

CHAPTER 13

CAPITAL PUNISHMENT

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I. DRAMATIC DEVELOPMENTS THAT COULD LEAD TO FUNDAMENTAL CHANGE IN THE DEATH PENALTY'S FUTURE IN THE UNITED STATES

A. *Overview of the Status Quo Ante (i.e., when last year's chapter was finalized)*

Public support for the death penalty had declined to its lowest level in decades, and for the first time, when Gallup asked whether the public preferred capital punishment or life without parole (LWOP), LWOP was selected by a significant majority.

- Continuing a trend that began in the early years of this century, another state – Colorado – abolished the death penalty in 2020 – as New York, New Jersey, New Mexico, Connecticut, Maryland, Delaware, Washington, and New Hampshire had done beginning in 2003. Two additional states – California and Ohio – began moratoriums on executions – in California, doing so directly and Ohio, doing so through the Governor's refusal (due to concerns over lethal injection) to authorize any executions. Existing moratoriums continued in two other states. And despite pronouncements that it had figured out how to conduct safe lethal injections, Oklahoma continued not to execute anyone.
- The number of new death sentences and the number of executions continued to be at levels much lower than in the first two decades after executions resumed in 1976. The executions and new death sentences involved a much lower number of states and jurisdictions within states than in the earlier decades.
- This trend accelerated further when district attorneys who sought and secured death penalties far more than their counterparts elsewhere (even in their own states) were defeated for re-election or were otherwise replaced by more moderate district attorneys.
- Public opinion's turning against capital punishment was accelerated by the widespread reporting of even more innocent people having been sentenced to death (including some people executed for crimes of which they were likely innocent), racial discrimination in implementing the death penalty, and the growing awareness of problems with longstanding police and prosecution practices (such as fatal errors in relying on "junk science," coerced confessions, and ineffective counsel).
- More and more conservatives publicly opposed capital punishment, in some instances due to the Catholic Church's absolute objections to it, and in others due to such traditionally conservative arguments as opposing wasteful, costly government programs that accomplish nothing.
- There was a further substantial increase in the public's awareness of executions being an outgrowth of lynchings, and of the basic truism that a human being's life must be assessed by considering much more than the worst thing that he or she ever did.

- There was greater appreciation for the fact that many murder victims' survivors oppose executions and that few, if any, achieve whatever is meant by "closure" after an execution.
- Whether one got the death penalty or got executed depended far less on how bad the defendant's conduct was and much more on the quality of the defense counsel, the extent of prosecutorial/police misconduct, and defense counsel's failure to object at what was said to be the only time for objecting to something unconstitutional. Moreover, even before the pandemic began, it was apparent that an increasing percentage of those being executed would not have received death sentences – and might not have even had their prosecutors seek the death penalty – if their cases had arisen in the last 15 years. But very few Governors or others in position to grant clemency, a lesser sentence, or a pardon did so even when it was clear that if the cases were arising now, the death sentence would not have been imposed.

During the few months between finalizing last year's book chapter and its publication, one other thing became apparent: many states were not permitting executions to proceed. And many capital trials and other proceedings in capital cases did not proceed in the normal course of litigating them, due to the effect of the pandemic on courts, judges, police, court officers, and witnesses for both sides. The only seven executions by states in 2020 took place in just five states (Texas, Alabama, Georgia, Missouri, and Tennessee).

After Texas' July 8, 2020 execution, there were no more executions by any state through at least mid-April 2021 – the longest period of time between state executions in U.S. history. Alabama came close to executing Willie B. Smith in February 2021, but the Supreme Court precluded the execution due to an unresolved issue arising from the prosecution's not permitting Mr. Smith's religious advisor to be present.

B. One Man, at Times Buttressed by His Attorney General, Generated an Unprecedented Number of Federal Death Row Executions Between July 2020 and January 2021

At this precarious time in the death penalty's history, one man intervened: a man who decades earlier had taken out ads in every New York City daily newspaper urging that five young Black youths who had been accused of raping "the Central Park jogger," should be executed (it later turned out that all were innocent); and had said a few years before 2020 that he could shoot a man dead in cold blood in the center of New York City but would be acquitted; and earlier in 2020 had benefited tremendously when his newly appointed Attorney General issued a "summary" of the evidence in the special prosecutor's report that dramatically and misleadingly misstated the special counsel's devastating report on the man's actions.

This one man was President Donald Trump, aided and abetted until the final three executions by his Attorney General, William Barr.

The principal way in which Trump and Barr acted unilaterally with regard to capital punishment involved the 62 people who had been sentenced to death under the federal death penalty law. This law had been revived in 1988 and expanded in 1994 (with significant support from Senator Joseph Biden), and it and habeas corpus law were made even more adverse to death row inmates in 1996.

Once a federal death row inmate loses on direct appeal and in one full round of federal habeas (under 28 U.S.C. § 2255), the inmate is at risk of the President's setting an execution date – unless a federal court enjoins the setting of such a date. Until the summer of 2020, many federal death row inmates were protected against execution by a federal district court injunction. Trump and Barr became more and more determined to set execution dates and more and more adamant against any delays in execution dates.

Between July 2020 and January 2021, the Trump administration sought to execute 13 federal death row inmates. Many of these prisoners had substantial bases for claims that, if found to be valid, would have made it unconstitutional to execute them. These claims included assertions that inmates were insufficiently mentally competent to be executed, were so severely mentally ill at the time of the offense that they were clearly less morally responsible than what the Supreme Court referred to as the “average murderer,” were constitutionally protected against execution because of intellectual disability or were factually innocent of the alleged crime.

None of these 13 inmates was granted relief on their constitutional claims. Why? Failures of their earlier lawyers to object at the time prescribed for making such objections, and assertions by the courts that even if their constitutional claims were assumed to be meritorious, the constitutional error was insufficiently serious to merit relief. In a great many of these cases, the Supreme Court provided *no* reason for rejecting the claims. Indeed, when a lower court *did* grant relief, the federal appeals court or the Supreme Court often without explanation denied relief. In some of these cases, there was no time for counsel to prepare a brief providing reasons for upholding the lower court decision.

Moreover, no explanation – no less, a convincing explanation – was given for how these 13 people were selected for execution out of the federal death row population of 62. Surely, it could not be seriously maintained that Corey Johnson was as much or more morally culpable as his two death row co-defendants, Richard Tipton and James Roane – given that Mr. Johnson was the only one of the three to have intellectual disability. The government was not required to make any such explanation – nor did it.¹

The Supreme Court and the appeals courts were not moved by evidence that death row inmates facing execution within weeks or even days had become ill with the novel coronavirus (COVID-19), as had many prison officials and others who had come into the prison for executions.² Moreover, it turned out that many of the members of the press also became ill with the virus after covering executions. It was obvious that safety would be enhanced by postponing the last three executions and holding them under safer conditions. However, doing so was not considered by the Justice Department because it would require moving the execution dates to occur after President Trump left office.

Joseph Biden, who as a member and Chair of the Senate Judiciary Committee took a leading role in the enactment and expansion of the federal death penalty in the 1980s and 1990s, announced during his 2020 presidential campaign that he now favors ending the federal death penalty and encouraging states to abolish their death penalties.³ It was widely anticipated that anyone under a death warrant when Mr. Biden became President would at the very least get a lengthy reprieve.

¹ Elizabeth Bruenig, Opinion, *Abolish the Federal Death Penalty*, N.Y. TIMES, Feb. 20, 2021.

² Jonathan Allen, *U.S. executes man with COVID-19, 12th under Trump administration*, REUTERS, Jan. 14, 2021.

³ Madeleine Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, TIME, Jan. 25, 2021.

C. Broad-Based Backlash Against the Federal Execution Bloodbath

1. National Revulsion

There was widespread revulsion at the lame-duck administration's efforts to execute as many federal death row inmates as possible before leaving office. Several reporters have already written extensively about what happened, in an effort to explain – first to themselves and then to readers – how such arbitrary and capricious decision-making could determine who would be executed.

In one such critique, *New York Times* opinion writer Elizabeth Bruenig, in her fourth lengthy analysis of what she referred to as a “killing spree,” pointed out that the Supreme Court (with, by the end of the “spree,” three Trump appointees) “began denying appeals and vacating stays – sometimes in the middle of the night, always without comment. They cast aside questions about inmates’ intellectual competence, their degree of involvement in the underlying crime, their youth at the time of the crime and their horrific childhood abuse.” She further said that contrary to Supreme Court holdings, “people with cognitive disabilities have certainly been executed – Corey Johnson, as recently as last month.”⁴

The revulsion extended to many professional organizations and members of the religious community who were concerned that the President was exacerbating racial tensions. Many such groups filed amicus briefs in support of the people fighting for their lives. There was also concern about the government's not providing accurate information about the impact of carrying out executions on the potential spread of COVID-19.⁵ There was great concern about the impact on the Supreme Court's reputation and on the tradition of respect for law being undermined by the short shrift given by the Court to these cases.⁶ There was also consternation over the federal government's high financial cost of carrying out these executions. Based on its review of documents made available under the Freedom of Information Act, the ACLU's Capital Punishment Project estimated that almost \$4.7 million was spent on the first five executions, in July and August 2020.⁷

2. Revulsion in Virginia

a. Quite Possibly, Revulsion Made the Difference in Virginia's Deciding to Abolish the Death Penalty

In the decades since 1976, when the Supreme Court upheld death sentences for the first time since *Furman v. Georgia*,⁸ Virginia executed 113 people – more than any state besides Texas. Its capital case histories were replete with cases in which people whose guilt

⁴ Bruenig, *supra* note 1 (a somewhat longer version of this article was put online on Feb. 18, 2021, with the headline *The Government Has Not Explained How These 13 People Were Selected to Die*); see also Elizabeth Bruenig, Opinion, *An I.Q. Score as a Death Sentence*, N.Y. TIMES, Jan. 13, 2021 (a somewhat longer version of this article was put online on Jan. 11, 2021, with the headline *When an I.Q. Score Is a Death Sentence*). Book chapter author's note: I was a postconviction lawyer for Mr. Johnson.

⁵ E.g., *Why Is This Happening? Watching 13 executions with Liliana Segura: podcast and transcript*, NBC NEWS, Feb. 5, 2021, <https://www.nbcnews.com/think/opinion/watching-13-executions-liliana-segura-podcast-transcript-nca1256830>; Michael Tarm, *Executioners sanitized accounts of deaths in federal cases*, AP NEWS, Feb. 17, 2021.

⁶ David Cole, *A Rush to Execute*, N.Y. REV., Feb. 25, 2021; Jessica Schulberg, *The Supreme Court Was Complicit In Donald Trump's Execution Spree*, HUFFPOST, Jan. 22, 2021; Jordan S. Rubin, *Death Penalty Lawyers Left in Dark by Unexplained SCOTUS Orders*, BLOOMBERG L., Jan. 22, 2021; Adam Liptak, *'Expedited Spree of Executions' Faced Little Supreme Court Scrutiny*, N.Y. TIMES, Jan. 18, 2021.

⁷ Keri Blakinger & Maurice Chammah, *A \$6,300 Bus. A \$33 Last Meal. What New Documents Tell Us About Trump's Execution Spree*, THE MARSHALL PROJECT, Jan. 14, 2021.

⁸ *Furman v. Georgia* 408 U.S. 238 (1972).

was in grave doubt were executed. There was even one innocent man, Earl Washington, who would have been executed had not a pro bono lawyer received at virtually the last hour a detailed critique by another death row inmate about what was happening in Washington's case. Other serious problems in Virginia were prosecutorial and law enforcement misconduct, ineffectual defense counsel, disproportionality, and racial disparities throughout all phases of capital litigation.

Over these same decades, Virginia was becoming far less conservative. The combined effect of that plus improved capital defense was to drive down executions to under ten a year, and to essentially avert new death sentences. By mid-2020, Virginia had only two men on death row and had not executed anyone in almost a decade.⁹

What made 2021 the year in which Virginia abolished the death penalty? There were many factors, but the most visceral seemed to be revulsion at President Trump's efforts to execute as many federal death row inmates as possible before leaving office. After 17 years in which the federal government did not execute anyone, it executed 13 people between July 2020 and January 15, 2021 – including three in the final full week of President Trump's term. One of those executions – that of Corey Johnson on January 14, 2021 – received a fair amount of coverage in Virginia, where Johnson's crimes occurred.¹⁰ Mr. Johnson was never able to get a court or clemency body to consider seriously and rule on the merits of his compelling showing that he had intellectual disability and thus was constitutionally protected from execution.¹¹

The New York Times reported that “[t]he Trump Administration's spree of executions seems to have given the issue some urgency in Virginia.” A Democrat candidate in this year's Virginia gubernatorial election said she “heard more from people saying it's time to end the death penalty during those executions than I have before,” and that “the rash of executions just put the issue front and center for some people who hadn't thought about it before.”¹²

b. Comments at the Signing Ceremony on March 24, 2021

The law's final passage occurred on February 22, 2021.¹³ Governor Ralph Northam signed it into law on March 24, 2021, in a ceremony held outside Greensville Correctional Center in Jarratt. Prior to the ceremony, the Governor toured the prison's execution chamber, where, since the prison opened in the early 1990s, Virginia had executed 102 people. (Starting with its years as a colony, Virginia has executed almost 1,400 people, more than any other state.) Under the new law, the sentences of Virginia's two remaining death row inmates were changed to LWOP.¹⁴

In his remarks at the signing ceremony, Governor Northam cited the extensive history of racial disparities in applying capital punishment, and the many errors that had been made. A leading Senate sponsor of the bill, Scott A. Surovell, said the nexus between lynchings of Black men and the death penalty's advent is “undeniable.” He stated that by abolishing

⁹ *Virginia*, DEATH PENALTY INFO. CTR. (last visited Feb. 26, 2021).

¹⁰ Liliana Segura, *After Trump's Execution Spree, Lingering Trauma And A Push For Abolition*, THE INTERCEPT, Feb. 6, 2021.

¹¹ Bruenig, *supra* note 4; Peter Berns, Opinion, *Why people with intellectual disability, like Cory Johnson, should not be executed*, RICHMOND TIMES-DISPATCH, Jan. 11, 2021; Frank Green, *U.S. executes Cory Johnson for 1992 Richmond murders*, RICHMOND TIMES-DISPATCH, Jan. 15, 2021.

¹² Trip Gabriel, *Virginia, Shifting Left Fast, Moves Closer to Abolishing Death Penalty*, N.Y. TIMES, Feb. 4, 2021.

¹³ Denise Lavoie & Sarah Rankin, *Virginia lawmakers vote to abolish the death penalty*, AP NEWS, Feb. 22, 2021.

¹⁴ Denise Lavoie, *Virginia, with 2nd-most executions, outlaws the death penalty*, AP NEWS, Mar. 24, 2021.

capital punishment, Virginia could again become a world leader “as a society, a government that values civil rights.”¹⁵

c. *Possible National Implications of Virginia’s Abolishing Capital Punishment*

Amherst Professor Austin Sarat said it was important that Virginia was the first Southern state, south of the Mason-Dixon Line, to abolish the death penalty. Besides aptly complementing Virginia’s dismantling of Confederate shrines, Sarat said, abolition should be seen as “a decisive rebuke to the Trump administration and its shameful execution spree.” Sarat said that just maybe Virginia might be leading the entire country towards abolition.¹⁶

d. *Impact on Politicians’ Calculations*

The death penalty is no longer perceived as a magic elixir by candidates even in some states south of the Mason-Dixon Line, and opposition to it no longer is generally perceived as generating a political death sentence. As the public has learned more and more about the death penalty system *as implemented*, public officials and political candidates have found it much easier to support abolition, a moratorium, or measures to limit the worst features of capital punishment.

3. *Testimony by Attorney General-Designate Merrick Garland at His February 22, 2021 Confirmation Hearing*

At his confirmation hearing on February 22, 2021, Attorney General-designate Merrick Garland was asked by Senator Patrick Leahy whether the Biden Administration would reinstate what Senator Leahy referred to as a moratorium on the death penalty, which he said had lasted from 2003 (during the George W. Bush Administration) until the last six months of the Trump Administration, while Senators Leahy and Booker work on legislation to abolish the federal death penalty. It was apparent from the context that Senator Leahy was asking about the *de facto* moratorium on executions during those 17 years.

Attorney General-designate Garland answered as follows:

Well, as you know, Senator, President Biden is an opponent of the death penalty. I have to say that over those almost 20 years in which the federal death penalty has been paused, I have had a great pause about the death penalty. I am very concerned about the large number of exonerations that have occurred through DNA evidence and otherwise, not only in death penalty convictions but also in other convictions. I think a terrible thing occurs when somebody is convicted of a crime that they did not commit. And the most terrible thing happens if someone is executed for a crime they did not commit. It’s also the case that during this pause we’ve seen fewer and fewer death penalty applications anywhere in the country, not only in the federal government but among the states. And as a consequence, I’m concerned about the increasing almost randomness or arbitrariness of its application, when you have so little number of cases. And finally, and very importantly, is the other matter which you raise, which is its disparate impact. The data is clear that it

¹⁵ Gregory S. Schneider, *Virginia abolishes the death penalty, becoming the first Southern state to ban its use*, WASH. POST, Mar. 24, 2021.

¹⁶ Austin Sarat, *Virginia Delivers a Rebuke to Trump’s Execution Spree and Points the End of America’s Death Penalty*, JUSTIA: VERDICT, Feb. 9, 2021; see also *Final throes: Use of the death penalty in America may be ending*, THE ECONOMIST, Jan. 23, 2021.

has an enormously disparate impact on Black Americans and members of communities of color, and exonerations also – that something like half of the exonerations had to do with Black men. So, all of this has given me pause. And I expect that the President will be giving direction in this area. And if so, I expect it not at all unlikely that we will return to the previous policy.¹⁷

4. *New Joint Efforts by Business Leaders to Fight Capital Punishment*

On March 18, 2021, 21 business founders and CEOs of successful businesses around the globe issued a joint letter condemning capital punishment and urging other business leaders to join the international fight against racism through the Responsible Business Initiative for Justice. The business leaders signing the joint letter included Richard Branson (Virgin Group), Guilherme Leal (Natura, from Brazil), Jared Smith (Qualtrics co-founder), and Strive Masiyiwa (South Africa’s Econet Group).¹⁸

Many observers credited former President Trump for focusing attention on the way that capital punishment is a leading manifestation of “lethal white-on-black violence” – albeit under the guise of due process. He thereby inadvertently persuaded many business leaders that their efforts against racism should include opposition to capital punishment.¹⁹

II. CONTINUING TRENDS WITH REGARD TO THE GREATLY DIMINISHED SUPPORT FOR CAPITAL PUNISHMENT

A. *Large Decline in Public Support for Capital Punishment*

There has been a remarkable shift in public attitudes about the death penalty.

One of the most recent indicators of this change was the Gallup poll conducted during the 2020 fall election campaign. As it has done for decades, Gallup asked, “Are you in favor of the death penalty for a person convicted of murder?” – a question which leaves it to one’s imagination what the alternative(s) to the death penalty would be. Through 1960, the answer Yes was given far more than the answer No. When polling on this question resumed in 1965, and through March 1972, the margin between Yes and No generally became much smaller, and No even won a plurality in May 1966, by 47% to 42%. But beginning in November 1972 (shortly after *Furman* cleared out all death rows), Yes answers exceeded No answers by large, often extremely large, margins. The margins declined significantly in 2017-2020, to 14%, 15%, 14%, and 12%. In 2020, the percentage of people who answered Yes fell to 55%, far below the percentages in most prior years – and the lowest since 1972, the year in which *Furman* was decided.²⁰

A similar trend existing with regard to a question that Gallup asks less often, which gives a choice between the death penalty and life without parole (“LWOP”). For the first time, in October 2019, a majority of people said they preferred LWOP over capital punishment. The results were 60% LWOP, 36% Death Penalty, and 4% Undecided. The Death Penalty led

¹⁷ Christina Carrega, *Garland says death penalty cases gave him “pause” and he expects Biden will halt federal prosecutions*, CNN, Feb. 22, 2021; Geoff Earle, *Biden’s AG nominee Merrick Garland says he harbors a ‘great concern’ about the death penalty*, DAILY MAIL, Feb. 22, 2021.

¹⁸ Radmilla Suleymanova, *Is the world at a ‘tipping point’ to abolish the death penalty?*, AL JAZEERA, Mar. 18, 2021; Tina Casey, *U.S. Business Leaders Can Tip the Balance on the Death Penalty*, TRIPLE PUNDIT, Mar. 18, 2021.

¹⁹ *E.g.*, Casey, *supra* note 18.

²⁰ Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, GALLUP, Nov. 19, 2020.

by large margins from 1985-2000, when the margin fell to 2%. In 2001, the Death Penalty opened up a 12% margin over LWOP, but in 2006, the Death Penalty trailed slightly, 47% to 48%. In the two next surveys, the Death Penalty led by 3% in October 2010 and by 5% in September 2014.²¹

On April 15, 2021, the Marshall Project reported that an increasing number of Republican legislators are proposing or supporting reforms of capital punishment (such as the mental illness exclusion law enacted in Ohio (see discussion in Section II.C. below)) even as other Republican lawmakers now favor abolition. It is possible that, over time, many Republicans now favoring reforms may decide to support abolition. The April 15 story said that Democratic lawmakers are now much more uniformly opposed to capital punishment than they were a few decades ago.²²

B. Post-Abolition Trends/Activities in the States That Have Ended the Death Penalty – Lack of Predicted Horrible Effects

Experience with the actual – not theoretical – death penalty system, replete with its many real-life problems and no practical benefits, has been crucial to ending it in those states that have abolished it.²³ A significant post-abolition phenomenon is 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.

Perhaps the most important fact about the demise of capital punishment in these states is that *none* of the parade of horrors that death penalty proponents had asserted would transpire if the death penalty were abolished has actually occurred in any of these states. For example, there has not been, post-abolition, an upsurge in police or correction officer or children’s murders, or in the cost of the criminal justice system.²⁴

A study of “what happened after abolition of the death penalty in New Jersey, New Mexico, Illinois, and Maryland” was published in January 2020.²⁵ The study did not find any general backlash. Instead, “the thought of abolition today seems to be more troubling to political leaders and citizens than the act of abolition. While polls show that a bare majority still favors the death penalty, Americans may be more ready to accept abolition than they have ever been. As a result, political leaders now have considerable room to maneuver and less to fear when they decide that they will ‘no longer tinker with the machinery of death.’”²⁶

C. Ohio’s Further Distancing Itself from the Death Penalty; Serious Mental Illness Exemption; Bipartisan Effort for Abolition in 2021

There were a number of developments in the latter part of 2020 and early 2021 in Ohio that moved the State further in the direction of limiting greatly and possibly abolishing the death penalty.

²¹ Jeffrey M. Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP, Nov. 25, 2019.

²² Keri Blakinger & Maurice Chammah, *Can the Death Penalty Be Fixed? These Republicans Think So*, THE MARSHALL PROJECT, Apr. 15, 2021.

²³ ABA Section of Civil Rights & Social Justice, *Life After the Death Penalty: Implications for Retentionist States*, Presented at the House of the New York City Bar Ass’n (Aug. 14, 2017), https://deathpenaltyinfo.org/files/pdf/Life-After-Death-Penalty_Transcript.pdf.

²⁴ *Id.* at 16-33.

²⁵ Austin Sarat et al., *After Abolition: Acquiescence, Backlash, and the Consequences of Ending the Death Penalty*, 1 HASTINGS J. CRIME & PUNISHMENT 33, 40 (2020).

²⁶ *Id.* at 77-78 (footnote omitted) (citation omitted).

In a December 2020 interview with the Associated Press, Governor Michael DeWine said that his refusal since taking office in January 2019 to permit executions was due to his concern about the availability through legitimate channels of drugs to be used in lethal injections, and his belief that if Ohio were to execute people by lethal injection, that would jeopardize the State's ability to buy drugs from legitimate pharmaceutical companies for other purposes. Noting that in 1981 he had been an author of the Ohio capital punishment law, Governor DeWine said he now was much more skeptical that capital punishment deters crime and thought gun control would be more likely to do so.

Governor DeWine said he would not end the moratorium until the legislature passed a bill providing that executions be carried out by a means other than lethal injection. He said as a practical matter the moratorium would continue throughout 2022.²⁷ On April 9, 2021, Governor DeWine postponed the three remaining scheduled executions for 2021, citing Ohio's continuing inability to get the drugs it uses in lethal injections and the lack of any legislative action to rectify the situation.²⁸

Earlier, on January 9, 2021, Governor DeWine signed House Bill 136, which both houses of the Ohio legislature passed by overwhelming margins. It precludes the execution of anyone who was seriously mentally ill at the time of the crime, if the mental illness significantly impaired their judgment, capacity, or ability to appreciate the nature of their conduct. Despite loud objections from some prosecutors, the bill passed the House by a 76-18 vote in June 2019, and then passed in slightly amended form in the Senate by a 27-3 vote in December 2020. The House then accepted the Senate amendments.²⁹

This is the first law enacted anywhere in the country to adopt what was essentially the most significant of the three proposals adopted by the ABA, the American Psychological Association, and the American Psychiatric Association in 2006, as amended in 2014 by the Ohio Supreme Court's special Death Penalty Task Force. Its enactment in a large state with a substantial population, a large death row, and a Republican Governor and legislature is likely to bring further attention to a severe mental illness exemption from capital punishment in other death penalty jurisdictions in the United States.

A statewide poll taken in late September and early October 2020, and issued on January 28, 2021, showed that a large majority in Ohio supported replacing capital punishment with a system in which LWOP is the most severe punishment. Abolition was supported by majorities of both Democrats and Republicans.³⁰ Conservative support for abolition had grown significantly, which had led in early 2020 to the formation of Ohio Conservatives Concerned About the Death Penalty.³¹

On February 18, 2021, abolition legislation was announced by Republican and Democratic sponsors in Ohio's Senate and House. Republican support was much greater than in the past. Among the sponsors were people who formerly supported capital punishment. They gave numerous reasons for changing their minds, including Republican Senator Steve Huffman, a physician who said after decades of reflection that he now felt that LWOP was a sufficiently severe punishment and that "[l]ife is precious." Republican Senator Niraj Antani said that having been a "Republican outlier" when he first supported abolition six years

²⁷ Julie Carr Smyth et al., *Ohio Governor: Lethal injection no longer execution option*, AP NEWS, Dec. 8, 2020.

²⁸ *Gov. DeWine delays three remaining 2021 executions*, AP NEWS, Apr. 9, 2021.

²⁹ *Ohio Bars Death Penalty for People with Severe Mental Illness*, DEATH PENALTY INFO. CTR., Jan. 11, 2021.

³⁰ Marty Schladen, *Poll: Big majority in Ohio support getting rid of the death penalty*, OHIO CAP. J., Jan. 28, 2021.

³¹ Vince Grzegorek, *Bipartisan Bill Might Finally Abolish the Death Penalty in Ohio*, CLEVELAND SCENE, Feb. 18, 2021.

earlier, he was now confident that many Republicans would see abolition as a “pro-life issue” and an anti-big government issue. Republican Representative Jean Schmidt said that although two decades earlier she had fought hard to keep capital punishment, she had changed her mind after meeting with men who had been erroneously sentenced to death.³²

Political observers reported that chances of enacting an abolition bill were considerably greater than in the past, but far from a sure thing.³³ Governor DeWine said that his views on the death penalty had definitely evolved, he expected that the legislature would eventually consider it, and “I’ll certainly weigh in as they move a bill forward.”³⁴

In early March 2021, former Governor Robert Taft and former Attorneys General Jim Petro and Lee Fisher – two Republicans and one Democrat – who had strongly supported enactment of Ohio’s death penalty law four decades earlier, said in a joint op-ed that in practice it is “broken, costly and unjust.” Accordingly, they said, “We urge the Ohio legislature to repeal what we helped wrought.”³⁵

D. Another Three States Have Formal or De Facto Moratoriums on Executions

1. 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.”³⁶ The Oregon Supreme Court in 2013 upheld the moratorium.³⁷ During the 2014 election, in which this policy was an issue,³⁸ Kitzhaber was re-elected. After his resignation for unrelated reasons, Kate Brown, the new Governor, continued the moratorium.³⁹ She was re-elected in 2016 and 2018 after pledging to continue the moratorium.⁴⁰

2. 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 about whether the system was functioning properly or having a positive impact.⁴¹ Wolf defeated Corbett. On February 13, 2015, Governor Wolf announced a moratorium on executions until a bi-partisan commission on the death penalty appointed by the State Senate issued its report, Governor Wolf reviewed it, and “any recommendations contained therein

³² Marty Schladen, *Chances for Ohio death penalty repeal appear to be growing*, OHIO CAP. J., Feb. 19, 2021.

³³ Editorial, *Expensive, impractical, ineffective: The case against capital punishment in Ohio*, COLUMBUS DISPATCH, Feb. 9, 2021.

³⁴ Schladen, *supra* note 32.

³⁵ Lee Fisher, Robert Taft & Jim Pietro, Opinion, *Former governor, attorneys general: Ohio death penalty broken, costly and unjust. It must be repealed*, COLUMBUS DISPATCH, Mar. 9, 2021.

³⁶ William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011.

³⁷ *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013) (en banc).

³⁸ Laura Gunderson, *Tough Question Tuesday: Kitzhaber on death penalty decision; Richardson says he won’t impose personal convictions*, OREGONIAN, Oct. 21, 2014.

³⁹ Tony Hernandez, *Brown to maintain death penalty moratorium*, OREGONIAN, Oct. 19, 2016.

⁴⁰ Oregon enacted legislation in 2019 that reduced the number of death-eligible categories of “aggravated murder” from 19 to 4: cases involving acts of terrorism in which two or more people are killed, premeditated murders of children aged 13 or younger, prison murders committed by those already incarcerated for aggravated murder, and premeditated murders of police or correctional officers. See Noelle Crombie, *Calling Oregon death penalty ‘costly and immoral,’ governor signs bill limiting its use*, OREGONIAN, Aug. 1, 2019.

⁴¹ Nick Field, *PA-Gov: The Third Gubernatorial Debate*, POLITICSPA.COM, Oct. 8, 2014.

are satisfactorily addressed.”⁴² On December 21, 2015, the Pennsylvania Supreme Court unanimously held that Governor Wolf was entitled to act in the way he had described in his February 13, 2015 announcement.⁴³

The commission issued its report on June 25, 2018. Recommendations included 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.⁴⁴ Governor Wolf continued the moratorium.

In November 2018, Governor Wolf was re-elected. His opponent, Scott Wagner, opposed and promised to end the moratorium. The legislature has not enacted the commission’s key recommendations. As of April 2021, the moratorium has continued.

3. 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 while he 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 had already exhausted all state and federal avenues for relief.⁴⁵

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, 2019.⁴⁶ The concurrence of Justices Goodwin Liu and Mariano-Florentino Cuéllar described California’s capital punishment system as “expensive and dysfunctional,” achieving neither justice nor even remotely timely resolution of cases. Nothing meaningful had been done about these problems for decades,⁴⁷ even after the passage in 2016 of a supposedly execution-accelerating proposition, due to the failure to increase funding for death penalty implementation.

E. Oklahoma’s Failure to Resume Executions Notwithstanding Its Many Assertions That It Would

Oklahoma was once the second most prolific executioner in the United States. But by January 2021, it had gone six years since its last execution – in which the wrong drug was used to execute Charles Warner. That flawed execution followed the botched execution of

⁴² Memorandum from Gov. Tom Wolf, Feb. 13, 2015, at 1, 4, <http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>.

⁴³ *Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015).

⁴⁴ JOINT STATE GOV’T COMM’N CAPITAL PUNISHMENT IN PENNSYLVANIA: THE REPORT OF THE TASK FORCE AND ADVISORY COMMITTEE, at 30-31 (2018).

⁴⁵ 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>.

⁴⁶ *People v. Potts*, 436 P.3d 899 (Cal. 2019), *cert. denied*, 140 S. Ct. 580 (2019) (mem.).

⁴⁷ *Id.* at 938 (Liu, J., concurring, joined by Cuéllar, J.).

Clayton Lockett in 2014, and preceded multiple failed attempts to execute Richard Glossip, who remains on death row.⁴⁸

Oklahoma announced in 2018 that it would switch from lethal injection as its preferred execution method, both because it was unpopular and because Oklahoma had found it increasingly difficult to obtain the drugs it wished to use in executions. Unexpectedly, in 2020, government officials announced that they had found a supply of the drugs and would be able to resume executions whenever courts would permit them. Oklahoma's death penalty has been on a court-ordered hiatus since October 2015, when the Oklahoma Court of Criminal Appeals imposed an indefinite stay on all executions.⁴⁹

In 2020, State Representative Kevin McDugle proposed that a death penalty conviction be reviewable if the inmate presented "a plausible" claim of actual innocence supported by information or evidence not previously presented and if the innocence claim is capable of being "investigated and resolved." He also proposed that the government be authorized to launch an investigation into whether an inmate was "convicted of an offense that he or she did not commit." Then, in October 2020, McDugle hosted an interim study on the death penalty at the State Capitol.⁵⁰

In April 2021, Representative McDugle expressed concern that Mr. Glossip would be executed before the legislature enacted a law that would preclude his execution unless there is much clearer evidence that he was involved in the crimes for which he faces execution. McDugle said, "I want to make darn sure that if we as Oklahoma are putting someone to death, they deserve to be there . . . I know there is human error all the way through."⁵¹

There is considerable doubt about whether one of the other people Oklahoma wishes to execute soon, Julius Jones, is guilty. His case was marred, it now appears, by police and prosecutorial misconduct, by concededly ineffective defense counsel, and by the jury's never learning about strong reasons to believe that someone else actually committed the crime. On March 8, 2021, the Pardon and Parole Board, by a 3-1 vote, advanced his commutation application for a reduced sentence to phase 2 of the legislative session. If his application is approved after the second stage hearing, Governor Stitt would make the final decision.⁵²

F. New State Death Sentences in 2019-2020

Before the pandemic hit with a vengeance in March 2020, new state death sentences were trending lower than the total of 34 in 2019 and ended the year at 18, the lowest in any post-*Gregg* year.⁵³ Half of those in 2019 were imposed in Florida, Ohio, and Texas. Half of Ohio's were from Cuyahoga County, whose District Attorney since 2017, Michael O'Malley,

⁴⁸ Nolan Clay & Rick Green, *Wrong drug used for January execution, state records show*, THE OKLAHOMAN, Oct. 8, 2015.

⁴⁹ Graham Lee Brewer & Manny Fernandez, *Oklahoma Botched 2 Executions. It Says It's Ready to Try Again*, N.Y. TIMES, Feb. 13, 2020; Dylan Goforth, *The return of the death penalty in Oklahoma*, THE FRONTIER, July 31, 2020.

⁵⁰ Dylan Goforth, *Lawmaker proposes 'Conviction Integrity Unit' to review death penalty cases*, THE FRONTIER, Feb. 5, 2021.

⁵¹ Blakinger & Chammah, *supra* note 22.

⁵² Sean Murphy, *Oklahoma panel advances convicted killer's commutation*, AP NEWS, Mar. 8, 2021; Kim Bellware, *Can a decade-old witness confession help save Julius Jones from execution?*, WASH. POST, Mar. 5, 2021.

⁵³ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2020: YEAR END REPORT, at 10 (2020) [hereinafter DPIC 2020 YEAR END REPORT].

has (by DPIC's reckoning) been far more aggressive than his counterparts elsewhere in seeking the death penalty.⁵⁴

In California, a long-standing leader in imposing new death sentences, the number dropped from eleven in 2017 to five in 2018, and three in 2019. There were similar declines in Maricopa County, Arizona (a total of nine from 2015-2018, down to zero in 2019), and Oklahoma County, Oklahoma and Montgomery County, Alabama (both zero in 2019 after both having a total of four from 2015-2018).⁵⁵

Just 30 counties (under 1% of all U.S. counties) and one federal district accounted for all death sentences imposed in the United States in 2019. In only two counties (Cuyahoga, Ohio and Riverside, California) were more than one death sentence imposed.⁵⁶

G. Huge Decrease in State Executions from an Already Lower Level Than in Recent Decades

The number of executions by state governments in the United States dropped from 98 in 1999 to 42 in 2007, and 37 in 2008, rose to 52 in 2009, then declined to 46 in 2010, 43 each in 2011 and 2012, 39 in 2013, 35 in 2014, 28 in 2015, and 20 in 2016 (the fewest since 1991). Thereafter, executions rose to 23 in 2017 and 25 in 2018 before dropping to 22 in 2019. 2019 was the fifth straight year with fewer than 30 executions.⁵⁷ Just seven states – Texas, Tennessee, Alabama, Georgia, Florida, South Dakota, and Missouri – were the originators of 2019's seven executions.⁵⁸

In 2020, the number of state executions was again seven. Three of these were carried out by Texas, and Alabama, Georgia, Missouri, and Tennessee each executed one person. The federal government executed 10 people.⁵⁹

The continuation of state executions at seven for the second consecutive year was greatly influenced (as was a large drop in capital trials) by COVID-19. Among the early indicia that this would be so were the following:

On March 16 and March 19, 2020, the Texas Court of Criminal Appeals issued 60-day stays of two executions that had been scheduled for later that month. It cited "the current health crisis and the enormous resources needed to address that emergency." On April 1, 2020, it issued another such stay, as did District Judge Angela Saucier in a fourth case, on April 6, 2020.⁶⁰ Defense attorneys sought stays of executions in several states, asserting that the COVID-19 pandemic was making it substantially more difficult to undertake the investigations necessary to develop and present evidence in support of clemency. Another consideration was the potential danger of having substantial groups of people assemble for executions.

⁵⁴ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR END REPORT, at 10-11 (2019) [hereinafter DPIC 2019 YEAR END REPORT].

⁵⁵ *Recent Death Sentences by Name, Race, County, and Year*, DEATH PENALTY INFO. CTR. (last visited Feb. 26, 2021) (follow hyperlinks for years under discussion).

⁵⁶ DPIC 2019 YEAR END REPORT, *supra* note 54, at 11.

⁵⁷ DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, at 1 (2019); DPIC 2019 YEAR END REPORT, *supra* note 54, at 1.

⁵⁸ DPIC 2019 YEAR END REPORT, *supra* note 54, at 8.

⁵⁹ DPIC 2020 YEAR END REPORT, *supra* note 53, at 10.

⁶⁰ Jess Bravin, *Prisoner Executions Are Put Off Because of Pandemic*, WALL ST. J., Mar. 26, 2020; Danielle Haynes, *Texas delays third execution amid COVID-19 Pandemic*, UPI, Apr. 1, 2020; *4th Texas execution delayed in midst of virus outbreak*, AP NEWS, Apr. 6, 2020.

On April 10, 2020, nine “doctors, pharmacists and front-line medical workers” sent an open letter to state prison systems. The letter urged them to turn over drugs such as midazolam – which they were holding for use in executions – to health care professionals who needed these drugs urgently to help patients. Many of these drugs were in very short supply.⁶¹

These concerns – including questions as to whether states could get drugs needed for lethal injection – continued thereafter. As noted above, the problems did not deter the Trump Administration from resuming federal executions after 17 years and executing 13 people in six months.

H. Additional Reasons for Concern That Innocent People Could Be Executed

Awareness has continued to increase that innocent people can and do get sentenced to death, and that they may be executed despite substantial doubts about their guilt. These executions occur, in large part, due to default and other procedural technicalities to which many judges, attorneys general, clemency authorities, and governors give far more weight than to accuracy or fairness. Some death row inmates’ lives have been spared due to the greater critical attention now being paid to various kinds of “junk science.” Yet, even in some of these cases, fortuities played a role in saving the inmates’ lives.

1. Belated Discovery That Prosecution Relied on Erroneous DNA Analysis, and/or Other “Proof” That Turned Out to Be Junk Science

a. Areli Escobar

On December 30, 2020, Judge David Wahlberg recommended that the Texas Court of Criminal Appeals vacate the murder and rape convictions and death sentence, all imposed in 2011, on Areli Escobar. The victim was his neighbor’s daughter.

Judge Wahlberg found that all relevant parts of government responsible for overseeing the Travis County DNA lab had failed to properly supervise it and did not take effective action against the person from the lab, Diana Morales, who gave unscientific, unfounded, false testimony against Mr. Escobar. Judge Wahlberg said that a reasonable person could conclude that Ms. Morales had improperly harmed Mr. Escobar and that he deserved to have a new trial, this time with properly prepared and functioning experts and lead witness.⁶²

As of mid-April 2021, the Texas Court of Criminal Appeals had not taken any action on the motion for a new trial.

b. Sedley Alley: Effort to Disprove Guilt Years After Execution

In 2006, Tennessee executed Sedley Alley on charges that he had raped and murdered Suzanne M. Collins. In 2019, his daughter asked the state courts to conduct posthumous DNA testing that she and her Innocence Project lawyers argued could prove his innocence. On November 18, 2019, the trial court dismissed her request.

⁶¹ Asher Stockler, *Health Care Workers Ask States to Hand Over Death Penalty Drugs Needed to Fight COVID-19 Pandemic*, NEWSWEEK, Apr. 10, 2020.

⁶² Katie Hall, *Concerned over DNA evidence, judge recommends new trial to Austin man on death row for 2009 slaying*, AUSTIN AM.-STATESMAN, Jan. 6, 2021.

Alley had consistently said he had been coerced into confessing to the crime, and his supposed confession was inconsistent with the physical evidence in the case. The Tennessee Supreme Court had denied Alley's request for DNA testing prior to execution, but in an opinion in another case after Alley had been executed, the court acknowledged that it had wrongly denied his request. Innocence Project co-founder Barry Scheck said, "This case has all the tell-tale signs of a wrongful conviction – a confession that has been demonstrated to be false by objective forensic evidence, mistaken eyewitness identification, and, most disturbing, the refusal to test DNA evidence that could have exonerated Mr. Alley or removed the doubts about his guilt." In dismissing the request for DNA testing, Judge Paula Skahan said that Alley's estate did not have standing under Tennessee law to request the testing.⁶³

In February 2021, former United States Solicitor General Paul Clement joined with Professor Scheck and Stephen Ross Johnson (a nationally renowned criminal defense lawyer based in Tennessee) to argue on the estate's behalf before a panel of the Tennessee Court of Criminal Appeals. If DNA testing were to be permitted, it might show whether another man, who was under arrest and charged with murder and sexual assaults, might be guilty of the murder for which Mr. Alley had been executed.⁶⁴

As the Alley case illustrates, 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. The further past the trial a death row inmate gets, the less likely courts are to permit access to or DNA testing of materials that have never previously been subjected to the currently most sophisticated DNA testing methods. Often, courts seem unconcerned that 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.⁶⁵

2. Efforts to Preclude Newly Elected "Reform" Prosecutors from Looking into Old Cases

In 2020, as in several recent years, many reform prosecutors were elected. A prominent example was Los Angeles County's election of George Gascón (who had resigned as San Francisco's District Attorney in order to run in Los Angeles). Gascón defeated the incumbent, with a major issue being the incumbent's frequently seeking and securing capital punishment. In early February 2021, however, Gascón said he would not prevent his office's prosecutors from seeking the death penalty in the case of a "boy next door" killer.⁶⁶ But he said he would review death sentences already secured by his office (which has put over 200 people onto California's death row).⁶⁷

In November 2020, Deborah Gonzalez of Athens, Georgia and Jason Williams of New Orleans, Louisiana were elected after pledging never to seek the death penalty. Among the places that elected anti-death penalty prosecutors earlier in 2020 were Arizona's Pima County (Tucson), Georgia's Fulton County (Atlanta), Oregon's Multnomah County (Portland), and Texas' Travis County (Austin).

⁶³ Deanna Paul, *A DNA test could exonerate a man 13 years after his execution. The state refuses to do it.*, WASH. POST, Nov. 21, 2019.

⁶⁴ Emily Bazelon, *Opinion, Did Tennessee Execute an Innocent Man?*, N.Y. TIMES, Feb. 9, 2021.

⁶⁵ Paul, *supra* note 63.

⁶⁶ James Queally, *Gascón makes exception to death penalty ban for "boy next door" killer*, L.A. TIMES, Feb. 5, 2021.

⁶⁷ Daniel Nichanian, *Newly Elected Prosecutors Are Challenging the Death Penalty*, THE APPEAL, Dec. 9, 2020.

Pima County has sent more people to Arizona's death row than any other county in the state. In 2020, it elected Laura Conover to be chief prosecutor. She trumpeted her past work with the Coalition of Arizonans to Abolish the Death Penalty. Parisa Dehghani-Tafti, who was the legal director of the Mid-Atlantic Innocence Project, won a prosecutor's race in northern Virginia in 2019 on a similar platform.

Travis County, Texas elected José Garza, who pledged not to seek the death penalty and to review previously imposed sentences for legal or factual errors. Eight people sentenced to death in Travis County have been executed since 1976, and a ninth person, Areli Escobar, was found on December 30, 2020, to have been convicted and sentenced on the basis of horribly incorrect "DNA evidence" and possibly victimized by a prosecutor's office cover-up (see Section H.1.a. above).

In Franklin County, Ohio, Ron O'Brien, after many years getting death penalties there, was defeated by Democrat Gary Tyack.⁶⁸

3. *Dispute Between Trial Prosecutor and State Attorney General on Reopening Death Row Inmate's Case with Glaring Guilt Questions*

On December 24, 2019, a Missouri appeals court dismissed a case that involved the effort by St. Louis' elected prosecutor, Kim Gardner, to reopen the case of death-row inmate Lamar Johnson. Ms. Gardner, with the support of 34 elected prosecutors throughout the United States, sought to get Mr. Johnson a new trial at which the prosecution could present new evidence that might result in an acquittal. In the 24 years since Mr. Johnson's conviction, the lead prosecution witness recanted and two other men confessed to having committed the crime by themselves. The appeals court said it had to dismiss the case, but it required that the case be sent to the Missouri Supreme Court, since the controversy raised a new issue involving "questions fundamental to our criminal justice system."⁶⁹

On March 2, 2021, the Missouri Supreme Court unanimously dismissed the appeal. It held that there no precedent for allowing an appeal from the denial of a motion for a new trial made decades after the conviction became final. However, in a separate opinion, Missouri Chief Justice George Draper III said a prosecutor could attempt to overturn a wrongful conviction via a court rule allowing a party to file a motion to seek relief from a final judgment in certain circumstances. He also said the legislature could enact a law permitting a prosecutor to file a motion for a new trial in this type of situation. And Supreme Court Judge Laura Denvir Stith said in a separate opinion that a petition for a writ of habeas corpus could provide a way for Johnson to seek relief. Both concurrences attacked the Missouri Attorney General's actions in Johnson's case, with Chief Justice Draper calling the office's position "disingenuous" and Judge Stith being scathing in her criticism. Circuit Attorney Gardner vowed to continue to seek relief for Mr. Johnson.⁷⁰

4. *State Executions Despite Substantial Reasons to Doubt Guilt*

a. *Larry Swearingen*

The forensic evidence against Texas prisoner Larry Swearingen was extraordinarily weak. It was finally challenged as Swearingen's execution drew closer. Numerous forensic

⁶⁸ *Id.*

⁶⁹ Rachel Rice, *Missouri Supreme Court is asked to determine if Lamar Johnson gets new trial*, ST. LOUIS POST-DISPATCH, Dec. 24, 2019.

⁷⁰ Emily Hoerner, *Mo. Supreme Court denies latest appeal of Lamar Johnson, whom local prosecutors say is wrongly convicted*, INJUSTICE WATCH, Mar. 4, 2021.

experts contradicted prosecution trial testimony. The State’s “smoking gun” – a piece of pantyhose supposedly matching the pantyhose used to strangle the victim – had not been found during two initial searches of Swearingen’s home. It eventually had been “found” only after the victim’s body was discovered with a pantyhose ligature around her neck. The lab technician who testified at trial that the two pieces were halves of a single pair of pantyhose had initially found “no physical match” between them.

Four forensic pathologists, three forensic entomologists, and a forensic anthropologist contradicted the medical examiner’s testimony on the time of death. Under the medical examiner’s timeline, the victim had been killed immediately after her disappearance. All the other experts concluded she had been dead at most two weeks before her body was discovered. Because Swearingen had been arrested three weeks before the body was found and had remained in police custody, he could not have committed the killing under the timeline upon which the State relied. Texas nonetheless executed Swearingen on August 21, 2019.⁷¹

b. Donnie Lance

On January 29, 2020, Georgia executed Donnie Lance after denying requests for DNA testing and clemency that were supported by the children he shared with one of the two victims. Lance’s Georgia Supreme Court motion said that prosecutors had improperly selected friends for the grand jury that indicted Lance. At trial, his lawyers completely failed to present mitigation evidence. On appeal, his lawyers said that evidence that he had brain damage from brain traumas could have been presented. In 2019, three U.S. Supreme Court justices dissented from the Court’s refusal to hear his appeal. Justice Sonia Sotomayor, joined by Justices Elena Kagan and Ruth Bader Ginsburg, wrote that the Court’s inaction “permits an egregious breakdown of basic procedural safeguards to go unremedied.” In supporting clemency, Stephanie Cape said, “Me and my brother deserve to know who did it – whether it’s him or someone else. We’ve lived our whole life not knowing for sure. If there’s a chance for actual proof, why not do it?”⁷²

5. Two People with Strong Innocence Claims Barely Avoided Execution in 2019 and Remain at Risk of Execution in 2021

a. James Dailey

James Dailey’s November 7, 2019 scheduled execution was halted by a Florida federal district court on procedural grounds unrelated to the substance of his serious innocence issues. Dailey presented evidence that his co-defendant, Jack Percy, had admitted at least four different times – including in a 2017 signed affidavit – that he alone had committed the murder. No physical evidence linked Dailey to the crime, and the only testimony against him had come from Percy – who was sentenced to life in prison – and three jailhouse informants to whom police provided information about the murders and had the charges against them reduced. An extensive story based on the reporting of a *New York Times* staff writer and *ProPublica* reporter was published in *The New York Times Magazine* in December 2019.⁷³ It revealed that one of the jailhouse informant witnesses against Dailey, Paul Skalnik, was a serial perjurer whose testimony had put dozens of defendants in jail, including four on death

⁷¹ Tom Jackman, *Did faulty science, and bad testimony, bring Larry Swearingen to the brink of execution?*, WASH. POST, Aug. 17, 2019; Jolie McCullough, *Texas executed Larry Swearingen for a 1998 Texas slaying. His lawyer says bad science got him on death row*, TEX. TRIB., Aug. 21, 2019.

⁷² Joshua Sharpe & Bill Rankin, *Georgia executes Donnie Lance for 1997 double murder*, ATLANTA J.-CONST., Jan. 30, 2020; Bill Rankin, *Condemned man’s children call for DNA tests*, ATLANTA J.-CONST., Nov. 14, 2019.

⁷³ Pamela Colloff, *How This Con Man’s Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. TIMES (Magazine), Dec. 4, 2019.

row. On December 29, 2019, the *Times* devoted most of its editorial page to a denunciation of Florida's continuing efforts to execute Mr. Dailey.⁷⁴

On February 20, 2020, Florida circuit court Judge Pat Siracusa ordered that an evidentiary hearing be held on March 5, 2020, at which Jack Percy would testify. Mr. Dailey's counsel expected Mr. Percy to say under oath – as he had said in an affidavit on December 28, 2019 – that he alone killed the victim and that Dailey was in no way involved. However, he retracted that statement during a deposition a week before the hearing, and then completely refused to testify at the hearing.⁷⁵

On May 29, 2020, Judge Siracusa denied Mr. Dailey's innocence claim.⁷⁶ Ironically, one day earlier, journalist Pamela Colloff received a National Magazine Award for her exposé of the key informant in the case.

b. Rodney Reed

Texas death row inmate Rodney Reed came within five days of execution in November 2019 when the Texas Court of Criminal Appeals stayed the execution to enable a lower court to consider whether perjured testimony and withholding of exculpatory evidence had combined to convict an innocent person. Earlier on the day of the stay order, the Texas Board of Pardons and Paroles had unanimously urged Governor Abbott to order a 120-day reprieve. There had been an impressive campaign in support of saving Reed's life by a wide bipartisan coalition of elected officials and well-known and well-respected people. Indeed, three million people had signed a petition seeking a stay.⁷⁷

DPIC summarized the grounds on which Reed's attorneys had sought the stay and the new hearing as follows:

Reed's attorneys sought DNA testing of evidence from the case, including the belt used to strangle the victim, Stacey Stites. Reed, who is black, said that he and Stites, who was white, were having an affair that they kept secret because their interracial relationship would have caused a scandal in their small Texas town. He presented numerous affidavits pointing to Stites' fiancé, Jimmy Fennell, an Austin-area police officer, as the killer. Moreover, witnesses said they had heard Fennell on several occasions threaten to kill Stites if she cheated on him. Fennell had even said that "he would strangle her with a belt" if she changed her testimony. Fennell was fired from his police job following his arrest and conviction for kidnapping a woman while on duty and later sexually assaulting her. Finally, a prominent expert concluded that Fennell's testimony that Stites had been abducted and killed on her way to work is "medically and scientifically impossible."⁷⁸

⁷⁴ Jesse Wegman, Opinion, *Will Florida Kill an Innocent Man?*, N.Y. TIMES, Dec. 29, 2019.

⁷⁵ Jamal Thalji, *Will someone else confess in death row inmate James Dailey's case?* TAMPA BAY TIMES, Feb. 20, 2020; Dan Sullivan, *Inmate's Hopes Met With Silence*, TAMPA BAY TIMES, Mar. 6, 2020.

⁷⁶ Dan Sullivan, *Judge denies innocence claims of Pinellas death row inmate*, TAMPA BAY TIMES, May 29, 2020.

⁷⁷ DPIC 2019 YEAR END REPORT, *supra* note 54, at 15.

⁷⁸ *Id.*

6. Cases in Which Death Row Inmates with Strong Indicia of Innocence Have Been Released

a. Christopher Williams

In December 2019, the Philadelphia District Attorney's Conviction Integrity Unit decided to drop charges against Christopher Williams, who had been on Pennsylvania's death row since 1993. He had secured in 2013 the right to a new trial, due to his trial counsel's failure to investigate crime-scene evidence and to have medical and forensic witnesses present available medical and forensic evidence showing that the only witness linking Williams to the murder had testified to something that was physically impossible.⁷⁹ However, he was not released until February 2021, when he was also exonerated in a second case.⁸⁰

b. Anthony Fletcher

On January 21, 2021, Anthony Fletcher, a former boxing champion, pleaded no contest to reduced charges, which led to a Philadelphia judge's releasing him immediately. Fletcher had been imprisoned for almost three decades after being convicted and sentenced to death for a supposedly intentional murder. It turned out that none of the prosecution's purported eyewitnesses saw what they had testified to having seen, and that the prosecution's other evidence was much more questionable than it had at first appeared to be.⁸¹

c. Alfred Dewayne Brown

On December 17, 2020, the Texas Supreme Court held that, having been found by the Harris County District Attorney's office to have been innocent of capital murder (for which he had been convicted, sentenced to death, and imprisoned – including nearly a decade on death row), Alfred Dewayne Brown was entitled to receive almost \$2 million in damages.⁸²

d. Walter Ogrod

In June 2020, Walter Ogrod was released from prison, after Philadelphia prosecutors withdrew all charges against him and he was exonerated after 28 years of protesting his innocence of the murder of a four-year-old girl. The District Attorney's office said Ogrod's conviction and death sentence were secured through the use of a coerced confession he gave to two detectives whom prosecutors asserted also coerced confessions from other innocent defendants, withheld key evidence from the defense, and relied on highly suspect testimony from jailhouse informants.⁸³ Tom Lowenstein's superb 2017 book, *The Trials of Walter Ogrod*, played a substantial role in focusing attention on serious problems that led to his exoneration.⁸⁴

⁷⁹ Samantha Melamed, *A brutal triple murder, an eager informant, hidden evidence, and now, exoneration*, PHILA. INQUIRER, Jan. 8, 2020.

⁸⁰ Samantha Melamed, *Accused of 6 murders, Philly man spent 25 years on death row. Now, his record is cleared*, PHILA. INQUIRER, Feb. 9, 2021.

⁸¹ Julie Shaw, *He spent years on death row. Now, a former Philly boxer will be released from prison*, PHILA. INQUIRER, Jan. 21, 2021.

⁸² Jolie McCullough, *Texas Supreme Court rules Alfred Dewayne Brown must be compensated for his wrongful imprisonment*, TEX. TRIB., Dec. 18, 2020.

⁸³ Chris Palmer, *Days after he was freed from death row, Walter Ogrod's tainted Philly murder case was officially thrown out*, PHILA. INQUIRER, June 10, 2020.

⁸⁴ See THOMAS LOWENSTEIN, *THE TRIALS OF WALTER OGDOD* (2017).

e. 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 row before a mistrial in a trial regarding his intellectual disability led to his sentence being changed by stipulation to LWOP.⁸⁵ 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.”⁸⁶ 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.⁸⁷ Accordingly, Gates was granted a new trial. The prosecution appealed to the Georgia Supreme Court, which unanimously affirmed on March 13, 2020.⁸⁸ On May 15, 2020, Mr. Gates was released from prison after being sentenced to time served after entry of an *Alford* plea.⁸⁹

f. Charles Ray Finch

In June 2019, Charles Ray Finch was exonerated in North Carolina, following a federal court ruling that he had proven his “actual innocence.” Finch had been convicted in 1976 as a result of false eyewitness testimony. At the time, North Carolina law carried a mandatory death sentence, and the statute was declared unconstitutional shortly after Finch’s conviction. That court decision likely saved Finch’s life, because after more than 25 years of appeals, he had no legal remedies left. Then, Finch obtained the assistance of the Wrongful Conviction Clinic at Duke Law School, which worked for another 15 years to secure his freedom. The clinic’s students and volunteers discovered that police had pressured witnesses to testify against Finch and that a key witness had undisclosed alcoholism and cognitive problems that included difficulty with short-term memory. They also uncovered evidence that police had manipulated eyewitness identification lineups by dressing Finch in the same type of clothing the perpetrator had been described as wearing and that the police then lied about their misconduct.⁹⁰

g. Orlando Maisonet

Orlando Maisonet 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.⁹¹

⁸⁵ *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct. Jan. 10, 2019), <https://deathpenaltyinfo.org/files/pdf/GatesJohnnyLeeNewTrialDecision2019-01-10.pdf>.

⁸⁶ *Id.* at 16.

⁸⁷ *Id.* at 25.

⁸⁸ *State v. Gates*, 840 S.E.2d 437 (Ga. 2020).

⁸⁹ Bill Rankin, *Georgia man freed after 43 years for crime he denies committing*, ATLANTA J.-CONST., May 15, 2020.

⁹⁰ Rose Wong, *Free after 43 years: How Duke’s Wrongful Convictions Clinic freed an innocent man*, THE CHRON. (Duke Univ.), June 20, 2019.

⁹¹ Samantha Melamed, *Philly judge cites prosecutorial misconduct, vacates conviction of man who spent 28 years on death row*, PHILA. INQUIRER, Feb. 19, 2019.

The parties then agreed upon a final disposition. On May 9, 2019, Judge O’Keefe granted Maisonet’s motion to reconsider, and permitted Maisonet’s release. The victim’s sister, Gloria Figueroa, told the judge, just prior to the resentencing, that she thought Maisonet was completely innocent.⁹²

h. 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.⁹³

7. There Was Enhanced Public Awareness That Even Long Accepted Types of Evidence Can Lead to Erroneous Convictions and Death Sentences

As Pulitzer winning journalist Edward Humes wrote in the *Los Angeles Times* on January 13, 2019, “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.” DNA exposed many errors that led to convictions of the innocent, even in capital cases. “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. . . . 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.”⁹⁴

a. Bite Marks

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.’”⁹⁵

⁹² Samantha Melamed, *Philly man freed from 28 years on death row after finding of prosecutor’s misconduct*, PHILA. INQUIRER, May 9, 2019.

⁹³ 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.

⁹⁴ Edward Humes, *Opinion, Bad forensic science is putting innocent people in prison*, L.A. TIMES, Jan. 13, 2019. Serious forensic errors are discussed in more detail in last year’s chapter at Part I.C.3.a.

⁹⁵ 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

On January 15, 2021, the Texas Court of Criminal Appeals announced it was staying Mr. Milan's execution date indefinitely and had remanded the case to the trial court, where a disability hearing was later scheduled.⁹⁶

b. "Shaken Baby" Murder Diagnoses Are Increasingly Discredited

A diagnosis of "Shaken Baby Syndrome" has been used often to gain murder convictions and sometimes death sentences. Often, people were convicted based on "expert" testimony that this syndrome was the only way to explain the baby's bleeding on his brain and brain swelling. Indeed, sometimes, the baby's treating physicians and a child abuse expert testified at trial that the only explanation for the baby's bleeding on his brain and in his eyes, and the brain swelling that led to his death, was violent shaking by the last person who was with him before he went into medical distress. Now, with the help of experts in forensic pathology, infectious disease, hematology, neuroradiology, and biomechanical engineering, defense counsel are increasingly fending off convictions for alleged shaking of babies. An important recent example was Clarence Jones, III's success on appeal in Maryland.⁹⁷

An earlier partial success occurred in the case of Genesis Hill. A federal district court overturned Hill's Ohio death sentence for killing his six-month-old daughter, Domika. The conviction and sentence were based upon a questionable shaken-baby diagnosis. A principal reason for the federal court's decision was the substantially changed expert opinion of the deputy coroner who had performed the autopsy. Her revised opinion – in which she now relied on new scientific literature – was that the child's death was far more consistent with the child's being crushed in an accidental fall than with direct blows to the head. The expert now found credible Hill's account of having fallen off of a retaining wall while holding his daughter. Hill later accepted a sentence of life, with parole eligibility after he has spent 30 years in jail. Common Pleas Judge Lisa Allen imposed that sentence on June 27, 2019.⁹⁸

I. Executions of People Sentenced in Violation of the Constitution or Whose Executions Raised Serious Fairness Issues

1. Billie Coble

Texas executed Billie Coble on February 28, 2019, despite federal court findings that two prosecution expert witnesses had provided "problematic" and "fabricated" testimony at his trial about his supposed future dangerousness. Coble's first death sentence had been overturned. In his 18 years in prison before his resentencing trial, he "did not have a single disciplinary report." Prosecutors presented psychiatric testimony from Dr. Richard Coons,

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).

⁹⁶Courtney Stern, *Man on death row for 2008 murder of child in Rusk County granted stay of execution*, NEWS J., Jan. 15, 2021.

⁹⁷ See *Jones v. State*, No. 0087, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021) (reversing Circuit Court for Baltimore County and remanding with instructions to grant petition for writ of actual innocence and conduct further proceedings).

⁹⁸ Kevin Grasha, *From death row to possible parole: Genesis Hill gets new sentence*, CINCINNATI ENQUIRER, June 27, 2019.

who based his conclusion of future dangerousness on his assessing the case “his way’ with his own methodology” without ever checking the evidence’s accuracy. They also presented testimony from a supposed prison conditions expert – A.P. Merillat – who provided false testimony about the prevalence of prison violence and loopholes in prison rules that he claimed would allow life sentenced prisoners to commit acts of violence. The Fifth Circuit noted that “the State does not dispute that parts of Merillat’s testimony were fabricated.” Although a finding that the prisoner poses a continuing threat to society is a precondition to a Texas death sentence, the federal courts ruled that the unconstitutional presentation of this evidence was “harmless.” The 70-year-old Coble was the oldest person executed by Texas in the “modern” era of capital punishment.⁹⁹

2. *Paul David Storey*

On October 2, 2019, with three judges dissenting, the Texas Court of Criminal Appeals rejected a Tarrant County trial court’s recommendation that Paul David Storey’s death sentence be overturned because Fort Worth prosecutors had lied to the jury by asserting that the victim’s family wanted Storey to be sentenced to death. The court said the claim was procedurally barred.¹⁰⁰ Three judges dissented, pointing out that the victim’s parents had been death penalty opponents for many years and that the prosecutors had known this before trial. The dissenters said the prosecution’s argument to the contrary was “patently false.”¹⁰¹

3. *Jeff Cromartie*

Georgia executed Jeff Cromartie on November 13, 2019. No stay or hearing occurred even after Cromartie’s stepbrother and co-defendant said in an affidavit that the prosecution’s star witness had bragged about being the triggerman. Relatives of both the victim, Richard Slysz, and Cromartie had asked for DNA testing. Indeed, Elizabeth Legette, Mr. Slysz’s daughter, had written to prosecutors and then the Georgia Supreme Court, saying that she feared Cromartie may not have shot her father. “My father’s death was senseless,” Legette wrote to prosecutors in August. “Executing another man would also be senseless, especially if he may not have shot my father.”¹⁰²

4. *Nathaniel Woods*

Alabama executed Nathaniel Woods on March 5, 2020. The execution outraged many people both within and outside Alabama. Much outrage arose because Woods did not kill anyone and played no part in the killings. The actual killer, Kerry Spencer, was apparently asleep when the police officers arrived to serve Woods with an arrest warrant for a misdemeanor. Mr. Spencer continues to insist that Woods had nothing to do with the killings.

An additional reason many opposed Woods’ execution is that two of the jurors voted against imposing the death penalty.¹⁰³ On March 30, 2020, DPIC released an analysis

⁹⁹ Jolie McCullough, *Texas executes Billie Coble, the oldest man put to death in the state during modern era of the death penalty*, TEX. TRIB., Feb. 28, 2019; Brian Stull, *Texas Is Planning an Execution Based on Fraudulent Testimony*, ACLU, Feb. 26, 2019.

¹⁰⁰ *Ex parte Storey*, 584 S.W.3d 437 (Tex. Crim. App. 2019) (per curiam), cert. denied, 140 S. Ct. 2742 (2020).

¹⁰¹ *Id.* at 443 (Yeary, J., dissenting, joined by Slaughter, J.).

¹⁰² Joshua Sharpe, *Execution set for Georgia inmate amid DNA fight*, ATLANTA J.-CONST., Oct. 10, 2019; Jason Hanna & Rebekah Riess, *A Georgia man is executed after courts deny his appeals for new DNA testing*, CNN, Nov. 14, 2019.

¹⁰³ Katie Shepherd, *‘You killed my brother’: Sister of Nathaniel Woods confronts Alabama governor over controversial execution*, WASH. POST, Mar. 13, 2020; Christina Maxouris, *Nathaniel Woods’ execution doesn’t end the controversy over his case*, CNN, Mar. 6, 2020; Rick Rojas, *2 Jurors Voted to Spare Nathaniel Woods’s Life. Alabama Executed Him*, N.Y. TIMES, Mar. 5, 2020.

showing that where non-unanimous death penalty verdicts are possible, the risk of wrongful convictions increases.¹⁰⁴

5. Gary Raw Bowles

Gary Ray Bowles, whom Florida executed in 2019, was intellectually disabled. In denying him relief, the Florida courts applied a scientifically invalid standard that was later declared unconstitutional. His intellectual disability evidence was never reviewed by any court applying the proper constitutional standard. He most likely was not constitutionally eligible for the death penalty.¹⁰⁵

6. Charles Rhines

Charles Rhines was executed by South Dakota on November 4, 2019, without any court reviewing the evidence that jurors had unconstitutionally sentenced him to death because of his sexual orientation.¹⁰⁶ One juror who voted for death said jurors “knew that [Rhines] was a homosexual and thought that he shouldn’t be able to spend his life with men in prison.” A second juror stated in an affidavit that “[o]ne juror made . . . a comment that if he’s gay, we’d be sending him where he wants to go if we voted for [LWOP].” A third juror reported that there had been “lots of discussion of homosexuality” and “a lot of disgust.”¹⁰⁷ The ABA strongly urged a grant of clemency for Rhines.

J. Continuing Concerns About Lethal Injections

1. Tennessee Inmates Executed, at Their Choice, in the Electric Chair Rather Than by Lethal Injection

Under Tennessee law, a death row inmate whose death sentence was imposed prior to 1999 can decide between lethal injection and electrocution as the execution method. The first Tennessee inmate to be electrocuted after opting for electrocution was Daryl Keith Holtin in 2007. Between 2018 and February 20, 2020, Tennessee executed five people who chose electrocution over lethal injection, with only one person being executed by lethal injection.¹⁰⁸ Tennessee’s turning point was the execution in 2018 of Billy Ray Irick. An anesthesiologist who reviewed witness descriptions of Irick’s execution concluded to “a reasonable degree of medical certainty” that during the execution Irick was “aware and sensate” and “experienced the feeling of choking, drowning in his own fluids, suffocating, being burned alive, and the burning sensation caused by the injection of potassium chloride.”¹⁰⁹

¹⁰⁴ DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions, DEATH PENALTY INFO. CTR., Mar. 13, 2020.

¹⁰⁵ No Court Has Reviewed the Evidence that Gary Bowles May Be Intellectually Disabled; Florida Plans to Execute Him Anyway, DEATH PENALTY INFO. CTR., Aug. 22, 2019.

¹⁰⁶ Convicted killer Charles Rhines executed in South Dakota for stabbing co-worker in 1992, CBS NEWS, Nov. 4, 2019; Supreme Court Denies Review in Case Raising Anti-Gay Bias, EQUAL JUST. INITIATIVE, Apr. 15, 2019.

¹⁰⁷ Supreme Court Denies Review, *supra* note 106 (third alteration in original).

¹⁰⁸ Rick Rojas, *Fearing Lethal Injection, Inmates in Tennessee Opt for the Electric Chair*, N.Y. TIMES, Feb. 20, 2020; Pamela Ortega & Emily Smith, *3 corrections officers say Nicholas Sutton protected them. He was executed Thursday night*, CNN, Feb. 21, 2020; Liliana Segura, *Will Tennessee Kill A Man Who Saved Lives On Death Row?*, THE INTERCEPT, Feb. 16, 2020.

¹⁰⁹ Steve Hale, *Billy Ray Irick Was Tortured During Execution*, NASHVILLE SCENE, Sept. 7, 2018.

2. South Carolina Considers Offering the Firing Squad

On March 2, 2021, the South Carolina Senate approved a bill intended to permit the state to resume executions after a decade. The State has been unable to execute anyone for many years because the expiration date on its lethal injection drugs was reached and it could not thereafter acquire any more. Since state law entitles a death row inmate to choose between the electric chair and lethal injection, inmates have been choosing lethal injection. Since the State cannot honor that choice, it has not been able to execute anyone. The idea underlying the bill which the Senate passed is that if the prisoners have a choice of the electric chair and the firing squad, they could then be lawfully executed.¹¹⁰

3. Arizona Says It Now Has Sufficient Drugs to Execute by Lethal Injection Its Death Row Inmates Whose Appeals Are Complete

On March 5, 2021, the Arizona Department of Corrections, Rehabilitation and Reentry said that it had procured a sufficient supply of pentobarbital to enable it to resume executing people. Its most recent execution, of Joseph Wood in 2014, was highly controversial because he was administered 15 doses of a two-drug combination over two hours.

In the almost seven years thereafter, Arizona was unable to find pentobarbital, despite making extensive efforts to find lethal injection drugs, including attempting to import sodium thiopental, an effort that failed when federal agents seized the drug at the Phoenix airport. That drug was no longer made by companies approved for doing so by the U.S. Food and Drug Administration. Pursuant to state law, the government refused to disclose how or from whom it had acquired the drug or what pharmacist(s) would be involved in preparing it for use in executions.

On April 6, 2021, Attorney General Mark Brnovich said he would request that the Arizona Supreme Court set a “firm briefing schedule” for any execution-related issues for death row inmates Clarence Dixon and Frank Atwood and then, once those issues are resolved, issue execution warrants for them. Dixon’s and Atwood’s lawyers said it was clear from recent litigations that both inmates had serious constitutional issues, as well as severe physical weaknesses. A group of 21 former corrections officer expressed concern that many of those who participate in these executions would develop PTSP and other traumas.¹¹¹

As cogently summarized by *The New York Times* opinion analyst Elizabeth Bruenig on April 15, 2021: “[S]cientific evidence suggests that pentobarbital poisoning is an excruciating way to die.”¹¹² Legal challenges likely will be made on the basis of expert analysis.

A few days earlier, on April 9, 2021, *The Guardian* reported the bizarre facts about Arizona’s obtaining pentobarbital. At a time when Arizona’s Department of Corrections was being heavily criticized for being understaffed, providing low quality care, and having facilities that were gradually falling apart, it somehow assembled and surreptitiously paid \$1.5 million to buy enough pentobarbital to execute almost double its death row population. *The Guardian* also reported that Arizona had twice previously attempted to illegally import

¹¹⁰ Jeffrey Collins, *South Carolina Senate adds firing squad to execution methods*, AP NEWS, Mar. 2, 2021.

¹¹¹ *Arizona AG Asks Court to Set Execution Dates, Sparking Broad Backlash*, DEATH PENALTY INFO. CTR. (last visited Apr. 12, 2021).

¹¹² Elizabeth Bruenig, *Opinion, Trump’s Killing Spree Continues*, N.Y. TIMES, Apr. 15, 2021.

execution drugs from dubious sources, and that Tennessee and Missouri had secretly and expensively procured and used execution drugs from abroad.¹¹³

4. *The Supreme Court Showed No Interest in Such Concerns, Including When Raised by Federal Death Row Inmates*

The Supreme Court's majority showed no significant interest in the federal government's use of essentially untested drugs or drug combinations in the 13 federal executions in 2020-2021. It also appeared uninterested in challenges to lethal injection executions by states. The Court seemed much more interested in getting executions completed than in the constitutionality of why and how they were done.

Yet, the nature of "lethal injection" has changed greatly over the years of its use in executions. Whereas once there was a relatively common combination of drugs used, now there is less uniformity and more improvisation in what drugs are used, such as from where they are acquired, what side effects may occur, and ultimately whether "lethal injection" executions today bear any resemblance other than the words "lethal injection" to what the Court considered when it in general upheld their constitutionality.¹¹⁴

K. *Failure to Make Reforms Recommended by State Commissions or ABA Assessment Team; Severe Retrenchment by Florida*

1. *Kentucky*

In February 2020, an eminent group of public defense leaders in Kentucky – including the four lawyers to hold the title of Kentucky Public Advocate during the past 28 years and the two who have served as Executive Director of the Louisville-Jefferson County Public Defender Corporation over the course of the past 38 years – issued an analysis of the extent to which any branch of Kentucky's government had taken steps to implement recommendations made in 2011 by the assessment team of the ABA Death Penalty Due Process Review Project (see Part V.D.1. below for a discussion of the assessment teams). They concluded that no branch of government had seriously taken action to implement the ABA assessment team's recommendations, with the exception of a DNA testing reform. Accordingly, they said, "Kentucky does not have a system that fairly and reliably assures who should be executed, which has created a real risk of executing the innocent, compromised the credibility of our courts and the outcomes of the judicial process, and robbed the rest of the criminal justice system of funds that could be used productively to protect the safety of Kentuckians and address other societal ills."¹¹⁵

2. *Florida Supreme Court Moves Towards Greater Unfairness in Capital Sentencing*

The Florida Supreme Court led Florida in the opposite direction of reforms that Florida had made in the last few years – changes which had begun to make Florida's death penalty system significantly less arbitrary, capricious, and lacking in due process. The reforms began with the U.S. Supreme Court's unanimous decision in *Hurst v. Florida*,¹¹⁶ that in order to be constitutional, Florida's death penalty system must require that a unanimous

¹¹³ Ed Pilkington, *Revealed: Republican-led states secretly spending huge sums on execution drugs*, THE GUARDIAN, Apr. 9, 2021.

¹¹⁴ Austin Sarat, *The Dreadful Failure of Lethal Injection*, JUSTIA, Mar. 23, 2021.

¹¹⁵ KY. DEP'T OF PUB. ADVOCACY, A REVIEW AND REPORT ON THE STATUS OF THE RECOMMENDATIONS MADE BY THE KENTUCKY DEATH PENALTY ASSESSMENT TEAM, at 2, 16 (2020).

¹¹⁶ *Hurst v. Florida*, 577 U.S. 92 (2016).

jury find that every fact existed which was a pre-requisite to making the defendant eligible for imposition of the death sentence. That had not been a requirement of the Florida system.

Soon thereafter, the Florida Supreme Court was asked by the parties to decide whether a Florida death sentence could nevertheless be constitutional if, after the Supreme Court decision in *Hurst*, a Florida jury had unanimously voted that the defendant had committed an act that made the defendant eligible for imposition of the death penalty. The Florida Supreme Court held that the answer to that question was No.¹¹⁷

The Florida Supreme Court and the Florida legislature then engaged in what amounted to an interplay on judicial interpretation and constitutional holdings concerning various possible wordings of a revised constitutional or statutory provision. After much back and forth, it appeared that the Florida legislature and supreme court had concluded that in order for a death sentence handed down in a Florida court to be constitutional, every fact whose existence was a pre-requisite for death penalty eligibility must have been found by a unanimous jury, *and* that the decision to impose the death penalty must have been made by a unanimous jury – *and* that if the foregoing had not happened before the death penalty was imposed in the case and the defendant then raised the issue in light of the new requirements of federal and Florida law, there must thereafter be unanimous jury votes with regard to all facts necessary to death eligibility and with regard to the imposition of the death penalty.

Florida judges and jurors were in the middle of implementing the foregoing both as to cases being tried in the first place and cases in which the new requirements were being implemented retroactively. It was clear to everyone that this had the potential for permanently removing a significant number of people from Florida's death row and for significantly reducing the number of people newly sentenced to death in Florida. The biggest contentious issue was whether it was fair that due to fortuities of timing, some death row inmates' death sentences had been handed down too early to save their lives, *i.e.*, prior to the date as to which the Supreme Court's holding and/or subsequent legislation was applicable.

However, Florida's Governor Ron DeSantis had and took an opportunity to substantially transform the composition of the Florida Supreme Court by appointing new judges to seats on the court for which the terms of years of the previous judges had expired. This resulted in a court that was considerably more death penalty-friendly than the court had been. In an unusual series of decisions, the newly reconstituted Florida Supreme Court made it more difficult to challenge a death sentence than it had been prior to the Supreme Court's *Hurst* decision, and it drastically limited any retroactive application of any defendant-friendly change to the law.¹¹⁸

Unless the Supreme Court of the United States overturns the death sentence-friendly decisions by the Florida Supreme Court and/or legislature, or unless the Florida legislature were to legislatively overturn these decisions, Florida may become one of the few or perhaps the only state with increasing numbers of people being sent to death row and being executed.

¹¹⁷ *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (per curiam), *receded from by State v. Poole*, 297 So. 3d 487 (Fla. 2020) (per curiam).

¹¹⁸ Editorial, *The Florida Supreme Court's U-turn on the death penalty*, TAMPA BAY TIMES, May 27, 2020.

III. OTHER FACTORS LIKELY AFFECTING 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. They had been conceived of and implemented by the Equal Justice Initiative and its extraordinary executive director Bryan Stevenson. The openings received enormous national attention. As more visitors and organizations visited the National Memorial and Legacy Museum, either in person or virtually, their underlying messages – underscored by Mr. Stevenson’s numerous public appearances and interviews – were regularly included in public discourse.¹¹⁹ These messages were further enhanced by large viewership of the *Just Mercy* movie and the continuing success of the *Just Mercy* book.

The key educational message being expressed in these various ways is that we are still suffering from the dreadful legacy of lynchings and other terrorism that long rendered the post-slavery constitutional amendments and federal civil rights laws a practical nullity. In this context, capital punishment has played a crucial role, as a seemingly more tasteful version of lynchings and other terrorist acts.

Most Americans until the last few years had very little idea of the continuity of white supremacy as an ideology through the present, and of the post-traumatic impact that lynchings still have in many communities of color – including Northern communities of color to which enormous migrations occurred that at least created some physical distance from 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 in this sad saga. Many people long believed that after the Supreme Court cleared out America’s death rows in 1972 and then upheld new statutes in 1976, it had ensured that there would be careful individualized consideration of the appropriate punishment for those found guilty, who were now aided by thorough investigation and presentation by defense counsel. However, that widely held belief is belied by the actual history of the revived death penalty system.

B. *Increasing Awareness of and Outrage About Killings of Unarmed Black People by Police – Which Now Exceed the Number of U.S. Executions – Has Further Highlighted the Need to Act Effectively Against Present-Day Manifestations of Racial Factors in Implementing the Death Penalty*

By early 2021, the national awareness of, and videotaped contemporaneous evidence regarding, police killings of unarmed Black people had reached a crescendo. On January 25, 2021, NPR presented the results of its investigation into the large number of police killings of law-abiding Black people. The results were extremely dismaying, including the fact that “[s]ince 2015, police officers have fatally shot at least 135 unarmed Black men and women

¹¹⁹ 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/>.

nationwide.”¹²⁰ If one adds up the yearly totals of executions in the United States for the years since 2015 (set forth in Part II.G. above), it is quickly apparent that it is *fewer* than the number of unarmed Black people killed by police in the United States during those same years.

A subsequently revealed video of a dreadful incident in December 5, 2020 in Virginia, which fortunately did not end up in anyone being killed, highlights police officers’ ingrained biases – including manifestations via the use of execution-related words. In this situation, police ended up in a confrontation with an active duty Army second lieutenant, Caron Nazario, who was in uniform, arising from his new SUV not having permanent license plates (it did have temporary indicia of proper licensing). *After* the two police officers knew that Mr. Nazario was an Army second lieutenant, they pepper-sprayed, struck and handcuffed him. Slightly earlier, when Lieutenant Nazario calmly asked the two police officers, “What’s going on?,” officer Gutierrez responded: “You’re fixin’ to ride the lightning, son.” “Ride the lightning” is a colloquial term for execution by electrocution. It was most famously referenced in the movie *The Green Mile*, a film about a Black man facing execution.¹²¹

C. ***Greater Awareness of the Ways That Racial Disparities Are Affecting Death Penalty Implementation***

The most notorious example of the failure to effectuate the civil rights of capital case defendants over the past four decades is the Court’s abysmal decision in *McCleskey v. Kemp*.¹²² There, the Supreme Court refused to grant constitutional relief despite assuming the validity of a sophisticated study showing that, after holding other factors constant, a defendant’s odds of *being sentenced to death* in Georgia were far greater if the victim was white than if the victim was Black. As *The New York Times*’ chief Supreme Court reporter, Adam Liptak, recently observed, “*McCleskey* has not aged well.” Its principal author, Justice Lewis Powell, said it was the case that he most regretted involvement in, and the dissenters became more scathing as *McCleskey* became the courts’ principal justification for doing nothing about racial discrimination – be it intentional or not – unless there is contemporaneous “smoking gun” proof of discriminatory intent and effect.¹²³

In 2020, Professors Scott Phillips and Justin Marceau presented the results of their study, which emulated David Baldus’ study from *McCleskey*, but was more comprehensive in that it followed the cases to their ultimate conclusions – *e.g.*, executions or natural causes. They found that after holding other factors constant, the odds of a Georgia capital defendant’s *getting executed* were 17 times greater if the victim was Black than if the victim was white. This differential far exceeded the 4+ times greater odds that Baldus had found concerning *being sentenced to death*. But there is no reason to think today’s Supreme Court, which is far more “conservative” than the *McCleskey* Court, would find any constitutional problem.¹²⁴

Some members of the Supreme Court (and others of like mind in other courts, legislative bodies, and throughout society) now find it unacceptable for there to be racial discrimination in the capital punishment system that is patently obvious through “smoking

¹²⁰ Cheryl W. Thompson, *Fatal Police Shootings Of Unarmed Black People Reveal Troubling Patterns*, NPR, Jan. 25, 2021.

¹²¹ Timothy Bella, *A Black Army officer held at gunpoint during traffic stop was afraid to get out of his car. ‘You should be,’ police said.*, WASH. POST, Apr. 10, 2021.

¹²² *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹²³ Adam Liptak, *A Vast Racial Gap in Death Penalty Cases, New Study Finds*, N.Y. TIMES, Aug. 3, 2020.

¹²⁴ *Id.* (discussing Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020)).

gun” evidence – *i.e.*, direct proof of discriminatory intent and action that leaves nothing to the imagination. Indeed, in *Foster v. Chatman*,¹²⁵ in which unequivocal evidence in the prosecution’s trial files showed that the prosecutors deliberately violated *Batson v. Kentucky*¹²⁶ by coming up with pretextual, phony reasons for exercising peremptory challenges to keep Black people off of the jury, Chief Justice Roberts held that there clearly had been “a concerted effort to keep blacks off of the jury. . . . Two peremptory strikes on the basis of race are two more than the Constitution allows.”¹²⁷

Moreover, when the jury is invited to make, and does make, a decision on imposing the death penalty that is directly affected by the defendant’s race, Chief Justice Roberts (writing for the Court) has found a constitutional problem – and in doing so has used language seemingly inconsistent with that of *McCleskey*. In *Buck v. Davis*,¹²⁸ Chief Justice Roberts, writing for the Court, held that Texas death row inmate Duane Buck had received unconstitutionally ineffective assistance of counsel when his counsel presented an “expert” witness who 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. Since Buck would always be Black, he would, according to his own expert, inherently increase the “probability” of future violence.”¹²⁹

The Court stated that the possibility that Buck was sentenced to die in part due to his race “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.”¹³⁰ The Court said this was even more troubling “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.’”¹³¹ This and other language in the Chief Justice’s majority decision are inconsistent with the logic and wording of the Court’s *McCleskey* holding 30 years earlier.

It is also crucial that all participants in jury selection in capital cases be on the lookout for prosecutors who may be making peremptory challenges on the basis of race.¹³²

¹²⁵ *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

¹²⁶ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹²⁷ *Foster*, 136 S. Ct. at 1744, 1755. In some instances, prosecutors’ blatant discrimination in jury selection in case after case is sufficient to demonstrate a violation of *Swain v. Alabama*, 380 U.S. 202 (1965), as Judge John D. Allen concluded in dictum had occurred in all seven Muscogee County capital cases whose documents he reviewed when considering *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct. Jan. 10, 2019), <https://deathpenaltyinfo.org/files/pdf/GatesJohnnyLeeNewTrialDecision2019-01-10.pdf>. In three of these cases, the defendants had been executed before this proof of discrimination was uncovered.

¹²⁸ *Buck v. Davis*, 137 S. Ct. 759 (2017).

¹²⁹ *Id.* at 768-70.

¹³⁰ *Id.* at 778.

¹³¹ *Id.* (alterations in original) (citation omitted).

¹³² In 2019, the Supreme Court overturned the conviction of Curtis Giovanni Flowers, a Mississippi death row prisoner who had been tried six times for a 1996 quadruple murder in Winona, Mississippi. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). No physical or witness evidence ever indicated that Flowers had been at the crime scene. Three of the first five trials ended in convictions that were overturned on appeal and two resulted in hung juries. The lead prosecutor for all six trials was Doug Evans, the District Attorney in Mississippi’s Fifth Circuit Court District. Before a settlement was reached, Evans announced that he would not be involved in a seventh trial; and there was a stipulation under which a settling plaintiff would get \$500,000 in damages due to alleged violations of federal law. Circuit Judge George Mitchell filed an order under which Flowers would receive \$500,000 and his counsel would receive \$50,000. In the sixth trial, the defense argued that the prosecution had violated *Batson v. Kentucky* by discriminating on the basis of race in jury selection. In 2016, the

D. Unusual Developments in 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.”¹³³

In the two decades after *McCleskey* was handed down in 1987, numerous civil rights, equal justice, and due process groups around the United States, including the ABA, attempted to get a legislative remedy for the kinds of systemic racial discrimination for which the Supreme Court had held there was no constitutional remedy but might be a statutory remedy. The first, and so far only, state to try to deal with this pervasive problem legislatively was North Carolina, which in 2009 enacted a Racial Justice Act. It provided that prior to trial, a defendant could seek to preclude the prosecutor from seeking the death penalty by showing that race had a significant impact on the decision to seek death. Also, a death row inmate could seek to have a death sentence overturned by showing that race had a significant impact on the death sentence’s imposition. Statistical evidence could be used in seeking relief, but prosecutors could seek to rebut it.¹³⁴

After being significantly amended and limited in 2012, the law was repealed in June 2013 – a repeal that purported to be retroactive.¹³⁵ Before the law’s amendment, Judge Gregory A. Weeks held in April 2012 that in death row inmate Marcus Robinson’s 1994 trial “race was [so great] a materially, practically and statistically significant factor” in the prosecutor’s use of peremptory changes during jury selection as “to support an inference of intentional discrimination.” Judge Weeks resentenced Robinson to LWOP.¹³⁶

Supreme Court remanded “for further consideration in light of the decision in *Foster*.” On remand, the Mississippi Supreme Court affirmed, with three justices dissenting. *Id.* at 2237-38.

On June 21, 2019, the Supreme Court, by a 7-2 vote, overturned Flowers’ conviction because of Evans’ unconstitutional discrimination in jury selection. Justice Kavanaugh, writing for the majority, focused on Evans’ consistent exclusion of Black potential jurors in Flowers’ six trials. He said: “The numbers speak loudly.” Justice Kavanaugh found it noteworthy that “[t]he State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions.” *Id.* at 2245-47. The Court also found that Evans treated similar potential jurors differently.

Justice Alito wrote a concurring opinion emphasizing the extraordinary nature of the case, given Evans’ egregious history of racial discrimination. Justice Thomas wrote a dissent joined by Justice Gorsuch in which he challenged the majority’s characterization of the record. In a portion of the dissent not joined by Justice Gorsuch, Justice Thomas said that criminal defendants should not be entitled to relief when prosecutors discriminate against jurors on the basis of race. *Id.* at 2267-74 (Thomas, J., dissenting, joined in part by Gorsuch, J.).

On January 6, 2020, District Attorney Evans withdrew from the case. Later in 2020, the State dropped all charges, and Flowers was released. But Evans remained chief prosecutor for seven counties.

The New York Times’ Aimee Ortiz reported in September 2020 that a study by the National Registry of Exonerations found that outright police or prosecutor misconduct occurred in 78% of cases nationwide in which Black men have been wrongfully convicted of murder. Aimee Ortiz, *Police or Prosecutor Misconduct Is at Root of Half of Exoneration Cases, Study Finds*, N.Y. TIMES, Sept. 16, 2020.

¹³³ James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, THE CHAMPION, June 2018, at 28.

¹³⁴ Associated Press, *Perdue signs Racial Justice Act*, Aug. 11, 2009, <http://wral.com/news/state/story/5769609/>.

¹³⁵ Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013.

¹³⁶ Anne Blythe, *Racial Justice Act spares 1st inmate from death sentence*, NEWS & OBSERVER, Apr. 20, 2012; Emery P. Dalesio, Associated Press, *Judge: Race played role in NC death penalty case*, Apr. 20, 2012, <http://cnsnews.com/news/article/judge-race-played-role-nc-death-penalty-case>.

On December 13, 2012, Judge Weeks applied the amended Racial Justice Act to grant relief to Tilmon Golphin, Christina Walters, and Quintel Augustine.¹³⁷ He stated, “In the writing of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making.” Judge Weeks held that the evidence – ironically, buttressed by the State’s own evidence and experts – overwhelmingly showed that in all three cases prosecutors had distorted juries’ compositions to make them extraordinarily white. There was also statewide evidence, including evidence concerning “trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned . . . to circumvent the constitutional prohibition against race discrimination in jury selection.”¹³⁸

On December 18, 2015, the North Carolina Supreme Court vacated Judge Weeks’ two decisions. It ordered new hearings to enable the State to respond further to the defendants’ statewide statistical study of peremptory challenges, to give both sides the chance to submit more statistical studies, and to permit the lower court to appoint its own expert “to conduct a quantitative and qualitative study.” It also held that the three defendants whose claims were dealt with together in the December 13, 2012 decision should have been had separate hearings.¹³⁹

In view of the prior history of efforts to deal with racial discrimination in the criminal justice system, the developments through 2015 were unsurprising. But unexpected things began to occur in June 2020. The North Carolina Supreme Court first ruled on the cases of Rayford Burke and Andrew Ramseur, both of which had been dismissed without hearings. On June 5, 2020, it held, 6 to 1, that applying the Racial Justice Act’s repeal retroactively, was in effect the same as enacting an unconstitutional *ex post facto* law that retroactively increased the penalty for an already committed crime. Their cases were remanded for further proceedings. This holding could affect more than 140 people whose rights to a hearing under the Racial Justice Act had been eliminated by the Act’s repeal.¹⁴⁰

On September 25, 2020 (having already ruled in August 2020 that Marcus Robinson would serve LWOP), the North Carolina Supreme Court held that Christina Walters, Tilmon Golphin, and Quintel Augustine should have their sentences reduced to life sentences by applying the repealed Racial Justice Act. Judge Weeks, in ruling in these inmates’ favor in 2012, had pointed to a wealth of evidence of racial bias in jury selection.¹⁴¹

E. Innovative Legal Thinking, to Effectuate the Basic Principle That Black Lives Matter

Even before the North Carolina Supreme Court reversed its prior course in 2020, innovative lawyers/legal scholars had begun to try to develop new legal arguments in light of the widespread support among Americans of the basic principle: “Black lives matter.”

A leading example is Alexis Hoag’s article, *Valuing Black Lives: A Case for Ending the Death Penalty*. Its abstract says:

¹³⁷ Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 14, 2012.

¹³⁸ *State v. Golphin et al.*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35004, 01 CRS 65079, slip op. at 3-5 (N.C. Gen. Ct. Just. Cumberland Cnty. Dec. 13, 2012).

¹³⁹ *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015); *State v. Augustine*, 780 S.E.2d 552 (N.C. 2015) (mem.).

¹⁴⁰ *North Carolina Supreme Court Strikes Down Racial Justice Act Repeal, Permits Race Challenges by 140 Death-Row Prisoners*, DEATH PENALTY INFO. CTR., June 8, 2020.

¹⁴¹ Bryan Anderson, *3 North Carolina death row inmates to serve life in prison*, AP NEWS, Sept. 25, 2020.

Since *Furman v. Georgia*, capital punishment jurisprudence has equipped decisionmakers with increased structure, guidance, and narrowing in death sentencing in an effort to eliminate the arbitrary imposition of death. Yet, these efforts have been largely unsuccessful given the wide discretion built into capital sentencing which allows for prejudice, bias, and racism to persist. Juries continue to sentence a disproportionately high number of defendants who have been convicted of murdering white victims to death. As a result, death sentencing schemes tend to undervalue Black murder victims' lives. Any effort to eliminate the disparity must center on the undervaluation of Black lives.

This Article suggests that the next challenge to the death penalty should be on equal protection grounds based on the undervaluation of Black lives. It highlights that the Fourteenth Amendment was originally intended, in part, to extend the equal protection of the laws to Black victims of crime. The Article then explores the pitfalls of other race-based challenges to the death penalty. And [it] demonstrates that a challenge based on disparities in capitally prosecuting white and Black victim cases could end capital punishment. The Article concludes with a road map for what a challenge based on the undervaluation of Black lives would look like.¹⁴²

F. *Denial of Relief to Death Row Inmates Who Would Not Have Been Sentenced to Death If Their Trial Counsel Had Represented Them As Effectively As They Likely Would Be Represented Now*

Problems with the quality or performance of counsel representing capital defendants and death row inmates have been mentioned many times above. Significant improvements in the quality of defense counsel 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 clemency authorities to grant relief on the basis of newly recognized evidence that should have been found by trial counsel, or based on trial counsel's waivers or failures to mention the discovery of 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.

On January 11, 2019, the *Atlanta Journal-Constitution* reported that in new Georgia cases "capital punishment . . . 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.¹⁴³ It also mentioned that Georgia was preparing to execute Donnie Lance (whose case and execution are described above in Part II.H.4.b.).

G. *The Catholic Church*

1. *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 capital punishment unambiguously. The Pope said the Church would strive to end capital punishment everywhere. As previously worded, the Catechism said the death penalty could be used "if

¹⁴² Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 983-84 (2020).

¹⁴³ Bill Rankin, *Death penalty on the wane in Georgia*, ATLANTA J.-CONST., Jan. 11, 2019.

this is the only possible way of effectively defending human lives against the unjust aggressor,” but that situations where executing “the offender is an absolute necessity ‘are very rare, if not practically nonexistent.’”¹⁴⁴ As amended in 2018, Section 2267 of the *Catechism of the Catholic Church* says:

Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.

Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.

Consequently, the Church teaches, in the light of the Gospel, that “the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person,” and “she works with determination for its abolition worldwide.”

The Pope stressed that “[t]he 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.”¹⁴⁵

H. 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, began moratoriums on execution that remain in effect.¹⁴⁶

On April 21, 2021, Amnesty International reported that in 2020 the number of confirmed executions – in countries other than China and a few other nations for which it cannot make reasonable estimates – had decreased about 26% since 2019 – to its lowest level in more than a decade. Amnesty International attributed much of the drop to the redirection of resources to confront the COVID-19 pandemic. Meanwhile, there were substantial decreases in executions in Saudi Arabia and Iran but significant increases in Egypt.¹⁴⁷ For the twelfth consecutive year, the United States was the only country in the Americas to execute anyone.¹⁴⁸ Chad totally abolished capital punishment – the fifth country in Africa to do so in the last 10 years. And Kazakhstan moved strongly in the direction of abolition. As of December 31, 2020, 144 countries had abolished capital punishment “in law or practice” and 108 had abolished it for all crimes, while there were 55 retentionist countries.¹⁴⁹

¹⁴⁴ Linda Bordoni, *Pope Francis: ‘death penalty inadmissible’*, VATICAN NEWS, Aug. 2, 2018.

¹⁴⁵ Pope Francis I, Address of His Holiness Pope Francis to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization (Oct. 11, 2017), http://www.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.html.

¹⁴⁶ AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2009, at 11, 18 (2010).

¹⁴⁷ AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2020, at 7-8, 36-37 (2021).

¹⁴⁸ *Id.* at 16.

¹⁴⁹ *Id.* at 8, 57.

A total of 18 countries executed people in 2020, down from 20 in 2018 and 2019, 23 in 2017 and 31 in 1999.¹⁵⁰ The United States was between sixth and twelfth depending on totals that Amnesty International could not verify for certain countries.¹⁵¹

On December 16, 2020, the U.N. General Assembly in plenary session 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. The final results were 123 in favor, 38 against, 24 abstaining, and 8 not present.¹⁵² The 123 in favor were the most ever to vote for such a resolution. The previous record, in 2018, was 120. Djibouti, Jordan, Lebanon, and South Korea changed their votes to support the resolution for the first time, while Congo (Republic of), Guinea, Nauru, and the Philippines moved from opposition or abstention to support the resolution. Yemen and Zimbabwe moved from opposition to abstention. The increased support for this resolution over time is remarkable. The first such resolution, adopted in 2007, garnered 104 votes.¹⁵³

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 reinstatement could be done only by constitutional amendment.¹⁵⁴ On January 2, 2021, Kazakhstan abolished capital punishment.¹⁵⁵ And in February 2021, Pakistan's Supreme Court held that those "who are unable to comprehend the rationale behind their punishment due to a mental illness" cannot be sentenced to death. In 2016, the Pakistan Supreme Court had been denounced around the world when it held that that an execution could proceed because schizophrenia is "not a permanent mental disorder." Under the February 2021 decision, the death sentence upheld in 2016 will be commuted to life, and additional legal reforms will follow.¹⁵⁶

On January 6, 2020, *The Washington Post* reported that after unexpectedly being elected in 2018, Malaysia's Prime Minister Mahathir Mohamed's government imposed an immediate moratorium on executions and promised to abolish capital punishment. Capital punishment, a remnant of British rule, has been the mandatory penalty for numerous offenses. There were 1,300 death row inmates, including at least one who was convicted of killing someone who turned out indisputably to be alive. Any change in Malaysia's system would have impacts elsewhere, in part because nearly half of death row inmates there were foreign nationals. More than 100 were female, according to Amnesty International.¹⁵⁷

On March 20, 2020, India carried out its first state executions since 2015. It executed four men convicted of the gang rape and murder of a 23-year-old woman, a physiotherapy intern, on a private bus that she and her male companion boarded after seeing a movie. The December 2012 crime caused an uproar and changes in India's law regarding sexual assault.¹⁵⁸

¹⁵⁰ *Id.* at 10; AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2018, at 8-9 (2019).

¹⁵¹ AMNESTY INT'L, *supra* note 147, at 55.

¹⁵² *Id.* at 61-62.

¹⁵³ *Id.* at 8.

¹⁵⁴ *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>.

¹⁵⁵ *Kazakhstan Officially Abolishes Death Penalty After Nearly Two-Decade Freeze*, RADIOFREEEUROPE, Jan. 2, 2021.

¹⁵⁶ Email from Robin Maher, Former Director of the ABA Death Penalty Representation Project, to author (Feb. 10, 2021) (on file with the author) (discussing Rana Bilal, *SC bars carrying out death penalty for inmates with mental disorders*, DAWN (Pak.), Feb 10, 2021).

¹⁵⁷ Preeti Jha, *Malaysia reconsiders capital punishment*, WASH. POST, Jan. 6, 2020.

¹⁵⁸ David Welna, *4 Men Hanged In India For 2012 Gang Rape And Murder That Sparked Outrage*, NPR, Mar. 20, 2020.

The United States' insistence on possibly executing people convicted of certain crimes sometimes prevents it from convicting them of those crimes. A decision by the Supreme Court of the United Kingdom illustrates how this can happen. In March 2020, the United States sought to try Shafee El Sheikh and Alexandra Kotey for killing two U.K. and two U.S. citizens. Lord Kerr concluded that the U.K. government had improperly provided the U.S. prosecutors with information that could be used to secure the death penalty without seeking assurances that the information would not be used to seek the death penalty.¹⁵⁹

I. Important Issues

The following are among the additional 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 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”).¹⁶⁰ Professor Anthony G. Amsterdam discussed AEDPA in a 2004 talk, selectively excerpted as follows:

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

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

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

¹⁵⁹ *Elgizouli v. Sec'y of State for the Home Dep't* [2020] UKSC 10 (appeal taken from EWHC).

¹⁶⁰ Pub. L. 104-132, 110 Stat. 1214 (1996).

claims were outside the range of honest bungling or were close enough to it for government work.¹⁶¹

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.”¹⁶² 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.”¹⁶³ “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.’”¹⁶⁴

c. *Possible Opt-Ins to Even More Prosecution Friendly 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.”¹⁶⁵ In an opt-in state, there could be a far shorter deadline than AEDPA’s one year for filing a federal habeas petition and new, draconian deadlines for resolving such cases. To opt-in, a state would have to establish “a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in [s]tate 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.¹⁶⁶

Opponents of this change (including the ABA) say the Attorney General may be a biased decisionmaker, 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.¹⁶⁷

On April 13, 2020, Attorney General William P. Barr filed, for publication in the *Federal Register* on April 14, 2020, his certification dated April 6, 2020, of Arizona’s

¹⁶¹ 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).

¹⁶² 28 U.S.C. § 2254(d)(1).

¹⁶³ *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))).

¹⁶⁴ *Id.* (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

¹⁶⁵ Pub. L. No. 109-177, 120 Stat. 192 (2006).

¹⁶⁶ 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)).

¹⁶⁷ *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.

postconviction capital punishment system, effective May 19, 1998.¹⁶⁸ Challenges to Attorney General Barr's certification were pending when he left office in early 2021 (see discussion below in Part V.A. regarding the ABA's amicus brief in support of petitioners' challenge to certification). It is quite possible that Attorney General Merrick Garland will revoke the certification.

2. *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."¹⁶⁹ 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.¹⁷⁰

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." Moreover, by permitting the execution of people whose guilt is pursuant to the felony murder rule, the Court is permitting executions of people with relatively low levels of culpability.

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

Despite *Atkins*' categorical bar to executing people with intellectual disability (formerly referred to as mental retardation), some people with intellectual disability have been, and likely will continue to be, executed. In 2017, the Supreme Court began to act against a particularly egregious violation of *Atkins*: Texas' unique and anomalous way of determining intellectual disability claims, which the medical community did not support. This culminated in 2019, when 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."¹⁷¹

A recent example was Corey Johnson, executed on January 14, 2021, without any court's having considered the merits of his strong showing of intellectual disability (see discussion above in Part I.C.2.a.).

¹⁶⁸ Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20,705 (Apr. 14, 2020).

¹⁶⁹ *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

¹⁷⁰ *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.

¹⁷¹ *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (per curiam).

- b. Substantial Number of People with Severe Mental Illness Executed or Still Facing Execution**
- i. Twenty-first Century Executions Disproportionately Involve People with Mental Illness, and Often Are Effectively “Assisted Suicides”**

On April 3, 2017, Professor Frank Baumgartner and the University of North Carolina’s Betsy Neill wrote in the *Washington Post* about their 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.¹⁷²

At an 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.¹⁷³

- 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 an aggravating factor, not mitigating. This is often due to jurors’ implicit biases, compounded by misleading or otherwise inadequate jury instructions.¹⁷⁴ Following trial, procedural obstacles or unreasonable burdens often doom efforts to seek relief. Moreover, in clemency proceedings, serious mental illness is usually not seriously considered as a basis for granting relief.

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-à-vis the death penalty, what “severe mental illness” refers to, ways to reform present laws, and why (and under what circumstances) people with severe mental illness should be exempt from capital

¹⁷² Frank R. Baumgartner & Betsy Neill, *Does the death penalty target people who are mentally ill? We checked.*, WASH. POST, Apr. 3, 2017.

¹⁷³ 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 23 (Aug. 2, 2018) (remarks of Meredith Martin Rountree), https://deathpenaltyinfo.org/files/pdf/ABA_Has_The_Death_Penalty_Become_An_Anachronism.pdf.

¹⁷⁴ 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).

punishment.¹⁷⁵ 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.¹⁷⁶ A month earlier, former Tennessee Attorney General W.J. Michael Cody reached the same conclusion in an op-ed in the *Commercial Appeal*.¹⁷⁷ As mentioned above, Ohio did enact such a law in January 2021.

In a January 2, 2018 op-ed in the *Commercial Appeal*, Marine Corps Lieutenant General John Castellaw urged Tennessee to enact a bill that would exclude capital punishment “for those with severe mental illness, including those people with illnesses [such as PTSD] connected with their military service.” General Castellaw particularly assailed Georgia for having executed Andrew Brannan in 2015. Brannan, decorated for his Vietnam service, later received service-related diagnoses for PTSD and bipolar disorder. Despite his stellar history and his lacking *any* criminal record, Brannan was executed for killing a deputy sheriff after a traffic stop to which Brannan had reacted erratically and during which he had urged the deputy sheriff to kill him. General Castellaw said “we can do better by staying tough on crime but becoming smarter on sentencing those whose actions are impacted by severe mental illness.”¹⁷⁸

3. 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*. As the death penalty became much more politicized, securing clemency became much more difficult.

a. 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.¹⁷⁹

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.

¹⁷⁵ ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016).

¹⁷⁶ Bob Taft & Joe Kernan, Opinion, *End inhumane capital punishment for mentally ill*, THE BLADE (Toledo), Mar. 28, 2017.

¹⁷⁷ W.J. Michael Cody, Opinion, *Exclude mentally ill defendants from death penalty*, COM. APPEAL, Feb. 12, 2017.

¹⁷⁸ John Castellaw, Opinion, *Exclude mentally ill vets from death penalty*, COM. APPEAL, Jan. 2, 2018.

¹⁷⁹ See Pub. L. No. 104-132, 110 Stat. 1214.

Even when the newly developed evidence creates a real question about the defendant's guilt, the federal courts' doors are usually effectively closed to second or later habeas proceedings. The AEDPA has a very narrow exception, involving situations in which the factual basis for a federal constitutional claim could not have been discovered before through due diligence *and* the facts on which the claim is based, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."¹⁸⁰ 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 *In re Davis*, where the Court required "evidence that could not have been obtained at the time of trial [to] clearly establish . . . innocence."¹⁸¹ 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 formidable *Davis* hurdle were met.

b. Exceptional Cases Where Clemency Has Been Granted

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.

March 26, 2018, Ohio Governor John Kasich gave executive clemency to William T. Montgomery, who was scheduled to be executed on April 11 for two 1986 murders.¹⁸² 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."¹⁸³

In most cases where serious doubt about guilt does or 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.

¹⁸⁰ 28 U.S.C. § 2244(b)(2)(B)(ii).

¹⁸¹ *In re Davis*, 557 U.S. 952, 952 (2009) (mem.).

¹⁸² 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.

¹⁸³ Phyllis L. Crocker, *Opinion, Next Ohio execution raises too much doubt*, THE BLADE (Toledo), Mar. 10, 2018.

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

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 Mr. Wood, whose conviction and death sentence she had secured almost two decades earlier. Although he was the getaway driver, Wood 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,” which the jury could have found made him likely to be dangerous in the future, despite 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.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ The Supreme Court denied Wood’s certiorari petition on October 7, 2019.¹⁸⁷

A second example of an unsuccessful clemency application that garnered significant popular support involved Tennessee death row inmate Lee Hall. He was executed on December 5, 2019, without getting judicial review of a legal claim that substantively was the same as that which the Tennessee courts had used to vacate the conviction of another death-row veteran, Hubert Glenn Sexton, less than a fortnight earlier.¹⁸⁸ Governor Bill Lee relied in denying clemency on the Tennessee courts’ distinguishing *Sexton* due to a procedural difference between the two cases.¹⁸⁹

d. *Potential Equitable Argument for Clemency*

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.¹⁹⁰

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

¹⁸⁴ Letter from Lucy Wilke, Dist. Att’y, Kerr Cnty., Tex., to Texas Board of Pardons and Paroles (Aug. 3, 2017), https://static.texastribune.org/media/documents/WoodJefferyLeeLtrfromDAsoffice.pdf?_ga=2.235713986.217083783.1512681080-988673696.1491600194.

¹⁸⁵ Keri Blakinger, *Court findings offer hope for death row inmate in case tainted by ‘Dr. Death’*, HOUS. CHRON., Mar. 20, 2018.

¹⁸⁶ Hannah Wiley, *Texas Court of Criminal Appeals rules against death row inmate Jeff Wood*, TEX. TRIB., Nov. 21, 2018.

¹⁸⁷ *Wood v. Texas*, 140 S. Ct. 147 (2019) (mem.).

¹⁸⁸ Caitlyn Shelton, *Tennessee executes death row inmate Lee Hall*, FOX17 (Nashville), Dec. 5, 2019.

¹⁸⁹ *State v. Hall*, No. E1997-00344-SC-DDT-DD (Tenn. Dec. 3, 2019) (per curiam), https://www.tncourts.gov/sites/default/files/docs/hall_per_curiam_order_j_lee_dissenting_0.pdf.

¹⁹⁰ Steven Hale, *Haslam Denies Clemency for Edmund Zagorski*, NASHVILLE SCENE, Oct. 5, 2018.

executed. They did so because they incorrectly thought the alternative was parole eligibility in as little as seven years.¹⁹¹

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 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 long-time 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.¹⁹² Fortunately, the Georgia parole board viewed things differently on January 16, 2020, when presented with strong evidence that the jury that sentenced Jimmy Fletcher Meders to death believed that the only alternative was a “life” sentence under which Meders could be paroled within a few years. Hours before his scheduled execution, the parole board granted him clemency and commuted his death sentence to LWOP. The parole board cited Meders’ lack of a criminal record prior to committing his offense, his commission of only one minor infraction in over 30 years on death row, the jury’s explicit desire during deliberations to impose an LWOP sentence which was legally unavailable at the time, and every living, able juror’s continued support for such a sentence.¹⁹³

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

¹⁹¹ Hannah Gorman, *The Jury System on Trial: Do Jurors Execute Justice?*, 15 AMICUS J. 13 (2006).

¹⁹² It was considered by Cuyahoga County Chief Prosecutor Timothy McGinty, who wrote the Ohio Parole Board in 2013 to ask it to recommend changing Billy Slagle’s death sentence to LWOP. McGinty pointed to changes in Ohio law and in how he and his team now 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.

¹⁹³ Ga. State Bd. of Pardons & Paroles, Press Release, *Parole Board Grants Clemency to Jimmy Fletcher Meders*, Jan. 16, 2020, <https://pap.georgia.gov/press-releases/2020-01-16/parole-board-grants-clemency-jimmy-fletcher-meders>. It was common knowledge in legal circles in the 1980s that Georgia juries were often voting to impose death sentences *not* due to any belief that the defendant deserved the death penalty but because of jurors’ incorrect belief that the alternative was to have the defendant be paroled in seven years. Even though the Georgia Supreme Court knew this (as Judge Weltner openly acknowledged), it did nothing to correct this misimpression and affirmed the death sentences. See Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 78-80 (1989); J. Mark Lane, *“Is There Life Without Parole?”: A Capital Defendant’s Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 337 n.51 (1993).

IV. SIGNIFICANT SUPREME COURT DEVELOPMENTS NOT DISCUSSED ABOVE

A. *Cases Involving Spiritual Advisor's Presence During Execution*

1. *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, 2018.¹⁹⁴

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, 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 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."¹⁹⁵

2. *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 [him] in the execution chamber."¹⁹⁶ Justice Kavanaugh, writing separately, stated that "government discrimination against religion – in particular, discrimination against religious persons, religious organizations, and religious speech – violates the Constitution."¹⁹⁷

¹⁹⁴ *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (*mem.*).

¹⁹⁵ *Id.* at 661, 662 (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.).

¹⁹⁶ *Murphy v. Collier*, 139 S. Ct. 1111, 1111 (2019) (*mem.*).

¹⁹⁷ *Id.* (Kavanaugh, J., concurring).

George Mason University Law Professor Ilya Somin provided the following pure speculation about the Court's different decision in *Murphy* than in *Ray*. 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."¹⁹⁸ 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.¹⁹⁹

3. *Dunn v. Smith*, 141 S. Ct. 725 (2021) (*mem.*)

This case involved Alabama's decision to bar all clergy of all faiths from the execution chamber – a significant change from its requirement until two years earlier that Christian clergy must be present. The Eleventh Circuit enjoined this, and the Court narrowly voted against vacating the injunction. Justice Kagan, joined by Justices Breyer, Sotomayor, and Barrett, wrote that Alabama's policy substantially burdened Smith's exercise of religion, since he needed his pastor there to help him through his passage and to "properly express to God his repentance." This legitimate burden could not be imposed unless the "strict scrutiny" hurdle were met. It could not do so, given all the incident-free involvement of clergy in execution chambers.²⁰⁰ What Slate.com referred to as "a mystery justice" apparently joined in the denial of the application.²⁰¹

Justice Thomas dissented, and Justice Kavanaugh wrote a dissent in which Chief Justice Roberts joined. The dissent would have upheld the policy as non-discriminatory and as upholding the "safety, security, and solemnity" of the execution chamber. The dissent then offered this practical advice: "it seems apparent that States that want to avoid months or years of litigation delays because of this RLUIPA issue should figure out a way to allow spiritual advisors into the execution room, as other States and the Federal Government have done. Doing so not only would satisfy inmates' requests, but also would avoid still further delays and bring long overdue closure for victims' families."²⁰²

B. *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (*per curiam*)

The Supreme Court, *per curiam*, reversed the Ninth Circuit's ruling in favor of an Arizona death row inmate's claim of ineffective assistance of counsel. The Court noted that the defendant had impeded his counsel in securing additional mitigation evidence. But the core of its opinion was that even if one were to assume that counsel's performance was deficient, it could not be said that no reasonable jurist could have ruled against defendant's claim of prejudice from the counsel's performance. The Court said that in a habeas case, a federal court cannot reverse a state court's denial of relief absent an error by the state court that went "beyond any possibility of fairminded disagreement." Justices Breyer, Kagan, and Sotomayor dissented.²⁰³

¹⁹⁸ Ilya Somin, *Supreme Court Stays Execution in Death Penalty/Religious Liberty Case*, REASON.COM: VOLOKH CONSPIRACY, Mar. 29, 2019.

¹⁹⁹ *Texas Bans All Clergy From Death-Row Executions After Supreme Court Ruling*, DAILY BEAST, Apr. 4, 2019.

²⁰⁰ *Dunn v. Smith*, 141 S. Ct. 725, 725-26 (2021) (*mem.*) (Kagan, J., concurring, joined by Breyer, Sotomayor, and Barrett, JJ.).

²⁰¹ Mark Joseph Stern, *Amy Coney Barrett Joins Liberals and a Mystery Justice to Block Execution*, SLATE.COM, Feb. 12, 2021.

²⁰² *Dunn*, 141 S. Ct. at 726-27 (Kavanaugh, J., dissenting, joined by Roberts, C.J.).

²⁰³ *Shinn v. Kayer*, 141 S. Ct. 517, 524, 526 (2020) (*per curiam*).

C. *McKinney v. Arizona*, 140 S. Ct. 702 (2020)

On February 25, 2020, the Supreme Court dealt with a case in which a federal appeals court vacated a death penalty, pursuant to *Eddings v. Oklahoma*,²⁰⁴ because the judge who imposed it had not considered, in mitigation, evidence that the defendant had suffered post-traumatic stress disorder. Thereafter, the Arizona Supreme Court, rather than remanding the case to a trial-level court at which a jury could have weighed aggravating and mitigating circumstances, reweighed those circumstances itself and concluded that capital punishment was justified.²⁰⁵

The Court held, 5-4, that the Arizona Supreme Court could constitutionally make that decision because the litigation came to that court from a federal habeas corpus proceeding. The Court held that its *Ring* and *Hurst* decisions entitling a defendant to jury decision-making on basic factors in capital cases is not applicable in a case in which the conviction, death sentence, and direct appeal had all occurred prior to the Court's handing down those decisions. Moreover, the Court held that nothing in its prior decisions about a state appellate court's reweighing aggravating and mitigating factors precluded such reweighing in this situation.²⁰⁶

D. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020)

Justice Kagan wrote the majority opinion in this 6-3 case. For the Court, she rejected Mr. Kahler's argument that Nebraska was required by the First Amendment to instruct the jury that it could convict him of capital murder only if it considered his defense that he did not at the time of the crime have the ability to tell right from wrong. Justice Kagan said that it was sufficient for constitutional purposes that Mr. Kahler could try to show that he lacked the requisite intent to commit the crime. Justice Kagan stated that there are substantial uncertainties about human minds and that "perennial gaps in knowledge intersect with differing opinions about how far, and in what ways, mental illness should excuse criminal conduct." She said that the states could determine how to weigh these things. Moreover, in a death penalty case, the defendant's mental illness could be considered in the penalty phase of the trial.²⁰⁷

Dissenting, Justice Breyer said that the insanity defense on which Kahler had attempted to rely was so fundamental to our jurisprudence that defendants were constitutionally entitled to have juries consider it. In particular, he said: "Few doctrines are as deeply rooted in our common-law heritage as the insanity defense. . . . A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime. This principle remained embedded in the law even as social mores shifted and medical understandings of mental illness evolved."²⁰⁸

V. ABA ACTIVITIES NOT DISCUSSED ABOVE

A. *ABA Amicus Briefs*

On August 20, 2020, the ABA filed an amicus brief in the U.S. Court of Appeals for the D.C. Circuit in support of petitioners in *Office of the Federal Public Defender for the*

²⁰⁴ *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

²⁰⁵ *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020).

²⁰⁶ *Id.* at 707-08.

²⁰⁷ *Kahler v. Kansas*, 140 S. Ct. 1021, 1028, 1037 (2020).

²⁰⁸ *Id.* at 1039 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.).

District of Arizona v. Barr. The ABA earlier opposed Arizona’s application for certification as an “opt-in” state (see Part III.H.1.c. and note 167 above), pointing to its 2006 Assessment of the state’s death penalty system that found it failed to meet numerous benchmarks for fairness and due process, as well as the work of the Death Penalty Representation Project, which recruited pro bono counsel for numerous Arizona prisoners because of a lack of a functioning statewide mechanism for indigent capital representation. The ABA’s amicus brief urged the D.C. Circuit – which has statutory authority to conduct *de novo* review of DOJ’s certification decisions – to overturn the certification based on these considerations as well as the failure of the state’s counsel system to ensure compliance with the ABA’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.²⁰⁹

On October 3, 2019, the ABA filed an amicus brief in the Nevada Supreme Court in *Vanisi v. Gittere*, stating that the application of capital punishment to people who at the time of the crime suffered from severe mental illness is unconstitutional under both the U.S. and Nevada constitutions.²¹⁰ The Due Process Project was primarily responsible for this brief.

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 35 years, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and resentencing proceedings. Volunteer firms have also written amicus briefs on behalf of the ABA or other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation. In dozens of cases placed with volunteer counsel, inmates have been exonerated or had their death sentences commuted or overturned.²¹¹ The Representation Project also helped prepare statements issued by the ABA in 2019 urging the granting of clemency for two death row inmates with substantial claims of factual innocence: James Dailey and Rodney Reed (whose cases are discussed above in Parts II.H.5.a. and II.H.5.b., respectively).

In the summer of 2019, when Tennessee death row prisoner Andrew Thomas was resentenced, he was the 100th death row inmate to have received a finalized sentence less than death after being helped by the Representation Project and its pro bono partners. “The majority of those have been resentenced to life or a term of years, after lawyers proved that a death sentence would be unconstitutional; five death sentences were commuted to life terms after grants of executive clemency; and 15 of those 100 prisoners were released from prison altogether after their attorneys demonstrated that they were wrongfully convicted of crimes they did not commit.”²¹²

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

²⁰⁹ The ABA’s Brief as Amicus Curiae in Support of Petitioners at 2-4, *Off. of the Fed. Pub. Def. for the Dist. of Ariz. v. Barr*, No 20-1144 (D.C. Cir. filed Aug. 20, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/federal-public-defender-arizona-v-barr-opt-in-amicus.pdf.

²¹⁰ Brief for Amicus Curiae the ABA in Support of Appellant and Reversal at 4-5, *Vanisi v. Gittere*, No. 78209 (Nev. filed Oct. 3, 2019), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/vanisi-amicus-brief-aba.pdf.

²¹¹ 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.

²¹² *Project Achieves Major Milestone: 100 Prisoners Off Death Row*, ABA, Aug. 26, 2019.

provides technical assistance, expert testimony, training, and resources to the capital defender community and pro bono counsel.²¹³ 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”).²¹⁴ 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.²¹⁵ 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.

The Representation Project also has provided or sent affidavits, declarations, and letters on behalf of the ABA.

For example, on December 18, 2019, Project Director Emily Olson-Gault submitted an expert affidavit on behalf of the ABA supporting a motion for continuance in the case of Nikolas Cruz, accused in the March 2018 school shooting in Parkland, Florida. The judge had set trial for January 2020, less than two years after the shooting. Without taking a position on the case or the proper penalty if Cruz is convicted, the affidavit explained the importance of allowing adequate time for defense counsel to prepare. As explained in the affidavit, preparation for any capital trial requires extraordinary time and effort, and this need may be even greater in unusually complicated cases such as Mr. Cruz’s. The ABA’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases caution that there are “weighty costs” if jurisdictions do not invest the necessary time and resources to allow for high quality representation at the trial stage, “to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.” At a hearing conducted the day after the ABA submitted its affidavit, the judge granted the motion.²¹⁶

Project Director Emily Olson-Gault authored two Declarations in early April 2020 about the ABA Guidelines and the need to provide adequate additional time to capital defenders who are unable to conduct field investigations because of the ongoing health risk. One Declaration focused on trial-level work²¹⁷ and the other on habeas corpus and other collateral litigation. These Declarations were circulated broadly to the Representation Project’s partners in the defense community. Both received extensive use in numerous individual cases, including in successful requests to the Ohio Governor and Tennessee

²¹³ An online resource containing decades of capital training materials that are searchable by author, subject, and date is available at <http://www.capstandards.org>.

²¹⁴ ABA, ABA Guidelines (revised Feb. 2003), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.authcheckdam.pdf.

²¹⁵ 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.

²¹⁶ Email from Emily Olson-Gault, Director & Chief Counsel of the ABA Death Penalty Representation Project, to author (Mar. 3, 2021) (on file with the author).

²¹⁷ Declaration of Emily Olson-Gault, Esq. (Apr. 2, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-trial-level-covid-declaration.pdf.

Supreme Court for stays of execution. The habeas Declaration was updated on December 30, 2020, to include discussion of the harm to defenders and others who were forced to attempt to provide representation during the pandemic.²¹⁸

On May 13, 2020, ABA President Judy Perry Martinez sent a letter to Missouri Governor Michael Parson urging Governor Parson to use his clemency power to grant a reprieve to death-sentenced prisoner Walter Barton.²¹⁹ About a week earlier, the Representation Project identified this case as one in need of urgent intervention. Due to health and safety concerns stemming from the COVID-19 pandemic, Mr. Barton's counsel, a court-appointed solo practitioner, had been unable to conduct the intensive investigation and litigation that typically occurs in the leadup to an execution. In Mr. Barton's case, there were significant unresolved claims of innocence that could not be investigated due to COVID-19. This included counsel's inability to obtain critical affidavits from jurors about how new forensic evidence would have altered their judgment in the case.

1. Federal and Missouri Executions Advocacy

In July 2019, Attorney General William Barr announced the Department of Justice's intent to resume federal executions together with a new federal execution protocol. Although lawsuits over the protocol delayed the government's initial efforts to jumpstart executions, on July 14, 2020, Daniel Lewis Lee became the first federal prisoner to be executed in 17 years. His was the first of 13 executions the federal government carried out between July 2020 and January 2021.

On November 12, 2020, the Representation Project assisted in the preparation of a letter from ABA President Patricia Lee Refo to President Donald Trump (and copied to Attorney General William Barr) urging him to suspend plans to execute Orlando Hall, Lisa Montgomery, and Brandon Bernard in light of surging COVID-19 cases nationwide and the impact of the pandemic on due process and zealous representation.²²⁰ The ABA letter noted that due to the pandemic, counsel for Mr. Hall and Mr. Bernard were unable to visit their clients or conduct the legal work required by the ABA Guidelines when an execution date has been set, such as undertaking a thorough reinvestigation of the case in preparation for clemency. The ABA letter also noted troubling evidence of racial discrimination in Mr. Hall's case, and widespread support of clemency for Mr. Bernard, who was sentenced to death at only 18 years old for his role as an accomplice to a kidnapping and murder. As the letter noted, the ABA also opposes the imposition of the death penalty on individuals younger than age 21 at the time of the crime.²²¹ The ABA letter also revealed that attorneys for Ms. Montgomery contracted COVID-19 after visiting their client once her execution date had been set. While the letter laid out other troubling facts, Ms. Montgomery's case presented in favor of clemency – including evidence of her serious mental illness at the time of her crime, another independent ground on which the ABA opposed her execution.²²² The letter

²¹⁸ Declaration of Emily Olson-Gault, Esq. (Dec. 20, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-habeas-level-covid-declaration-updated.pdf.

²¹⁹ Letter from Judy Perry Martinez, President of the ABA, to Michael Parson, Governor of Mo. (May 13, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/20200513-letter-re-walter-barton.pdf.

²²⁰ Letter from Patricia Lee Refo, President of the ABA, to Donald J. Trump, President of the U.S. (Nov. 12, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-letter-federal-execution-refo.pdf.

²²¹ See ABA 2018 Mid-Year Resolution 111 (2018), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_midyear_111.pdf.

²²² See ABA House of Delegates Recommendation 122A (adopted Aug. 2006), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2006_am_122a.pdf.

ultimately concluded that regardless of the many issues raised by each individual case, *none* of the remaining scheduled federal executions should proceed in light of the pandemic's impact on capital counsel's ability to properly and zealously represent their clients.

On December 30, 2020, upon learning that Missouri Attorney General Eric Schmitt had requested that an execution date be set for Ernest Johnson, the Representation Project helped prepare a letter from ABA President Patricia Lee Refo to Governor Michael Parson of Missouri urging him to use his clemency powers to reprieve any execution dates that might be set in the state during the ongoing COVID-19 pandemic.²²³ In addition to raising concerns that Mr. Johnson might be ineligible for execution due to an intellectual disability, the letter also pointed to the significant obstacles the pandemic posed to zealous representation by counsel. The letter also noted the growing evidence that carrying out executions during the pandemic increased the risk of disease transmission within prison systems and subsequently out into the surrounding communities.

On January 12, 2021, the Representation Project helped ABA President Patricia Lee Refo prepare a letter asking Acting Attorney General Jeffrey Rosen to consider delaying the three federal executions still scheduled in the days before President Biden's January 20, 2021 inauguration, until such time as COVID-19 vaccines were available and virus transmission was no longer so widespread.²²⁴ In addition to reiterating the points concerning due process, justice, and fundamental fairness raised by the ABA in its November 12, 2020 correspondence to the White House, the January 2021 ABA letter specifically pointed to evidence that the federal executions in November and December had in fact likely contributed to a significant uptick in disease transmission within the federal prison facility as well as into the surrounding communities. The letter urged Acting Attorney General Rosen to consider this evidence, supported by a federal court ruling, that the executions were causing significantly increased risk of disease transmission and harm to all those involved in the federal executions, from other prisoners to correctional officers to media witnesses.

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

The CCRI, a recent ABA initiative, seeks to improve resources and information available to attorneys and governmental decisionmakers 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.²²⁵

On December 20, 2019, the CCRI added a 19-page memorandum outlining the capital clemency process in Virginia to its capital clemency website.²²⁶ On March 19, 2020, the CCRI added a 29-page memorandum to the website outlining the capital clemency process and notable death penalty cases in Florida.²²⁷ And on October 6, 2020, the CCRI added a 26-page memorandum regarding the capital clemency process and notable death penalty cases in

²²³ Letter from Patricia Lee Refo, President of the ABA, to Michael Parson, Governor of Mo. (Dec. 30, 2020), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-letter-ernest-johnson-covid-19.pdf.

²²⁴ Letter from Patricia Lee Refo, President of the ABA, to Jeffrey A. Rosen, Acting Attorney General (Jan. 12, 2021), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/jan_2021_letter_rosen_fed_executions.pdf.

²²⁵ For information and resources regarding the CCRI, see the ABA's CCRI website, available at <https://www.capitalclemency.org>.

²²⁶ CCRI, Virginia: Capital Clemency Information Memorandum (Dec. 20, 2019), <https://www.capitalclemency.org/resource/virginia-capital-clemency-memo/>.

²²⁷ CCRI, Florida: Capital Clemency Information Memorandum (Mar. 19, 2020), <https://www.capitalclemency.org/resource/florida-capital-clemency-memo/>.

Tennessee to its online repository.²²⁸ The website now hosts memoranda detailing the death penalty clemency process in 16 different jurisdictions, comprising hundreds of pages of novel information. The CCRI expects to add at least three more state memoranda as well as a memorandum on the federal capital clemency process in 2021.

In summer 2020, Representation Project staff attorney and CCRI counsel Laura Schaefer assisted defense counsel in Tennessee in preparing a civil rights action challenging the State's intention to proceed with an execution during the COVID-19 pandemic, in spite of the pandemic's impact on counsel's ability to prepare for clemency. Alongside this effort, the CCRI assisted in the production of a lengthy affidavit by Carol Wright, Capital Habeas Unit Chief for the Middle District of Florida Federal Defenders, detailing the significant responsibilities and expectations of capital counsel in the clemency process. This lawsuit was subsequently withdrawn upon Tennessee Governor Bill Lee's decision to reprieve the scheduled execution through the end of 2020, specifically noting the pandemic's impact on counsel's ability to adequately prepare the prisoner's case for clemency.²²⁹

Iterations of Ms. Wright's affidavit were subsequently used in litigation challenging federal prisoner William Emmet LeCroy's September 2020 federal execution, as well as in successful litigation challenging the federal government's intention to proceed with Lisa Montgomery's December 2020 execution date, despite Ms. Montgomery's attorneys' COVID-19 diagnoses interfering with their ability to prepare her case for clemency. Ms. Montgomery's execution date was reprieved for about one month in light of this lawsuit.²³⁰

In fall 2020, the Office of the Federal Public Defender, Western District of Oklahoma Capital Habeas Unit, reached out to CCRI counsel Laura Schaefer to request her assistance with an upcoming presentation to the Oklahoma Parole and Pardon Board. Ms. Schaefer has been working with attorneys at the Oklahoma City CHU to prepare a two-hour long CLE presentation for the Oklahoma Board, at which the Oklahoma Attorney General will also have an opportunity to present. Although this presentation was initially scheduled for December 2020, it was rescheduled due to inclement weather. The presentation has not yet been rescheduled but is expected to take place sometime in spring 2021.²³¹

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 decisionmakers 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

²²⁸ CCRI, Tennessee: Capital Clemency Information Memorandum (Oct. 6, 2020), <https://www.capitalclemency.org/resource/tennessee-clemency-memo/>.

²²⁹ Email from Emily Olson-Gault, Director & Chief Counsel of the ABA Death Penalty Representation Project, to author (Mar. 3, 2021) (on file with the author).

²³⁰ *Id.*

²³¹ *Id.*

state's system.²³² To the extent these problems continue to fester, there are strong reasons for imposing moratoriums and otherwise curtailing the death penalty's use.

2. *The Assessments' Continuing Impact*

These assessments and their recommendations are still relied on and cited to by policymakers, the press, and other commentators. For example, a major reason Pennsylvania's Governor began a moratorium was his concern about the fairness of that state's implementation of the death penalty – in light of the serious concerns expressed by the ABA's Pennsylvania assessment team.

3. *Programs*

The Due Process Project, in collaboration with the ABA Section of Civil Rights and Social Justice ("CRSJ"), developed a three-part CLE webinar series exploring the fundamental issues in using the death penalty, how the COVID-19 pandemic has only exacerbated these issues, and recent legal developments in death penalty practice, implementation, and legislation.²³³ In these free CLE webinars, panelists explored the intricacies of the death penalty; identifying certain elements as barriers to the collective pursuit of advancing law and justice. In addition to being offered for CLE credit at the time of presentation, all three programs are currently available for free on-demand. The ABA sought 1.5 hours of CLE credit in 60-minute states and 1.8 hours of CLE credit in 50-minute states for each CLE program.

On August 18, 2020, the Due Process Project and CRSJ hosted the first webinar, "Valuing Black Lives: A Case for Ending the Death Penalty," featuring panelists Alexis Hoag, Ngozi Ndulue, and Mark Pickett, and moderator Henderson Hill. This CLE explored the concept of the death penalty with regard to its historical development, including its interplay with post-slavery racism and its present-day effects.²³⁴

The second program, "Valuing Speed: The Costs in Fairness, Accuracy & Money in Trying to Accelerate Executions," was presented on August 19, 2020, and discussed how execution holds initially across the country and the widespread economic downturn in the United States have negatively impacted the use of the death penalty. This CLE featured panelists Jeff Fagan, Margery M. Koosed, and Steve Potolsky, and moderator the Honorable Tracie A. Todd.²³⁵

The three-part CLE series concluded on August 20, 2020, with "A Tale of Two Trends: Decreasing Support and Accelerating Federal Executions." This CLE explored how the symbolic role of the death penalty is akin to that of Confederate monuments in a spirited discussion about growing trends toward abolition and moratorium – even as the federal government resumed and tried to accelerate executions. The final program in the series

²³² 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.

²³³ See Death Penalty Virtual CLE Series website, available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/death-penalty-virtual-cle-series.

²³⁴ See Valuing Black Lives: A Case for Ending the Death Penalty website, available at https://www.americanbar.org/groups/crsj/events_cle/recent/valuing-black-lives.

²³⁵ See Valuing Speed: The Costs in Fairness, Accuracy & Money in Trying to Accelerate Executions website, available at https://www.americanbar.org/groups/crsj/events_cle/recent/valuing-speed.

featured ABA President Patricia Lee Refo, panelists Rob Dunham and Brandon Garrett, and moderator J. Wyndal Gordon.²³⁶

VI. THE FUTURE

The unprecedented 13 federal executions in six months accelerated the public's already increased understanding of major systemic problems with capital punishment. This greater understanding has since 2003 led to the abolition or discontinuation of capital punishment in ten states and to statewide moratoriums in four additional states.

New death sentences, while increasing in 2017 and 2018, dropped in 2019 to a number well below the pre-2015 yearly totals. They were heading even further down when the pandemic greatly reduced new death sentences imposed in the last ten months of 2020.

The slight increases in executions in 2017 and 2018 were followed by a decline in 2019, and there was a further downward trend early in 2020. Then, all executions at the state level ceased in July 2020 and had not resumed as of mid-April 2021. Meanwhile, 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, which has the nation's largest death row. But the Florida Supreme Court's decisions in capital cases since the court's membership changed could increase both new death sentences and executions there.

There is, after the dramatic executions of 13 federal inmates in six months, much greater appreciation of major problems with the death penalty's implementation. Increasingly, the death penalty *in practice* has been attacked by people who have served in the judiciary or law enforcement, taken part in executions, written death penalty laws, or are politically conservative. Indeed, many more conservatives now say that capital punishment is a failed, inefficient, expensive government program that accomplishes nothing. Religious-based support for executions has dropped significantly and should further decrease in view of Pope Francis' having changed the Catechism 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 new death sentences and executions. It is also crucial to focus on the roles that race and inadequate jury instructions play in capital sentencing decisions – especially at a time of much enhanced public support for the concept that Black lives matter.

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

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

²³⁶ See A Tale of Two Trends: Decreasing Support and Accelerating Federal Executions website, available at https://www.americanbar.org/groups/crsj/events_cle/recent/a-tale-of-two-trends.

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* raised in clemency proceedings, most clemency authorities fail to fulfill their duty to be “fail-safes” against unfairness. Moreover, the Supreme Court, as now comprised, may retreat from some of the Court’s substantive holdings in capital cases.

In these and many other respects, it is vital that the legal profession and the public be better informed about how capital punishment really “works.” The more that people know about the death penalty *as actually implemented*, the more they oppose it. The *actual* capital punishment system in the United States can be justified only if one believes in arbitrarily and capriciously applied, highly erratic vengeance. More and more people are realizing that the typical pro-death-penalty arguments, which focus on a theoretical but non-existent capital punishment system, are completely irrelevant.

Ultimately, our society must decide whether to continue with a penalty implemented in ways that cannot survive any serious cost/benefit analysis. As more and more people recognize that capital punishment in this country is inconsistent with both conservative and liberal principles, and with common sense, the opportunity for its abolition in many more states will arrive. Those who *already* realize that our actual death penalty is like “the emperor’s new clothes” should do everything with a reasonable chance of accelerating its demise.