of Another Era”: Most People on North Carolina’s Death Row Would Not Be Sentenced to Die Today, THE INTERCEPT, Oct. 17, 2018.

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

Thomas Maher, who now heads Indigent Defense Services, says policymakers and courts should ponder this question: "Should we execute scores of inmates for crimes that would not warrant the death penalty if they were tried today?"²⁰¹ Others interviewed by *The Intercept* have made the same point.

4. *Proposed Improvements to Enhance Counsel and Judicial Actions in Federal Death Penalty Trial Courts and in Federal Habeas Proceedings Regarding State and Federal Death Sentences*

On September 13, 2018, the Judicial Conference of the United States endorsed several interim recommendations that, if implemented, would enhance the ability of federal defender offices to improve representation at trials and in federal habeas proceedings – including by their training and mentoring lawyers from the private bar.²⁰² The Judicial Conference also endorsed recommendations that would lead to more training of judges about habeas corpus cases arising from state and federal death penalties, plus the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists. Moreover, the Judicial Conference endorsed recommendations that judges be trained on "[b]est practices on the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General." These recommendations were drawn from the final report of the Committee to Review the Criminal Justice Act Program, issued in June 2018.²⁰³

5. *The Continuing Danger of Executing Innocent People*

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

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

A further limitation is due to prosecutors and the courts. Prosecutors often fail to produce or oppose testing of materials from which probative DNA testing might be done, and courts often refuse to order that these materials be produced. And the further past the trial a death row inmate gets, the less likely courts are to permit access to or DNA testing of

²⁰¹ *Id.*

²⁰² Nat'l Ass'n of Criminal Def. Lawyers, Press Release, *Judicial Conference Takes Steps Toward Greater Independence for Federal Public Defender System; Nation's Criminal Defense Bar Encouraged by Progress*, Sept. 13, 2018, <https://www.nacdl.org/fed-pd-judicial-conference-newsrelease/>.

²⁰³ JUDICIAL CONFERENCE OF THE U.S., 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, at xxxvi-xl (rev. Apr. 2018).

materials that have never previously been tested using the currently most sophisticated DNA testing methods. Often, courts seem unconcerned by the fact there was no prior DNA testing, or that the testing that was done involved different physical evidence, or that the earlier testing used much less sophisticated methods and ended up being inconclusive.

Florida courts have denied 19 death row inmates – eight of whom have been executed – any access to DNA testing. And these courts have precluded nine others from testing additional evidence or from using more sophisticated DNA testing after less sophisticated testing was inconclusive.²⁰⁴

A case illustrating the problems that can be left unresolved that such testing might resolve is that of Florida's Tommy Zeigler. His case was the subject of a six-part series by a Pulitzer-prize winning investigative journalist, Leonora LaPeter Anton, in the *Tampa Bay Times* in November 2018.²⁰⁵ Zeigler has been on death row for 42 years, after a jury convicted him of killing his wife, her parents, and Zeigler's handyman in Zeigler's furniture store. Zeigler was himself shot at that time. The trial judge overrode the jury's recommendation of a life sentence.

The series examined in depth numerous questions concerning whether Zeigler was guilty. Zeigler was permitted limited DNA testing in 2001 that seemed to support his assertion that his furniture store was robbed on the fateful occasion. Despite his lawyers' offer to pay for more advanced DNA testing and their having proffered evidence casting serious doubt on the veracity of some important prosecution witnesses and showing how unlikely it is that he could have shot himself in the stomach as a way to seem innocent, the courts have precluded further DNA testing.

On January 3, 2019, Ms. Anton reported that the Ninth Judicial Circuit's state's attorney's office, which has turned down all of Zeigler's prior requests, was having the director of its new conviction integrity unit (created in September 2018) consider Zeigler's case. Ms. Anton further reported that Republican James Grant, chair of the Florida House's subcommittee on criminal justice, favors criminal justice reforms this year, including DNA and other reliable tests for inmates – particularly those against whom junk science was used, and consequences for those who deliberately withhold or destroy evidence. Zeigler's conviction and death sentence were secured after the prosecution introduced blood-spatter evidence that, as Ms. Anton noted, critics now say is more speculative than scientific. Ms. Anton further discussed the fact that in the cases of other Florida death row inmates, such as Henry Sireci, convictions and death sentences were secured through the use of hair comparisons. Yet, in 2013, "the FBI and American Society of Crime Laboratory Directors acknowledged that previous hair comparison analysis was invalid."²⁰⁶

²⁰⁴ Leonora LaPeter Anton, *Blood and truth: The lingering case of Tommy Zeigler and how Florida fights DNA testing* (pt. 1), TAMPA BAY TIMES, Nov. 25, 2018.

²⁰⁵ Leonora LaPeter Anton, *Blood and truth: The lingering case of Tommy Zeigler and how Florida fights DNA testing* (pts. 1-6), TAMPA BAY TIMES, Nov. 25-30, 2018.

²⁰⁶ Leonora LaPeter Anton, *State's attorney's office reviewing 1975 murder case recently featured in Times series*, TAMPA BAY TIMES, Jan. 3, 2019 (updated Jan. 9); see also Humes, *supra* note 183.

b. *People in the News in 2017-2019 Due to Innocence Findings or Considerations, After Years on Death Row*

i., ii. *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. Dennis had been on death row of almost a quarter century when the *en banc* Third Circuit ordered a new trial because of the prosecution’s failure to produce evidence tending to exonerate him and implicate another person.²⁰⁷ Dennis’ release on May 13, 2017 appeared to end the last of three wrongful capital prosecutions in unrelated cases, all involving the same two Philadelphia detectives.²⁰⁸

iii. *Isaiah McCoy*

On January 19, 2017, former Delaware death row inmate Isaiah McCoy was acquitted by the judge at his retrial and released. He was set free thanks to the work of his lawyers and an investigator. The Delaware Supreme Court 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.²⁰⁹

iv. *Rodricus Crawford*

On April 17, 2017, the Caddo Parish, Louisiana 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 Crawford’s son had pneumonia when he died, plus bacteria in his blood that was suggestive of sepsis.²¹⁰ The trial prosecutor, Dale Cox, 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, experience “as much physical suffering as it is humanly possible to endure before he dies.”²¹¹

At oral argument in 2016, the Louisiana Supreme Court “seemed bewildered that Crawford had ever been charged with a capital crime.”²¹² On November 16, 2016, the court overturned Crawford’s conviction, because the trial judge did not force Cox to give “race neutral reasons” for using five peremptory challenges to keep blacks off the jury. Two justices

²⁰⁷ 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.

²⁰⁸ Mark Bookman, *Three Murders in Philadelphia*, SLATE.COM, May 12, 2017.

²⁰⁹ Jessica Masulli Reyes, *Former death row inmate goes free after acquittal*, NEWS J. (Wilmington), Jan. 19, 2017.

²¹⁰ Jonah Engel Bromwich, *Louisiana Man Who Spent Three Years on Death Row Has Murder Charge Dismissed*, N.Y. TIMES, Apr. 20, 2017.

²¹¹ Rachel Aviv, *A Death Sentence Overturned in Louisiana*, NEW YORKER, Nov. 23, 2016.

²¹² *Id.*

would have overturned the conviction due to insufficient evidence that Crawford intended to kill the boy; they felt he should have been acquitted.²¹³

v. *Ralph Daniel Wright, Jr.*

On May 11, 2017, the Florida Supreme Court ordered Wright's murder convictions vacated and acquitted him, because the evidence supporting the convictions was "purely circumstantial" and not enough for any conviction.²¹⁴ A majority of the court, in concurring, said no reasonable juror would have found him guilty beyond a reasonable doubt.²¹⁵ His death sentence had already become invalid as a result of *Hurst*. At trial, the jury had recommended death by only a 7-5 vote.

vi. *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.²¹⁶ A few years later, in 1983, that ruling – including its ordering a new trial – became effective. But Hartfield – who is developmentally disabled – stayed in prison without being retried until 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 was violated by the extremely long delay and said he had endured "a criminal justice nightmare."²¹⁷ He was released on June 12, 2017.²¹⁸

vii. *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.²¹⁹ 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."²²⁰ Newly found evidence showed that the victim, 11 months old, had

²¹³ *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.

²¹⁴ *Wright v. State*, 221 So. 3d 512, 525 (Fla. 2017).

²¹⁵ *Id.* at 526 (Canady, J., concurring).

²¹⁶ *Hartfield v. State*, 645 S.W.2d 436 (Tex. Crim. App. 1980) (en banc).

²¹⁷ *Hartfield v. State*, 516 S.W.3d 57, 68 (Tex. App.), *cert. denied*, 138 S. Ct. 473 (2017); Richard Pérez-Peña, 'Justice Nightmare': 32 Years in Texas Prisons After Conviction Voided, N.Y. TIMES, Jan. 19, 2017.

²¹⁸ *Jerry Hartfield Released from Texas Prison After 35 Years Without Valid Conviction*, EJI.ORG, June 22, 2017.

²¹⁹ Michael Kiefer, *The long journey from death row to freedom: Arizona lawyer's sleuthing frees murder convict*, ARIZ. REPUBLIC, June 15, 2017.

²²⁰ *Robins v. State*, 385 P.3d 57, 2016 WL 5801204, at *4 (Nev. 2016) (unpublished table decision).

infantile scurvy – which explained why she had all her injuries and then died. The prosecutor’s office retained a doctor who concurred she had scurvy.²²¹

viii. 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 2005.²²² Newman, who was freed on October 11, 2017, “represented” himself at his 2002 trial, and 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 had major depression. At his one-day trial, the prosecution, lacking physical evidence linking Newman to the crime, presented an “expert” who inaccurately said hair on Newman’s clothing was the victim’s.²²³

Initially, the Arkansas Supreme Court upheld Newman’s attempt to waive all appeals. But four days before his scheduled execution, he permitted counsel to seek a stay of execution. They presented DNA results excluding him as a source of DNA evidence on the blanket on which the victim had been found and debunking the hair “match” presented at trial. Counsel also showed that prosecutors had withheld evidence contradicting the “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.²²⁴ In September 2017, the Arkansas Supreme Court precluded use of his “confessions” at retrial.²²⁵ This led special prosecutor Ron Fields to request dismissal of the charges, since without the “confessions,” there was insufficient evidence for a conviction.²²⁶

ix. 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 2003.²²⁷

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 of them. The Cook County prosecutors, in light of Judge Obbish’s decision, dropped all charges against both. ICE then immediately seized both.

²²¹ *Use of the Death Penalty for Killing a Child Victim*, DEATH PENALTY INFO. CTR., Aug 6, 2017.

²²² Dave Hughes, *Former Arkansas death row inmate freed after 16 years in custody; charges dropped in mutilation case*, ARK. DEMOCRAT-GAZETTE, Oct. 12, 2017.

²²³ *Newman v. State*, No. CR-12-118, 2014 WL 197789, at *2-3, *4 n.1, *11 (Ark. Jan 16, 2014).

²²⁴ *Id.* at *29.

²²⁵ *State v. Newman*, 525 S.W.3d 457 (Ark. 2017).

²²⁶ Krystle Sherrell & Kate Jordan, *Arkansas Death Row Inmate Walks Free After Nearly 17 Years In Prison*, KFSM 5NEWS (Fort Smith), Oct. 11, 2017.

²²⁷ *Former Death-Row Prisoner Exonerated in Illinois, Seized by ICE*, DEATH PENALTY NEWS, Jan. 3, 2018.

There was no physical or biological evidence against either. Solache said his “confession” was written in English by an assistant state attorney, who did not speak Spanish. Solache spoke only Spanish, and Guevara never had the “confession” translated into Spanish. Solache also said he was questioned coercively for three days, during which he was sleep deprived, denied consular help, and given minimal food or drink.²²⁸

x. 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.”²²⁹ It found that medical evidence showed there was neither rape nor sodomy and may not have been a murder. Instead, the toddler may have died from complications from having been struck by a car.²³⁰ “After reviewing the medical records and photographs that I should have been provided in 1993,” a state trial expert withdrew his assessment of rape.²³¹ The defense presented evidence from Dr. Astrid Heger, a leading expert on child abuse, who said the other state expert at trial had given testimony “so unlikely to the point of being absurd. No such mechanism of injury has ever been reported in any literature of child abuse or child assault.”²³² She added that the internal injuries the child sustained were commonly seen in victims of automobile accidents. Prosecutors admitted that the forensic evidence they used to convict Benavides Figueroa was false, but unsuccessfully asked the state court to sustain a conviction for second-degree murder.²³³ After the court’s decision, Kern County District Attorney Lisa Green said a retrial was improbable.²³⁴ An April 27, 2018 editorial said that records had emerged seven years after trial showing no sexual assault and casting doubt on whether the toddler had been murdered.²³⁵

xi. William T. Montgomery

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.²³⁶

²²⁸ *Id.*

²²⁹ *In re Figueroa*, 412 P.3d 356, 367 (Cal. 2018).

²³⁰ *Id.* at 360-62, 367.

²³¹ Chloe Carlson, *BREAKING NEWS: Death penalty reversed; “false evidence” used in trial, court rules*, KGET-TV (Bakersfield), Mar. 12, 2018.

²³² *Id.*

²³³ *Figueroa*, 412 P.3d at 359.

²³⁴ Carlson, *supra* note 231.

²³⁵ Editorial, *The latest California death row exoneration shows why we need to end the death penalty*, L.A. TIMES, Apr. 27, 2018.

²³⁶ 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.

At trial, the prosecution asserted that Montgomery murdered first Debra Ogle and then her roommate, and thereafter dumped Ms. Ogle's body in the woods where it was found four days later. Yet, many witnesses said they saw Ogle alive four days after her alleged murder – something the prosecution never told the defense. An independent review of the autopsy report showed her body probably had been found only hours after her death and did not show various indicia that would have been present if she had died four days earlier. The co-defendant had provided a story consistent with the prosecution's theory only after giving five different accounts. The co-defendant got a sentence of a term of years with parole eligibility. The parole board was also troubled by three jurors' affidavits.²³⁷

xii. Barry Lee Jones

On July 31, 2018, federal district judge Timothy M. Burgess vacated Arizona death-row inmate Barry Lee Jones' conviction for killing four-year-old Rachel Gray, and ordered the state to immediately retry or release Jones. Jones had spent 23 years on Arizona's death row. Judge Burgess found that if trial counsel had been competent, "there is a reasonable probability that his jury would not have convicted him of *any* of the crimes."²³⁸ Judge Burgess said a "rush to judgment" by police investigators had led to a conviction based largely on questionable eyewitness testimony from two eight-year-olds, plus unreliable forensic testimony. A medical examiner who testified against Jones later gave contradictory testimony about the timing of the victim's fatal injury that would have ruled out Jones as a suspect. Police failed to investigate evidence pointing to other suspects, and Jones' defense team failed to examine alternative theories of the crime. And there was no evidence that the alleged rape occurred at the time of the fatal abdominal injury. Judge Burgess found that the trial lawyer and the appointed state postconviction lawyer were ineffective, and that neither did professionally appropriate investigations. Andrew Sowards, a defense investigator, said the judge "saw the state's investigation for what it was, which was shoddy, the defense investigation for what it was, which was nonexistent, and he said, 'That's not fair.' And that's how it's supposed to work."²³⁹

A decade ago, the federal courts would have considered Jones' ineffective assistance claim waived because of his prior lawyers' failures to raise it in state court, and Jones likely would have been executed. However, in 2012 in *Martinez v. Ryan*, the Supreme Court held that federal habeas corpus courts may review a state prisoner's claim that his trial lawyer was ineffective if the failure to raise the claim in state court resulted from additional ineffective representation by his state postconviction lawyer.²⁴⁰ After *Martinez* was decided, the Ninth Circuit sent the case back to the district court for further consideration.

xiii. Robert Will

On September 26, 2018, federal district judge Keith P. Ellison denied relief to Texas death-row inmate Robert Will, despite believing that Will was denied a fair trial and could

²³⁷ Phyllis L. Crocker, Opinion, *Next Ohio execution raises too much doubt*, THE BLADE (Toledo), Mar. 10, 2018.

²³⁸ *Jones v. Ryan*, 327 F. Supp. 3d 1157, 1218 (D. Ariz. July 31, 2018).

²³⁹ Liliana Segura, *After 23 Years on Death Row, Barry Jones Sees His Conviction Overturned: Arizona Must Retry or Release Him Immediately*, THE INTERCEPT, Aug. 1, 2018.

²⁴⁰ *Martinez v. Ryan*, 566 U.S. 1 (2012).

be innocent. The judge said that were it not for constraints imposed by the AEDPA, he “would almost certainly have granted” a new trial to Mr. Will, but that he had been left unable to deal with “the troubling possibility of [Will’s] actual innocence.” Judge Ellison urged the Fifth Circuit to address Will’s claims, saying that his “technical ruling” should not “obscure the extraordinarily significant issues that the Court of Appeals – unlike this Court – can properly consider.”²⁴¹

xiv. *Clemente Aguirre-Jarquin*

On October 27, 2016, the Florida Supreme Court unanimously vacated the conviction of death row inmate Clemente Aguirre-Jarquin. Newly discovered confessions and DNA evidence strongly suggested that the real killer was the prosecution’s chief witness. At trial, the jury had voted 7-5 for the death penalty for one murder and 9-3 for the death penalty for the other murder. 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.²⁴²

Mr. Aguirre-Jarquin was exonerated on November 5, 2018 after jury selection for his re-trial began. Samantha Williams, the principal prosecution witness, was mentally ill. She had confessed to at least five people that she had killed the victims. No DNA found at the crime scene and tested matched Mr. Aguirre-Jarquin, but most blood stains matched the victims, and Ms. Williams’ DNA was found on eight blood stains in four rooms.²⁴³

xv. *Johnny Lee Gates*

In a decision dated January 10, 2019, Georgia Superior Court Senior Judge John D. Allen granted the extraordinary motion for a new trial by Johnny Lee Gates, who served more than 26 years on Georgia’s death before a mistrial in a trial regarding his intellectual disability led to his sentence being changed by stipulation to LWOP.²⁴⁴ In 2015, interns for the Georgia Innocence Project found in the District Attorney’s office two items that state documents said had been destroyed in 1979. DNA experts for both sides agreed that Gates’ DNA was not found on these two “key items . . . used by the perpetrator to bind the victim’s hands.”²⁴⁵ The judge rejected the prosecution’s speculation that Gates’ DNA may have degraded and was no longer on the items or might have fallen off the items or otherwise been lost. Judge Allen said that the DNA results on these two items were even more troubling because “the State itself destroyed the bulk of the remaining evidence” – including other exculpatory evidence – in 1979, when the case was still on direct appeal.²⁴⁶ Accordingly, Gates was granted a new trial. The prosecution said it would appeal to the Georgia Supreme Court.

²⁴¹ *Will v. Davis*, No. H-07-CV-1000, 2018 WL 4621170, at *1, *2 (S.D. Tex. Sept. 26, 2018), *appeal filed*, No. 18-70030 (5th Cir. Oct. 25, 2018).

²⁴² *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.

²⁴³ Michael Williams, *Prosecutors drop case against exonerated death-row inmate Clemente Aguirre-Jarquin*, ORLANDO SENTINEL, Nov. 5, 2018.

²⁴⁴ *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct. Jan. 10, 2019), <https://deathpenaltyinfo.org/files/pdf/GatesJohnnyLeeNewTrialDecision2019-01-10.pdf>.

²⁴⁵ *Id.* at 16.

²⁴⁶ *Id.* at 25.

xvi. Charles Ray Finch

On January 25, 2019, the Fourth Circuit held that Charles Ray Finch, who had originally been sentenced to death in North Carolina, “has overcome the exacting standard for actual innocence through sufficiently alleging and providing new evidence of a constitutional violation and through demonstrating that the totality of the evidence, both old and new, would likely fail to convince any reasonable juror of his guilt beyond a reasonable doubt,” and accordingly is entitled to have federal court adjudication of his constitutional claims.²⁴⁷ The court found that Finch was harmed by improperly suggestive line-ups, which led to his likely being mistakenly identified by an eyewitness. It also found that a new autopsy contradicted trial evidence regarding the nature of the murder weapon, new ballistics evidence contradicted prosecution assertions of a match with a bullet found in Finch’s car, and several witnesses said they had been pressured to testify for the prosecution.

xvii. Orlando Maisonet

Orlando Maisonet has spent 28 years on Pennsylvania’s death row after being convicted and sentenced to death at separate trials for two murders. After one of these convictions was vacated, Maisonet was acquitted at a 2005 retrial. In February 2019, Philadelphia Common Pleas Judge J. Scott O’Keefe vacated Maisonet’s conviction in the other murder, due to prosecutorial misconduct and ineffective defense counsel. The district attorney’s office, although not conceding prosecutorial misconduct, supported the motion to vacate. Both sides agreed that the prosecution had acted prejudicially by showing the jury a clip from *America’s Most Wanted* that included a dramatization of the crime and that Maisonet’s trial lawyer was ineffective for failing to object. Maisonet may either be retried or released.²⁴⁸

xviii. 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.²⁴⁹ 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.²⁵⁰ Numerous other troubling aspects of his prosecution and the underlying police investigation were discussed in Pulitzer Prize-winning columns by the *Houston Chronicle*’s Lia Falkenberg.²⁵¹ But in April 2016, Texas Comptroller Glenn Hegar denied Brown’s compensation application because Brown had never been formally determined to be “actually innocent.”²⁵²

²⁴⁷ *Finch v. McKoy*, 914 F.3d 292, 302 (4th Cir. 2019).

²⁴⁸ Samantha Melamed, *Philly judge cites prosecutorial misconduct, vacates conviction of man who spent 28 years on death row*, THE INQUIRER, Feb. 19, 2019.

²⁴⁹ Brian Rogers, *DA drops charges against Alfred Brown*, HOUS. CHRON., June 8, 2015.

²⁵⁰ *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.

²⁵¹ *E.g.*, Lisa Falkenberg, *Evidence mounts that wrong man on death row for killing HPD officer*, HOUS. CHRON., Apr. 20, 2015.

²⁵² Brian Rogers, *Comptroller: Former death row inmate not eligible for exoneration funds*, HOUS. CHRON., Apr. 7, 2016.

(cont’d)

On March 2, 2018, the Harris County District Attorney's office released evidence showing the trial prosecutor, Dan Rizzo, had known at the time and withheld from the defense telephone records supporting Brown's innocence claim. The prosecutor had intimidated a witness whose original account was consistent with the phone records into falsely changing her account and implicating Brown.²⁵³

On March 1, 2019, John Raley, whom District Attorney Kim Ogg had appointed as special prosecutor to investigate Brown's case, announced that "there is no evidence sufficient for a reasonable juror to find that he is guilty beyond a reasonable doubt, which is the legal definition of innocence, and Alfred Dewayne Brown is innocent." District Attorney Ogg accepted Raley's conclusion. Accordingly, her office filed in court an amended motion to dismiss, with Raley's report as the sole exhibit. The granting of this motion will enable Mr. Brown to receive compensation from the State. Ogg also said she would follow up on Raley's recommendation that there be further investigation of Rizzo.²⁵⁴

xix. Clifford Williams, Jr.

In 1976, a Florida trial judge sentenced Clifford Williams, Jr. to death, overriding the jury's recommendation of a life sentence. Four years later, the Florida Supreme Court changed his sentence to a life sentence. On March 28, 2019, a Duval County judge dismissed all charges against both Williams and his nephew, and they were released after more than four decades in prison. The exonerations resulted from the creation in 2018 by new District Attorney Melissa Nelson of Florida's first Conviction Integrity Review Unit. The Unit's director had issued a report in February 2019 saying that the physical scientific evidence, far from inculcating either defendant, was inconsistent with the testimony of a key prosecution witness and that a man who had been near the crime scene had confessed committing the murders to several people.²⁵⁵

c. 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 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

²⁵³ 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.

²⁵⁴ Jolie McCullough, *Prosecutor declares freed Texas death row inmate Alfred Dewayne Brown innocent, paving way for state compensation*, TEX. TRIB., Mar. 1, 2019; Office of Dist. Attorney Kim Ogg, Press Release, *Special Prosecutor's Report: State of Texas v. Alfred Dewayne Brown*, Mar. 1, 2019, <https://app.dao.hctx.net/special-prosecutors-report-state-texas-v-alfred-dewayne-brown>.

²⁵⁵ Andrew Pantazi, *Jacksonville men freed 43 years after wrongful murder conviction, a first for a Florida conviction review unit*, FLA. TIMES-UNION, Mar. 28, 2019.

evidence to link Keith to the crimes – *i.e.*, “certain eyewitness testimony with certain forensic evidence about which important questions have been raised.”²⁵⁶ In late October 2016, Keith filed a motion for a new trial, asserting that the Ohio Bureau of Investigation analyst who testified for the prosecution at trial had been suspected by her superiors of having shaded her testimony to improperly favor the prosecution and allegedly was “mentally unstable.” Lee Price, Ohio’s Attorney General at the time of the trial, reportedly said after reviewing the new evidence presented by Keith’s counsel that if he had had this evidence and had it been his decision to make, he would not have permitted her to testify.²⁵⁷ Keith’s motion was denied, and on June 26, 2017, the Court of Appeals for the Third Appellate District affirmed.²⁵⁸

ii. 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. 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.²⁵⁹

In a comprehensive book about Ogrod’s case published in 2017, *The Trials of Walter Ogrod*, Tom Lowenstein presented a harrowing account – including the Philadelphia District Attorney’s office’s long opposition to 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.a. 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.”²⁶⁰

iii. 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

²⁵⁶ *Governor Removes Ohio Man From Death Row, Reduces Sentence*, INNOCENCE PROJECT, Sept. 2, 2010.

²⁵⁷ Motion for New Trial Based on Newly Discovered Evidence and/or Post-conviction Relief Under Ohio Rev. Code § 2953.23 at 3, *State v. Keith*, Case No. 94 CR 0042 (Ohio Ct. Com. Pl. filed Oct. 28, 2016), <http://www.otse.org/wp-content/uploads/2016/11/Mtn.-for-New-Trial-Based-on-New-Evidence.pdf>; see also Peter Krouse, *Former death-row inmate Kevin Keith seeks new trial, cites testimony of “mentally unstable” BCI agent*, CLEV.COM, Dec. 27, 2016.

²⁵⁸ *State v. Keith*, No. 3-17-01, 2017 WL 2729625 (Ohio Ct. App. June 26, 2017), *cert. denied*, 138 S. Ct. 2575 (2018).

²⁵⁹ Will Bunch, *A death row inmate, a murder victim’s son, and a 16-year quest for justice*, THE INQUIRER, Mar. 30, 2017.

²⁶⁰ THOMAS LOWENSTEIN, *THE TRIALS OF WALTER OGDOD* (2017).

Brown, and on bitemark “expert” testimony that Brown’s wrist had a bitemark matching the girl’s bite pattern.²⁶¹

The court issued its October 2017 order without requiring an evidentiary hearing on the DNA results. It described its decision as “extraordinary and extremely rare in the context of a petition for leave to pursue post-conviction collateral relief.”²⁶² The motion to reconsider was denied in early 2018.

iv. 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.²⁶³

v. 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.²⁶⁴

On May 2, 2013, the Ohio Supreme Court held that a judge must reconsider whether to allow DNA testing.²⁶⁵ But new DNA tests on a cigarette butt found in the driveway at the

²⁶¹ Therese Apel, *Death row inmate’s triple killing conviction overturned*, CLARION-LEDGER (Jackson), Oct. 26, 2017.

²⁶² *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.

²⁶³ *Commonwealth v. Dougherty*, No. 1648 EDA 2016, 2017 WL 4949000 (Pa. Super. Ct. Oct. 31, 2017).

²⁶⁴ Andrew Cohen, *Is Ohio Keeping Another Innocent Man on Death Row?*, THE ATLANTIC, Jan. 31, 2012.

²⁶⁵ *State v. Noling*, 992 N.E.2d 1095 (Ohio 2013).

victims' home²⁶⁶ did not produce "hits." Noling's lawyers then sought DNA testing of other items by a private lab.

On March 6, 2018, the Ohio Supreme Court held that while Noling could have the full DNA profile from the cigarette butt, his counsel could not have DNA testing done on shell casings from a handgun the killer would probably have touched while handling it and jewelry boxes that the killer probably handled. The court deferred to the state's lab's view that too many people had touched these things to make DNA testing possible.²⁶⁷

vi. Rodney Reed

In November 2014, *The Intercept* ran a long analysis of Rodney Reed's case, titled *Is Texas Getting Ready to Kill An Innocent Man?*²⁶⁸ 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."²⁶⁹ Certiorari was denied on June 25, 2018.

Mr. Reed continues to have a habeas appeal in the Court of Criminal Appeals and a stay of execution. There was an evidentiary hearing in October 2017.²⁷⁰ On June 26, 2018, Reed filed a Supplemental Application for Writ of Habeas Corpus in the Court of Criminal Appeals and the 21st Judicial District Court, Bastrop County, Texas.²⁷¹ The Innocence Project said this supplemental application included recantations from the three key state experts at trial who had provided a crucial link between Reed's DNA and the murder – a link used to discredit Reed's assertion of a consensual sexual relationship with the victim.²⁷²

vii. Julius Jones

The Last Defense, an ABC documentary series, devoted three episodes in July 2018 to the case of Oklahoma death row inmate Julius Jones. The series raised serious questions about the handling of Jones' case and about his guilt.²⁷³

viii. Kevin Cooper

²⁶⁶ Ed Meyer, *Death row inmate Noling wins new DNA tests of cigarette evidence in 1990 double murder*, BEACON J. (Ohio), Dec. 19, 2013.

²⁶⁷ *State v. Noling*, 101 N.E.3d 435 (Ohio 2018).

²⁶⁸ Jordan Smith, *Is Texas Getting Ready to Kill An Innocent Man?*, THE INTERCEPT, Nov. 17, 2014.

²⁶⁹ *Reed v. State*, 541 S.W.3d 759, 780 (Tex. Crim. App. 2017), *cert. denied*, 138 S. Ct. 2675 (2018).

²⁷⁰ Chuck Lindell, *Rodney Reed hearing ends with sharp disagreements aired*, AUSTIN AM.-STATESMAN, Oct. 13, 2017.

²⁷¹ Supplemental Application for Writ of Habeas Corpus, *Ex parte Reed*, Writ Cause No. WR-50,961-08, Trial Cause No. 8701 (Tex. Crim. App. & Tex. Dist. Ct. filed June 26, 2018), https://www.innocenceproject.org/wp-content/uploads/2018/06/Reed_Supp-11.073-Writ_6-26-18.pdf.

²⁷² Innocence Project, Press Release, *Expert Witnesses Admit Error in Case of Rodney Reed who has Served 22 Years on Texas Death Row, Prompting New Appeal*, June 27, 2018, <https://www.innocenceproject.org/expert-witnesses-admit-error-in-case-of-rodney-reed-who-has-served-22-years-on-texas-death-row-prompting-new-appeal/>.

²⁷³ Patrick B. McGuigan & Darla Shelden, *ABC's "The Last Defense" examines Oklahoma death row inmate Julius Jones' case*, CITY SENTINEL (Okla. City), July 6, 2018.

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.²⁷⁴

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."²⁷⁵ On December 24, 2018, shortly before leaving office, Governor Brown said he would order new DNA testing of four pieces of evidence.²⁷⁶ On February 22, 2019, Brown's successor, Governor Gavin Newsom, issued an executive order expanding the scope of the new DNA testing, to include additional evidence.²⁷⁷

d. 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.²⁷⁸ The authors determined, after a five-year investigation, that DeLuna had been executed solely based on contradictory eyewitness accounts that mistakenly identified him, whereas the witnesses actually saw his "spitting image," Hernandez. The authors said law enforcement's investigation was fatally flawed by many mistakes and omissions, including not following up on clues. Whereas DeLuna's court-appointed lawyer ineptly said it was unlikely anyone named Hernandez was involved and the lead prosecutor said Hernandez was a "phantom" made up by DeLuna, Hernandez did exist, had a history of using a knife in attacking people, and was once jailed for killing a woman using the same knife used in this case's killing.²⁷⁹

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

²⁷⁴ *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.

²⁷⁵ 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.

²⁷⁶ Kathleen Ronayne & Don Thompson, *Governor Brown Orders New DNA Testing in 35-Year-Old Kevin Cooper Murder Case*, NBC4 NEWS (L.A.), Dec. 24, 2018.

²⁷⁷ Alejandra Reyes-Velarde, *Gov. Newsom orders additional DNA testing in case of death row inmate Kevin Cooper*, L.A. TIMES, Feb. 22, 2019.

²⁷⁸ 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).

²⁷⁹ 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.37ab293d08346aa6f7c1d1bfdd5758f.491>.

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."²⁸⁰

ii. *Ruben Cantu*

Texas executed Ruben Cantu in 1993 for a 1984 murder. Sam Millsap, Jr., who had a perfect record when seeking death sentences as San Antonio's district attorney, never had qualms over his cases until the *Houston Chronicle's* Lise Olsen interviewed him in 2005 and raised serious questions about Cantu's guilt. Millsap was stunned by Olsen's findings. He felt he had over-relied on a purported eyewitness identification and later said that if he could redo things, he would not seek the death penalty for Cantu. Olsen's story led then-District Attorney Susan Reed to re-examine the case in 2007. Reed concluded that Cantu was guilty. Millsap now advocates the death penalty's abolition due to systemic imperfections. Lise Olsen "feels little vindication for her work," since "Ruben Cantu is dead. There is no victory in this story."²⁸¹ 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, the Justice Department Inspector General's office reported in July 2014 that Texas's 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 based principally on a strand of hair recovered from the crime scene – hair the prosecution asserted was his. That was the only *physical* evidence supposedly tying him to the scene. The only other evidence was later-recanted testimony by an alleged accomplice. Under Texas law, that testimony was insufficient for conviction, absent independent corroborating evidence.

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

²⁸⁰ Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, THE ATLANTIC, May 14, 2012.

²⁸¹ Stephanie Gallman, *From seeking the death penalty to fighting it*, CNN, Aug. 7, 2015.

life.” The *Texas Observer* called this “a highly questionable execution – a case that may not have resulted in a conviction were it tried with modern forensic science.”²⁸²

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, and sometimes “information . . . [possibly] material and even favorable to the defense . . . was withheld or misrepresented.” They recommended that 190 criminal cases in which SBI reports were, at best, incomplete be thoroughly reviewed. These included three cases where defendants who had confessed 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.²⁸³

Counsel for John Hardy Rose, executed on November 30, 2001, said that if they had known about the undisclosed negative results from a test for blood, Rose’s sentence might not have been death – since there already was a question whether the crime was premeditated or impulsive. Desmond Carter, executed on December 10, 2002, had inexperienced counsel who assumed that the SBI lab evidence was accurate. Counsel for Joseph Timothy Keel, executed on November 7, 2003, began considering the undisclosed evidence’s possible impact but said, “[T]here are no do-overs with the death penalty. We can’t go back and fix these errors.”²⁸⁴

viii. Cameron T. Willingham

Controversy over Texas’s 2004 execution of Cameron T. Willingham for arson/murder continues. Governor Rick Perry failed in 2004 to grant a 30-day reprieve despite – as later revealed – receiving material from a renowned arson expert (retained by Willingham’s lawyers) who found major problems with the prosecution’s trial evidence about arson. It was unclear whether Governor Perry reviewed that material. In 2009, shortly before the State Forensic Science Commission was to hold hearings at which its arson expert, Craig L. Beyler, was to testify, Governor Perry replaced the Commission’s chair and two other members. The hearings were cancelled.²⁸⁵ 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.”²⁸⁶

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

²⁸² Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEX. OBSERVER, Nov. 11, 2010.

²⁸³ Associated Press, *Outside Review Finds Flaws in 190 SBI Prosecutions*, Aug. 19, 2010, <http://www.wral.com/news/state/story/8153666/>.

²⁸⁴ Joseph Neff & Mandy Locke, *For executed men, audit’s too late*, NEWS & OBSERVER, Aug. 19, 2010.

²⁸⁵ James C. McKinley, Jr., *Controversy Builds in Texas Over an Execution*, N.Y. TIMES, Oct. 20, 2009.

²⁸⁶ Steve Mills, *Cameron Todd Willingham case: Expert Says Fire for Which Father Was Executed Was Not Arson*, CHI. TRIB., Aug. 25, 2009.

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."²⁸⁷ Texas Attorney General Greg Abbott ruled in July 2011 that the Commission could not investigate evidence collected or tested prior to 2005.²⁸⁸ 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.²⁸⁹

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.²⁹⁰

On March 9, 2015, the *Washington Post* reported on a newly discovered letter from Webb to Jackson imploring Jackson to follow through on a promise to get Webb's conviction downgraded. Within days after getting that letter, Jackson secured an order from Willingham's trial judge that changed "the record of Webb's robbery conviction to make him immediately eligible for parole." The *Post* reported that Jackson never disclosed to the defense even the possibility of a deal with Webb. The *Post* also reported that Jackson had recently admitted – after long denying it – that he had intervened to try to get Webb's conviction changed to be for the lower charge. It further reported that in two days of recent interviews, Webb said Jackson had threatened him with a life sentence if he did not implicate Willingham. Webb also reportedly said, "I did not want to see Willingham go to death row and die for something I damn well knew was a lie and something I didn't initiate." He said he had been forced into lying by Jackson's pressure.²⁹¹

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

²⁸⁷ 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.

²⁸⁸ Claire Cardona, *Forensic Science Panel Recommends Arson Probe*, TEX. TRIB., Oct. 28, 2011.

²⁸⁹ Chuck Lindell, *Willingham inquiry ends, but effects linger*, AUSTIN AM.-STATESMAN, Oct. 28, 2011.

²⁹⁰ Jason Heid, *Innocence Project Asks Governor Perry to Pardon Cameron Todd Willingham*, D MAG. FRONT/BURNER BLOG, Sept. 27, 2013.

²⁹¹ Maurice Possley, *A dad was executed for deaths of his 3 girls. Now a letter casts more doubts*, WASH. POST, Mar. 9, 2015.

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.”²⁹² The district judge found that Davis had not met that extremely high burden.²⁹³ And he questioned the credibility of several witnesses who had, in whole or part, recanted trial testimony before the hearing.²⁹⁴

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 in Section c.v.). 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.”²⁹⁵

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

Arthur’s counsel then sought “more advanced DNA testing on the wig” that Gilbert’s statement said Arthur used during the killing. Arthur’s counsel, saying all agreed the perpetrator wore this wig during the crime, offered to pay for the additional DNA testing. The State said this would be no better than prior testing and that the wig had no additional DNA that could be tested.²⁹⁶ On January 6, 2014, the Eleventh Circuit held that Arthur had not shown an “extraordinary circumstance” permitting him to seek federal court relief again.²⁹⁷

On January 23, 2017, the Supreme Court denied certiorari on Arthur’s challenge to Alabama’s method of sentencing.²⁹⁸ Approximately one month later, on February 21, the Court denied certiorari on Arthur’s lethal injection challenge.²⁹⁹ 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, 2017.³⁰⁰

²⁹² *In re Davis*, 557 U.S. 952, 952 (2009) (mem.).

²⁹³ Greg Bluestein, Associated Press, *Ga. execution leaves debate over guilt unresolved*, Sept. 22, 2011, <https://www.highbeam.com/doc/1A1-1d250a317f5743e7a54e67be56571e86.html>.

²⁹⁴ *In re Davis*, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

²⁹⁵ Andrew Cohen, *Another Death Row Debacle: The Case Against Thomas Arthur*, THE ATLANTIC, Feb. 27, 2012.

²⁹⁶ Radley Balko, Opinion, *The outrageous conviction of Montez Spradley*, WASH. POST, Sept. 21, 2015.

²⁹⁷ *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014).

²⁹⁸ *Arthur v. Alabama*, 137 S. Ct. 831 (2017) (mem.).

²⁹⁹ *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (mem.).

³⁰⁰ Kent Faulk, *Alabama executes Tommy Arthur*, AL.COM, May 26, 2017.

6. 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.³⁰¹

b. Study Finding Racial Disparities Begin with Investigation and Arrests

In October 2018, Columbia Law School Professor Jeffrey Fagan and NYU Professor Amanda Geller reported the results of their analyses of every homicide recorded in the FBI's Supplementary Homicide Reports from 1976 to 2009. They found that suspects were arrested significantly more often when victims were white than when they were African American. These disparities at the arrest stage helped lead to racial disparities in capital punishment by the race of the victim.³⁰²

c. Batson and Swain Violations

i. North Carolina

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

The North Carolina state appellate courts have done nothing to prevent prosecutors from striking minority jurors based on race. In 30 years, and in over 100 cases raising the *Batson* issue, the courts of appeals in North Carolina have never reversed a case because of discrimination against a minority juror. Remarkably, North Carolina is the only state in the American South with such a stark record of indifference to racial bias in jury selection.³⁰³

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

On May 23, 2016, the Supreme Court dealt with blatant evidence of intentional violations of *Batson v. Kentucky*³⁰⁴ by the Georgia prosecutors – District Attorney Stephen

³⁰¹ Glenn L. Pierce et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. CRIM. L. & CRIMINOLOGY 733 (2017).

³⁰² Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides* (Columbia Pub. Law Research Paper No. 14-593, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202470.

³⁰³ James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, THE CHAMPION, June 2018, at 28.

³⁰⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986).

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.”³⁰⁵ Chief Justice Roberts wrote the majority opinion, for six members of the Court. Justice Alito wrote a concurrence, and Justice Thomas dissented.

Infuriated by the State’s indignant refusal to admit what its file made obvious, and by 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 struck [two jurors] Two peremptory strikes on the basis of race are two more than the Constitution allows.”³⁰⁶

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

One of the two prosecutors found to have violated *Batson* in *Foster*, Douglas Pullen, was also involved in what Senior Judge John D. Allen found on January 10, 2019 had been systematic, intentional discrimination against potential African American jurors by Muscogee County, Georgia prosecutors in all seven capital trials with African American defendants from 1975-1979.³⁰⁷ Although neither prosecutor was named in the opinion, trial transcripts show that Pullen, then Assistant District Attorney, and District Attorney William Smith were the prosecutors at the trial of Johnny Lee Gates (whose case Judge Allen was considering). Judge Allen said that one or both of these prosecutors were involved in all seven cases. Judge Allen held that the *Swain* claim of Johnny Lee Gates (to whom he granted a new trial due to innocence issues (discussed above in Section 5.b.xv.)), had been procedurally defaulted.

But Judge Allen was so troubled by what he found in the prosecutors’ notes and other evidence, including their closing arguments, that he devoted ten pages of his decision to detailing what the prosecutors had done – and included several of the prosecutors’ notes in the decision. He found the evidence of racial discriminatory intent was “overwhelming.” Among many other things, the prosecutors’ notes describe potential African American jurors as “slow,” “old+ignorant,” “cocky,” “con artist,” “hostile,” and “fat.” The prosecutors also regularly ranked African Americans (including all four in Gates’ case) as “1” on a scale of 1 to 5 (with 1 being the worst) with no explanation, whereas they ranked only 1 of the 43 white prospective jurors in Gates’ case as “1” – explaining that he opposed capital punishment. As

³⁰⁵ *Foster v. Chatman*, 136 S. Ct. 1737, 1744 (2016).

³⁰⁶ *Id.* at 1755.

³⁰⁷ *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct. Jan. 10, 2019), <https://deathpenaltyinfo.org/files/pdf/GatesJohnnyLeeNewTrialDecision2019-01-10.pdf>.

noted above, Gates was sentenced to death, although after a mistrial in 2003 at a trial regarding his intellectual disability, his sentence became LWOP.³⁰⁸

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

iv. Curtis Flowers Back in Supreme Court After Being Denied Relief on Remand, and Two Other Foster Remands

On June 20, 2016, the Supreme Court granted certiorari, vacated the prior decisions, and remanded for consideration in light of *Foster* three cases in three other states in which prosecutors' peremptory challenges had removed black prospective jurors.³⁰⁹

In *Floyd v. Alabama*, Floyd lost on remand (with Judge Jabari, concurring, saying that the circumstances of Floyd's raising the claim had been unusual), and certiorari was denied. In *Williams v. Louisiana*, the Louisiana Supreme Court further remanded the case so that there would be a proper consideration regarding the *Batson* claim.

In *Flowers v. Mississippi*, the Court granted certiorari on November 2, 2018, after Mr. Flowers was denied relief on a remand made in light of *Floyd*. Earlier, in June 2018, APM Reports revealed that Mississippi Fifth Circuit Court District Attorney Doug Evans has disproportionately excluded African Americans from juries for over a quarter of a century. This included all six prior trials of Curtis Flowers.³¹⁰

The Supreme Court oral argument in *Flowers v. Mississippi* took place on March 20, 2019. The *Los Angeles Times*' veteran Supreme Court reporter, David Savage, wrote that the "Supreme Court justices sounded ready . . . to overturn a Mississippi murder conviction because of racial bias in selecting jurors." Savage said "the only question for the justices seemed to be whether to focus narrowly on the jury in the last trial or more broadly on the pattern of racial discrimination that played out over all six" trials. The Court's newest member, Justice Kavanaugh, pointed out that District Attorney Evans moved to strike 41 of the 42 prospective jurors in the six trials and asked, "How do you look at that and not come away thinking" that Evans engaged in blatant racial bias?³¹¹

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

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

³⁰⁸ Bill Rankin, *Georgia judge orders new trial in 1976 case that sent man to death row*, ATLANTA J.-CONST., Jan. 17, 2019.

³⁰⁹ *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.). 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.

³¹⁰ *In the Dark: Season Two* (pts. 1-18), APM REP., <https://www.apmreports.org/in-the-dark/season-two> (last visited Jan. 31, 2019).

³¹¹ David G. Savage, *Supreme Court appears set to overturn Mississippi murder case based on racial bias*, L.A. TIMES, Mar. 20, 2019.

Chief Justice Roberts, writing for the Court, held that Texas death row inmate Duane Buck had received unconstitutionally ineffective assistance of counsel. The ineffectiveness consisted of the defense’s presenting an “expert” witness, Dr. Walter Quijano, who – although saying that Buck would not be likely to act dangerously in the future – testified that the fact that Buck was black meant that he was likely to be more dangerous in the future than were he not black. At Buck’s sentencing phase, the State relied on the “expert’s” testimony as showing that there was no assurance that Buck would not pose a future danger. During its two days of deliberations, the jury asked in one of its four notes for “the psychology reports” in the record – one of which was Dr. Quijano’s.³¹²

The Court held that there was a reasonable probability that one or more jurors would have had a reasonable doubt about Buck’s future dangerousness if Dr. Quijano had not testified. The Court reasoned as follows: The key issue at the sentencing proceeding was future dangerousness – so, the jury had to do some speculating as to the future. A factor against a finding of future dangerousness was that if Buck were to serve life in prison, he would be very unlikely to be in a romantic heterosexual relationship – the context of his previously violent crimes. “But,” the Court said, “one thing would never change: the color of Buck’s skin. Buck would always be black. And according to Dr. Quijano, that immutable characteristic carried with it an ‘[i]ncreased probability’ of future violence.” This was “hard statistical evidence – from an expert – to guide an otherwise speculative inquiry.” The Court described this evidence as “potent” because it “appealed to a powerful racial stereotype – that of black men as ‘violence prone.’”³¹³

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

[O]ur holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.³¹⁴

This was even more troubling, the Court said, “because it concerned race,” as to which discrimination is particularly egregious in the criminal justice system. Consideration of race in that context “injures not just the defendant, but ‘the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.’”³¹⁵ This and other language in the Chief Justice’s majority decision is inconsistent with the logic and wording of the Court’s *McCleskey* holding 20 years earlier.

³¹² *Buck v. Davis*, 137 S. Ct. 759, 768-70 (2017).

³¹³ *Id.* at 776 (alteration in original) (citation omitted).

³¹⁴ *Id.* at 778.

³¹⁵ *Id.* (alterations in original) (citation omitted).

- ii. Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (*per curiam*); *Tharpe v. Ford*, No. 18-6819, 2019 WL 1231746 (U.S. Mar. 18, 2019) (*mem.*)

Georgia death row inmate Keith Tharpe attempted to get a stay of execution despite not having raised his claim when Georgia procedure said he should have raised it. His claim was supported by a never-recanted sworn affidavit by a now-deceased juror from his trial, Barney Gattie. The Supreme Court said that the Eleventh Circuit should have focused on the real basis for the state court's default holding: the state court's belief that Gattie's own vote for death had not been affected by Tharpe's race. The Court said Gattie's "remarkable affidavit . . . presents a strong factual basis" for concluding that Gattie's vote *was* affected by Tharpe's race. Indeed, the affidavit can hardly be read any other way. Among other things in the affidavit, Gattie referred to Tharpe using what is sometimes referred to as the "N" word; questioned whether African Americans "even have souls"; and said that some jurors had voted for the death penalty in order to make Tharpe an example to blacks who kill other blacks. The Court held that reasonable jurists could debate whether the state court ruling had been shown to be wrong by clear and convincing evidence. The Court remanded for further consideration of whether to issue a certificate of appealability.³¹⁶ In August 2018, the Eleventh Circuit declined to consider the merits of Tharpe's claim, holding that consideration of the claim was precluded by Tharpe's failure to raise the claim in state courts.³¹⁷

On March 18, 2019, the Court denied certiorari. Justice Sotomayor, although concurring in the certiorari denial, wrote separately "because I am profoundly troubled by the underlying facts of this case." She said that "we should not look away from the magnitude of the potential injustice that procedural barriers are shielding from judicial review." She stated that "Gattie's sentiments – and the fact that they went unexposed for so long, evading review on the merits – amount to an arresting demonstration that racism can and does seep into the jury system."³¹⁸

e. Biasing Effects of Death Qualification

Professors Monica Lynch and Craig Haney performed two surveys of Solano County, California jurors, done 18 months apart, to explore whether and if so how differences between people of different races affect how capital juries are selected. They found that the process of death qualification, in which potential jurors who would automatically vote either against or in favor of the death penalty, results in unrepresentative juries from which African Americans are disproportionately excluded and biases the selected juries in favor of conviction and death sentences.³¹⁹ As death penalty support has dropped over time, the gap between the views of whites and the views of African Americans and women has grown, as has the distorting impact of death qualification. The authors also noted that the death qualification process gave prosecutors a facially race-neutral reason for disproportionately excluding African-American jurors. But there were extremely few circuit court holdings that the Fifth Circuit could put on the road towards being remanded to their trial courts.

³¹⁶ *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (*per curiam*).

³¹⁷ *Tharpe v. Warden*, 898 F.3d 1342 (11th Cir. 2018).

³¹⁸ *Tharpe v. Ford*, No. 18-6819, 2019 WL 1231746, at *1, *2 (U.S. Mar. 18, 2019) (*mem.*) (Sotomayor, J., concurring).

³¹⁹ Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148 (2018).

Moreover, a majority of white jurors – and particularly white male jurors – disregarded most mitigating evidence, and many of them thought that some of the mitigating factors should be weighted in favor of imposing the death penalty. White respondents also “were significantly more receptive to aggravating evidence and were more inclined to weigh these specific items in favor of a death sentence compared to African American respondents.” The process, they said, “creat[es] a jury whose members are unusually hostile to mitigation,” which may “functionally undermine” the fair consideration of a capital defendant’s case in mitigation. “This risk,” the authors wrote, “is particularly high in cases involving African American defendants, especially where white men dominate the jury.” They said the combined impact is that, “[i]n a county in California where support for and opposition to capital punishment are beginning to approach parity, death qualification still has the potential to produce jury pools that are significantly more likely to favor the death penalty.”³²⁰

7. *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.”³²¹ 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:

[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.³²²

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

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.

³²⁰ *Id.* at 165, 168, 169.

³²¹ *E.g., Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

³²² *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.

In 2017, the Court began to act against a particularly egregious violation of *Atkins*: Texas’s unique and anomalous way of determining intellectual disability claims, which the medical community did not support. On March 28, 2017, in *Moore v. Texas*, the Court held Texas’s standard unconstitutional and remanded the case to the Texas Court of Criminal Appeals for a new determination as to whether Moore was intellectually disabled.³²³ On November 1, 2017, Harris County prosecutors filed a brief acknowledging that Moore came within the established intellectual disability standard and accordingly could not be executed.³²⁴ Nevertheless, the Texas Court of Criminal Appeals held again that Moore did not have intellectual disability.³²⁵

On February 19, 2019, the Supreme Court granted certiorari and summarily reversed. The Court said the Texas Court of Criminal Appeals had in “too many instances” repeated “with small variations . . . the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion.” Indeed, the Court stated, despite the Texas Court of Criminal Appeals’ saying it was abandoning the evidentiary factors upon which it had long relied in denying intellectual disability claims, “it seems to have used many of those factors in reaching its conclusion.” The Court concluded that after removing the old factors from the lower court’s opinion, there was not enough on the basis of which to reach a different conclusion than that reached by the trial court. Accordingly, the Court found that, “on the basis of the trial court record, Moore has shown he is a person with intellectual disability.”³²⁶

Chief Justice Roberts, who had dissented from the Court’s 2017 *Moore* decision, stated in a concurrence that he still felt the Court’s 2017 articulation of how to decide intellectual disability claims “lacked clarity.” But while that could present a problem in other cases, he said it did not present a problem in deciding *this* case. He stated that “it is easy to see that the Texas Court of Criminal Appeals misapplied” the 2017 holding in Moore’s case. Accordingly, the lower court’s decision did not “pass muster.”³²⁷ The Chief Justice joined in the Court’s *per curiam* opinion – as apparently, *sub silentio*, did Justice Kavanaugh. The other three dissenters from the Court’s 2017 decision dissented, asserting that the Court had engaged improperly in “a foray into factfinding.”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”

³²³ *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)).

³²⁴ Respondent’s Brief at 27-28, *Moore v. State*, No. 0314483 (Tex. Crim. App. filed Nov. 1, 2017), <https://deathpenaltyinfo.org/files/pdf/ExParteMooreCCASStatesBrief.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/ExParteMooreCCAAmicusBriefTXDPAAssessmentTeam.pdf>.

³²⁵ *Ex parte Moore*, 548 S.W.3d 552, 573 (Tex. Crim. App. 2018), *rev’d*, *Moore v. Texas*, No. 18-443, 2019 WL 659798 (U.S. Feb. 19, 2019).

³²⁶ *Moore*, 2019 WL 659798, at *3, *4, *5 (per curiam).

³²⁷ *Id.* at *5 (Robert, C.J., concurring).

³²⁸ *Id.* at *7 (Alito, J., dissenting, joined by Thomas and Gorsuch, JJ.).

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

At the August 2, 2018 ABA program, Meredith Martin Rountree elaborated on the pernicious effects of permitting people to "volunteer" for execution. She said approximately 10% of those executed since *Gregg* have been "volunteers." This means that anything unconstitutional about their convictions or death sentences was most likely never reviewed. That, in turn, lessens confidence that capital punishment is applied so uniformly that only the worst of the worst are executed.³³⁰

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 injury," and at least six apparently "suffer from a mental illness."³³¹ 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."³³²

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 sentences declined by over two-thirds in the next decade. As DPIC wrote, there is a

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

³³⁰ ABA Conference on the Death Penalty, *supra* note 117, at 23 (remarks of Meredith Martin Rountree).

³³¹ FAIR PUNISHMENT PROJECT, PRISONERS ON OHIO'S EXECUTION LIST DEFINED BY INTELLECTUAL IMPAIRMENT, MENTAL ILLNESS, TRAUMA, AND YOUNG AGE (2017).

³³² Karen Kasler, *Harvard Report Finds Majority of Ohio Death Row Inmates Likely Have Mental Impairments*, WKSU RADIO (Kent State Univ.), Aug. 30, 2017.

good chance many of those scheduled to be executed in the next three years might have received LWOP if that had been an option, in cases with mitigating “evidence of intellectual disability, mental illness, or behavioral problems arising from chronic abuse and trauma.”³³³

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

In many cases, sentencers *have* considered serious mental illness – but as aggravating. This is often due to jurors’ implicit biases, compounded by misleading or otherwise inadequate jury instructions.³³⁴ Following trial, procedural obstacles or unreasonable burdens often doom efforts to seek relief. Moreover, in clemency proceedings, serious mental illness is usually deemed unimportant.

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

i. Policies Supported by Leading Professional Organizations

The ABA, American Psychiatric Association, and American Psychological Association all have three policies on mental disability and capital punishment.³³⁵ The first would implement *Atkins* to comport with the AAIDD and American Psychiatric Association positions. It would also exempt from execution anyone with dementia or traumatic injury at the time of the crime. These disabilities have very similar impacts as intellectual disability but often do not come within its definition since they always (dementia) or usually (head injury) arise after age 18.

The second policy would prohibit executing someone with severe mental disability where demonstrated impairment of mental and emotional functioning at the time of the offense makes execution disproportionate to culpability.³³⁶

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

³³³ *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).

³³⁴ 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).

³³⁵ *Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006).

³³⁶ 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).

execution.³³⁷ 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.³³⁸

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.³³⁹ This has not yet led to the enactment of legislation in Ohio, but efforts there continue.

In December 2016, the ABA Death Penalty Due Process Review Project's Severe Mental Illness Initiative issued a thorough report, *Severe Mental Illness and the Death Penalty*, regarding how mental illness is now dealt with vis-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.³⁴⁰ 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.³⁴¹ A month earlier, former Tennessee Attorney General W.J. Michael Cody reached the same conclusion in an op-ed in the *Commercial Appeal*.³⁴²

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."³⁴³ 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

³³⁷ For detailed discussion of the third policy, see *Recommendations and Report*, *supra* note 335, and Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005).

³³⁸ *Ryan v. Gonzales*, 133 S. Ct. 696, 708-09 (2013).

³³⁹ JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY, FINAL REPORT & RECOMMENDATIONS, at 6 (2014).

³⁴⁰ ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016).

³⁴¹ Bob Taft & Joe Kernan, Opinion, *End inhumane capital punishment for mentally ill*, THE BLADE (Toledo), Mar. 28, 2017.

³⁴² W.J. Michael Cody, Opinion, *Exclude mentally ill defendants from death penalty*, COM. APPEAL, Feb. 12, 2017.

³⁴³ Joseph Thornton, Opinion, *Former Florida Death Row doctor with a Veterans' Day message*, FLA. POL., Nov. 10, 2017.

(cont'd)

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.”³⁴⁴

On January 17, 2019, Virginia’s State Senate passed a bill that would preclude capital punishment in the circumstances set forth in the second prong of the joint policy adopted by the ABA and the two APAs. The bill passed by a vote of 23-17, with four Republicans and all Democrats (including some strong death penalty supporters) voting in favor. The bill next moves to the Virginia House of Delegates, which Republicans control by a proportionately lower margin than they control the State Senate.³⁴⁵

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

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.

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

Usually, innocence-based postconviction and clemency efforts fail. One systemic factor involves situations in which a death row inmate receives inadequate representation from trial lawyers who do not raise available attacks on the evidence purporting to show guilt, and/or the trial prosecution presents questionable evidence or withholds from the defense evidence that might cast doubt on guilt. Ordinarily, such issues would be raised first in the initial state postconviction proceeding. Federal constitutional issues raised unsuccessfully in that proceeding may be raised in federal habeas corpus, although the AEDPA has made it far more difficult to grant relief on meritorious constitutional claims.³⁴⁶

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

³⁴⁴ John Castellaw, Opinion, *Exclude mentally ill vets from death penalty*, COM. APPEAL, Jan. 2, 2018.

³⁴⁵ Laura Vozzella, *Bill to ban death penalty for severely mentally ill clears GOP-controlled Va. Senate*, WASH. POST, Jan. 17, 2019.

³⁴⁶ Pub. L. No. 104-132, 110 Stat. 1214.

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.”³⁴⁷ And when the issue is whether all constitutional prerequisites *to imposing the death penalty* exist, the appellate rulings to date hold that even meeting the daunting AEDPA standard is of no avail.

When it is either impossible to satisfy that provision of AEDPA or a court finds the provision inapplicable, a prisoner may attempt to secure relief by filing a petition to the Supreme Court for an original writ of habeas corpus. That is far more difficult to seek – as in *Davis*, where the Court required “evidence that could not have been obtained at the time of trial [to] clearly establish . . . innocence.”³⁴⁸ That standard can virtually never be met. Many who would not have been convicted if the new evidence had been presented cannot “clearly” prove their innocence via evidence that could not have been secured for the trial. As to a claim of “innocence of the death penalty,” for example where evidence that could not have been obtained for trial clearly establishes intellectual disability, the Court has not squarely said whether it might consider the claim even if the incredible *Davis* hurdle were met.

One of the few contexts in which some death row inmates have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt (as 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.³⁴⁹ 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.³⁵⁰

After Governor Greitens left office in disgrace on June 1, 2018, the Board heard new evidence and arguments from Williams’ attorneys in August 2018.

As discussed above (in Part I.B.5.b.xi.), on March 26, 2018, Ohio Governor John Kasich gave executive clemency to William T. Montgomery, who was scheduled to be executed

³⁴⁷ 28 U.S.C. § 2244(b)(2)(B)(ii).

³⁴⁸ *In re Davis*, 557 U.S. 952, 952 (2009) (mem.).

³⁴⁹ Exec. Order 17-20 (Mo. Aug. 22, 2017), <http://on.mo.gov/2vVU6Hj>.

³⁵⁰ Tricia Bushnell, *Greitens must delay Marcellus Williams execution to assure justice is served*, KAN. CITY STAR, Aug. 22, 2017.

on April 11 for two 1986 murders.³⁵¹ Phyllis Crocker, Dean of the University of Detroit Mercy School of Law, said: “At best, Montgomery was convicted on a false set of facts and at worst, he may be actually innocent. In death penalty cases there must be no doubt whatsoever. There is too much doubt to allow this execution.”³⁵²

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. 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.

ii. 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.³⁵³

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.³⁵⁴ 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.³⁵⁵

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. Experts agreed that he was not likely ever to be restored to competence to stand trial.³⁵⁶

³⁵¹ Provance, *Governor commutes death sentence*, *supra* note 236; Provance, *Parole board recommends clemency*, *supra* note 236.

³⁵² Phyllis L. Crocker, Opinion, *Next Ohio execution raises too much doubt*, THE BLADE (Toledo), Mar. 10, 2018.

³⁵³ Maurice Chammah, *How Obama Disappointed on the Death Penalty*, THE MARSHALL PROJECT, Jan. 18, 2017.

³⁵⁴ 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>; James L. White, *McGehee’s sentence commutation official*, HARRISON DAILY TIMES, Oct. 10, 2017.

³⁵⁵ Jessica Brand, *Arkansas Is About to Execute Eight Men in Eleven Days*, FAIR PUNISHMENT PROJECT, Mar. 30, 2017.

³⁵⁶ Andrew Cain, *McAuliffe commutes death sentence of killer found mentally incompetent to be executed*, RICHMOND TIMES-DISPATCH, Dec. 29, 2017.

On February 8, 2018, Ohio Governor John Kasich granted a reprieve to Raymond Tibbetts to allow time to consider defense counsel's failure to present mitigation that a juror said could have made a real difference. Then, on July 20, 2018, Kasich commuted Tibbetts' death sentence due to his having been abused as a child and because a juror had been misled about the use to which mitigation could be put.³⁵⁷

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.³⁵⁸

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

The cases discussed in the last few paragraphs are anomalous. More typical is the case of Jeffery Wood. In a letter made public in December 2017, Kerr County, Texas District Attorney Lucy Wilke supported clemency for Wood, whose conviction and death sentence she had secured almost two decades earlier. Although he had been the getaway driver, was not present when the murder occurred and denied knowing that his fellow robber would kill anyone, Wood was convicted and sentenced to death under the "law of parties," making him legally responsible for his fellow robber's actions. District Attorney Wilke pointed to Wood's non-participation in the killing, his IQ of 80, the highly dubious "expert" testimony that he would be dangerous in the future, and his history of non-violence. Signing the same letter were Chief of Police David Knight and District Court Judge N. Keith Williams, who was presiding over a challenge to the use of the "expert" testimony about future dangerousness.³⁵⁹

After 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 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.³⁶⁰ But on November 21, 2018 the Texas Court of Criminal Appeals (with two judges dissenting) reversed the district court and upheld Wood's death sentence.³⁶¹

iv. Potential Equitable Argument for Clemency

³⁵⁷ Jackie Borchardt, *Ohio governor delays execution of Raymond Tibbetts due to juror's concerns*, CLEV.COM, Feb. 8, 2018; DPIC 2018 YEAR END REPORT, *supra* note 1, at 7.

³⁵⁸ Jolie McCullough, *Minutes before execution, Texas Gov. Greg Abbott commutes the sentence of Thomas Whitaker*, TEX. TRIB., Feb. 22, 2018.

³⁵⁹ 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.

³⁶⁰ Keri Blakinger, *Court findings offer hope for death row inmate in case tainted by 'Dr. Death'*, HOUS. CHRON., Mar. 20, 2018.

³⁶¹ Hannah Wiley, *Texas Court of Criminal Appeals rules against death row inmate Jeff Wood*, TEX. TRIB., Nov. 21, 2018.

(cont'd)

On October 5, 2018, Tennessee Governor Bill Haslam denied clemency to Edmund Zagorski. Six trial jurors had stated in declarations that they would never have voted to sentence Zagorski to death if LWOP had been an option.³⁶²

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.³⁶³ Now that LWOP is – and is believed by many jurors to be – an alternative in which there is no chance of parole, many juries have voted for LWOP instead of the death penalty. This may happen most often when jurors have lingering doubt about guilt, or believe the defendant should be severely punished but not executed. As discussed early in this chapter, a major reason why 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.³⁶⁴ McGinty pointed to changes in Ohio law and in how he and his team now assessed potential death penalty cases. He said these changes “would likely have led a jury to recommend a sentence of life without the possibility of parole had that been an option.” But on July 16, 2013, the Parole Board voted 6-4 not to recommend clemency, and Governor Kasich denied clemency. Slagle was found hanged in his cell on August 3, 2013, three days before his execution date. He did not know about a recent revelation that the prosecutor’s office had been ready in 1988 to enter into a plea deal averting imposition of the death penalty.³⁶⁵

The Supreme Court has repeatedly limited the categories of cases in which capital punishment may be implemented, by pointing to “evolving standards of decency.” It seems utterly at odds with today’s standards of decency, and with actual prosecutorial and juror practices, plus improved performance by defense counsel in many jurisdictions, to execute a person for whom death most likely would *not* be sought or if sought would almost surely not be imposed if the exact same case were to arise today. A considerable majority of those now

³⁶² Steven Hale, *Haslam Denies Clemency for Edmund Zagorski*, NASHVILLE SCENE, Oct. 5, 2018.

³⁶³ Hannah Gorman, *The Jury System on Trial: Do Jurors Execute Justice?*, 15 AMICUS J. 13 (2006).

³⁶⁴ Robert Higgs, *Parole board recommends against clemency for murderer, despite urgings of Cuyahoga prosecutor*, CLEV. PLAIN DEALER, July 16, 2013.

³⁶⁵ Alan Johnson, *Death-row inmate who killed self didn’t know of new hope*, COLUMBUS DISPATCH, Aug. 6, 2013.

being executed most likely would not be sentenced to death if charged with the same crimes today.

This is most likely true of others on Tennessee's death row whose executions are set to occur in the wake of Edmund Zagorski's execution. Whereas only two men have been sentenced to death in Tennessee since 2013, Tennessee executed three people in 2018 and has scheduled four executions in 2019 and two in 2020.³⁶⁶

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.

A study prepared for the Oklahoma Commission by two criminal justice professors and a law professor from the University of Seattle found, consistent with every prior credible study they examined regarding other states, that when capital punishment is sought in Oklahoma, "significantly more time, effort, and costs [are incurred] on average, as compared 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.³⁶⁷

The Utah Commission on Civil and Social Justice issued a study in February 2018, that found, as did all the other reputable studies, that the capital punishment system is more expensive than a system without capital punishment.

II. SIGNIFICANT SUPREME COURT DEVELOPMENTS NOT DISCUSSED ABOVE

A. *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 of an appearance of bias due to the prosecutor's criminal investigation of 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 so the state court could determine if, under all the alleged circumstances, "the risk of bias was too high to be constitutionally tolerable."³⁶⁸

B. *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 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 made these findings in its guilt phase decision. Second, the

³⁶⁶ Schuppe, *supra* note 45.

³⁶⁷ 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 130, app. IB.

³⁶⁸ *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (*per curiam*).

Court said the Sixth Circuit had used the wrong test for the exception, and that the correct test was whether “but for a constitutional error, no reasonable jury would have found the [defendant] eligible for the death penalty.” The Court, in remanding, said “[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.”³⁶⁹

C. *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.”³⁷⁰ McWilliams had a history of many severe head injuries. The court appointed an expert who was a colleague of the State’s two 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. It was also only days before the sentencing that defense counsel got to see mental health records. 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 majority had not answered the question of whether the defendant was entitled to an expert who was a member of the defense team.³⁷¹

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

In *Martinez v. Ryan*³⁷² and *Trevino v. Thaler*,³⁷³ 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 this 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 the *Martinez/Trevino* exception might apply anyway. It 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.³⁷⁴

³⁶⁹ *Jenkins v. Hutton*, 137 S. Ct. 1769, 1772-73 (2017) (per curiam) (second alteration in original) (citation omitted).

³⁷⁰ *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017) (citation omitted).

³⁷¹ *Id.* at 1801-02 (Alito, J., dissenting).

³⁷² *Martinez v. Ryan*, 566 U.S. 1 (2012).

³⁷³ *Trevino v. Thaler*, 569 U.S. 413 (2013).

³⁷⁴ *Davila v. Davis*, 137 S. Ct. 2058, 2065-69 (2017).

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.³⁷⁵

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

The Court unanimously held that, under the Supreme Court holdings in *Martinez v. Ryan* and *Trevino v. Thaler*, a Texas death row inmate was entitled to develop and assert in a federal habeas corpus proceeding a claim that he had been denied his constitutional right to the effective assistance of counsel by his trial counsel's failure to investigate and then present in the trial's penalty phase substantial evidence regarding his mental health problems and the effects of drug and alcohol abuse. The Court said that Ayestas' state habeas counsel's failure to deal effectively with trial counsel's failures entitled Ayestas to develop and present these claims in the federal habeas proceeding.³⁷⁶

Federal habeas counsel sought, but was denied by the federal district court, investigative funding under 18 U.S.C. § 3599(f). The Court said that the district court had used an improper test in denying these funds. The proper inquiry is "whether a reasonable attorney would regard the services as sufficiently important" in light of factors the Court proceeded to discuss. The Court stressed that in exercising its discretion to determine whether the funding being sought was "reasonably necessary," a court should consider the potential merit of the claim the petitioner seeks to make, the likelihood that the requested services will "generate useful and admissible evidence," and the chance that the petitioner can overcome any procedural barriers.³⁷⁷

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

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

The Supreme Court addressed what deference federal courts should give to state court decisions where the decision of the highest state court to adjudicate the case does not include any reasoning. The Court held that in such instances, the federal courts should consider a reasoned lower state court decision that preceded the higher state court's summary dismissal and make a rebuttable presumption that the higher state court had adopted the lower state court's reasoning. The majority said that to rebut the presumption, the State had to show that the higher court relied or likely relied on other bases for the lower state court's decision – such as an argument the State made in the highest state court regarding another basis for affirming or that was obvious from the record.³⁷⁸

³⁷⁵ *Id.* at 2071-75 (Breyer, J., dissenting).

³⁷⁶ *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

³⁷⁷ *Id.* at 1093, 1094.

³⁷⁸ *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

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

Defendant McCoy strenuously complained to the trial judge about his counsel's concessions of his guilt – which the defendant denied in his own testimony – and to counsel's attempt in the penalty phase to persuade the jury to be merciful in view of McCoy's mental and emotional issues.³⁷⁹

By a 6-3 vote, the Court held that a defendant is entitled to insist that his counsel not concede his guilt, even where counsel is experienced and strongly feels that conceding guilt is the best way to avert a death sentence. The Court stressed that a defendant is entitled to determine the objectives of the defense, even if the objectives are to avoid a life sentence as not being “worth living” and to gamble on a “minuscule” chance that the jury will find him not guilty.³⁸⁰

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

On June 4, 2018, Justice Sotomayor, joined by Justice Ginsburg, dissented from the denial of Carlos Trevino's certiorari petition. Following the Court's remand of Mr. Trevino's case, the Fifth Circuit rejected his ineffective assistance of counsel claim, in which he asserted that his counsel should have uncovered and presented evidence of his fetal alcohol spectrum disorder and of his functioning at the intellectual level of someone with intellectual disability due to developmental delays and cognitive impairments. The Fifth Circuit, by a 2-1 vote, held that it was not ineffective to not present such evidence, because it could have been a “double-edged sword” by providing the jury a basis to find that if not executed he could be dangerous in the future.³⁸¹

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

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

On February 7, 2019, the Court vacated the Eleventh Circuit's stay of Alabama death row inmate Domineque Ray's execution, “[b]ecause Ray [had] waited until January 28, 2019 to seek relief” from an execution date that had been scheduled on November 6, 2018.³⁸²

Justice Kagan dissented, in an opinion in which Justices Ginsburg, Breyer and Sotomayor joined. Justice Kagan pointed out that the Eleventh Circuit had found “a substantial likelihood” that the prison was violating the First Amendment by denying Ray's request to have clergy of his faith, Islam, to be with him in the execution chamber, whereas the prison “regularly allows a Christian chaplain to be present in the execution chamber.” Justice Kagan said that the prison's policy, under which a death row inmate of any faith other than Christianity, “whether [it be] Islam, Judaism, or any other,” will be executed without “a minister of his own faith by his side,” violates the First Amendment's “core

³⁷⁹ *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

³⁸⁰ *Id.* at 1508.

³⁸¹ *Trevino v. Davis*, 138 S. Ct. 1793 (2018) (Sotomayor, J., dissenting from denial of writ of certiorari).

³⁸² *Dunn v. Ray*, 139 S. Ct. 661 (2019) (*mem.*).

principle of denominational neutrality.” Justice Kagan said that the State had offered no evidence to support its assertion that the prison’s policy was necessary to ensure prison security. Justice Kagan agreed with the Eleventh Circuit that Ray had raised his constitutional claim in a timely manner. It was only on January 23, five days before Ray filed his complaint, that the warden had denied Ray’s “request to have his imam by his side” during his execution. Justice Kagan said that the statute did not provide Ray with notice that his request would be denied and seemed to mean that such a request would be granted. “[T]he prison refused to give Ray a copy of its own practices and procedures” – which would have given him notice on the basis of which he could have raised a First Amendment claim. Instead of giving deference to the Eleventh Circuit, which desired full consideration of Ray’s claim, the Court “itself rejects the claim [albeit not the merits of the claim] – with little briefing and no argument – just so the State can meet its preferred execution date.”³⁸³

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

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

The Court ordered that Mr. Murphy’s execution be stayed “unless the State permits Murphy’s Buddhist spiritual advisor . . . to accompany Murphy in the execution chamber.”³⁸⁴ Justice Kavanaugh, writing separately, stated that “government discrimination against religion – in particular, discrimination against religious persons, religious organizations, and religious speech – violates the Constitution.”³⁸⁵

George Mason University Law Professor Ilya Somin provided the following pure speculation about the Court’s different decision in Murphy’s case than in Ray’s case. Professor Somin theorized that the justices “belatedly realized they had made a mistake; and not just any mistake, but one that inflicted real damage on their and the Court’s reputations. Presented with a chance to ‘correct’ their error and signal that they will not tolerate religious discrimination in death penalty administration, they were willing to bend over backwards to seize the opportunity, and not let it slip away.”³⁸⁶ Bending over backwards in a different direction, Texas quickly announced that only prison security staff could go with an inmate to the execution chamber — not a spiritual advisor of any faith.³⁸⁷

³⁸³ *Id.* at 661, 662 (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.).

³⁸⁴ *Murphy v. Collier*, 139 S. Ct. 1111, 1111 (2019) (mem.).

³⁸⁵ *Id.* (Kavanaugh, J., concurring).

³⁸⁶ Ilya Somin, *Supreme Court Stays Execution in Death Penalty/Religious Liberty Case*, REASON.COM: VOLOKH CONSPIRACY (Mar. 29, 2019).

³⁸⁷ *Texas Bans All Clergy From Death-Row Executions After Supreme Court Ruling*, DAILY BEAST, <https://www.thedailybeast.com/patrick-murphy-texas-bans-all-clergy-from-death-row-executions-after-supreme-court-ruling> (Apr. 4, 2019).

K. *Price v. Dunn*, No. 18-8766 (18A1044)(U.S. Apr. 12, 2019)

The discordancy between the Court's five most conservative justices and its four other justices regarding applications to stay, or to vacate stays of, impending executions deteriorated, at least in tone, on the night of Thursday, April 11, 2019 and the very early morning hours of Friday, April 12, 2019. The five-justice majority turned down Justice Breyer's request to wait a few more hours until the Court's regular Friday morning conference, at which they could have discussed in person Alabama's application to vacate the stays by federal circuit and district courts of Christopher L. Price's execution. The majority's short unsigned opinion said that Mr. Price had waited too long before challenging Alabama's three-drug protocol and before urging that nitrogen gas be used. In his dissent, issued at about 3 a.m., Justice Breyer said that Alabama's application had been dealt with arbitrarily, with unwarranted haste. This chain of events did not lead immediately to Mr. Price's execution, which Alabama postponed sometime during the night. Perhaps, upon reflection, the Court will seek to improve its ability to make reasoned decisions on serious constitutional issues.³⁸⁸

L. *Dunn v. Madison*, 138 S. Ct. 9 (2017) (*per curiam*); *Madison v. Alabama*, No. 17-7505 (U.S. Feb. 27, 2019)

In 2017, the Court reversed the Eleventh Circuit holding that Madison was incompetent to be executed and that the Alabama court's contrary decision had been unreasonable. Applying the AEDPA, the Court said that Madison's claim could not be granted because there was no clearly established law holding that a death row inmate's inability to recall committing the crime could make him incompetent to be executed.³⁸⁹ 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.³⁹⁰ 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.³⁹¹

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

³⁸⁸ Adam Liptak, *3 A.M. Dissent As Court Splits Over Execution*, N.Y. TIMES, Apr. 12, 2019, at A1, discussing *Price v. Dunn*, No. 18-8766(18A1044) (U.S. Apr. 12, 2019) (order denying application for stay of execution and petition for writ of certiorari), https://www.supremecourt.gov/orders/courtorders/041219zr_8mj9.pdf, and *Dunn v. Price*, No. 18A1053 (U.S. Apr. 12, 2019) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.), https://www.supremecourt.gov/opinions/18pdf/18a1053_omjp.pdf.

³⁸⁹ *Dunn v. Madison*, 138 S. Ct. 9, 11-12 (2017) (*per curiam*).

³⁹⁰ *Madison v. Commissioner*, 851 F.3d 1173, 1179 (11th Cir.), *rev'd sub nom. Dunn v. Madison*, 138 S. Ct. 9 (2017).

³⁹¹ *Dunn*, 138 S. Ct. at 12 (Ginsburg, J., dissenting, joined by Breyer and Sotomayor, JJ.).

State is seeking to execute him. The Court remanded for consideration of Madison's competency to be executed by the Alabama courts.³⁹²

III. ABA ACTIVITIES NOT DISCUSSED ABOVE

A. *ABA Amicus Briefs*

The ABA filed an amicus brief in *Ayestas v. Davis*, asking the Supreme Court to reverse – as it did – the Fifth Circuit's holding that before a postconviction counsel can be granted funding for investigation and experts, counsel must establish a “substantial need” for the funding. The ABA brief stated that the Fifth Circuit had created a “Catch 22”-like situation, since in the absence of funding, counsel would almost always find it impossible to show what the investigators and experts whom counsel lacked the funds to hire would have discovered and concluded.³⁹³

The ABA also filed an amicus brief in *McCoy v. Louisiana*. The ABA brief argued that counsel must respect a mentally competent client's right to make fundamental decisions regarding his or her case, including the decision on whether to concede or contest guilt.³⁹⁴

In November 2018, the ABA filed an amicus brief in *Moore v. Texas*. The ABA brief supported granting a writ of certiorari and summarily reversing the Texas Court of Criminal Appeals, which on remand in light of the Court's holding in *Moore v. Texas*³⁹⁵ again denied Moore's claim of intellectual disability. The ABA brief said the Texas Court of Criminal Appeals, by relying on many of the same criteria as in its original decision – criteria rejected in the Court's 2017 holding, had fundamentally failed to comply with the Court's mandate.³⁹⁶

B. *Representation Project*

The ABA Death Penalty Representation Project (the “Representation Project”) was created in 1986 to address a growing problem with the quality and availability of defense counsel for death row prisoners. In the last 33 years, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and re-sentencing proceedings. Volunteer firms have also written amicus briefs on behalf of the ABA or other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation.

³⁹² *Madison v. Alabama*, No. 17-7505, slip op. at 1-2 (U.S. Feb. 27, 2019), https://www.supremecourt.gov/opinions/18pdf/17-7505_new_6kg7.pdf.

³⁹³ 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.

³⁹⁴ 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.

³⁹⁵ *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017).

³⁹⁶ Brief of the ABA as Amicus Curiae in Support of Petition for Writ of Certiorari at 7-8, *Moore v. Texas*, No. 18-443 (U.S. filed Nov. 8, 2018), 2018 WL 5876932, at *7-8.

In dozens of cases placed with volunteer counsel, inmates have been exonerated or had their death sentences commuted or overturned.³⁹⁷

On July 20, 2018, Representation Project-recruited counsel from Crowell & Moring secured a federal district court decision vacating the conviction of former Florida death row inmate Crosley Green and ordering a new trial. Crowell & Moring had earlier secured commutation of Green's death sentence. Judge Roy B. Dalton, Jr. held that the prosecution had violated the Constitution by withholding from Green's trial counsel evidence that the police officers who arrived first at the crime scene had concluded that the account of the prosecution's key witness was not credible and that the witness, not Green, had committed the murder.³⁹⁸

On November 15, 2017, Representation Project-recruited counsel from Maslon LLP secured a Texas Court of Criminal Appeals ruling 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.³⁹⁹

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.⁴⁰⁰

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.⁴⁰¹ 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

³⁹⁷ 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.

³⁹⁸ John A. Torres, *Crosley Green: Wins a new trial after judge holds that prosecutor withheld evidence*, FLA. TODAY, July 20, 2018.

³⁹⁹ ABA DEATH PENALTY REPRESENTATION PROJECT, 2017 YEAR-END REPORT & NEWSLETTER, at 13 (2017) [hereinafter ABA 2017 YEAR-END REPORT & NEWSLETTER].

⁴⁰⁰ ABA DEATH PENALTY REPRESENTATION PROJECT, SPRING 2017 NEWSLETTER (2017).

⁴⁰¹ *Id.*

defender community and *pro bono* counsel.⁴⁰² 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”).⁴⁰³ 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.⁴⁰⁴ They are the widely accepted standard of care for the capital defense effort and have been cited in more than 500 state and federal cases, including decisions by the Supreme Court.

In 2017-2018, the Representation Project worked with the Idaho Public Defense Commission and several Idaho capital defense practitioners to draft new standards for appointment of capital defense counsel (trial, appellate, and postconviction) based on the ABA Guidelines. The new standards were presented to the Idaho legislature in early 2018 and were approved with the close of the legislative session on May 1, 2018. The old standards will continue to govern the appointment of counsel until April 30, 2019, at which point the new standards will take full effect.⁴⁰⁵

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

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

One example was Ms. Olson-Gault’s submission of written testimony to, and her appearance on, September 7, 2018 before the Judiciary Committee for the Nebraska Unicameral Legislature to answer questions about an interim study to examine statutory adoption of the ABA Guidelines in Nebraska.⁴⁰⁶

⁴⁰² An online resource containing decades of capital training materials that are searchable by author, subject, and date is available at <http://www.capstandards.org>.

⁴⁰³ ABA, ABA Guidelines (revised Feb. 2003), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

⁴⁰⁴ 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.

⁴⁰⁵ Emily Olson-Gault, *Idaho Adopts New Capital Defense Standards Based on ABA Guidelines*, ABA (Oct. 11, 2018).

⁴⁰⁶ ABA DEATH PENALTY REPRESENTATION PROJECT, 2018 YEAR-END REPORT & NEWSLETTER, at 14 (2018) [hereinafter ABA 2018 YEAR-END REPORT & NEWSLETTER].

A second example is Ms. Olson-Gault's November 13, 2017 testimony as a subject matter expert on the ABA Guidelines, in a Guantanamo Military Proceeding involving the alleged key actor in the 2000 bombing of the U.S.S. Cole.⁴⁰⁷ 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 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.⁴⁰⁸

A third example is Ms. Olson-Gault's testimony at a 2016 hearing conducted by the Committee to Review the Criminal Justice Act Program. She testified about many of the problems with representation in capital cases and the Project's work to address them.⁴⁰⁹ The Committee's June 2018 report quotes Ms. Olson-Gault's testimony about the difficulty of finding pro bono counsel to fill the gap left by the lack of qualified attorneys and funding. In her remarks to the Committee, she made clear that pro bono representation cannot serve as a substitute for a well-functioning system of indigent defense.⁴¹⁰

In the summer of 2018, the *Hofstra Law Review* published a symposium entitled *Effective Capital Defense Representation, the ABA Guidelines, and the Twilight of the Death Penalty*, marking the 15th anniversary of the publication of the ABA Guidelines.⁴¹¹ One of the symposium's articles, by Ms. Olson-Gault, discussed available resources for demonstrating that the ABA Guidelines reflect existing professional norms.⁴¹² Another article, by Laura Schaefer, a Representation Project Staff Attorney and ABA capital clemency initiative counsel, discussed arguments that counsel can make in seeking sufficient funding for proper representation in clemency proceedings.⁴¹³

⁴⁰⁷ ABA 2017 YEAR-END REPORT & NEWSLETTER, *supra* note 399, at 12.

⁴⁰⁸ *Id.*

⁴⁰⁹ 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>.

⁴¹⁰ ABA 2018 YEAR-END REPORT & NEWSLETTER, *supra* note 406, at 4.

⁴¹¹ Symposium, *Effective Capital Defense Representation, the ABA Guidelines, and the Twilight of the Death Penalty*, 46 HOFSTRA L. REV. 1097 (2018).

⁴¹² Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279 (2018).

⁴¹³ Laura Schaefer, *The Ethical Argument for Funding in Clemency: The "Mercy" Function and the ABA Guidelines*, 46 HOFSTRA L. REV. 1257 (2018).

The Representation Project participates as faculty in state and national training seminars for judges and defense counsel, regarding the elements of capital defense and the importance of an effective capital defense function. It has also organized training seminars for capital defenders and judges in other countries and participated as faculty at international conferences.

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

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

The CCRI, a recent ABA initiative, seeks to improve resources and information available to attorneys and governmental 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.⁴¹⁴ In the spring of 2018, the ABA published *Representing Death-Sentence Prisoners in Clemency: A Guide for Practitioners*, an innovative resource for lawyers handling or otherwise interested in clemency petitions.⁴¹⁵ The ABA also launched in May 2018 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.⁴¹⁶

D. *The Due Process Review Project*

In 2001, the ABA established the Death Penalty Due Process Review Project (the "Due Process Project") to conduct research and educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes.

1. *The Assessments Under ABA Auspices of 12 States' Implementation of the Death Penalty*

From 2004-2012, the Due Process Project assessed the extent to which the death penalty systems in 12 states comported with ABA policies designed to promote fairness and due process. The assessment reports were prepared by in-state assessment teams and Due Process Project staff for Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. Serious problems were found in every

⁴¹⁴ 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.

⁴¹⁵ Email from Aurélie Tabuteau Mangels, Mental Illness Initiative Fellow, to Ronald Tabak, Jan. 31, 2018 (on file with author).

⁴¹⁶ 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.

state's system.⁴¹⁷ To the extent these problems continue to fester, there are strong reasons for imposing moratoriums and otherwise curtailing the death penalty's use.⁴¹⁸

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*⁴¹⁹ – under the new policy the ABA opposes the execution of anyone who was age 21 or younger at the time of the crime.⁴²⁰

4. *Future Activities*

Since mid-2018, the Due Process Project's steering committee has been working on securing funding to enable the Project to undertake new initiatives.

E. *Timely Programs*

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*. 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*.⁴²¹

⁴¹⁷ 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.

⁴¹⁸ See Motion for New Trial Based on Newly Discovered Evidence and/or Post-conviction Relief Under Ohio Rev. Code § 2953.23, *supra* note 257, at 3; see also Krouse, *supra* note 257.

⁴¹⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴²⁰ ABA Death Penalty Due Process Review Project, Res. 111 (Feb. 5, 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>

⁴²¹ 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.

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.⁴²²

During the ABA’s annual meeting in New York, the Section of Civil Rights and Social Justice, along with other ABA entities, co-sponsored with the New York City Bar Association a program (discussed above in Part I.A.4) on August 14, 2017, concerning key lessons to be learned from what has *not* happened since many states abolished or otherwise completely stopped using the death penalty.⁴²³

And on August 2, 2018, during the ABA’s annual meeting in Chicago, various ABA entities presented the program (discussed in many places above including Parts I.A.7.a.ii-iii, I.A.11.c, I.A.13.c.ii, and I.B.7.b.i), featuring Chicago’s Cardinal Blase Cupich, Karen Gottlieb, Meredith Martin Rountree, and Robert Dunham.⁴²⁴

IV. THE FUTURE

There is ever-increasing recognition of major systemic problems with capital punishment. In recent years, this has led to abolition or discontinuation of capital punishment in eight (soon to be nine) states and to statewide moratoria in five additional states. And changes to Florida’s and Alabama’s laws have made it harder to secure new death sentences in those states.

New death sentences, while increasing in 2017 and 2018, remained well below the yearly totals from before 2015. The number of new death sentences might decrease again, in light of new approaches of newly elected prosecutors, particularly if defense counsel performance improves.

The slight increases in executions in 2017 and 2018 may be followed by larger increases. Whether these occur will depend on the outcomes of legal challenges to execution methods and to clemency processes and decisions. Governor Newsom’s March 13, 2019 announcement of a moratorium on executions eliminates – at least for as long as he is Governor (and assuming his executive order is not overturned in court) – the possibility that there could be a substantial number of executions in California. California, which has the nation’s largest death row, last executed an inmate in 2006.

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

⁴²² 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.

⁴²³ ABA, *Life After the Death Penalty*, *supra* note 82.

⁴²⁴ ABA Conference on the Death Penalty, *supra* note 117.

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' changing the Catechism in August 2018 to be unequivocally against capital punishment. Opinion polls continue to show much lower support for the death penalty than in the past, even when the actual alternative – LWOP – is not presented as a choice.

Increased attention is being paid to analyses showing that a very small number of jurisdictions are responsible for very disproportionate percentages of 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 preclude ruling on the merits of many meritorious federal constitutional claims. Most clemency authorities seem likely to keep hiding behind the fiction that somewhere along the way, judges or juries already have fully considered all facts relevant to a fair determination of whether a person should be executed.

Reality belies that fiction. All too often, key evidence relating to guilt or sentence – or to deliberate racial discrimination or other prosecutorial misconduct – has been – prior to clemency proceedings – hidden by prosecutors, never found by defense counsel, rendered meaningless by confusing and misleading jury instructions, or barred from meaningful consideration by various procedural technicalities. And when such crucial evidence *is* finally raised in clemency proceedings, most clemency authorities fail to fulfill their duty to be “fail-safes” against unfairness.

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.