

## CHAPTER 11

### CAPITAL PUNISHMENT

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#### **I. DEVELOPMENTS PRIOR TO 2020-2021 THAT, COMBINED WITH WIDESPREAD REVULSION AGAINST THE FEDERAL DEATH ROW EXECUTION SPREE AS ACQUIESCED IN BY A RADICALLY-CHANGED SUPREME COURT, COULD LEAD TO FUNDAMENTAL CHANGE IN THE DEATH PENALTY'S FUTURE IN THE UNITED STATES**

##### **A. *Huge Public Opinion Shift Against the Death Penalty***

By the time of the presidential election in November 2020, public support for the death penalty had declined to its lowest level in decades. For the first time, when Gallup asked in October 2019 whether the public preferred capital punishment or life without parole (LWOP), LWOP was selected by a significant majority.<sup>1</sup>

Public opinion's turning against capital punishment was accelerated by the widespread reporting of more cases in which innocent people had been sentenced to death, 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, new counsels' failures to seek certiorari or funds to reinvestigate, and much punier claims of ineffective counsel than the facts justified making).

On March 4, 2021, a January 2021 poll of Nevada voters by David Binder Research was released. It showed a large swing against supporting the death penalty since a similar poll was conducted in 2017. A majority now favored abolishing the death penalty or preferred LWOP or other alternatives, whereas in past polling substantial majorities favored the death penalty.<sup>2</sup> A similar shift in public opinion was reported for Ohio in January 2021, concerning the results of a poll taken in autumn 2020 (see Part IV.A. below). Bills to restore the death penalty for killing police officers and some other first responders have been introduced in Illinois but thus far have not gotten anywhere.<sup>3</sup>

More and more conservatives publicly opposed capital punishment, in light of the Catholic Church's absolute objections to it, and due to such traditionally conservative positions as opposing wasteful, costly government programs that accomplish nothing.

There was a further substantial increase in the public's awareness of executions being a historical 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. This public understanding was particularly enhanced by further, more nuanced coverage of Bryan Stevenson's fight for equal justice in the law. It is apparent from the lead segment of CBS

<sup>1</sup> Jeffrey M. Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP, Nov. 25, 2019.

<sup>2</sup> Compare Sean Golonka, *Poll: Nevadans divided over abolishing the death penalty, a shift from previous poll*, NEV. INDEP., Mar. 8, 2021, with Riley Snyder, *The Independent Poll: Nevada voters overwhelmingly support death penalty*, NEV. INDEP., Jan. 20, 2017.

<sup>3</sup> See, e.g., Zach Roth, *Ill. lawmakers seek return of death penalty for cop killers*, EFFINGHAM DAILY NEWS (Ill.), Jan. 29, 2022.

News' *Sunday Morning* on January 30, 2022<sup>4</sup> and the closing segment of NPR's *All Things Considered* on March 5, 2022<sup>5</sup> that informed comments by the reporters and those interviewed were at least as persuasive as what Mr. Stevenson said.

**B. *Drop in the Twenty-first Century's First Two Decades in the Number of States Which Still (in Some Sense) Have Capital Punishment***

Colorado abolished the death penalty in 2020, as New York, New Jersey, New Mexico, Connecticut, Maryland, Delaware, Washington, and New Hampshire had previously done since 2003. Two additional states – California and Ohio – began moratoriums on executions: in California directly, and in Ohio through the Governor's refusal (due to concerns over lethal injection) to authorize any executions. Existing moratoriums continued in two other states: Oregon and Pennsylvania. Moreover, an Oregon Supreme Court decision in October 2021 held that a 2019 statute excluded the defendant's being executed.<sup>6</sup> This holding made it impossible for any death penalty handed down under the prior statute to be held constitutional under Oregon's constitution. And on May 2, 2022, Tennessee's Republican Governor Bill Lee stated that Tennessee would not proceed in 2022 with any of its five scheduled executions. Governor Lee stated that Tennessee was retaining former U.S. Attorney Ed Stanton to assess the State's execution process, including its expenditures to buy drugs used in executions and how it had prepared for its recent executions.<sup>7</sup>

**C. *Decline in New Death Sentences and Executions in the Years Prior to the Pandemic***

Before the pandemic hit with a vengeance in March 2020, new state death sentences were trending lower, ending 2020 with 18, the lowest in any post-*Gregg* year.<sup>8</sup> Half of the new death sentences in 2019 were imposed in Florida, Ohio, and Texas. Half of Ohio's were from Cuyahoga County, whose County Prosecutor since 2017, Michael O'Malley, was (by DPIC's reckoning) far more aggressive than his counterparts elsewhere in seeking the death penalty.<sup>9</sup>

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 in Oklahoma County, Oklahoma and Montgomery County, Alabama (both zero in 2019 after both having a total of four from 2015-2018).<sup>10</sup>

Merely 30 counties in the United States (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

<sup>4</sup> *This Week on Sunday Morning*, CBS NEWS, Jan. 30, 2022, <https://www.cbsnews.com/news/this-week-on-sunday-morning-january-30-2022> (follow hyperlinks for cover story and video of full episode).

<sup>5</sup> *All Things Considered: A visit to the National Memorial for Peace and Justice*, NPR, Mar. 5, 2022, <https://www.npr.org/2022/03/05/1084772008/a-visit-to-the-national-memorial-for-peace-and-justice>.

<sup>6</sup> *State v. Bartol*, 496 P.3d 1013 (Or. 2021) (en banc).

<sup>7</sup> *Tennessee Governor Lee calls to pause 2022 executions, calls for independent review*, WTVC NEWS (Chattanooga), May 2, 2022.

<sup>8</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2020: YEAR END REPORT, at 10 (2020) [hereinafter DPIC 2020 YEAR END REPORT].

<sup>9</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR END REPORT, at 10-11 (2019) [hereinafter DPIC 2019 YEAR END REPORT].

<sup>10</sup> *Recent Death Sentences by Name, Race, County, and Year*, DEATH PENALTY INFO. CTR. (last visited Mar. 2, 2022) (follow hyperlinks for years under discussion).

counties (Cuyahoga, Ohio and Riverside, California) were more than one death sentence imposed.<sup>11</sup>

In 2020, the number of executions authorized by state governments was again seven. Three of these executions were carried out by Texas. Alabama, Georgia, Missouri, and Tennessee each executed one person.<sup>12</sup>

In 2021, 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.<sup>13</sup> Just seven states – Texas, Tennessee, Alabama, Georgia, Florida, South Dakota, and Missouri – were the originators of 2019's executions.<sup>14</sup>

## II. ONE MAN, AT TIMES BUTTRESSED BY HIS ATTORNEY GENERAL, GENERATED AN UNPRECEDENTED NUMBER OF FEDERAL 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. The summary 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). 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 district or circuit court or the Supreme 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. A majority or plurality of the Court usually gave extremely short shrift to the death row inmates' claims. After Justice Amy Coney Barrett on October 27, 2020 replaced

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<sup>11</sup> DPIC 2019 YEAR END REPORT, *supra* note 9, at 11.

<sup>12</sup> DPIC 2020 YEAR END REPORT, *supra* note 8, at 10.

<sup>13</sup> DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, at 1 (2019); DPIC 2019 YEAR END REPORT, *supra* note 9, at 1.

<sup>14</sup> DPIC 2019 YEAR END REPORT, *supra* note 9, at 8.

Justice Ruth Bader Ginsburg, who died on September 20, 2020, the Court's extremely negative reactions to such claims were expressed more openly.

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.” The Court stressed that such death row inmates were constitutionally protected against execution because of intellectual disability, and were factually innocent of the alleged crime.

None of these 13 inmates were granted relief on their constitutional claims. Why not? One can speculate about the reasons, such as: failures of earlier lawyers to object at the time prescribed for making such objections; and assertions by the habeas courts that even if their constitutional claims were assumed to be meritorious, the asserted constitutional errors were insufficiently serious to merit further investigation that might perhaps lead to yet another trial; or were asserted too late to survive the Court-made “anti-retroactivity” doctrine. In a great many of these cases, the Supreme Court vacated a stay of execution ordered by the district or circuit court, but did not indicate its reasons for doing so. Defense counsel had no opportunity to respond or to address how the circuit or district court dealt with their other claims. In some cases, there was no time for counsel to prepare a brief providing reasons for upholding the lower court decision.

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 encouraged states to abolish their death penalties.<sup>15</sup> It was widely anticipated that anyone under a death warrant when Mr. Biden became President would at the very least get a lengthy reprieve. There was no one under a death warrant when he took office.

### III. BROAD-BASED BACKLASH AGAINST THE FEDERAL EXECUTION BLOODBATH

The federal execution spree and the Court's apparent indifference to the law and the facts in sanctioning the spree have not had major continuing and growing effects on efforts to abolish the death penalty in additional states, expand it further, or bring it back where it has been abolished. It is too soon to say with assurance whether the tremendous changes in public opinion will continue despite a rise in violent crime, including murders – in both death penalty and abolition states – during the pandemic. So far in the 2022 elections, the death penalty has not been made a significant issue nationally or in any state – although it is clear that Republicans plan on making “strong on crime” a key issue and will advocate the death penalty where it sees political benefit from doing so.

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<sup>15</sup> Madeline Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, TIME, Jan. 25, 2021.

## A. *Revulsion in Virginia*

### 1. *Quite Possibly, Revulsion Made the Difference in Virginia's Decision 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*,<sup>16</sup> Virginia executed 113 people – more than any state, besides Texas. Its capital case histories were replete with cases in which people whose guilt was in grave doubt were executed. There was even one innocent man, Earl Washington, who would have been executed had not another death row inmate provided the pro bono lawyer with materials that resulted in saving Mr. Washington's life.<sup>17</sup> 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 greatly 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 sentenced anyone to death in almost a decade.<sup>18</sup>

*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 candidate in the 2021 Virginia Democratic gubernatorial primary said that “[I have] 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.”<sup>19</sup>

### 2. *Comments at the Signing Ceremony on March 24, 2021*

The law's final passage occurred on February 22, 2021.<sup>20</sup> Governor Ralph Northam signed it into law on March 24, 2021, at 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 1400 people, more than any other state.) Under the new law, the sentences of Virginia's two remaining death row inmates were changed to LWOP.<sup>21</sup>

In his remarks at the ceremony, Governor Northam cited the extensive history of racial disparities in applying capital punishment, and the many errors that have 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 capital punishment, Virginia could again become a world leader “as a society, a government that values civil rights.”<sup>22</sup>

<sup>16</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>17</sup> Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying*, WASH. POST, Oct. 3, 2000.

<sup>18</sup> *Virginia*, DEATH PENALTY INFO. CTR. (last visited Mar. 2, 2022).

<sup>19</sup> Trip Gabriel, *Virginia, Shifting Left Fast, Moves Closer to Abolishing Death Penalty*, N.Y. TIMES, Feb. 4, 2021.

<sup>20</sup> Denise Lavoie & Sarah Rankin, *Virginia lawmakers vote to abolish the death penalty*, AP NEWS, Feb. 22, 2021.

<sup>21</sup> Denise Lavoie, *Virginia, with 2nd-most executions, outlaws the death penalty*, AP NEWS, Mar. 24, 2021.

<sup>22</sup> Gregory S. Schneider, *Virginia abolishes the death penalty, becoming the first Southern state to ban its use*, WASH. POST, Mar. 24, 2021.

A year later, on February 7, 2022, a Virginia senate committee rejected, on a party-line vote, a bill that would have reinstated capital punishment as a possible penalty for killers of police.<sup>23</sup>

**B. *National Revulsion Against Trump's Arbitrary and Capricious Decisions Regarding Who Got Executed and When, and the Supreme Court's Seeming Indifference Thereto***

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 (which, by the end of the “spree,” included 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 [the preceding] month.”<sup>24</sup>

Pulitzer prize winning conservative columnist George Will, on April 23, 2021, wrote an op-ed entitled *Killing Capital Punishment*. While Mr. Will has in the past objected to the death penalty as applied, only to revert to supporting it, this time it seems that he has reached a final position. Mr. Will wrote:

The death of capital punishment in the United States is not only desirable but also paradoxical. Attempts to make this practice constitutional have enveloped it with ever-more-refined procedural safeguards intended to make it compatible with the Eighth Amendment's proscription of “cruel and unusual punishments.” But the safeguards have made it increasingly like then-Supreme Court Justice Potter Stewart's 1972 description of it [in *Furman v. Georgia*] as “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>25</sup>

The revulsion extended to many professional organizations and members of religious communities who were concerned that the Trump Administration was exacerbating racial tensions. Many such groups filed amicus briefs in support of the people fighting for their lives. There was also great concern about the government's not providing accurate information about the impact of carrying out executions on the potential spread of COVID-

<sup>23</sup> Mark Bowes, *Democrats on Senate Judiciary Committee stop bill that would reinstate death penalty for killing police officers*, RICHMOND TIMES-DISPATCH, Feb. 8, 2022.

<sup>24</sup> Elizabeth Bruenig, *Opinion, Abolish the Federal Death Penalty*, N.Y. TIMES, Feb. 20, 2021 (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.

<sup>25</sup> George Will, *Opinion, Killing capital punishment*, CHARLESTON GAZETTE-MAIL (W. Va.), Apr. 23, 2021.

19.<sup>26</sup> There was also consternation over the government's high financial costs 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 in July and August 2020 the federal government spent almost \$4.7 billion on the first five executions.<sup>27</sup>

Professor Paul Schiff Berman was so outraged about the Supreme Court's action in an Alabama case almost a year later that he wrote an opinion piece for the January 31, 2022 *National Law Journal* entitled *The Supreme Court Kills Its Principles in Service to the Death Penalty*. He wrote that the Supreme Court's reputation for dealing with death penalty cases deliberately and fairly reached a new low – or would have if more people were paying attention.<sup>28</sup> The Alabama case arose from the State's effort to be more humane by giving death row inmates an alternative method of execution to lethal injection by offering nitrogen – which had never yet been used in executions. Alabama death row inmates with upcoming execution dates were given an explanation by the warden and then a form to complete on which each would make a choice. However, the form was written in a manner that could be understood only by someone with at least an 11th grade reading level. This was far beyond the mental capacity of an inmate with severe mental disabilities and with only a 2nd or 3rd grade reading level – such as Matthew Reeves.<sup>29</sup>

A federal district judge (a Trump appointee), after hearing and considering Mr. Reeves' claim, made extensive factual findings and ruled in Reeves' favor. An Eleventh Circuit three-judge panel unanimously affirmed. But then, without briefing, oral argument or any opinion explaining its action, the Court voted 5-4 to lift the district judge's injunction and permit the execution<sup>30</sup> – which was carried out promptly. The four dissenters had no one with whom to dispute their conclusions – one of which was that the majority was violating the requirement to give substantial deference to a trial-level judge who has seen and heard witnesses and has read voluminous records.<sup>31</sup> Mr. Reeves' attempt to have his claim considered was held to be procedurally barred because he failed to satisfy a procedural requirement that he would not have understood even if he had been told about it.

It was later reported that Justice Barrett, although not joining in the dissent filed by Justices Kagan, Sotomayor, and Breyer, had voted against lifting the stay. Professor Berman said of the outcome: “This is yet another example of the current Supreme Court running roughshod over the rule of law and principles of reasoned deliberative judicial decision-making in favor of imposing its will by fiat.”<sup>32</sup>

### **C. *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

<sup>26</sup> *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-ncna1256830>; Michael Tarm, *Executioners sanitized accounts of deaths in federal cases*, AP NEWS, Feb. 17, 2021.

<sup>27</sup> 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.

<sup>28</sup> Paul Schiff Berman, Commentary, *The Supreme Court Kills Its Principles in Service to the Death Penalty*, NAT'L L.J., Jan. 31, 2022.

<sup>29</sup> *Id.*

<sup>30</sup> *Hamm v. Reeves*, 142 S. Ct. 743 (2022) (mem.).

<sup>31</sup> *Id.* at 743-44 (Kagan, J., dissenting, joined by Breyer and Sotomayor, JJ.).

<sup>32</sup> Berman, *supra* note 28.

(Virgin Group), Sheryl Sandberg (COO of Facebook), Alan Jope (Unilever), Guilherme Leal (co-founder of Natura and Instituto Ethos), Jared Smith (Qualtrics' co-founder), and Strive Masayiwa (Econet Group).<sup>33</sup>

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.”<sup>34</sup>

#### **D. *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 the moratorium on federal death penalty executions, which had lasted from 2003 (during the George W. Bush Administration) until the last six months of the Trump Administration. Senator Leahy said this would give him and Senator Booker time to work on legislation to abolish the federal death penalty. 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 its disparate impact. The data is clear that it 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.<sup>35</sup>

## **IV. OHIO AND CALIFORNIA MORATORIUMS, OHIO'S NEW MENTAL DISABILITIES LAW**

### **A. *Ohio***

Between late 2020 and March 2022, a number of developments moved Ohio further in the direction of limiting greatly, and possibly abolishing, the death penalty.

<sup>33</sup> 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.

<sup>34</sup> *E.g.*, Casey, *supra* note 33.

<sup>35</sup> 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.

In a December 2020 interview, Governor Michael DeWine, a Republican, said he had refused to permit executions since taking office in January 2019 due to his concern about the availability of legitimate 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 deter. He said he would not end the moratorium until the legislature passed a bill providing for executions to be carried out by a means other than lethal injection.<sup>36</sup>

On January 9, 2021, Governor DeWine signed House Bill 136. 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.<sup>37</sup>

This is the second law enacted anywhere in the country that includes what is 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 proposals for a meaningful death penalty exemption for the severely mentally ill in other death penalty jurisdictions in the United States. Indiana had come fairly close to adopting such a law several years earlier. Kentucky enacted a somewhat similar law in 2009, but death row inmates rarely sought to secure relief under the law.

A 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.<sup>38</sup> Conservative support for abolition had grown significantly, which led in early 2020 to the formation of Ohio Conservatives Concerned About the Death Penalty.<sup>39</sup>

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. Republican Senator Steve Huffman, a physician, 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 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.<sup>40</sup>

<sup>36</sup> Julie Carr Smyth et al., *Ohio Governor: Lethal injection no longer execution option*, AP NEWS, Dec. 8, 2020.

<sup>37</sup> *Ohio Bars Death Penalty for People with Severe Mental Illness*, DEATH PENALTY INFO. CTR., Jan. 11, 2021.

<sup>38</sup> Marty Schladen, *Poll: Big majority in Ohio support getting rid of the death penalty*, OHIO CAP. J., Jan. 28, 2021.

<sup>39</sup> Vince Grzegorek, *Bipartisan Bill Might Finally Abolish the Death Penalty in Ohio*, CLEVELAND SCENE, Feb. 18, 2021.

<sup>40</sup> Marty Schladen, *Chances for Ohio death penalty repeal appear to be growing*, OHIO CAP. J., Feb. 19, 2021.

In early March 2021, former Governor Robert Taft and former Attorneys General Jim Petro and Lee Fisher – two Republicans and one Democrat – said in a joint op-ed that in practice capital punishment is “broken, costly and unjust.” Accordingly, they said, “We urge the Ohio legislature to repeal what we helped wrought.”<sup>41</sup>

Political observers reported that chances of enacting an abolition bill were considerably greater than in the past, but far from a sure thing.<sup>42</sup> 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.”<sup>43</sup>

On February 18, 2022, Governor DeWine once again shifted execution dates, this time from 2022 to 2025. His office said this was done “due to ongoing problems involving the willingness of pharmaceutical suppliers to provide drugs to the Ohio Department of Rehabilitation and Correction . . . without endangering other Ohioans.”<sup>44</sup>

On March 8, 2022, reporter Marin Cogan made Ohio her prime example in writing in *Vox, Why Some Republicans Are Turning Against the Death Penalty: A New – and Surprising – Bipartisan Coalition Is Taking Shape Around One of the Country’s Most Controversial Issues*. Ms. Cogan noted that “a survey of 44 Ohio state lawmakers from the final week of February [2022] showed that 46 percent of Republican lawmakers felt that the state should eliminate the death penalty, while 38 percent of Democrats said the same (and half of the Democrats polled were undecided).” Cogan quoted legislators from both sides of the aisle who said that abolishing the death penalty was only a matter of time.<sup>45</sup>

Ms. Cogan further reported that Ohio was not an anomaly in state legislatures. Republicans are leading or co-sponsoring efforts to repeal or limit the death penalty in Kentucky, Georgia, Missouri, Kansas, and Pennsylvania (another bill introduced by GOP lawmakers in Utah was narrowly defeated in committee in February 2022) and an advocacy group, Conservatives Concerned About the Death Penalty, has been highlighting the growing numbers of Republicans speaking out against it. Cogan said it was significant that this was one issue where, at the state level, people of different parties, ideologies, and religious beliefs could join together.

## **B. California**

On March 13, 2019, California’s new Governor, Gavin Newsom, issued an executive order (i) providing reprieves for all California death row inmates, who will not be subject to execution while Newsom is 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

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<sup>41</sup> 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.

<sup>42</sup> Editorial, *Expensive, impractical, ineffective: The case against capital punishment in Ohio*, COLUMBUS DISPATCH, Feb. 9, 2021.

<sup>43</sup> Schladen, *supra* note 40.

<sup>44</sup> Eric Lagatta, *Ohio Gov. Mike DeWine delays three executions, citing problems obtaining lethal drugs*, COLUMBUS DISPATCH, Feb. 20, 2022 (alteration in original).

<sup>45</sup> Marin Cogan, *Why some Republicans are turning against the death penalty*, VOX, Mar. 8, 2022.

punishment system's high cost; and the fact that 25 California death row inmates had already exhausted all state and federal avenues for relief.<sup>46</sup>

Governor Newsom was subjected to a recall vote in October 2021, partly because of his actions against capital punishment. The recall effort was resoundingly defeated, and in January 2022 Governor Newsom announced that he would move all inmates off death row at San Quentin and into other prisons.<sup>47</sup>

On June 23, 2021, the California Committee on Revision of the Penal Code (which the California legislature created within the Law Revision Commission) unanimously adopted a Report on the death penalty. It recommended repealing the death penalty and dismantling death row because “the death penalty as created and enforced in California does not and cannot ensure justice and fairness for all Californians.”<sup>48</sup> It also proposed some less-sweeping measures given that repealing the death penalty is difficult under state law. With regard to racial disparities, it said that all sources it had reviewed “show a consistent theme: race often determines when the death penalty is sought and when it is imposed.”

### ***C. Supreme Court Decisions Helped Create a Muddled Situation Regarding Execution Methods***

The Supreme Court has contributed mightily to the current muddled situation regarding means of execution by giving states wide latitude in deciding how to kill people. Going back to the late 19th century, it has never confronted a method of execution of which it disapproved.

In a number of cases starting in 2007, the Court has permitted lethal injection and refused to say whether any drugs or drug combinations could be unconstitutional. Chief Justice John Roberts and Justices Neil Gorsuch and Clarence Thomas have told a pleasing, if distorted, story of progress in America's execution methods.<sup>49</sup> Their opinions leave most readers with the impression that death penalty states are sincerely committed to treating death row inmates more humanely before executing them. Upon reflection, one may recognize that the words *humanely* and *executing* do not belong in the same sentence.

### ***D. Difficulties Many States Faced in Trying to Resume Executions After Botched Executions Led to Substantial Public Outrage***

Oklahoma was once the second most prolific executioner in the United States. But by January 2021, it had gone six years without an execution after using the wrong drug to execute Charles Warner, shortly after the attempted but botched execution of Clayton Lockett in 2014. Mr. Lockett survived several subsequent efforts to execute him.<sup>50</sup> He remains on death row.

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

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<sup>46</sup> 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>.

<sup>47</sup> Hannah Wiley & Richard Winton, *California moves forward on plans to shut down death row*, L.A. TIMES, Jan. 31, 2022.

<sup>48</sup> Erin Ringel, *California Committee Adopts Report Recommending Death Penalty Abolition*, ABA, July 14, 2021.

<sup>49</sup> See Garrett Epps, *The Supreme Court's Death Drive*, THE ATL., Apr. 24, 2019.

<sup>50</sup> Nolan Clay & Rick Green, *Wrong drug used for January execution, state records show*, THE OKLAHOMAN, Oct. 8, 2015.

it increasingly difficult to obtain the drugs it wished to use in executions. In 2020, government officials said they unexpectedly had found a supply of the drugs and could resume executions whenever courts would permit them.<sup>51</sup> Oklahoma executed Bigler Stouffer II on December 9, 2021, Donald Grant on January 27, 2022, and Gilbert Ray Postelle on February 17, 2022 – all by lethal injection.<sup>52</sup>

In 1982, Texas pioneered in using a concoction of previously untested drugs and drug combinations. By the end of 2020, states had used at least ten distinct drug protocols in their executions. The traditional three-drug protocol having been all but forgotten, it was no surprise when the already high incidence of botched lethal injections increased further. Yet, lethal injection remains the primary execution method in all but one death penalty state.<sup>53</sup>

Many states revived previously discredited methods of execution or turned to new and untested ones like nitrogen hypoxia.

In 2021, South Carolina became the first state to depart from using lethal injection as its primary execution method. It became the only state in which electrocution plays that role. Firing squad and lethal injection are authorized by statute as secondary methods of execution. For many years, South Carolina could not execute anyone once 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 had been choosing lethal injection. Since the State could not honor that choice, it was unable to execute anyone.<sup>54</sup>

As of late March 2022, eight states (Alabama, Arizona, Florida, Kentucky, Mississippi, Oklahoma, South Carolina, and Tennessee) include the electric chair among their available methods of execution. Seven states (Alabama, Arizona, California, Mississippi, Missouri, Oklahoma, and Wyoming) allow for the use of lethal gas. And four states (Mississippi, Oklahoma, South Carolina, and Utah) now authorize the firing squad as an alternative to lethal injection. In most of these states, the alternatives are available only if lethal injection is declared unconstitutional or is otherwise unavailable. But six states (Arizona, California, Florida, Kentucky, South Carolina, and Tennessee) in addition to Alabama allow death row inmates to choose an execution method.<sup>55</sup>

### ***E. 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 2020, Tennessee executed five people who chose electrocution over lethal injection, with only one person being executed by lethal injection.<sup>56</sup>

<sup>51</sup> 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.

<sup>52</sup> *Oklahoma County Becomes Nation's Third Most Prolific County Executioner as State Puts Intellectually Impaired Teen Offender to Death*, DEATH PENALTY INFO. CTR., Feb. 18, 2022.

<sup>53</sup> Austin Sarat, *Alabama's Execution of Matthew Reeves Signals Methods of Execution Mess in the U.S.*, VERDICT, Jan. 31, 2022.

<sup>54</sup> Jeffrey Collins, *South Carolina Senate adds firing squad to execution methods*, AP NEWS, Mar. 2, 2021.

<sup>55</sup> Sarat, *supra* note 53.

<sup>56</sup> 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*

Tennessee's turning point was the execution in 2018 of Billy Ray Irick. An anesthesiologist who had reviewed witness descriptions of Irick's execution concluded to "a reasonable degree of medical certainty" that during the execution Mr. 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."<sup>57</sup>

#### ***F. Arizona's Unorthodox Ways of Getting Enough 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 Mr. Wood was administered 15 doses of a two-drug combination over two hours. The State's extensive efforts thereafter to find a lethal injection drug failed. Its attempt to import sodium thiopental 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 Food and Drug Administration. Pursuant to state law, Arizona 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.<sup>58</sup>

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. Then, once those issues were resolved, Arizona would 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 officers expressed concern that many of those who participate in these executions would develop PTSP and other traumas.<sup>59</sup>

*New York Times* opinion analyst Elizabeth Bruenig cogently summarized on April 15, 2021, the unresolved issues regarding the use of pentobarbital in executions: "[S]cientific evidence suggests that pentobarbital poisoning is an excruciating way to die."<sup>60</sup> 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 in 2014 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 execution drugs from dubious sources, and that Tennessee and Missouri had secretly and expensively procured and used execution drugs from abroad.<sup>61</sup>

Arizona on May 11, 2022 executed Clarence Wayne Dixon, who had been convicted of murder and rape in 1978. Arizona's most recent execution had been a lethal injection that

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*Thursday night*, CNN, Feb. 21, 2020; Liliana Segura, *Will Tennessee Kill A Man Who Saved Lives On Death Row?*, THE INTERCEPT, Feb. 16, 2020.

<sup>57</sup> Steve Hale, *Billy Ray Irick Was Tortured During Execution*, NASHVILLE SCENE, Sept. 7, 2018.

<sup>58</sup> Jacques Billeaud, *Arizona finds death penalty drug after hiatus in executions*, AP NEWS, Mar. 5, 2021.

<sup>59</sup> *Arizona AG Asks Court to Set Execution Dates, Sparking Broad Backlash*, DEATH PENALTY INFO. CTR., Apr. 12, 2021.

<sup>60</sup> Elizabeth Bruenig, *Opinion, Trump's Killing Spree Continues*, N.Y. TIMES, Apr. 15, 2021.

<sup>61</sup> Ed Pilkington, *Revealed: Republican-led states secretly spending huge sums on execution drugs*, THE GUARDIAN, Apr. 9, 2021.

many felt was botched. There was substantial opposition to Dixon's execution in view of his having frequently been diagnosed as mentally ill in several respects, including severe schizophrenia.<sup>62</sup>

### ***G. Additional Reasons for Concern That Innocent People Could Be Executed***

Awareness has continued to increase that in the United States 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 Requests Trying to Show Guilt of Another Person Are Usually Denied When Prosecution Relied on Erroneous DNA Analysis or Other "Proof" That Turned Out to Be "Junk Science," but Some States May Now Examine This Newly-Raised Evidence***

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.<sup>63</sup> Also ruling against the claim was the Tennessee Court of Criminal Appeals on May 7, 2021.<sup>64</sup>

On May 2, 2022, Tennessee's Governor Bill Lee announced that he would not permit any executions to proceed during the remainder of 2022. He appointed former U.S. Attorney Ed Stanton to study a failure to ensure that compounded drugs be checked for Endotoxins, as well as other issues about capital punishment's implementation.<sup>65</sup>

As many cases discussed herein illustrate, 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 had been 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.<sup>66</sup>

#### ***2. Georgia Execution Despite Substantial Reasons to Doubt Guilt***

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. Mr. 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

<sup>62</sup> Emma Mayer, *Clarence Dixon Executed in Arizona Despite Backlash Over His Mental Illness*, NEWSWEEK, May 11, 2022.

<sup>63</sup> 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.

<sup>64</sup> *Estate of Alley v. State*, No. W2019-02046-CCA-R3-PC, 2021 WL 1828501 (Tenn. Crim. App. May 7, 2021).

<sup>65</sup> *Tennessee Governor Lee calls to pause 2022 executions, calls for independent review*, *supra* note 7.

<sup>66</sup> Paul, *supra* note 63.

damage from brain traumas could have been presented much sooner. 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?”<sup>67</sup>

### **3. Newly Elected “Reform” Prosecutors Seek to Look into Old Cases**

In 2020, as in several other 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. Nonetheless, in early February 2021, Gascón said he would not prevent his office's prosecutors from seeking the death penalty in the case of a “boy next door” killer.<sup>68</sup> But he said he would review death sentences already secured by his office (which has put over 200 people onto California's death row).<sup>69</sup>

In November 2020, Deborah Gonzalez of Athens, Georgia and Jason Williams of New Orleans, Louisiana were elected to be district attorneys 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).

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 Dehghan-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 death sentences for legal or factual errors. Eight people sentenced to death in Travis County have been executed since 1976.

In Franklin County, Ohio, Ron O'Brien, after many years getting death penalties there, was defeated by Democrat Gary Tyack.<sup>70</sup>

### **4. Missouri State Attorney General Seeks to Prevent Trial Prosecutor to Reopen 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 in which the prosecution could present new evidence that might result in an acquittal. In the 24 years since Johnson's conviction, the lead prosecution witness recanted and two other men confessed to having committed the

<sup>67</sup> 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.

<sup>68</sup> James Queally, *Gascón makes exception to death penalty ban for “boy next door” killer*, L.A. TIMES, Feb. 5, 2021.

<sup>69</sup> Daniel Nichanian, *Newly Elected Prosecutors Are Challenging the Death Penalty*, THE APPEAL, Dec. 9, 2020.

<sup>70</sup> *Id.*

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.”<sup>71</sup>

On March 2, 2021, the Missouri Supreme Court unanimously dismissed the appeal. It said that there is 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 Judge Draper calling the office's position “disingenuous” and Judge Stith being scathing in her criticism and Circuit Attorney Gardner vowing to continue to seek relief for Mr. Johnson.<sup>72</sup>

The federal district court denied relief, and in 2021 the Seventh Circuit affirmed the lower court. On January 10, 2022, Cole County Circuit Judge Daniel Green said he was unlikely to grant the State's motion for summary judgement, and discussed possible trial dates with counsel.<sup>73</sup>

## **5. *People with Strong Innocence Claims Barely Avoided Execution in 2019-2021 and Remain at Risk of Execution in 2022***

### **a. *James Dailey***

James Dailey's November 7, 2019 scheduled execution was halted by a Florida federal judge. A *ProPublica* report published in *The New York Times Magazine* in December 2019 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 row.<sup>74</sup> On December 29, 2019, the *Times* devoted most of its editorial page to a denunciation of Florida's continuing efforts to execute Mr. Dailey.<sup>75</sup>

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.<sup>76</sup> On May 29, 2020, Judge Siracusa denied Dailey's innocence claim.<sup>77</sup> Ironically, one day earlier, journalist Pamela Colloff received a National Magazine Award for her exposé of the key informant in the case.

<sup>71</sup> Rachel Rice, *Missouri Supreme Court is asked to determine if Lamar Johnson gets new trial*, ST. LOUIS POST-DISPATCH, Dec. 24, 2019.

<sup>72</sup> Emily Hoerner, *Mo. Supreme Court denies latest appeal of Lamar Johnson, whom local prosecutors say is wrongly convicted*, INJUSTICE WATCH, Mar. 4, 2021.

<sup>73</sup> Grace Zokovitch, *Lamar Johnson's decades-old wrongful conviction case on potential path to trial*, ST. LOUIS POST-DISPATCH, Jan. 11, 2022.

<sup>74</sup> 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.

<sup>75</sup> Jesse Wegman, *Opinion, Will Florida Kill an Innocent Man?*, N.Y. TIMES, Dec. 29, 2019.

<sup>76</sup> 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.

<sup>77</sup> Dan Sullivan, *Judge denies innocence claims of Pinellas death row inmate*, TAMPA BAY TIMES, May 29, 2020.

Mr. Dailey next lost in the Florida Supreme Court. There was no review by the U.S. Supreme Court. He then lost in a trial-level court, and again in the Florida Supreme Court. Federal habeas consideration may still be possible.

Ironically, Dailey's best hope for avoiding execution would be executive clemency by extremely pro-death penalty governor Ron DeSantis.

**b. Rodney Reed**

Just days before Texas' planned November 2019 execution of Texas death row inmate Rodney Reed, the Texas Court of Criminal Appeals stayed the execution to enable lower courts to consider whether perjured testimony and withholding of exculpatory evidence had combined to convict Mr. Reed. Earlier on the day of the stay order, the Texas Board of Pardons and Paroles unanimously urged Governor Abbott to order a 120-day reprieve. There had been an impressive campaign in support of saving Reed's life. A wide bipartisan coalition of elected officials and well-known and well-respected people were among the three million people who signed a petition seeking a stay.<sup>78</sup>

On April 25, 2022, the Supreme Court granted Reed's petition for certiorari.<sup>79</sup> The Court is expected to consider Mr. Reed's contention that if the never-examined DNA found in or near the victim's body *had been examined*, the law enforcement officials would have advised to focus on additional suspects.

**c. 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 appeals court said the claim was procedurally barred.<sup>80</sup> Three dissenting judges pointed 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.”<sup>81</sup>

Mr. Storey's federal habeas corpus claims were denied by the district court. The Fifth Circuit affirmed on August 6, 2021.<sup>82</sup>

**d. Melissa Lucio**

On March 24, 2022, a bipartisan group of more than half the members of Texas' House of Representatives urged the Pardons and Paroles Board and the Governor to spare Ms. Lucio, who was scheduled to be executed on April 27, 2022 for the death of her two-year-old daughter. Recently filed expert reports concluded that the child had died from an accidental fall down steep stairs in her family's new home.<sup>83</sup> On April 25, 2022, the Texas

<sup>78</sup> DPIC 2019 YEAR END REPORT, *supra* note 9, at 15.

<sup>79</sup> *Reed v. Goertz*, No. 21-442, 2022 WL 1205834 (U.S. Apr. 25, 2022) (mem.).

<sup>80</sup> *Ex parte Storey*, 584 S.W.3d 437 (Tex. Crim. App. 2019) (per curiam), *cert. denied*, 140 S. Ct. 2742 (2020).

<sup>81</sup> *Id.* at 443 (Yeary, J., dissenting, joined by Slaughter, J.); Adam Liptak, *He killed their son, but they want to stop his execution*, N.Y. TIMES, Oct. 28, 2019.

<sup>82</sup> *Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2021), *petition for cert. docketed*, No. 12-6674 (U.S. Dec. 21, 2021).

<sup>83</sup> Jolie McCullough, *More than half of the Texas House wants to stop the execution of Melissa Lucio, convicted of killing her toddler*, TEX. TRIB., Mar. 24, 2022.

Court of Criminal Appeals stayed Ms. Lucio's execution and remanded her claims to the trial court for a merit's review.<sup>84</sup>

**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.<sup>85</sup> However, he was not released until February 2021, when he was also exonerated in a second case.<sup>86</sup>

**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. Mr. 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.<sup>87</sup>

**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.<sup>88</sup>

**d. Walter Ograd**

In June 2020, Walter Ograd 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 Mr. Ograd's conviction and death sentence were secured through the use of a coerced confession he gave to two detectives whom prosecutors now asserted also coerced confessions from other innocent defendants, withheld key evidence from the defense, and relied on highly suspect testimony from jailhouse informants.<sup>89</sup> Tom Lowenstein's superb 2017 book, *The Trials of*

<sup>84</sup> *Ex parte Lucio*, No. WR-72,702-05 (Tex. Crim. App. Apr. 25, 2022), <https://documents.deathpenaltyinfo.org/Lucio-TCCA-Stay-Order-2022-04-25.pdf>

<sup>85</sup> Samantha Melamed, *A brutal triple murder, an eager informant, hidden evidence, and now, exoneration*, PHILA. INQUIRER, Jan. 8, 2020.

<sup>86</sup> Samantha Melamed, *Accused of 6 murders, Philly man spent 25 years on death row. Now, his record is cleared*, PHILA. INQUIRER, Feb. 9, 2021.

<sup>87</sup> Julie Shaw, *He spent years on death row. Now, a former Philly boxer will be released from prison*, PHILA. INQUIRER, Jan. 21, 2021.

<sup>88</sup> Jolie McCullough, *Texas Supreme Court rules Alfred Dewayne Brown must be compensated for his wrongful imprisonment*, TEX. TRIB., Dec. 18, 2020.

<sup>89</sup> Chris Palmer, *Days after he was freed from death row, Walter Ograd's tainted Philly murder case was officially thrown out*, PHILA. INQUIRER, June 10, 2020.

Walter Ograd, played a substantial role in focusing attention on serious problems that led to his exoneration.<sup>90</sup>

### **7. *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.”<sup>91</sup>

On January 14, 2021, the Texas Court of Criminal Appeals announced it was staying Blaine Milam's execution date indefinitely and had remanded the case to the trial court, where an intellectual disability hearing was later scheduled.<sup>92</sup> Milam had been sentenced to death for the December 2008 killing of his girlfriend's thirteen-month-old daughter.

### **8. *“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.<sup>93</sup>

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

<sup>90</sup> See THOMAS LOWENSTEIN, *THE TRIALS OF WALTER OGRAD* (2017).

<sup>91</sup> 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.

<sup>92</sup> Courtney Stern, *Man on death row for 2008 murder of child in Rusk County granted stay of execution*, NEWS J., Jan. 15, 2021.

<sup>93</sup> 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).

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.<sup>94</sup>

The mental disability law also provided a basis for allowing the additional DNA testing that led the current District Attorney of Shelby County, Tennessee to include that because Pervis Payne had intellectual disability, he could not again be sentenced to death for the crime that had sent him to death row. Given his having served the entire sentence for another conviction, he was sentenced to two consecutive life sentences on January 31, 2022, which made him eligible for parole consideration in another five years.<sup>95</sup> He was removed from death row after more than three decades there.

## ***H. Executions of People Sentenced in Apparent Violation of the Constitution or Whose Executions Raised Serious Fairness Issues***

### ***1. Nathaniel Woods***

Alabama executed Nathaniel Woods on March 5, 2020. The execution outraged many people both within and outside Alabama. Much outrage arose because Mr. 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 continued 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.<sup>96</sup> On March 30, 2020, DPIC released an analysis showing that where non-unanimous death penalty verdicts are possible, the risk of wrongful convictions increases.<sup>97</sup>

### ***2. 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.<sup>98</sup> 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.”<sup>99</sup> The ABA strongly urged a grant of clemency for Mr. Rhines.

<sup>94</sup> Kevin Grasha, *From death row to possible parole: Genesis Hill gets new sentence*, CINCINNATI ENQUIRER, June 27, 2019.

<sup>95</sup> Katherine Burgess, *Pervis Payne to be eligible for parole in 5 years with concurrent life sentences, judge rules*, MEMPHIS COM. APPEAL, Jan. 31, 2022.

<sup>96</sup> Katie Shepherd, *'You killed my brother': Sister of Nathaniel Woods confronts Alabama governor on controversial execution*, WASH. POST, Mar. 13, 2020; Christina Maxouris, *Nathaniel Wood s' 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.

<sup>97</sup> DPIC Analysis: *Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions*, DEATH PENALTY INFO. CTR., Mar. 13, 2020.

<sup>98</sup> *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.

<sup>99</sup> *Supreme Court Denies Review*, *supra* note 98 (third alteration in original).

## ***I. 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 VII.D. 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.”<sup>100</sup>

Two years before the assessment team issued its report, Kentucky in 2009 enacted the first Racial Justice Act to be passed in this country. Unlike in North Carolina, which subsequently enacted its Racial Justice Act, there have been no significant successes by death row inmates making challenges under that statute, and relatively few challenges have been made (see Part V.D. below). And many years later, in 2021, Kentucky enacted a law intended to preclude executions of people who at the time of the crime had at least one of several designated mental illnesses.

### ***2. Florida***

The Florida Supreme Court led Florida in the opposite direction of reforms that Florida had made in the prior 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*,<sup>101</sup> that to be constitutional, Florida's death penalty system must require that a unanimous 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 in a Florida capital case whether a death sentence could be constitutional if, after the Supreme Court decision in *Hurst*, a Florida jury had unanimously voted to find 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.<sup>102</sup>

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 for

<sup>100</sup> 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).

<sup>101</sup> *Hurst v. Florida*, 577 U.S. 92 (2016).

<sup>102</sup> *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).

a death sentence handed down in a Florida court to be constitutional, every fact whose existence was a prerequisite for imposition of the death penalty had indeed been factually established before the death penalty was imposed in the case. The defendant then raised the issue in light of the new requirements of federal and Florida law, that 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.<sup>103</sup>

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 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. Another possible factor that could affect the future of Florida's death penalty is Governor DeSantis' re-election campaign in 2022.

## V. OTHER FACTORS LIKELY AFFECTING PUBLIC OPINION

### A. *Greater Understanding of Interrelationship of Death Penalty with Racial Superiority Ideology and Lynchings*

On March 29, 2022, President Biden signed into law the Emmett Till Antilynching Act. This new law, first proposed more than a century earlier, makes it a federal hate crime to lynch someone where the person dies or suffers serious bodily harm.<sup>104</sup> The program book for the Southern Center for Human Rights' early 2022 fundraiser said: "The death penalty is a direct descendant of lynching and other forms of racial violence and oppression in the American South. Race, socioeconomic status, the county in which the alleged offense was committed, and the quality of the attorneys ultimately play the most decisive roles in who receives a death sentence in America. The evidence is clear that the death penalty does not make us safer."<sup>105</sup> The pre-eminent litigator of racial discrimination claims for death row inmates, SCHR's Steve Bright, not only developed inventive arguments that could re-invent

<sup>103</sup> Editorial, *The Florida Supreme Court's U-turn on the death penalty*, TAMPA BAY TIMES, May 27, 2020.

<sup>104</sup> Kate Sullivan & Maegan Vazquez, *Biden signs bill making lynching a federal hate crime into law*, CNN, Mar. 30, 2022.

<sup>105</sup> *Death Penalty*, SCHR, <https://www.schr.org/death-penalty/> (last visited Apr. 13, 2022).

this area of the law; he also salvaged many cases by persuading young lawyers to handle lawsuits to force courts to confront these issues.

***B. Increasing Awareness of and Outrage About Killings of Unarmed Black People by Police – Which Has 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 nationwide.”<sup>106</sup> If one adds up the yearly totals of executions in the United States for the years since 2015 (set forth in Part I.C. 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.<sup>107</sup>

***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*.<sup>108</sup> 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, observed, “*McCleskey* has not aged well.” Its principal author, Justice Lewis Powell, said it was the case that he most regretted involvement in, and critics of the majority decision 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.<sup>109</sup>

<sup>106</sup> Cheryl W. Thompson, *Fatal Police Shootings Of Unarmed Black People Reveal Troubling Patterns*, NPR, Jan. 25, 2021.

<sup>107</sup> 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.

<sup>108</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>109</sup> Adam Liptak, *A Vast Racial Gap in Death Penalty Cases, New Study Finds*, N.Y. TIMES, Aug. 3, 2020.

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.<sup>110</sup>

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 gun” evidence – *i.e.*, direct proof of discriminatory intent and action that leaves nothing to the imagination. Indeed, in *Foster v. Chatman*,<sup>111</sup> unequivocal evidence in the prosecution's trial files showed that the prosecutors deliberately violated *Batson v. Kentucky*<sup>112</sup> 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.”<sup>113</sup>

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 (as of then, still frequently 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*,<sup>114</sup> 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.”<sup>115</sup>

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.”<sup>116</sup> 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,

<sup>110</sup> *Id.* (discussing Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020)).

<sup>111</sup> *Foster v. Chatman*, 578 U.S. 488 (2016).

<sup>112</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>113</sup> *Foster*, 578 U.S. at 493-94, 514. 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.

<sup>114</sup> *Buck v. Davis*, 137 S. Ct. 759 (2017).

<sup>115</sup> *Id.* at 768-70.

<sup>116</sup> *Id.* at 778.

and . . . the democratic ideal reflected in the processes of our courts.<sup>117</sup> 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.<sup>118</sup>

#### **D. Unusual Twists and Developments in North Carolina**

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 only two states to try to deal with this pervasive problem legislatively were Kentucky and North Carolina, which in 2009 both enacted differently worded Racial Justice Acts. These 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.<sup>119</sup> However, counsel in Kentucky never made a systematically developed challenge using that state's Racial Justice Act.

<sup>117</sup> *Id.* (alterations in original) (citation omitted).

<sup>118</sup> 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 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." He also 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 differently similar potential jurors of different races.

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.

<sup>119</sup> Associated Press, *Perdue signs Racial Justice Act*, Aug. 11, 2009, <http://wral.com/news/state/story/5769609/>;

After being significantly amended and limited in 2012, the North Carolina law was repealed in June 2013 – a repeal that purported to be retroactive.<sup>120</sup> 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 resented Robinson to LWOP.<sup>121</sup>

On December 13, 2012, Judge Weeks applied the amended Racial Justice Act to grant relief to Tilmon Golphin, Christina Walters, and Quintel Augustine.<sup>122</sup> 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.”<sup>123</sup>

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.<sup>124</sup>

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.<sup>125</sup>

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 (having timely applied under 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.<sup>126</sup>

<sup>120</sup> Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013.

<sup>121</sup> 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>.

<sup>122</sup> Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 14, 2012.

<sup>123</sup> *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).

<sup>124</sup> *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015); *State v. Augustine*, 780 S.E.2d 552 (N.C. 2015) (mem.).

<sup>125</sup> *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.

<sup>126</sup> Bryan Anderson, *3 North Carolina death row inmates to serve life in prison*, AP NEWS, Sept. 25, 2020.

## ***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 developing 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*.<sup>127</sup>

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.<sup>128</sup> It also mentioned that Georgia was preparing to execute Donnie Lance (whose case and execution are described above in Part IV.G.2.). It appears that Georgia still has years to go with capital punishment for those already on its death row.

## ***F. 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 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.’”<sup>129</sup> 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,

<sup>127</sup> Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 983-84 (2020).

<sup>128</sup> Bill Rankin, *Death penalty on the wane in Georgia*, ATLANTA J.-CONST., Jan. 11, 2019.

<sup>129</sup> Linda Bordoni, *Pope Francis: ‘death penalty inadmissible’*, VATICAN NEWS, Aug. 2, 2018.

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.”

### **G. 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.<sup>130</sup>

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.<sup>131</sup> For the twelfth consecutive year, the United States was the only country in the Americas to execute anyone.<sup>132</sup> Chad totally abolished capital punishment – the fifth country in Africa to do so in the last ten 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.<sup>133</sup>

A total of 18 countries executed people in 2020, down from 20 in 2018 and 2019, 23 in 2017 and 31 in 1999.<sup>134</sup> The United States was between sixth and twelfth depending on totals that Amnesty International could not verify for certain countries.<sup>135</sup>

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.<sup>136</sup> 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.<sup>137</sup>

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

<sup>130</sup> AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2009, at 11, 18 (2010).

<sup>131</sup> AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2020, at 7-8, 36-37 (2021).

<sup>132</sup> *Id.* at 16.

<sup>133</sup> *Id.* at 8, 57.

<sup>134</sup> *Id.* at 10; AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2018, at 8-9 (2019).

<sup>135</sup> AMNESTY INT'L, *supra* note 131, at 55.

<sup>136</sup> *Id.* at 61-62.

<sup>137</sup> *Id.* at 8.

reinstate it for terrorists and killers of women and children. This reinstatement could be done only by constitutional amendment.<sup>138</sup>

On January 2, 2021, Kazakhstan abolished capital punishment.<sup>139</sup>

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 was denounced around the world when it held 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 (unless shortened on appeal), and additional legal reforms will follow.<sup>140</sup>

On October 8, 2021, Sierra Leone formally abolished the death penalty, when President Julius Maada Bio signed the abolition legislation.<sup>141</sup> On January 20, 2022, Papua New Guinea's parliament passed and Prime Minister James Marape signed a law abolishing the death penalty.<sup>142</sup>

Saudi Arabia's mass execution of 81 people on March 12, 2022 was condemned by many countries as well as citizens of Saudi Arabia.<sup>143</sup>

The United States' insistence on possibly executing people convicted of certain crimes has sometimes prevented it from convicting them of those crimes. A decision by the Supreme Court a few years after the Soviet Union's collapse led to Russia's joining the Council of Europe, the oldest rule-of-law group in Europe. A condition of active membership of the European Union and the Parliamentary Assembly is to work towards abolishing the death penalty, starting with a moratorium on executions. When Russia joined the Council of Europe, all European countries that had been members of the Soviet Bloc joined the Council of Europe except for Belarus. Belarus never joined either body. Russia was permitted to have a moratorium because formal abolition would be quite complicated under Russian law.

On February 25, 2022, the day after Russia invaded Ukraine, the Council of Europe's Council of Ministers suspended Russia's representation rights on the Committee of Ministers of the Council of Europe and on the Parliamentary Assembly. Russia's former President Dmitry Medvedev is now Deputy of Russia's Security Council. (Medvedev famously switched jobs with Vladimir Putin twice, going from being Premier to President and then President to Premier, thereby helping Putin to say he can be re-elected twice more without violating Russia's term limits.) Medvedev said that Russia's leaving the Council of Europe presents Russia with a “good opportunity” to bring back capital punishment, which he said is a good crime fighting tool.<sup>144</sup>

<sup>138</sup> *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>.

<sup>139</sup> *Kazakhstan Officially Abolishes Death Penalty After Nearly Two-Decade Freeze*, RADIOFREEEUROPE, Jan. 2, 2021.

<sup>140</sup> 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).

<sup>141</sup> *Sierra Leone abolishes 'inhumane' death penalty*, THE GUARDIAN, Oct. 8, 2021.

<sup>142</sup> Lyanne Togiba, *Papua New Guinea repeals death penalty 30 years after reintroduction*, THE GUARDIAN, Jan. 21, 2022.

<sup>143</sup> *Saudi Arabian Mass Execution of 81 People Draws Condemnation from U.N. High Commissioner, Rights Activists*, DEATH PENALTY INFO. CTR., Mar. 16, 2022.

<sup>144</sup> Associated Press, *Russian official issues stark threats to the West*, Feb. 26, 2022, <https://www.staradvertiser.com/2022/02/26/breaking-news/russian-official-issues-stark-threats-to-the-west>.

## **H. Important Issues**

The following are among the additional issues that may affect opinions about capital punishment.

### **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”).<sup>145</sup> 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 claims were outside the range of honest bungling or were close enough to it for government work.<sup>146</sup>

#### **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.”<sup>147</sup> The Court said: “A state court's determination that

<sup>145</sup> Pub. L. 104-132, 110 Stat. 1214 (1996).

<sup>146</sup> 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).

<sup>147</sup> 28 U.S.C. § 2254(d)(1).

a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."<sup>148</sup> "The state court decision must be 'so lacking in justification that there has been an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."<sup>149</sup>

**c. Possible Opt-in Could Activate 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."<sup>150</sup> 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.<sup>151</sup>

Opponents of this change (including the ABA) say the Attorney General may be a biased decision-maker, given the Justice Department's close relationships with state attorneys general and its frequent amicus briefs supporting state-imposed death sentences. Moreover, the D.C. Circuit has *no* experience with the determinative issue regarding "opt-in": the quality of postconviction counsel in state court proceedings in capital cases.

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.<sup>152</sup>

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 postconviction capital punishment system, effective May 19, 1998.<sup>153</sup> Challenges to Attorney General Barr's certification were pending when he left office in early 2021 (see discussion below in Part VII.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**

<sup>148</sup> *Woods v. Etherton*, 578 U.S. 113, 116-17 (2016) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))).

<sup>149</sup> *Id.* at 117 (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

<sup>150</sup> Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>151</sup> 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)).

<sup>152</sup> *Habeas Corpus Res. Ctr. v. U.S. Dep't of Just.*, 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 Just.*, 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](https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/HCRC-v-DOJ_ABA-Amicus-Brief-FINAL.authcheckdam.pdf).

<sup>153</sup> Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20,705 (Apr. 14, 2020).

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.”<sup>154</sup> 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.<sup>155</sup>

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.”<sup>156</sup>

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 III.B.).

**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

<sup>154</sup> *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

<sup>155</sup> *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.

<sup>156</sup> *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (per curiam).

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.<sup>157</sup>

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.<sup>158</sup>

***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.<sup>159</sup> 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 punishment.<sup>160</sup> 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.<sup>161</sup> A month earlier, former Tennessee Attorney General W.J. Michael Cody reached the same conclusion in an op-ed in the *Commercial Appeal*.<sup>162</sup> As mentioned above, Ohio did enact such a law in January 2021 (see Part IV.A. above), as did Kentucky in March 2022.<sup>163</sup>

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

<sup>157</sup> Frank R. Baumgartner & Betsy Neill, *Does the death penalty target people who are mentally ill? We checked.*, WASH. POST, Apr. 3, 2017.

<sup>158</sup> 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](https://deathpenaltyinfo.org/files/pdf/ABA_Has_The_Death_Penalty_Become_An_Anachronism.pdf).

<sup>159</sup> 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).

<sup>160</sup> ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016).

<sup>161</sup> Bob Taft & Joe Kernan, Opinion, *End inhumane capital punishment for mentally ill*, THE BLADE (Toledo), Mar. 28, 2017.

<sup>162</sup> W.J. Michael Cody, Opinion, *Exclude mentally ill defendants from death penalty*, COM. APPEAL, Feb. 12, 2017.

<sup>163</sup> Bruce Schreiner, *Kentucky lawmakers vote to put limits on death penalty*, AP NEWS, Mar. 25, 2022.

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.”<sup>164</sup>

### **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.<sup>165</sup>

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

Even when the newly developed evidence creates a real question about the defendant's guilt, the federal courts' doors are usually effectively closed to second or later habeas proceedings. 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.”<sup>166</sup> 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.

<sup>164</sup> John Castellaw, Opinion, *Exclude mentally ill vets from death penalty*, COM. APPEAL, Jan. 2, 2018.

<sup>165</sup> See Pub. L. No. 104-132, 110 Stat. 1214.

<sup>166</sup> 28 U.S.C. § 2244(b)(2)(B)(ii).

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 secure – 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.”<sup>167</sup> 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.

On 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.<sup>168</sup> 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.”<sup>169</sup>

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.

**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.<sup>170</sup>

<sup>167</sup> *In re Davis*, 557 U.S. 952, 952 (2009) (mem.).

<sup>168</sup> 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.

<sup>169</sup> Phyllis L. Crocker, *Opinion, Next Ohio execution raises too much doubt*, THE BLADE (Toledo), Mar. 10, 2018.

<sup>170</sup> 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](https://static.texastribune.org/media/documents/WoodJefferyLeeLtrfromDAsoffice.pdf?_ga=2.235713986.217083783.1512681080-988673696.1491600194).

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 Woods' supposed future dangerousness.<sup>171</sup> But on November 21, 2018, the Texas Court of Criminal Appeals (with two judges dissenting) reversed the district court and upheld Woods' death sentence.<sup>172</sup> The Supreme Court denied Woods' certiorari petition on October 7, 2019.<sup>173</sup> He remains on death row. A bill that would preclude the death penalty where the defendant is found guilty only through the law of parties was passed overwhelmingly by the Texas House of Representatives in May 2021.<sup>174</sup> Mr. Woods' case was cited by many supporters of the bill. It was not voted on by the Texas Senate.

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.<sup>175</sup> Governor Bill Lee relied in denying clemency on the Tennessee courts' distinguishing *Sexton* due to a procedural difference between the two cases.<sup>176</sup>

***d. Potential Constitutional Claim, in Part on Reliance on LWOP's Availability***

LWOP was not an available alternative to the death penalty for capital murder at the time of the trials of many people now coming up for execution. If it had been available, it is likely that many people would have received LWOP instead of death and that in some cases death would not even have been sought. Interviews of actual jurors by the Capital Jury Project have revealed that many voted for death for people they did not believe should be executed. They did so because they incorrectly thought the alternative was parole eligibility in as little as seven years.<sup>177</sup>

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

<sup>171</sup> Keri Blakinger, *Court findings offer hope for death row inmate in case tainted by 'Dr. Death'*, HOUS. CHRON., Mar. 20, 2018.

<sup>172</sup> Hannah Wiley, *Texas Court of Criminal Appeals rules against death row inmate Jeff Wood*, TEX. TRIB., Nov. 21, 2018.

<sup>173</sup> *Wood v. Texas*, 140 S. Ct. 147 (2019) (mem.).

<sup>174</sup> John C. Moritz, *Texas House votes to end 'law of parties' in death penalty cases*, CORPUS CHRISTI CALLER TIMES, May 4, 2021.

<sup>175</sup> Caitlyn Shelton, *Tennessee executes death row inmate Lee Hall*, FOX17 (Nashville), Dec. 5, 2019.

<sup>176</sup> *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](https://www.tncourts.gov/sites/default/files/docs/hall_per_curiam_order_j_lee_dissenting_0.pdf).

<sup>177</sup> Hannah Gorman, *The Jury System on Trial: Do Jurors Execute Justice?*, 15 AMICUS J. 13 (2006).

ignored in clemency proceedings.<sup>178</sup> 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 paroles 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.<sup>179</sup>

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.

## VI. SIGNIFICANT SUPREME COURT DEVELOPMENTS NOT DISCUSSED ABOVE

### A. *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (*mem.*)

On March 28, 2019, the Court, which had been widely criticized for vacating a stay to Domineque Ray on February 7, 2019,<sup>180</sup> granted a stay under quite similar circumstances to Texas death row inmate Patrick Murphy. Mr. 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 Murphy's execution be stayed “unless the State permits Murphy's Buddhist spiritual advisor . . . to accompany [him] in the execution chamber.”<sup>181</sup>

<sup>178</sup> 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.

<sup>179</sup> 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).

<sup>180</sup> *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (*mem.*).

<sup>181</sup> *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (*mem.*).

Justice Kavanaugh, writing separately, stated that “governmental discrimination against religion – in particular, discrimination against religious persons, religious organizations, and religious speech – violates the Constitution.”<sup>182</sup>

George Mason University Law Professor Ilya Somin provided the following pure speculation about why the Court arrived at a 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.”<sup>183</sup> 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.<sup>184</sup>

### **B. *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.<sup>185</sup> What Slate.com referred to as “a mystery justice” apparently joined in the denial of the application.<sup>186</sup>

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: “[I]t 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.”<sup>187</sup>

### **C. *Ineffective Assistance of Counsel***

#### **1. *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam)**

The Supreme Court vacated and remanded the Texas Court of Criminal Appeals decision because defense counsel had wished to avoid being caught in a dispute between courts as to how to determine whether a defendant had mental disability. On this second

<sup>182</sup> *Id.* (Kavanaugh, J., concurring).

<sup>183</sup> Ilya Somin, *Supreme Court Stays Execution in Death Penalty/Religious Liberty Case*, REASON.COM: VOLOKH CONSPIRACY, Mar. 29, 2019.

<sup>184</sup> *Texas Bans All Clergy From Death-Row Executions After Supreme Court Ruling*, DAILY BEAST, Apr. 4, 2019.

<sup>185</sup> *Dunn v. Smith*, 141 S. Ct. 725, 725-26 (2021) (mem.) (Kagan, J., concurring, joined by Breyer, Sotomayor, and Barrett, JJ.).

<sup>186</sup> Mark Joseph Stern, *Amy Coney Barrett Joins Liberals and a Mystery Justice to Block Execution*, SLATE.COM, Feb. 12, 2021.

<sup>187</sup> *Dunn*, 141 S. Ct. at 726-27 (Kavanaugh, J., dissenting, joined by Roberts, C.J.).

appeal, the Court determined that the Texas court was now differing with the Court solely due to a different view of the facts. It was entitled to do so.<sup>188</sup>

**2. *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's efforts to secure 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 that his counsel's performance had prejudiced him. 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.<sup>189</sup>

**D. *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*,<sup>190</sup> 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.<sup>191</sup>

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.<sup>192</sup>

**E. *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.<sup>193</sup>

<sup>188</sup> *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam).

<sup>189</sup> *Shinn v. Kayer*, 141 S. Ct. 517, 524, 526 (2020) (per curiam).

<sup>190</sup> *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

<sup>191</sup> *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020).

<sup>192</sup> *Id.* at 707-08.

<sup>193</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1028, 1037 (2020).

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.”<sup>194</sup>

**F. *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022)**

The Court held that the district court did not violate the defendant's rights by focusing on what each prospective juror knew before coming to court, rather than asking each to respond to a complicated hypothetical that was based on what defense counsel thought might be asked during *voir dire* – that is, defense counsel's educated guesses of what might be asked. The Court held that the district court did not violate the defendant's rights and that the circuit court's proposed questions would have violated the Constitution by imposing its view of how to replace what was a “well-established standard of review.”<sup>195</sup>

The ABA amicus brief did not discuss the issue on which certiorari had been granted and did not support either party. Instead, it emphasized the need for individualized *content* questioning *voir dire*, especially in high profile cases.<sup>196</sup>

**VII. 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 District of Arizona v. Barr*. The ABA earlier opposed Arizona's application for certification as an “opt-in” state, 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 Arizona's counsel system to ensure compliance with the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.<sup>197</sup>

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

<sup>194</sup> *Id.* at 1039 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.).

<sup>195</sup> *United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022).

<sup>196</sup> Brief of American Bar Association as Amicus Curiae in Support of Neither Party, *United States v. Tsarnaev*, No. 20-443 (U.S. filed June 2021), 2021 WL 2592839.

<sup>197</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/federal-public-defender-arizona-v-barr-opt-in-amicus.pdf).

of the crime suffered from severe mental illness is unconstitutional under both the U.S. and Nevada constitutions.<sup>198</sup> 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.<sup>199</sup> 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: Rodney Reed and James Dailey (whose cases are discussed above in Parts IV.G.5.b. and IV.G.5.c., 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.”<sup>200</sup>

The Representation Project plays a vital role with regard to ABA amicus briefs and presidential statements and letters concerning the subjects of its expertise. Moreover, it provides technical assistance, expert testimony, training, and resources to the capital defender community and pro bono counsel.<sup>201</sup> Each autumn, the Representation Project honors outstanding pro bono 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”).<sup>202</sup> 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.

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<sup>198</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/amicus-briefs/vanisi-amicus-brief-aba.pdf).

<sup>199</sup> 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](https://www.americanbar.org/groups/committees/death_penalty_representation.html).

<sup>200</sup> *Project Achieves Major Milestone: 100 Prisoners Off Death Row*, ABA, Aug. 26, 2019.

<sup>201</sup> An online resource containing decades of capital training materials that are searchable by author, subject, and date is available at <http://www.capstandards.org>.

<sup>202</sup> ABA, ABA Guidelines (revised Feb. 2003), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2003guidelines.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.authcheckdam.pdf).

They have also been widely adopted by state bar associations, indigent defense commissions, and judicial conferences.<sup>203</sup> 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.<sup>204</sup>

Project Director Emily Olson-Gault also 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 work<sup>205</sup> and the other on habeas corpus and other collateral litigation.<sup>206</sup> 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 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.

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.<sup>207</sup> 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

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<sup>203</sup> 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](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/guidelines-fact-sheet.authcheckdam.pdf).

<sup>204</sup> 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).

<sup>205</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-trial-level-covid-declaration.pdf).

<sup>206</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-habeas-level-covid-declaration-updated.pdf).

<sup>207</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/20200513-letter-re-walter-barton.pdf).

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.<sup>208</sup> 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 Hall's case, and widespread support of clemency for 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.<sup>209</sup> The ABA letter also revealed that attorneys for Ms. Montgomery contracted COVID-19 after visiting their client after her execution date had been set. While the letter laid out other troubling facts, 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.<sup>210</sup> The letter 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.<sup>211</sup> 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

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<sup>208</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-letter-federal-execution-refo.pdf).

<sup>209</sup> See ABA 2018 Mid-Year Resolution 111 (2018), [https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018\\_hod\\_midyear\\_111.pdf](https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_midyear_111.pdf).

<sup>210</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2006_am_122a.pdf).

<sup>211</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-letter-ernest-johnson-covid-19.pdf).

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.<sup>212</sup> 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 decision-makers involved in the capital clemency process. By assessing current clemency practices, collecting and creating training materials and other resources, and providing state-specific guidance where feasible, the CCRI seeks to ensure more meaningful processes and reasoned decisions regarding capital clemency.<sup>213</sup>

On December 20, 2019, the CCRI added a 19-page memorandum outlining the capital clemency process in Virginia to its capital clemency website.<sup>214</sup> 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.<sup>215</sup> And on October 6, 2020, the CCRI added a 26-page memorandum regarding the capital clemency process and notable death penalty cases in Tennessee to its online repository.<sup>216</sup> 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

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<sup>212</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/jan_2021_letter_rosen_fed_executions.pdf).

<sup>213</sup> For information and resources regarding the CCRI, see the ABA's CCRI website, available at <https://www.capitalclemency.org>

<sup>214</sup> CCRI, Virginia: Capital Clemency Information Memorandum (Dec. 20, 2019), <https://www.capitalclemency.org/resource/virginia-capital-clemency-memo/>.

<sup>215</sup> CCRI, Florida: Capital Clemency Information Memorandum (Mar. 19, 2020), <https://www.capitalclemency.org/resource/florida-capital-clemency-memo/>.

<sup>216</sup> CCRI, Tennessee: Capital Clemency Information Memorandum (Oct. 6, 2020), <https://www.capitalclemency.org/resource/tennessee-clemency-memo/>.

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.<sup>217</sup>

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. Montgomery's execution date was reprieved for about one month in light of this lawsuit.<sup>218</sup> She was executed on January 13, 2021.

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 had 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 would also have an opportunity to present. Although this presentation was initially scheduled for December 2020, it was rescheduled due to inclement weather.<sup>219</sup>

#### ***D. The Due Process Review Project***

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

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

From 2004-2012, the Due Process Project assessed the extent to which the death penalty systems in 12 states comported with ABA policies designed to promote fairness and due process. The assessment reports were prepared by in-state assessment teams and Due Process Project staff for Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. Serious problems were found in every state's system.<sup>220</sup> 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.<sup>221</sup>

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<sup>217</sup> 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).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> 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](http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html).

<sup>221</sup> *Pennsylvania Governor Declares Moratorium on Death Penalty*, ABA, June 1, 2015.

### 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.<sup>222</sup> 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.<sup>223</sup>

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.<sup>224</sup>

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 featured ABA President Patricia Lee Refo, panelists Rob Dunham and Brandon Garrett, and moderator J. Wyndal Gordon.<sup>225</sup>

## VIII. 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.

<sup>222</sup> 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](https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/death-penalty-virtual-cle-series)

<sup>223</sup> 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](https://www.americanbar.org/groups/crsj/events_cle/recent/valuing-black-lives)

<sup>224</sup> 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](https://www.americanbar.org/groups/crsj/events_cle/recent/valuing-speed)

<sup>225</sup> 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](https://www.americanbar.org/groups/crsj/events_cle/recent/a-tale-of-two-trends)

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.

Unfortunately, the Supreme Court and lower courts continue to use procedural technicalities and deference to erroneous state court rulings to preclude ruling on the merits of many meritorious federal constitutional claims. Most clemency authorities seem likely to keep hiding behind the fiction that somewhere along the way, judges or juries already have fully considered all facts relevant to a fair determination of whether a person should be executed.

Reality belies that fiction. All too often, key evidence relating to guilt or innocence – 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.

Unfortunately, the Court's May 23, 2022 holding in *Shinn v. Martinez Ramirez*<sup>226</sup> is a major step backwards. In a decision by Justice Thomas, the Court held that there is no federal constitutional right to raise in one's first federal habeas corpus proceeding a claim that trial counsel and state postconviction counsel were ineffective if state law requires that the claim be raised in state court proceedings. This is contrary to the Court's holdings in *Martinez v.*

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<sup>226</sup> *Shinn v. Martinez Ramirez*, No. 20-1009, 2022 WL 1611786 (U.S. May 23, 2022).

*Ryan*<sup>227</sup> and *Trevino v. Thaler*.<sup>228</sup> It will result in more executions of people unconstitutionally convicted or sentenced to death. Legal scholars have widely denounced the decision.

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.

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<sup>227</sup> *Martinez v. Ryan*, 566 U.S. 1 (2012).

<sup>228</sup> *Trevino v. Thaler*, 569 U.S. 413 (2013).