CHAPTER [ ]

CAPITAL PUNISHMENT

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I. OVERVIEW

A. Recent Trends

1. States Ending or Limiting the Death Penalty or Considering Repeal or Reforms

In March 2013, Maryland repealed the death penalty prospectively, *i.e.*, with regard to future cases.[1] Four years earlier, it had limited "capital cases to those with biological or DNA evidence, a videotaped confession or a videotape linking the defendant to a homicide."[2]

In April 2012, Connecticut also repealed the death penalty prospectively. Both houses of the Connecticut legislature had voted in 2009 to abolish the death penalty, but they did not override Governor M. Jodi Rell's veto.[3] In November 2010, Connecticut elected a new Governor, Daniel Malloy, who opposes capital punishment. He was attacked during the campaign for his anti-death penalty position, to which he adhered during a high profile death penalty trial that was nearing its conclusion on election day.[4] Following the trial of a second defendant in that high profile case, which, as had the first, ended with a death sentence, the legislature took up the abolition bill in April 2012. The crucial vote came on April 5, 2012, when the State Senate passed the bill by a 20-16 vote. Assembly passage and Governor Malloy's signing of the bill soon followed.[5]

On March 9, 2011, Illinois abolished the death penalty.[6] In signing the repeal bill, Governor Pat Quinn said, "I have concluded that our system of imposing the death penalty is inherently flawed. The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right." Governor Quinn also commuted the sentences of everyone on Illinois' death row to life without parole.[7] Several months earlier, in October 2010, the Illinois Capital Punishment Reform Study Committee (established by the legislature in 2003) issued its sixth and final report,[8] which revealed that huge amounts had been spent in seeking the death penalty, that very few death sentences had been imposed, and that the threat of capital punishment had been used to secure guilty pleas and lesser sentences.[9] Leigh B. Bienen (who, coincidentally, was a member of the Committee) wrote in a law review article that since 2000, more than $100 million had been spent through Illinois' Capital Litigation Trust Fund, during which time 17 people (out of 500 against whom capital charges had been brought) were sentenced to death, four of whom were no longer on death row prior to Governor Quinn's commutations (two due to reversals on appeal and two due to suicide).[10]

On March 18, 2009, New Mexico abolished the death penalty, although the two people already on death row still face potential execution.[11] New Jersey abolished the death penalty in December 2007.[12]

Maryland, Connecticut, Illinois, New Jersey, and New Mexico are the first five states to abolish the death penalty by legislative action since the 1960s.

In New York State, capital punishment has also become inoperative. In 2004, New York's highest court held unconstitutional a key provision of the death penalty law.[13] After comprehensive hearings, the New York legislature did not correct the constitutional flaw.[14] In October 2007, New York's highest court vacated New York's final death sentence.[15] In 2008, Governor David Paterson ordered New York's death row dismantled.[16]

Since reinstating capital punishment in 1984, Oregon has executed only two people, both in the 1990s (the more recent being in 1997). John Kitzhaber, the Governor at the time, decided against stopping those executions. On November 22, 2011, Governor Kitzhaber, who in 2010 had again been elected Governor, announced that he would grant a temporary reprieve to death row inmate Gary Haugen, who (like the two inmates executed in the 1990s) had waived appeals. Moreover, Governor Kitzhaber stated that he would prevent any executions from occurring while he was Governor. He said the executions he had permitted in the 1990s had neither "made us safer" nor made "us more noble as a society. And I simply cannot participate once again in something I believe to be morally wrong." The Governor's policy precludes – as long as he remains Governor – the executions of Oregon's existing death row inmates and anyone later added to Oregon's death row. Since he did not commute any death sentences, Oregon's death row inmates could be executed under a different Governor.[17]

On January 14, 2011, just before leaving office, Pennsylvania Governor Edward G. Rendell, a former district attorney who had always ardently supported capital punishment, urged Pennsylvania's legislature to consider the death penalty's future and its possible abolition. He noted that in his eight years as Governor, there had been no executions or anything approaching a final execution date, although he had signed 119 execution warrants. He said that the death penalty is not a deterrent if there is a 15-year or longer period between handing down a death sentence and an execution. Noting that Congress and the Pennsylvania legislature already had adopted many measures seeking to accelerate executions, he asked the legislature to consider whether anything could be done to "significantly shorten" the number of years before an execution while still permitting "thorough and exhaustive review of the facts and the law in each case." He said, "If you conclude that there is no avenue to achieve this, then I ask you to examine the merits of continuing to have the death penalty on the books – as opposed to the certainty of a life sentence without any chance of parole, pardon or commutation."[18]

An important resource showing that Pennsylvania does *not* provide what Governor Rendell described as "thorough and exhaustive review of the facts and the law in each case" is the American Bar Association's October 2007 assessment study of Pennsylvania's death penalty.[19] The American Bar Association (the ABA) assessment team, whose members had "varying perspectives on the death penalty," concluded unanimously that Pennsylvania's death penalty system "fails to comply or only partially complies with many" ABA policies designed to assure fairness and accuracy, "and that many of these shortcomings are substantial."[20] The team identified the following "areas as most in need of reform": "Inadequate Procedures to Protect the Innocent"; "Failure to Protect Against Poor Defense Lawyering"; "No State Funding of Capital Indigent Defense Services"; "Inadequate Access to Experts and Investigators"; "Lack of Data on Death-Eligible Cases"; "Significant Limitations on Post-Conviction Relief"; "Significant Capital Juror Confusion"; and "Racial and Geographical Disparities in Pennsylvania's Capital Sentencing."[21]

In December 2011, the Pennsylvania Senate passed Senate Resolution 6, which directed "the Joint State Government Commission to establish a bipartisan task force and an advisory committee to conduct a study of capital punishment in this Commonwealth and to report their findings and recommendations." Among the Resolution's whereas clauses were several of the points Governor Rendell had raised, references to the ABA assessment study's criticisms, and

the conclusion by the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System that racial and gender bias "significantly affect" the way various participants in the legal system are treated. The Resolution directed the task force to study numerous specified subjects, including bias and fairness, and to report its results within two years.[22]

Ohio's Chief Justice Maureen O'Connor stated in her September 2011 State of Judiciary Address that work had to be done "to ensure that Ohio's death penalty is administered in the most fair, efficient, and judicious manner possible." Toward that end, she announced that the Supreme Court of Ohio and the Ohio State Bar Association were forming a Joint Task Force to Review the Administration of Ohio's Death Penalty. While the Chief Justice said the task force would not consider whether Ohio should have capital punishment, she did say that it would review, among many other things, the ABA's assessment report regarding Ohio's death penalty system.[23] She also stated that the task force might consider how judges were using their ability to change death sentences to life without parole, and why some prosecutors seek the death penalty whereas others do not.[24] As of February 2013, the Joint Task Force was continuing to engage in its review.[25]

2. Continued Lower Level of Death Sentences

There has been a very significant drop in the number of death penalties being imposed. Death sentences reached their peak at 315 in 1996.[26] In 2010, 104 people were sentenced to death, the lowest number since the re-introduction of capital punishment following *Furman v. Georgia*.[27] In 2011, the number dropped considerably, to 76. In early December 2012, the Death Penalty Information Center estimated that the number for 2012 would rise slightly, to 78. Among the capital punishment states with no new death sentences in 2012 were North Carolina, Virginia, South Carolina, and Indiana.[28]

2012 was the first year since 1977 in which there were no death sentences imposed in North Carolina. North Carolina has not executed anyone since 2006. And the state's murder rate decreased again in 2012.[29]

There were also no new death sentences in Harris County, Texas (which, as discussed in Part I.B.1.b. below, long was dubbed the "capital of capital punishment").[30]

3. Public Opinion

The decrease in capital sentencing in recent years and the state legislative, gubernatorial, and judicial developments described above have occurred at a time of significantly less public support for capital punishment.

In the 2012 American Values Survey (conducted by the Public Religion Research Institute), 47% of those responding favored life without parole, compared to 46% who favored the death penalty as the most severe punishment.[31]

A dramatic drop in support for the death penalty in California was apparent from a comparison of a November 2012 referendum, in which 48% of those voting supported total abolition of the state's death penalty, with a 1978 referendum, in which only 29% of voters opposed an expansion of the state's death penalty.[32]

The Gallup Poll, which unlike the American Values Survey and the California referendum did not offer any alternative to the death penalty, found in December 2012 that Americans' support for capital punishment, having "gradually" dropped from its peak in 1994 of 80%, was now at 63%.[33]

Possible Influences on Public Opinion

Among the possible influences on public opinion (in addition to the particular issues discussed later in this chapter, including in particular issues highlighted by Troy Davis' execution) are the views expressed by a growing number of people – many of them conservatives – who oppose or are skeptical about the death penalty *in practice* (even if they favor it *in theory*).

a. Opposition to Death Penalty by Authors of Death Penalty Laws

In 2011-12, authors and key supporters of enacted death penalty laws in several states criticized their implementation and advocated abolition of the death penalty.

The *Columbus Dispatch* has described Ohio Supreme Court Justice Paul E. Pfeifer, a Republican, as the "father of Ohio's death penalty." In 1981, as chairman of the Ohio Senate's Judiciary Committee, he played a key role in drafting Ohio's death penalty law.[34] As Justice, now senior member, of the Ohio Supreme Court, he has voted to uphold many death sentences while dissenting in a few cases.[35] But on January 18, 2011, he called for abolition of the death penalty. He said that the recent decline in new death sentences suggests that society now believes that life without parole is sufficient punishment.[36] Speaking to reporters on January 19, 2011, he referred to the death penalty as a "lottery," because statutory safeguards intended to avoid inequities – including disparities involving race and geography – have not worked. He said the best solution would be for the Governor to commute all death sentences.[37] At a hearing held by the Ohio House Criminal Justice Committee on December 14, 2011, Justice Pfeifer testified, "I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole."[38] He again called it a "death lottery," saying that "[t]he application is hit or miss depending on where you happen to commit the crime and the attitude of the prosecutor in that county."[39]

In Arizona, Rudy Gerber, who helped author the state's capital punishment law in the 1970s, now is against the death penalty.[40]

Don Heller, a Republican and a former prosecutor, helped author "the Briggs [ballot] initiative," that made capital punishment much broader in California. But in September 2011, he wrote that he had "made a terrible mistake 33 years ago," and that the death penalty should be replaced by life without parole. He stated that the 1978 initiative had been drafted "without fiscal study, input from others, or committee hearings." Among other things, he had not realized that over the ensuing 33 years, capital punishment in California would cost over $4 billion, amounting to over $300 million per execution. He also recognized that "[a]ppeals and delays cannot be eliminated" and that California could perpetrate "[a] gross miscarriage of justice," including executing an innocent person. He added that at a time of curtailments in educational, law enforcement, and prosecution funding, "the cost of capital punishment takes away funds that could be used to enhance public safety." In contrast, life without parole "protects public safety better," is "a lot cheaper," and can fix "mistakes."[41]

The Briggs initiative was named for then-State Senator John Briggs, and was developed and chiefly promoted by Senator Briggs, his future son-in-law, and his son Ron Briggs. In a February 12, 2012 op-ed, Ron Briggs wrote that while the three of them (now respectively retired, a Superior Court Judge, and a County Supervisor) remain "staunch Republican conservative[s] … [e]ach of us, independently, has concluded that the death penalty isn't working for California." Ron Briggs stated that "we created a fiscal monster that's taking a human toll on the very people we wanted to protect," and that the California death penalty

system was an "ineffective legal beast" costing over $100 million a year that "tie[d] up the lives of prosecutors and victims who could be moving on to other things." He said that in retrospect, he would have advocated life without parole, with restitution to victims.[42]

b. Views of Judges, Law Enforcement Officials, and Conservative Columnists

i. Judges and Former Solicitor General

After completing her first year as California's Chief Justice, former prosecutor and Republican appointee Tani Cantil-Sakauye told the *Los Angeles Times* that she did not think the death penalty "is working": "It's not effective. We know that." She said the capital punishment system would require "structural change, and we don't have the money to create the kind of change that is needed." Asked if she favored the death penalty, she replied, "only in the sense I apply the law and I believe the system is fair"; but she then quickly added, "I don't know if the question is whether you believe in it anymore. I think the greater question is its effectiveness and given the choices we face in California, should we have a merit-based discussion on its effectiveness and costs?" Thus, Chief Justice Cantil-Sakauye, one of the court's most conservative justices, expressed the same concerns raised late in his tenure by her predecessor, Ronald M. George (also a former prosecutor). He said the death penalty system was "dysfunctional." Upon learning of Chief Justice Cantil-Sakayue's comments, Santa Clara University Law Professor Gerald Uelmen remarked that he had heard privately that the California Supreme Court's conservative members had become "disillusioned" with California's death penalty system.[43]

Gerald Kogan, who prosecuted capital punishment cases and later, as Florida's Chief Justice, voted to uphold numerous death sentences, now favors abolishing capital punishment "with the possible exception of worst of the worst defendants such as Osama bin Laden or a mass serial killer."[44] No United States jurisdiction has a death penalty limited to such extreme cases.

On April 18, 2012, the *Gainesville Sun* published an op-ed by Judge Charles M. Harris, who served in Florida for five years as a Circuit Court Judge, for 14 years as an Appellate Judge, and in recent years as Senior Judge. He also was a member of the Governor's Commission on Capital Cases until the legislature dissolved it. Judge Harris described capital punishment as a "pig in a poke" which he opposed for "practical" reasons: it has been rendered "redundant" by life without parole; it is "excessively expensive"; it is neither a deterrent nor makes people safer; and it is "unbelievably inefficient," given the extremely low rate of executing those sentenced to death. He concluded by asking, "Could we not spend the over half billion dollars that will be wasted on capital punishment over the next ten years for a better law enforcement purpose? Isn't that what efficiency is all about? Isn't that how a well-oiled business is run?"[45]

ii. Current and Former State Attorneys General and Other Prosecutors

Former Ohio Attorney General Jim Petro, who had strongly favored capital punishment as a legislator, thinking it would be a deterrent and would be less costly than the alternatives, has now changed his position and doesn't believe he would vote for it now. As reported in January 2012, he now recognizes that it has neither been a deterrent nor saved money. He states, "I don't think the law has done anything to benefit society and us. It's cheaper and, in my view, sometimes a mistake can be made, so perhaps we are better off with life without parole." Indeed, he says, "We are probably safer, better and smarter to not have a death penalty." In his book,

False Justice: Eight Myths that Convict the Innocent, he discusses how mistakes can occur and details errors by police and prosecutors in dealing with death penalty cases. He says, "I would bet certainly well over half the prosecutors in the country looking at this book would ultimately agree with most of the issues."[46]

Gil Garcetti sought capital punishment many times as Los Angeles District Attorney. He now argues against it, saying it "does not and cannot function the way its supporters want it to. It is also an incredibly costly penalty, and the money would be far better spent keeping kids in school, keeping teachers and counselors in their schools and giving the juvenile justice system the resources it needs. Spending our tax dollars on actually preventing crimes, instead of pursuing death sentences after they've already been committed, will assure us we will have fewer victims." He also believes the death penalty is far more likely to lead to continuing anguish than closure for murder victims' survivors.[47]

San Francisco District Attorney George Gascon spent 30 years as a police officer, including service as police chief in Arizona and California. Once a capital punishment supporter, he now feels it should be abolished, with the most severe punishment being life without parole. His key reasons are the inevitability of mistakes in the criminal justice system and the danger of executing innocent persons; data and his own experiences that indicate that capital punishment fails to diminish crime; and the capital punishment system's expenditure of huge amounts of money that could instead be spent on fighting crime and seeking to solve homicides that "understaffed police departments" cannot investigate.[48]

Two former Texas District Attorneys, Grant Jones and Sam Millsap, wrote in December 2012 that they no longer believe capital punishment is the "best punishment" for any crimes. They said they had changed their minds because both had participated in cases that resulted in the executions of men "who may well have been innocent." Since human beings can always err, they stated, "the problem with the death penalty is that once it is carried out, there is no way to go back and fix a mistake."[49]

The District Attorney of Boulder County, Colorado, Stan Garnett, while neither "morally" nor "philosophically" against the death penalty, believes it is too costly, takes up too much time, and is too often implemented unfairly to be practical. He has pointed to a 1994 Colorado death sentence that remains pending, having already cost $18 million, as compared to his office's $4.6 million operating budget.[50]

iii. Former Corrections Leaders

Many former prison officials who formerly favored the death penalty – and in many instances oversaw executions – have now publicly opposed it, and others have opposed particular executions. A leading example is Allen Ault, who oversaw the construction of Georgia's death row and later, as director of the Georgia Department of Corrections, supervised executions. In 2011, he said that carrying out executions is an "inhumane job for people who have a conscience and who value life."[51] He said that the first two inmates whose executions he supervised had participated as teenagers in a "monstrous crime" but by the time of their executions had matured into "entirely different people." Shortly after Troy Davis' execution in September 2011, he wrote that "[t]hose of us who have participated in executions often suffer something very much like posttraumatic stress. Many turn to alcohol and drugs. For me, those nights that weren't sleepless were plagued by nightmares."[52] In an MSNBC interview on the night after Davis' execution, Ault said that when an execution was pending, he always spent time with the victim's family. He talked to the family again after the execution, and sometimes several weeks later. He

stated that "most of the victims' families" with whom he spoke "thought they were going to get a lot of relief or closure from the execution. And in most cases, they did not."[53]

In August 2010, Ron McAndrew, a former warden in Florida and Texas who "helped perform three electrocutions in Florida and oversaw five lethal injections in Texas," stated that he had supported the death penalty but now opposed it. He said that many others who had taken part in executions had sought his guidance, spending hours with him "on the phone, trying to process the horror we went through."[54] At a New Hampshire hearing, he testified that "[m]any colleagues turned to drugs and alcohol from the pain of knowing a man had died at their hands." He said, "I've been haunted by the men I was asked to execute in the name of the state of Florida." He stated that some corrections officers had killed themselves due to their involvement in executions.[55] After the hearing, he said that an execution is "nothing but a premeditated, ceremonial killing, and we do it to appease politicians who are tough on crime."[56]

Reginald Wilkinson, former Ohio Director of the Department of Rehabilitation and Corrections, has become an anti-death penalty activist. He has argued, "It's time … to evolve to a sophisticated society that would allow that life without parole would be a punishment equal to capital punishment."[57]

In January 2012, Frank Thompson, a former Oregon penitentiary warden, who oversaw Oregon's only two executions since it reinstated capital punishment, said capital punishment is "a failed public policy" that "fails terribly in meeting any evidence-based outcomes." He stated that Oregon could not afford capital punishment, especially in bad economic times, saying that capital punishment costs between $9 million and $20 million annually. Believing that life without parole should replace capital punishment, he joined Oregonians for Alternatives to the Death Penalty and its advisory council.[58]

On February 26, 2013, Warden Thompson testified in favor of a bill to abolish capital punishment, at an Oregon House Judiciary Committee hearing. He said the death penalty is not a deterrent and puts prison officials into an impossible predicament. He said, "Asking decent men and women to participate in the name of a failed public policy that takes human life is indefensible and rises to a level of immorality."[59]

Jeanne Woodford, former Warden of California's San Quentin prison, said in 2011 that she had endeavored to carry out her duty to implement it professionally. But she had concluded that capital punishment "serves no one. It doesn't serve the victims. It doesn't serve prevention. It's truly all about retribution." She has concluded that eventually, "you have to ask if a penalty that is so permanent can be available in such an imperfect system. The only guarantee against executing the innocent is to do away with the death penalty."[60] Ms. Woodford is now the head of the anti-death penalty group Death Penalty Focus.

In a statement issued only hours before Troy Davis' execution in September 2011, Woodford, along with Ault, McAndrew, Wilkinson, and two other retired prison officials, sent a letter to Georgia Corrections Officials and Georgia Governor Nathan Deal, requesting that the Governor call for the Georgia Board of Pardons and Paroles to reconsider its denial of clemency for Davis. They stated that the doubts about Davis' guilt would "have an irreversible and damaging impact on your staff." They added, "Living with the nightmares is something that we know from experience. No one has the right to ask a public servant to take on a lifelong sentence of nagging doubt, and for some of us, shame and guilt."[61]

For 17 years, Jerry Givens was Virginia's "chief executioner" – in charge of 62 executions. In February 2013, he discussed with the *Washington Post* his opposition to the death penalty. He has been greatly affected by the danger of executing an innocent person. In particular, he had come extremely close to executing Earl Washington, who had falsely confessed and got a reprieve just days before his scheduled execution. Washington was later

essentially exonerated by DNA and was pardoned. Givens unequivocally changed his mind after being convicted and spending four years in prison – in the wake of allegations that he had participated with a friend in buying a car with knowledge that the payment money came from drug sales. He still denies the charges. In 2010, Givens gave "dramatic" testimony at a legislative hearing, during which he described the suffering that results from participating in executions.[62]

iv. Conservative Columnists

Many conservative columnists have now expressed opposition to capital punishment. A leading example is the *Washington Post*'s Kathleen Parker, who wrote in September 2011 that "our barbaric practice of capital punishment, premeditated and coldblooded, is … an abomination. That we grant the state the power to end a citizen's life is a harrowing-enough thought. That we do so even when we know with certainty that sometimes innocents are killed is beyond comprehension." She added, "I understand the desire for justice. I've experienced the horror of murder up close. Three members of my extended family have died at the hands of others, and I wish the perpetrators a toasty eternity. But my killing them wouldn't restore anyone's life. It merely makes me a killer." She stated that while she didn't "judge" murder victims' survivors who favored executions of those convicted of killing their loved ones, "I do judge us. This nation. This society. This culture. The urge for justice and its close relative, revenge, is human, which is by definition also to err." Parker, writing just after Troy Davis' execution, added that given that we have sufficient reason to know that some innocent people have been executed, that the death penalty "is not an effective deterrent" and that the death penalty is more expensive than life in prison, "[w]hen we join together to administer death, we become something other than a civilized community of men and women. No matter how we frame the arguments or justifications, we become executioners. When there is doubt, as there seems to have been in Davis's case, we become murderers."[63]

v. Catholic Leaders

On November 30, 2011, Pope Benedict XVI stated that he favored "political and legislative initiatives … to eliminate the death penalty." As did Pope John Paul II, Pope Benedict XVI urged commutation in numerous capital punishment cases.[64]

Writing in the wake of Troy Davis' execution, over 300 Catholic theologians signed "A Catholic Call to Abolish the Death Penalty." They said that the Davis case demonstrated such "a deeply flawed justice system" that "the Antiterrorism and Effective Death Penalty Act, which created the legal conditions for executing a man whose guilt was not established beyond reasonable doubt" should be repealed at once. The theologians added that those who do not share their religious opposition to capital punishment should realize that, as the late Justice William J. Brennan once said, "the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are innocent." The theologians said near the end of their statement that "in concert with our recent popes and bishops, we oppose the death penalty, whether a person on death row is guilty or innocent, on both theological and practical grounds."[65]

Possible Effect of Public Opinion Changes on Positions of Various Governors

On February 9, 2013, *The Economist* published an article entitled *Death in Little Rock: Politicians with national ambitions are suddenly willing to challenge the death penalty*. The article cited, among other things, the January 16, 2013 statement by Arkansas' conservative Governor Mike Beebe (D) that his view on the death penalty had changed and that if sent a bill abolishing capital punishment, he would sign it; Colorado Governor John Hickenlooper (D), who is reconsidering his position favoring capital punishment; New Hampshire Governor Maggie Hassan (D), who, unlike former Governor (now Senator) Jean Shaheen and another predecessor, would reportedly sign a capital punishment abolition bill if it passes; Ohio Governor John Kasich (R), who has granted commutations to four death row inmates due to questions about the fairness of their trials and the quality of their defenses; and Kansas Governor Sam Brownback (R), who has said that capital punishment should be limited to those who, like Osama bin Laden, might provide inspiration for additional homicidal acts.

The Economist reported that "[t]he politics of death have changed because the country has changed." It noted that, in the wake of drops in violent crime, executions, and new death sentences, plus well-publicized exonerations and concerns about costs, "[w]hen polls offer life without parole as an alternative punishment for murder, Americans divide evenly."

The article concluded that the capital punishment debate "is less loud and more sceptical, giving thoughtful governors room to question a policy that causes them anguish – because they think it arbitrary, ineffective and costly, and because they impose it. That grim duty does not trouble all politicians: ask Mr. Clinton and Mr. Bush. But it should."[66]

4. Further Decline in Executions in 2011-2012, Affected by Lethal Injection Drug Shortage

The number of executions in the United States dropped from 98 in 1999 to 42 in 2007, a year in which many executions were stayed due to the Supreme Court's then-pending *Baze* case regarding the manner in which lethal injection is carried out. In 2008, the year in which the Supreme Court upheld Kentucky's lethal injection system, there were 37 executions. In 2009, executions rose to 52. In 2010, the number of executions dropped to 46. In 2011, they fell to 43, and there were also 43 executions in 2012.[67]

Four states – Texas, Oklahoma, Mississippi, and Arizona – executed more than three-fourths of those executed in 2012. The total number of states that executed people in 2012 was nine (tying for the lowest total in a year in 20 years), down from 13 in 2011.[68]

Part of the reason for the national decline in executions after 2009 has been shortages of drugs that could be used in lethal injections. In 2010, Arizona executed one person after importing one of those drugs – sodium thiopental – from the United Kingdom. That country later imposed restrictions on its export.[69]

Due to difficulties in securing sodium thiopental, Oklahoma began using pentobarbital, which has been used in euthanizing animals. Oklahoma first used it in an execution in December 2010, and again on January 6, 2011. It refused to identify the manufacturer whose pentobarbital it used, but said it had not purchased it from a veterinarian. A spokesman for Pfizer, whose subsidiary is a manufacturer of pentobarbital, said, "We sell exclusively to veterinarians [for use with dogs and cats] and we want it to be known that it's for veterinarian purposes alone."[70] By the end of 2011, about two-thirds of the states with capital punishment had switched or considered switching to pentobarbital.[71]

They were reacting to additional problems in getting sodium thiopental. For example, on January 21, 2011, Hospira, the only United States manufacturer of sodium thiopental, decided to permanently cease producing it, after Italy's government demanded that it stop the drug's use in executions.[72] That same month, 13 state Attorneys General sent a letter to United States Attorney General Eric Holder, seeking his assistance in either identifying an appropriate source for sodium thiopental or making supplies of it held by the federal government available to them. Holder answered that he was "optimistic" there could be solutions so executions could proceed.[73] Shortly thereafter, Tennessee gave eight grams of sodium thiopental to Alabama, having bought it from the same United Kingdom wholesaler that Arizona had used. Apparently, the federal Drug Enforcement Administration (the DEA) then contacted Alabama, which handed over the eight grams of sodium thiopental for the DEA's use in investigating the importation of sodium thiopental.[74]

On March 15, 2011, the DEA seized Georgia's supply of sodium thiopental from the prison at which Georgia's executions take place. The seizure seemed to be a response to a complaint from a death row inmate's lawyer, who asserted that if Georgia's Department of Corrections was importing sodium thiopental from a British distributor, it was violating the Controlled Substances Act because Georgia did not have a federal license to important controlled substances.[75]

On March 16, 2011, Texas said it was going to begin using pentobarbital in executions – as Ohio (in addition to Oklahoma) had already done. But Lundbeck Inc., a Danish company that manufactures pentobarbital, advised states that it was "adamantly opposed" to pentobarbital's use in executions.[76] Then, in April 2011, Kayem Pharmaceutical, of India, said it would not sell sodium thiopental if it would be used for lethal injection.[77]

Arizona's first use of pentobarbital "from a domestic source" took place in May 2011, when it executed Donald Beaty. This followed the United States Justice Department's warning that Arizona's importation in 2010 of sodium thiopental from a United Kingdom company may have violated United States law.[78] On May 19, 2011, Alabama carried out its first lethal injection execution using pentobarbital, having amended its protocol to permit this.[79] As noted above, numerous other states also began using pentobarbital as a substitute for sodium thiopental – despite the objections of Lundbeck.

In June 2011, the United States Secretary of Commerce asked Germany to help alleviate the shortage of lethal injection drugs. Dr. Phillip Rosler, Germany's Minister of Economics and Technology, denied the request and said he would ban any export of sodium thiopental if orders were placed with German pharmaceutical companies for use in American executions.[80] The Danish and British governments had already expressed similar views with regard to, respectively, pentobarbital and sodium thiopental.[81] Indeed, the United Kingdom had in April imposed an emergency export ban on sodium thiopental after being sued by an anti-death penalty human rights group.[82] In July 2011, Lundbeck blocked the sale to any United States penal institution of sodium thiopental (but not pentobarbital (also known as Nembutal), because it can be used against epilepsy).[83]

Then, in December 2011, the European Commission (the executive body of the European Union) imposed new restrictions on export sales of sodium thiopental and pentobarbital. But by then, many states had built up supplies and it was possible that some of them might use backchannels to get additional quantities.[84]

On February 20, 2012, Oklahoma's Corrections Director Justin Jones said that Oklahoma had a shortage of pentobarbital, with only four doses left. Although state law also permitted execution by electrocution or firing squad, Jones said he did not believe the courts would allow

electrocutions.[85] (As noted above, in December 2010, Oklahoma had been the first state to use pentobarbital in an execution.)

In May 2012, Missouri became the first state to alter its execution protocol to use in executions a large dose of propofol along with a local anesthetic. Propofol had been best known as the drug responsible for Michael Jackson's death. Although propofol was not in short supply,[86] the United Kingdom in July 2012 announced that it would ban its export to the United States, due to Missouri's action.[87] In September 2012, Fresenius Kabi, which had stated that it was propofol's sole remaining manufacturer in the United States, announced that it would not sell it for use in executions.[88] In August 2012, the Missouri Supreme Court had declined to authorize any execution dates, due to the pendency of a lawsuit asserting that the state's new execution protocol was unconstitutionally inhumane.[89]

On February 21, 2013, Georgia "hurriedly executed Andrew Allen Cook amid a legal scramble to carry out capital sentences before its supply" of pentobarbital reached its expiration date of March 1, 2013. *The Guardian* reported that day, "Georgia's difficulties procuring execution drugs is a reflection of the gradual stranglehold that is being put on the US death penalty by authorities and companies around the world refusing to act as accomplices in the death sentence." It added that Georgia was not the only state in which "supplies of pentobarbital are … running out" – in part because "[o]ne of the leading manufacturers of the drug, the Danish firm Lundbeck, has introduced tough restrictions on the distribution of the drug to prevent it falling into the hands of US executioners."[90]

5. Executing Inmates Soon After Saving Them from Their Suicide Attempts

Among the executions in the last three years, the one that created the most controversy was that of Troy Davis, which has been referred to above and will be discussed in more detail below. But other executions (discussed immediately below and in the sections further below about mental retardation and mental illness) raised concerns distinct from those presented by Davis' case.

In two cases, state governments provided medical treatment to save death row inmates' lives, and then proceeded to use other medicines in lethal injection executions. The first involved Lawrence Reynolds. About 36 hours before his scheduled execution in March 2010, he was discovered to be unconscious in his Ohio death row cell, after evidently having taken a drug overdose. The next day, the Governor gave him a one-week reprieve, so that he could be treated in a hospital. The next week, nine days after his drug overdose, he had gotten well enough to be, and was, killed by drugs that were lethally injected.[91]

On September 21, 2010, Georgia death row inmate Brandon Rhode tried to commit suicide on the morning of his scheduled execution, by slicing open his right arm – causing a deep wound – and cutting open his left arm and slicing a deep cut on his neck's right side. He was sent to a hospital where he got emergency treatment that saved his life. He had almost died due to losing huge amounts of blood. The Georgia Supreme Court granted an emergency stay of execution, but only until September 23 – two days after his original execution date. After his counsel went before various courts, his execution was rescheduled for September 27 – the day before his death warrant would expire. The United States Supreme Court denied a stay on September 27. He was executed that same evening, after the execution team took about a half hour to find a vein into which they could inject lethal drugs.[92]

In two cases in 2011, Texas death row inmate Humberto Leal and Florida death row inmate Manuel Valle were executed over the objections of the United States State Department, representatives of international organizations, and many others. They had both been convicted

and sentenced to death in violation of the Vienna Convention on Consular Relations, in that no one told either that as a foreign country's citizen he had the right to seek help from his country's consulate. And they had not been permitted to raise any claim based on the Vienna Convention in any court.[93] In so acting, Texas and Florida acted in the same manner as Texas had done in a case in which Texas' right to do so had been upheld by the United States Supreme Court.

The Supreme Court's holding in that earlier case, *Medellin v. Texas*,[94] concerned a Mexican national who had lived in the United States since preschool. After being arrested for murder and rape, Mr. Medellin was not informed that he had a right, under the Vienna Convention, to contact the Mexican consulate. Ignorant of this right, he did not contact the consulate. He was then convicted and sentenced to death. In state habeas, he sought to raise a claim about the violation of his Vienna Convention rights. The Texas courts and the federal district and appeals courts barred his claim because he had not raised it earlier (and because he did not persuade them that his conviction or sentence would have been affected if the consulate had been contacted). Thereafter, the International Court of Justice (the ICJ) held in *Avena and Other Mexican Nationals*[95] that the United States had violated Article 36(1)(b) of the Vienna Convention, by failing to inform 51 Mexican nationals, including Medellin, of their rights under the Vienna Convention, and that the United States was required to offer some form of consideration of their convictions and sentences, irrespective of state procedural default rules.

President Bush then issued a Memorandum to the United States Attorney General, stating that the United States would have "State courts give effect to the decision in accordance with general principles of comity." But when Medellin thereafter filed a second petition, the Texas Court of Criminal Appeals barred it as an abuse of the writ, stating that neither *Avena* nor the President's Memorandum superseded the state's procedural rules. The Supreme Court affirmed, holding that no relevant treaty was "self-executing" as "binding" federal law, nor could the states be bound in the absence of a congressionally enacted statute giving the treaties effect in domestic courts. The Court said that the treaties did not obligate the United States to comply with an ICJ decision to which the United States was a party, nor did ICJ decisions have instantaneous legal effect in state and federal courts.

Thereafter, Mexico returned to the ICJ and sought a declaration that the United States would violate the ICJ's ruling if Medellin were executed without further legal proceedings. There were none on the merits of his claim. Medellin was executed on August 6, 2008.[96]

On January 19, 2009, the ICJ found unanimously that by executing Medellin without providing the review and reconsideration that the ICJ had set forth in a July 16, 2008 Order, "the United States of America has breached the obligation incumbent upon it" under that Order.[97]

In 2011, in seeking unsuccessfully a Supreme Court stay, United States Solicitor General Donald Verrilli said Leal's execution "would place the United States in irreparable breach of its international-law obligation to afford [Leal] review and reconsideration of his claim that his conviction and sentence were prejudiced by Texas authorities' failure to provide consular notification and assistance under the Vienna Convention on Consular Relations."[98]

On September 19, 2012, the Nevada Supreme Court, by a 5-2 vote, reversed an order denying, on procedural grounds, Carlos Gutierrez's second postconviction petition in a capital case. It remanded the case for an evidentiary hearing regarding whether Gutierrez could surmount the procedural bars. Noting that Gutierrez had been a party in the ICJ's *Avena* case, the court pointed out that in denying stays to Leal and Medellin, the Supreme Court had stated that neither had proven real prejudice to a constitutional right due to their having been denied timely access to their consulates.[99] Citing Justice Stevens' concurrence in Medellin's first Supreme Court case, the Nevada Supreme Court said that "while, without an implementing mandate from Congress, state procedural default rules do not *have* to yield to *Avena*, they *may*

yield, if actual prejudice can be shown."[100] It stated that "Gutierrez arguably suffered actual prejudice due to the lack of consular assistance," because with help, Gutierrez might (a) not have "entered an unusual no-contest plea to first-degree murder," (b) have brought out more evidence of his wife's involvement, and (c) have more effectively contested the court interpreter's allegedly inaccurate and "potentially dishonest[]" interpretations – in a proceeding that was not tape-recorded. That interpreter later pleaded guilty to perjury for having falsely sworn during Gutierrez's sentencing hearing that he was certified and formally educated as an interpreter.[101] Accordingly, the Nevada Supreme Court remanded the case for an evidentiary hearing.

6. American Law Institute's Withdrawal of Capital Punishment Provisions

The American Law Institute (the ALI), comprised "of about 4,000 judges, lawyers and law professors … , synthesizes and shapes the law in restatements and model codes that provide structure and coherence in a federal legal system." In 1962, a section of its Model Penal Code "created the modern framework for the death penalty," which was "largely adopted" by the Supreme Court when it held revised death penalty laws constitutional beginning in 1976.[102]

On October 23, 2009, the ALI withdrew the Model Penal Code's capital punishment section "in light of the currently intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[103] It concluded that the Code's section on capital punishment, which had been the basis for many capital punishment systems used in the United States for decades, "on the whole … has not withstood the test of time." It stated that the ALI "should not play a further role in legitimating capital punishment, no matter how unintentionally," if it could not confidently "recommend procedures that would meet the most important of the concerns [about its implementation]." The ALI concluded that it should not "undertake a project concerning the death penalty" because the ALI's "Director, the Program Committee, and a large majority of the Council are not convinced that an ALI effort to offer contemporary procedures for administering a death penalty regime would succeed intellectually, institutionally … , and politically."[104]

7. Justice Ginsburg's Concerns About Death Penalty Implementation

On September 15, 2011, Supreme Court Justice Ruth Bader Ginsburg said, "I would probably go back to the day when the Supreme Court said the death penalty could not be administered in an even hand." This was an apparent reference to the approach the Court took in 1972's *Furman v. Georgia*, which had held unconstitutional all then-existing death sentences. Justice Ginsburg stated that she separately reviewed each capital punishment case. She said that although considering imminent executions was "a dreadful part of the business," she examined the merits of each such case in order to be able to have her views included when the Court decided them.[105]

In an interview broadcast in February 2013, Justice Ginsburg said, "If I had my way there would be no death penalty. But the death penalty for now is the law, and I could say 'Well, I won't participate in those cases,' but then I can't be an influence." She analogized her situation to that of Captain Edward Vere in *Billy Budd*, who felt compelled to follow the law literally and sentence Budd to be executed notwithstanding his having doubts concerning Budd's guilt. She said, "Every time I have to participate in a case where someone has been sentenced to death, I feel that same conflict. But when you're with a group of nine people, the highest court in the land, you can't pretend to be king or queen."[106]

8. Medical Groups' Opposition to Physicians' Participation in Executions

The American Board of Anesthesiologists informed its members in February 2010 that it would revoke the certification of any member who takes part in an execution involving lethal injection. The organization's secretary, Mark A. Rockoff, said it took this action because "we are healers, not executioners."[107]

In January 2010, the *Journal of Medical Licensure and Discipline* published a study showing that no doctor has ever been disciplined by a medical body in the United States for participating in an execution. The study's author, Ty Alper, said that despite the American Medical Association's long-held position that physician participation in an execution is unethical, experience has shown "that doctors do participate and are willing to participate." He said, "The AMA guidelines are … not enforceable in most circumstances." Although the American Medical Association once revoked a doctor's membership for participating in an execution, Mr. Alper doubted that a medical board would ever discipline a doctor for such conduct.[108]

9. Continuing International Trend Away from Capital Punishment

The international trend away from capital punishment has continued. Most of Latin America, Canada, and Western Europe abolished capital punishment by the early 1980s, as did South Africa when it ended apartheid. Following the fall of the Iron Curtain, virtually all of the European portions of the former Soviet Union either abolished capital punishment or (as in Russia) implemented moratoriums on execution that remain in effect.[109] Amnesty International reported that in 2011 the number of countries known to have carried out executions dropped to 20 from 23 in 2010, "a steep decline" from 31 a decade earlier. The United States was the only country in the Americas to execute people in 2011, as it had been in 2010 and 2009.[110]

Many Asian countries continue to implement the death penalty, with China by far the world leader in executions. Arab countries, Iran, and some African countries also continue to employ capital punishment.[111] According to Amnesty International, the only countries exceeding the United States in reported executions in 2011 were China, Iran, Saudi Arabia, Iraq, and possibly (if unreported executions were estimated) Yemen.[112]

In May 2011, six nongovernmental organizations in Malaysia, in cooperation with the Malaysian Bar Council and some members of Malaysia's parliament, held a forum as the first in what was intended to be a series of programs that would be part of a long-run effort to abolish Malaysia's death penalty.[113] In October 2011, Malaysia's Bar Council asked Prime Minister Datuk Seri Najib Razak to abolish capital punishment. The Council's president, Lim Chee Wee, said, "Some political figures may think we need public opinion to move ahead first before a political decision is made." He added that "[s]ome will say there is need for a referendum but I think the Prime Minister should have the strength and courage to lead us on this issue." Noting that research indicated that capital punishment had not deterred crime, Mr. Lim said that many people did not realize important objective things about capital punishment, and often favored the death penalty for emotional reasons. He said that various issues about the death penalty needed to be raised with the public. Shortly prior to Mr. Lim's remarks, a government minister, Datuk Seri Nazri Aziz, stated that any move in the direction of abolishing capital punishment would have to arise "from the public," and that the government would follow the majority view.[114]

On October 7, 2011, the Japan Federation of Bar Associations issued a declaration stating that "the death penalty is an inhumane penalty which deprives people of their precious lives. In addition, from the view point of the reformation and rehabilitation of convicted persons … , the

death penalty contains a fundamental problem that it completely removes the possibility of rehabilitation of prisoners after their reformation." The declaration also noted four cases where death-sentenced people had been acquitted in retrials, and pointed out other problems with the implementation of the death sentence in Japan. It concluded that "we should immediately suspend executions and conduct cross-society discussions on the abolition of the death penalty." In that connection, the declaration stated that "[i]nformation necessary to discuss the death penalty system, including the standards, procedure, and method of executions, should be broadly disclosed." It also called for several immediate reforms.[115]

On April 20, 2012, Taiwan's President Ma Ying-jeou stated that his government, as part of its effort to enhance human rights, would reduce the use of capital punishment. In 2010-2011, nine people had been executed there following four years without executions. President Ma noted that two international covenants that had become effective in Taiwan in 2010 encouraged countries to move towards abolition. He said that due to Taiwanese public opinion, abolition was not yet possible, whereas reducing use of the death penalty was possible.[116]

On April 19, 2012, the African Commission on Human and Peoples' Rights' Working Group on the Death Penalty issued its *Study on the Question of the Death Penalty in Africa*, after several years of work. The Study's Executive Summary concludes by saying that "any additional study is unlikely to change the basic findings of the Study in relation to the necessity for the abolition of the death penalty. What emerges from the survey of the pros and cons of the death penalty is that the abolitionist case is more compelling than the retentionist case."[117] In its analysis, the Working Group pointed to "new interesting developments" that on the whole "strengthen the case against the death penalty." These include judicial opinions saying there is no known way of executing people that avoids some degree of cruelty or inhumanity; statements by judges and prison commissioners in various countries that imposing and carrying out death sentences "have a brutalising and traumatic effect on the sentencing judge, on the executioner and on the family of the condemned person"; even where there are fair trials, fortuities affect whether capital punishment is imposed; studies indicating that "wrong persons have sometimes been executed"; studies finding that capital punishment "is often applied in an arbitrary and discriminatory fashion especially against vulnerable groups in society"; and "botched executions" and other examples of "agony and cruelty" in certain executions. The Working Group stated that "[t]hese developments have re-centred the debate on the death penalty and underscored the desirability of the total abolition of the death penalty."[118]

On July 3, 2012, the UN Office of the High Commissioner for Human Rights conducted the first of a series of panel discussions – with participants from around the world – on abolishing the death penalty. In a publication issued as an outgrowth of that session, the Office of the High Commissioner for Human Rights noted, among many other things, that "in March 2012, China amended its Criminal Procedure Law to include new procedures enhancing access to legal aid, requiring the recording of interrogations, introducing mandatory appellate hearings and a more rigorous review process in capital cases" and that "on August 3, 2012 the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS), which includes the United States, called for a moratorium on executions in the region and released a report reviewing key areas of concern about the death penalty."[119]

On December 20, 2012, the UN General Assembly voted 111 to 41 with 34 abstentions for a resolution calling for a moratorium on executions and encouraging all countries to ratify a UN protocol on abolishing capital punishment.[120] The UN General Assembly human rights committee's vote in November 2012 on a similar resolution was described in a news headline as "US sides with Iran and N. Korea in record UN vote over the death penalty." The vote was 110 to 39 with 36 abstentions.[121] Earlier General Assembly votes on similar resolutions were passed

by 104 to 54 with 29 abstentions in 2007,[122] 106 to 46 with 34 abstentions in 2008,[123] and 109 to 41 with 35 abstentions in 2010 (with Russia a new co-sponsor).[124]

B. Important Issues

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

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

a. National Analyses Focusing on the Role of a Small Percentage of Counties

Past studies regarding capital punishment have tended to focus, with regard to the inconsistency of its implementation, on differences between states and within particular states. However, in 2011-2012, two analyses highlighted the fact that the vast majority of death sentences and executions in the entire United States come from a very small percentage of counties, and that, in many respects, the vast majority of the country's citizenry is subsidizing capital punishment's use by this very small percentage of counties. One of these studies stated that in most of the counties that use the death penalty extensively, the money spent on prosecutors, police, and other law enforcement for *non-capital* crimes tends to be *less* than elsewhere, resulting in higher crime rates than elsewhere.

i. Report by Robert J. Smith

Robert J. Smith's essay, *The Geography of the Death Penalty and Its Ramifications*,[125] published in 2012, reports that a review by counties of death sentences and executions from 2004-2009 showed that only "10% of counties nationally returned even a single death sentence" and that "the majority of counties" in the states that impose capital punishment most often did "not return any death verdicts" from 2004-2009. Moreover, he found that less than 1% of counties in the country had sentenced since 1976 anyone executed between 2004 and 2009.[126]

In addition, he reported that only 4% of United States counties sentenced more than one person to death in 2004-2009. Those counties accounted for 76% of all death sentences imposed nationally in those years. When he looked at counties that *averaged* one or more death sentences per year in that time frame, Smith found that 29 counties – less than 1% of the United States' counties – did so. They were responsible for 44% of all death sentences imposed in the country in those years.[127]

California exemplifies distinctions between a state's counties. During the 2004-2009 period, 64% of its counties sentenced no one to death, and 90% death-sentenced no more than one person. Six counties death-sentenced at a rate of over one per year. Just three counties were responsible for over half of all of California's death sentences in those years.[128] Smith found similar results in other states – such as Florida – that, like California, were national leaders in imposing death sentences.

Smith's essay discussed research by Professor Frank Baumgartner from the University of North Carolina at Chapel Hill, whose database covered every American execution since 1976. Baumgartner's data showed that since 1976, *all* executions in the United States originated in just 15% of the country's counties. Moreover, only 50 counties (1.6% of all counties) had five or more of their death-sentenced prisoners executed.[129]

ii. Analysis by James S. Liebman and Peter Clarke

Columbia Law School Professor James S. Liebman and law student Peter Clarke analyzed in a 2011 article possible reasons for essentially the same phenomena identified by Smith, namely, that "capital punishment in the United States is a minority practice when the actual death-sentencing practices of the nation's 3000-plus counties and their populations are considered. This feature of American capital punishment has been present for decades, has become more pronounced recently, and is especially clear when death sentences, which are merely infrequent, are distinguished from executions, which are exceedingly rare."[130] They primarily used for their county-by-county analysis a study published in 2002 regarding death sentences in the United States between 1973 and 1995 – of which Professor Liebman was the principal author.[131]

They found numerous anomalies in the data for this period, including a Georgia county that imposed the same number of death sentences as a Virginia county whose population was 100 times greater. Over the 23-year period they studied, more than half of the country's death sentences came from 66, or about 2%, of the country's 3,143 counties, parishes, and boroughs; and 16% of them were responsible for 90% of all death sentences. When they then excluded states that don't have capital punishment, "counties comprising around 10% of the population were responsible for over 38% of the death sentences." [132] With regard to executions, they, as did Smith, relied principally on Professor Baumgartner's work covering 1976-2007.[133]

They also reviewed the 768 newly death-sentenced people from 2004-2009. They found that capital punishment "is retreating to its bastions," and has become even more concentrated in fewer counties.[134]

In reaching their conclusions about why this skewed use of capital punishment exists, Liebman and Clarke felt that useful hard data were insufficient, but that there were "some tantalizing clues" in the 2002 study principally authored by Professor Liebman. They cautioned that the 2002 study "is only suggestive for present purposes," since its purpose was to compare differences in "judicially identified serious error" in those places that did use capital punishment.[135]

With these caveats, they reached a variety of conclusions, of which the following were perhaps the most important: "[A] combination of parochialism[136] and libertarianism[137] characterizes the communities most disposed to impose death sentences"; "the imposition of death sentences, particularly for felony murder (a proxy for the out-of-the-blue stranger killings that generate the greatest fear among parochial communities), provides parochial and libertarian communities with a quick and cheap alternative to effective law enforcement. And that alternative is largely realized whether or not death sentences are ultimately carried out." They said their analysis sheds light on why we continue to utilize the "most idiosyncratic manifestation of the felony murder doctrine (which mysteriously transmogrifies involuntary manslaughter into capitally aggravated murder)." They added that it also helps explain capital punishment's not having a discernible deterrent effect: they believe that the jurisdictions that use capital punishment the most utilize it as "a weak substitute for, rather than a powerful addition to, otherwise effectively law enforcement strategies." Their analysis shows that there are many costs that the majority of the public bears for capital punishment's supposed benefits in the minority of counties that seek the death penalty – including greater crime, "a cumbersome process for reviewing systematically flawed death sentences whose execution is of less interest to the death sentences' originators than their imposition, and a heightened risk – to the judicial system as well as individual defendants – of miscarriages of justice."[138] In sum, "[t]he death

penalty … substitutes as a locally reassuring and externally intimidating demonstration of the community's disposition to defend itself against criminal invasions where pervasive and effective law enforcement is considered unaffordable or unpalatable."[139]

Later in their article, Liebman and Clarke set forth several additional insights. The first is that a "capital-prone community" derives its main benefit from capital punishment from handing down death sentences, rather than from executions. If a case is later reversed, continued prosecution has little perceived benefit and seems "little more than an expense the community need not bear."[140] They also conclude that these communities, relative to other places that are less likely to opt for seeking capital punishment, "tend to spend considerably less on law enforcement, courts and legal representation for capital defendants, and have substantially lower clearance rates for violent crimes."[141] Moreover, they probably experience "a decline in deterrence."[142]

Liebman and Clarke also offer a possible reason for the drop in death sentencing over the last 15 years: "[A] rebellion of sorts by the majority of communities and citizens in capital states who rarely or never use the death penalty, but for years have been subsidizing its profligate use by the minority of jurisdictions that often impose it."[143]

b. Studies and Court Decision Regarding Particular States or Counties

On October 15, 2011, about half-a-year before Connecticut prospectively abolished capital punishment, Stanford Law Professor John J. Donohue publicly issued a study of Connecticut's implementation of the death penalty from 1973-2007, which he had undertaken for purposes of litigation.[144] Among his conclusions were these:

- "Overall, the state's record of handling death-eligible cases represents a chaotic and unsound criminal justice policy that serves neither deterrence nor retribution."
- "The Connecticut death penalty regime does not select from the class of death-eligible defendants those most deserving of execution. At best, the Connecticut system haphazardly singles out a handful for execution from a substantial array of horrible murders."[145] Indeed, "there is no meaningful difference between capital-eligible murders in which prosecutors pursue capital charges and those in which prosecutors do not."[146]
- "[A]rbitrariness and discrimination are defining features of the state's capital punishment regime."[147]
- Since 1973, when Connecticut enacted its death penalty law, "there has been a steady erosion in the fraction of murder[] [cases] that are cleared. Today, nearly 40 percent of all Connecticut murdererers [sic] go unsolved."[148]
- Connecticut's capital punishment system leads to "disparate racial outcomes in the imposition of sustained death sentences that cannot be explained by the type of murder or the egregiousness and other aggravating factors of the crimes involved." After taking into account "the factors of the crime," outside the Waterbury judicial district, a defendant involved in "the most common type of capital felony … a minority killing a white victim … is 11 to 13 times as likely to be sentenced to death as a minority killing a minority or a white killing a white." Moreover, "controlling for the type of murder as well as the egregiousness and the number of special aggravating factors in a case," Connecticut prosecutors capitally charge minority killers of whites at a rate "roughly 20-22 percentage points higher than those who kill minority victims."[149]

- The determinations that may lead to death sentences are based on "dramatically different standards" across the state. In particular, people whose crimes make them eligible for seeking the death penalty "are sentenced to death at enormously higher rates" in Waterbury than in the rest of Connecticut. "The arbitrariness of geography … is a dominant factor in the Connecticut death penalty regime," even though neither judges nor prosecutors are elected.[150]

In July 2011, the Equal Justice Initiative released a report regarding Alabama's system in which the judge may override the jury's vote regarding sentencing and impose a different sentence.[151] Even if a jury unanimously votes for a life sentence, the judge may impose the death sentence. In practice, 92% of the overrides change jury recommendations of life into death sentences. This percentage is inflated by the fact that judges are elected and re-elected in Alabama (and often cite their impositions of the death penalty when seeking re-election). Overrides usually are far higher in judges' election years than in their non-election years. Overall, 21% of Alabama's 199 death row inmates as of July 2011 got there due to judges' overriding juries that had voted for life sentences. This, according to the Equal Justice Initiative, is the main "reason why Alabama has the highest per capita death sentencing rate and execution rate in the country."

The Equal Justice Initiative report also finds that the override system adds to the arbitrariness and capriciousness of Alabama's capital punishment system, and increases the potential role of racial factors in implementing capital punishment. The report states that 75% of death sentences by override involve white victims, although fewer than 35% of Alabama's homicide victims are white. Moreover, only three of the state's 67 counties are responsible for almost half of the life-to-death overrides.[152]

Another study published in 2011, by Pierce and Radelet, analyzes all cases in East Baton Rouge Parish, Louisiana that had ever been charged as first-degree murders between 1990 and 2008.[153] The study finds, among other things, that "[t]he relationship between the victim's race and death sentencing … is very strong, and it is statistically significant … . For homicides committed between 1990 and 2008 in East Baton Rouge Parish, those who kill whites are 2.6 times more likely to be sentenced to death than those who kill blacks … ." Moreover, "even after we statistically control for the other variables in the study – *i.e.*, number of aggravating circumstances, number of concurrent felonies, and number of homicide victims – the odds of a death sentence are still 97% higher for those who kill whites than for those who kill blacks."[154]

In 2012, the *Houston Law Review* published a study by Scott Phillips about the racial disparities in Harris County, Texas' death penalty system during Chuck Rosenthal's years as District Attorney: 2001-2008. Phillips, who previously analyzed Harris County's death penalty implementation between 1992 and 1999, when Johnny Holmes was District Attorney, notes that during the periods he studied, "if Harris County were a state it would rank second in executions after Texas." Phillips' study regarding Rosenthal's tenure found that whereas there no longer was a disparity in death sentences by race of defendant, death sentences were imposed where the victims were white "at 2.5 times the rate one would expect if the system were blind to race," and death sentences were imposed where victims were white females "at 5 times the rate one would expect if the system were blind to race and gender." Phillips terms these "disparities … particularly troubling"[155] because, as the *Houston Chronicle* reported, District Attorney Rosenthal resigned "in 2008 over sexually-charged and racially-tinged emails," one of which "included a photo of a black man, lying on the ground surrounded by watermelon and a bucket of chicken, that was labeled 'fatal overdose.'"[156] The *Chronicle*'s Lisa Falkenberg, after

interviewing black prosecutors in Rosenthal's office, reported[157] what Phillips, with substantial understatement, describes as "a broader office culture of racist comments and jokes."[158]

In 2012, the *Iowa Law Journal* published a study by Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans, and Martin T. Wells concerning Delaware cases since 1977 in which the death penalty has been sought. From 1977-1991, Delaware juries decided the sentence when capital punishment was sought (unless the defendant waived a jury). Thereafter, all such decisions have been made by judges. However, since 2002, determinations of the facts that make a defendant *eligible for* the death penalty have been made by juries, and (unlike in Alabama) judges must, in sentencing give "appropriate consideration" to the jury's view as to whether aggravating factors outweigh mitigating factors.[159] The authors reach three main conclusions. First, the reversal rate on appeal in Delaware was much lower than in other death penalty states after judges became the sentencers. Second, sentencing by judges (who sit in panels that need not be unanimous) has resulted in a statistically significant higher likelihood of the death sentence's imposition than (a) in other states and (b) in Delaware when its capital sentences were determined by juries. Third, there is, under judge sentencing, "a dramatic disparity of death-sentencing rates by race, one substantially more pronounced than in other jurisdictions." This appears to be particularly significant when the defendants are black and the victims are white. The authors encourage further investigation of disparity, since they have not yet done the comprehensive type of analysis pioneered by the late Professor David Baldus.[160]

In Tennessee, the requirement that there be a proportionality review during a death penalty appeal was likely intended to insure that similar cases receive similar sentences. In December 2012, the Tennessee Supreme Court ordered additional briefing from the parties and invited amicus briefs in *State v. Pruitt,*[161] on the following questions regarding proportionality:

(1) Whether the proportionality analysis adopted by that court's majority in *State v. Bland*[162] should be modified.

(2) Whether the absence of an intent to kill should render the death penalty disproportionate.

(3) Whether the pool of cases considered in proportionality analysis should be broadened.[163]

c. Decisions Granting Relief Under North Carolina's Racial Justice Act, Both Before and After Its Amendment

North Carolina's Racial Justice Act, enacted in 2009, provided that defendants prior to trial and death row inmates could seek to preclude prosecutors from seeking the death penalty or to have a death sentence overturned by showing that race had a significant impact on the decision to seek death or on the imposition of the death sentence. Statistical evidence could be used in seeking relief, but prosecutors could seek to rebut it.[164]

On April 20, 2012, Superior Court Judge Gregory A. Weeks handed down the first decision applying the Racial Justice Act. He held, with respect to death row inmate Marcus Robinson's 1994 trial in Cumberland County, that "race was a materially, practically and statistically significant factor" in the decision to exercise peremptory changes during jury selection by prosecutors that was sufficiently great as "to support an inference of intentional discrimination." He relied on an analysis by two Michigan State University professors who concluded that prosecutors peremptorily challenged blacks over twice as frequently as whites statewide, even more so (2.6 times as often) in Cumberland County, and, specifically, in Robinson's case. Robinson's counsel had asserted that after prosecutors used peremptory challenges to strike half of the eligible blacks and only 15% of eligible non-blacks, the trial jury

had ended up with nine whites, two blacks, and one Native American. Judge Weeks resentenced Robinson to life without possibility of parole. The prosecution immediately said it would appeal.[165]

On July 2, 2012, the North Carolina legislature overrode Governor Bev Perdue's veto of a bill that significantly amends the Racial Justice Act. The revised law limits statistical evidence to the crime's county or judicial district, requires evidence of bias in addition to statistics -- including evidence specifically about the defendant's case, and precludes consideration of the victim's race.[166]

On December 13, 2012, Judge Weeks applied the amended Racial Justice Act in the cases of Tilmon Golphin, Christina Walters, and Quintel Augustine.[167] They presented statistics, plus anecdotal evidence and documents, including prosecutors' handwritten notes. After hearing testimony for almost four weeks, Judge Weeks 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, under the amended Racial Justice Act (and alternatively under the original statute), that the evidence overwhelmingly showed that in all three cases prosecutors had distorted juries' compositions to become extraordinarily white. This was consistent with statewide evidence, including evidence concerning "trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection." The judge said, "Significantly, the State's evidence, including testimony from prosecutors, two expert witnesses, and a volume of documents, rather than causing the Court to question Defendants' proof, leads the Court to be more convinced of the strength of Defendants' evidence." The judge added, "The Court finds no joy in these conclusions. Indeed, the Court cannot overstate the gravity and somber nature of its findings. Nor can the Court overstate the harm to African American citizens and to the integrity of the justice system that results from racially discriminatory jury selection practices."[168]

d. Study Regarding the Federal Death Penalty

A study regarding the federal death penalty by G. Ben Cohen and Robert J. Smith, published in 2010, found "that federal death sentences are sought disproportionately where the expansion of the venire from the county [where a case would be tried in state court] to the [federal] district level had a dramatic demographic impact on the racial make-up of the jury" and may explain "the racial distortions in the federal death penalty."[169] The authors stated that most death-eligible crimes prosecuted by the federal government take place in areas with a concentration of minorities. By trying these cases in federal court – where the jury pool often includes suburbs with high percentages of white people – instead of in state courts in the counties where the crimes occurred, "the voice of the population impacted most by violent crime" decreases, the jury venires become "whiter," and the chance that the outcome is affected by "implicit race bias increases."[170] The authors report that in the eight federal districts with more than two death sentences, the counties in which the crimes occurred usually have a high African American population but that the "federal districts [where the trials took place] … [are] heavily white."[171]

e. Study of Racial Bias Among Capital Case "Jurors"

In a 2011 article, University of California Professors Mona Lynch and Craig Haney discuss, among many other things, an experiment in which "400 jury-eligible, non-student, death-qualified participants" individually viewed a video of a simulated death penalty trial and decided on either death or life without parole. The videos that particular people saw varied only in that in some, the victim and the defendant were both white; in some, the defendant was white and the victim was black; in some, the defendant was black and the victim was white; and in some, both the defendant and the victim were black. All participants were asked to complete questionnaires about themselves and their decision making processes. The results showed that those who saw a video with a black defendant "were significantly more likely to sentence him to death, especially" where the victim was white. The participants who least understood the jury instructions "were the most prone to racial bias." Those with "high comprehension" of the instructions sentenced the black and white defendants in "equal proportions." Also, the participants not only "were less willing to give the identical evidence mitigating weight" when the defendant was black as compared to when the defendant was white, they also "were significantly more likely to improperly use mitigating evidence in favor of a death sentence" when the defendant was black than when the defendant was white.[172]

Lynch and Haney also discuss a follow-up study that was the same as the first, except that the over 500 participants got to "deliberate" in 100 small group "juries," and the deliberations were videotaped and transcribed. Once again, the black defendant was more likely to be sentenced to death than the white defendant – but "the race effect was manifested only after deliberation." Also, again, the extent to which jurors understood the jury instructions had a "significant" impact: those with poor understanding were more likely to be affected by race – both in "the straw vote" and "final vote" of the "juries." Lynch and Haney find "that the evaluation of mitigating evidence was key to the measured race effects." White males seemed to be the "driving force" for these effects. They differed both from white women and non-whites in two ways: they were far more likely to sentence the defendant to death, "but only when the defendant was Black;" and they alone accounted for the entire race effect – apparently due to their reactions to what was presented as mitigating evidence. Moreover, the more white men there were on a "jury" the higher the death-sentencing of black defendants, with white men becoming even more "disproportionately influential" on "juries." Thus, jury deliberations could "activate and exacerbate racial bias under certain conditions."[173]

Lynch and Haney say that "[t]he race-of-defendant effect appears more likely to arise in the trial stage, is more a function of jury decision-making processes, and is especially likely in certain kinds of cases. Thus, capital cases that involve Black defendants, particularly when the victims are White, and where a concentration of White men serve on the juries, are especially prone to racially-biased outcomes."[174]

f. Study of Military Death Penalty

The United States Military's administration of its capital punishment system has recently been the subject of a law journal article and a newspaper series.

The law journal article, by the late Professor David Baldus and three colleagues and published in 2012, considered all potentially death-eligible military cases between 1984 and 2005 of which they were aware. They found capital punishment to be more likely sought and more likely secured, holding non-racial variables constant, in cases involving white victims -- and even more so in cases involving minority defendants and white victims. They also found that seeking and obtaining the death penalty was more likely in cases involving minority defendants (regardless of the victims' race) – in "a magnitude that is rarely seen in state court

systems."[175] The authors determined that the major source of the white-victim disparities was the "combined effect of convening authority charging decisions and court-martial panel findings of guilt at trial" (the latter being a precondition to capital sentencing proceedings). They also concluded that the main source of the minority-defendant disparities (independent of the victim's race) was "the death-sentencing decisions of panel members in capital sentencing hearings."[176] In cases with white victims, which were 97% of those that proceeded to capital sentencing hearings, "court-martial members sentenced minority accused to death at a much higher rate than similarly situated white accused."[177]

The authors observed that the likelihood of racial bias might well be greatly lowered or eliminated if the military death penalty were applicable only to cases with "military implications" – and not to "civilian-style" murder cases.[178] However, in the absence of that change, their findings "indicate that the 1984 executive order designed to bring military law into conformity with *Furman* failed to purge the risk of racial prejudice from the administration of the death penalty in the United States Armed Forces from 1984 through 2005."[179]

In August 2011, the McClatchy Newspapers ran a three-part series on the military death penalty. Their reporters found that of the 16 men who had been sentenced to death since the military changed its death penalty system in 1984, 10 had been removed from death row. Mostly, this occurred because of reversals by military appeals courts arising from "mistakes made at every level of the military's judicial system." These "included defense attorneys who bungled representation, judges who didn't know how to properly instruct a jury and prosecutors who mishandled evidence." Defense counsel in cases at each level, from trial to appeals, "routinely" were "young, inexperienced lawyers." Moreover, both defense and prosecution attorneys "generally rotate out of their jobs after a couple of years, and many are unlikely to get experience in capital cases."[180]

McClatchy reported that experts were alarmed by many aspects of the military death penalty system, "including a racial disparity that's worse in some ways than in civilian courts." Citing an advance copy of the report by Baldus' team, McClatchy discussed that study's finding that minorities were twice as likely in courts-martial to be sentenced to death than were whites.[181]

2. Inadequacies or Unavailability of Counsel for People Facing Execution

Problems with the quality or performance of counsel representing capital defendants and death row inmates have been mentioned several times above, and will be further discussed below. This section focuses on particular developments in 2010-2012.

a. Alabama

Alabama often has failed to find proper counsel at the trial level. In a November 22, 2010 op-ed, former Florida Supreme Court Chief Justice Gerald Kogan (who – as noted above – as a prosecutor sought capital punishment) and former Texas Governor Mark White (who oversaw 19 executions) said, "We are disturbed when we hear of yet another Alabama death row prisoner whose unskilled and barely paid defense lawyers cut their teeth on his capital trial and did little to try to save his life." They expressed particular concern because the Eleventh Circuit, in their view, had "create[d] a rogue set of rules to sustain … many … death sentences." What they described as "the most current example" in which the Eleventh Circuit had disregarded "established precedent"[182] was its 2-1 decision in *Boyd v. Allen*[183] – a case in which the Supreme Court later denied certiorari. Chief Judge Kogan and Governor White said that Mr. Boyd's

counsel, who were only paid $1,000 – at $20 an hour – for out-of-court time, did nothing, due to inadequate knowledge and inadequate pay, "to investigate their client's life history. So the jury never learned anything about the criminal assaults perpetrated against Boyd by his stepfather at least weekly throughout his youth; the alcoholic grandparents who tried to stitch up his wounds when drunk; or the passive mother who sat mute while her husband drew her children's blood."[184] According to Chief Judge Kogan and Governor White, the Eleventh Circuit had held that in light of the nature of the crime, "the attorneys' egregious failures were immaterial because no amount of evidence could … convince a sentencer to choose life-without-parole over death" and, even "[w]orse," the Eleventh Circuit had found "mechanistically" that trial counsel had performed adequately. Contrary to the Eleventh Circuit's view that the death penalty was the inevitable outcome, the jury had recommended a life sentence but had been overruled by the trial judge. The federal district judge had ordered a new sentencing proceeding (but was reversed by the Eleventh Circuit).[185]

Moreover, many Alabama death row inmates are unable to find capable counsel in time to file appropriate state postconviction petitions within the federal habeas statute's one-year statute of limitations. Absent a finding that the statute of limitations (adopted in 1996) has been tolled, this precludes the inmate from raising *any* federal constitutional claims – no matter how meritorious – in federal court.

This dire consequences of this problem are highlighted by the Eleventh Circuit's 2-1 decision on December 28, 2012 to deny equitable tolling in the case of Ronald Bert Smith. Smith's state postconviction petition was filed within the one-year federal statute of limitations, but without either (a) what would have been an uncontested motion that Smith was too poor to pay the $154 filing fee or (b) the $154 fee.[186]

The majority declined to hold that the statute of limitations was equitably tolled, despite the facts that Smith's Alabama attorney "was on probation for a public intoxication conviction," "was often intoxicated when he came into the office," had a continuing "history of abuse of prescription drugs and crystal methamphetamine," within a month after Smith's inadequately filed petition "was charged with nine counts of possession of a controlled substance," was shortly thereafter placed on "disability inactive status," and in the same time frame filed for voluntary bankruptcy. He committed suicide the next year.[187] In so holding, the majority relied on the actions of Smith's out-of-state attorney, including his eventually (albeit too late) paying the filing fee.[188]

Judge Rosemary Barkett, in dissenting, stated that Smith should at least have received an evidentiary hearing on his motion for equitable tolling, due to the combination of Smith's Alabama attorney's egregious misconduct and the fact that his out-of-state attorney never made a motion to be allowed to appear in Alabama courts and allegedly did virtually nothing on Smith's behalf. Judge Barkett found the out-of-state lawyer's "inaction" indistinguishable from "the attorney conduct in *Maples* [discussed in Part II.B. below], which the Supreme Court had concluded constituted abandonment" of a different Alabama death row inmate.[189]

Mr. Smith's trial jury had voted voted 7-5 for a life sentence, but had been overruled by the trial judge (under the uniquely unfair Alabama system described in Part I.B.1.b. above).[190]

b. Georgia

A few months before deciding against Mr. Smith, the Eleventh Circuit ruled, also by a 2-1 vote, against Georgia death row inmate Robert Wayne Holsey. While assuming for the sake of their decision (as had the Georgia Supreme Court) that Holsey's trial lawyers did not represent him effectively, the majority held that his constitutional right to the effective assistance of

counsel had not been violated. The majority said it could have ruled in Holsey's favor only if he had persuaded them that the Georgia Supreme Court had been *unreasonably* incorrect when it concluded that Holsey had not been sufficiently badly prejudiced by his counsel's ineffectiveness. The prejudice test was whether there was a reasonable probability that, absent counsel's ineffectiveness, Holsey would have received a life sentence.[191]

One of the two judges in the majority, Ed Carnes (who formerly led the death penalty work of the Alabama Attorney General's office) said that due to the severity of this crime and a prior crime, plus other aggravating factors, even effectively performing defense counsel would not have been had a reasonably probability of avoiding a death verdict. The other judge in the majority, J.L. Edmondson, did not join in Judge Carnes' decision. He said that an amendment in 1996 to the federal habeas statute had greatly influenced his decision to give great deference to the George Supreme Court's decision on the prejudice issue. Judge Edmondson stated that, although "[o]bjectively reasonable jurists might disagree about prejudice on this record," he believed that the Georgia Supreme Court's decision was "within the outside border of the range of" being a "reasonable" holding.[192]

Accordingly, Mr. Holsey got no relief even though his lead lawyer at trial "drank a quart of vodka every night of Holsey's trial because he was about to be sued and prosecuted for stealing client funds" and had testified thereafter that he "probably shouldn't have been allowed to represent anybody" at that time.[193]

Again, the dissenter was Judge Barkett, who pointed out that – notwithstanding Judge Carnes' assertions that much of the unpresented mitigation evidence would have been cumulative – the jury had heard only "sparse – almost non-existent – evidence of childhood abuse and mental retardation."[194] The available but unpresented evidence of Holsey's having been abused included that "throughout his childhood he was subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'"[195] Among other things, Judge Barkett noted, the jury did not learn that his mother beat Holsey with shoes and various household objects and often held his head under the bathtub faucet, and that the house was roach-infested and one could not avoid smelling urine and rotting food.[196]

c. Texas

Robert J. Smith's 2012 essay discussed three counties in Texas – Bexar, Harris, and Tarrant – that, lacking a public defender system, rely on private, appointed counsel in death penalty cases. Harris County pays attorneys a flat fee, regardless of the time they devote to a capital case – except that the fee can be reduced if cases plead out pretrial, as is often in the defendant's best interests. Unfortunately, as Smith points out, this system "creates incentives for lawyers to spend as little time as possible trying to obtain a plea or preparing for trial." Moreover, judges often deny attorneys' requests for funding for secretarial help and expert witnesses. In general, in all three counties, the appointed lawyers lack the independence and ability to share staff and resources that lawyers at institutional offices often have.[197]

Texas lawyer Jerry Guerinot "represented" 20 clients who ended up on Texas' death row. As the *New York Times*' Adam Liptak noted in 2010, "That is more people than are awaiting execution in about half of the 35 states that [then had] the death penalty."[198] According to Professor David R. Dow of the University of Houston, litigation director of the Texas Defender Service, "He doesn't even pick the low-hanging fruit which is hitting him in the head as he's walking under the tree." Mr. Guerinot reportedly is no longer handling capital cases.[199]

d. Pennsylvania

The *Philadelphia Inquirer* published in October 2011 the results of its review of counsel for Pennsylvania death row inmates in appeals and postconviction cases over three decades – including what these cases revealed about the work of trial counsel. It found that "defense lawyers in these high-stakes cases failed their clients in ways large and small." They frequently devoted little time to preparation "and put on only the barest defense. They neglect[ed] basic steps, such as interviewing defendants, seeking out witnesses, and investigating a defendant's background." The *Inquirer* said the problem was particularly egregious when capital defendants were represented by court-appointed counsel, who were "often overworked and underpaid." They received $2,000 for trial preparation and $400 daily for in-court time – far less than needed for a proper defense. Since a "staggering" number of these cases were later reversed, the public not only paid significant amounts for at least the prosecution and the courts in dealing with the *initial* trial and appeals, but if these cases were retried, the taxpayers incurred substantial additional costs – and in some instances, long-incarcerated defendants were acquitted at their retrials (while many others received life sentences, not death). Due to the low number of private lawyers willing to take on these cases, some lawyers held to have been ineffective in capital cases were "routinely" appointed to handle *more* capital cases, and at least two became judges.[200]

In stark contrast, no client of Philadelphia's Public Defender Office, which handles 20% of the city's capital cases, has received the death sentence since 1993, when it began handling capital cases, through (at least) 2009.[201]

The *Inquirer* reported that Pennsylvania Chief Justice Ronald D. Castille in September 2011 ordered a review of Philadelphia's compensation of appointed defense counsel. He did so in light of "intolerable" mistakes by defense counsel and some "idiotic" appeals briefs. One such "intolerable" mistake was made by Norman Scott, the lawyer for Willie Cooper. He urged the jury to consider Exodus' verse providing for "an eye for an eye and a tooth for tooth" if a pregnant woman is assaulted, loses her child, and is further damaged. Yet, Cooper had been convicted in the first part of the trial of killing a pregnant woman! Scott subsequently stated that he had used the biblical argument "out of habit," and now "realized he had made a terrible error." Scott was held ineffective, and Cooper got a life sentence at a retrial.[202]

The review ordered by Chief Justice Castille was conducted by Judge Benjamin Lerner. In February 2012, Judge Lerner issued his Report and Recommendations, in *Commonwealth v. McGarrell*.[203] He concluded that "the compensation of court appointed capital defense lawyers in Philadelphia is grossly inadequate, both as to the dollar amount of the compensation and as to the compensation schedule provided by the present fee system … . The existing compensation system unacceptably increases the risk of ineffective assistance of counsel in individual cases and is primarily responsible for the First Judicial District's growing inability to attract a sufficient number of qualified attorneys willing to accept court appointments in capital cases. Inevitably, this … has made it more difficult to dispose of capital cases within a reasonable period of time and, in too many cases, has delayed justice to the threshold of denial."[204] The compensation amounts "were woefully inadequate when first implemented … [and] are even more so today. Even worse, the GFS fee structure is completely inconsistent with how competent trial lawyers work, particularly in cases such as these which typically involve enormous preparation time and are frequently best resolved by a non-trial disposition." This system "favors the longest possible trial over the most comprehensive preparation and intensive negotiations" and "ignores the interest of the victims' families, the prosecutor and the court."[205] Judge Lerner stressed that "[t]he present Guaranteed Fee System for court appointed private counsel in capital cases is a disaster waiting to happen."[206]

Judge Lerner recommended that the Supreme Court direct the First Judicial District's Administration Governing Board to get rid of the existing GFS, implement a new fee system in which hourly rates are not different for preparation time and should be at least $90 per hour for both appointed defense attorneys.[207]

On February 27, 2012, John W. Herron, Administrative Judge for the Philadelphia Common Pleas Court's trial division, raised the flat fee for capital defense trial counsel from $2,000 to $10,000 and increased the flat fee for penalty-phase co-counsel from $1,700 to $7,500. He suspended the work of a new screening committee for the rest of 2012, noting that it thus far had approved only 12 Philadelphia defense lawyers. Judge Herron wrote that he felt obligated to deal with an increasing backlog of homicide cases due to a lack of qualified defense counsel who were currently available for court appointments. On February 28, 2012, Chief Judge Castille said that he approved of Judge Herron's actions and that for the rest of 2012, Judge Lerner would handle homicide defense counsel appointments.[208]

e. Los Angeles County and California

Robert J. Smith described in 2012 a situation in Los Angeles County similar to that which has long existed in Philadelphia. The Public Defender's Office, which handles half of trial-level capital punishment cases, had only gone to trial once in six years, and that client did not receive the death sentence. During that same time frame, 33 defendants represented by the Alternative Public Defender or the private bar received death sentences. The private lawyers are at one significant disadvantage: they are usually not appointed until quite late in the time frame during which they can seek to persuade the District Attorney not to seek the death penalty. So, private lawyers have far less ability than the Public Defender's Office to develop evidence and present it to the District Attorney prior to his decision on what punishment to seek. But wholly aside from that, some private lawyers who *could* find and present evidence to the District Attorney prior to his deadline fail to do so – due to ignorance, fear, or their spending their time on other cases.[209]

In California as a whole, there is on average a 10-to-12-year wait to find lawyers to represent death row inmates in state habeas corpus challenges. Almost half of those on California's death row do not yet have state habeas corpus counsel. In November 2010, then-Chief Justice Ronald M. George said that many attorneys are not appointed because they are unqualified to handle these matters. He stated, "I want to distinguish what we do in California from what they do in other states, where almost any warm body will qualify."[210]

f. Circumstances Leading to Inadequate Representation by Normally Capable Counsel

Sometimes, a normally capable defense lawyer faces circumstances that cause his representation to be highly inadequate. An example is Lionel Barrett's "representation" of Abu-Ali Abdur'Rahman. Barrett "was widely recognized as the premier murder defense attorney in Middle Tennessee." Yet, Barrett told the *ABA Journal* in 2011, "[e]verything I could have done wrong, I did," and "Abu-Ali is on death row because of me. I failed him." Barrett took on this and other cases because of his indebtedness. He interviewed Abdur'Rahman for the first time just five days before the start of jury selection, and was wholly unready for trial. Due to his uncharacteristically poor investigation, he never found available evidence about his client's mental illness and mental history – including Abdur'Rahman's long time in state mental institutions, findings that he had many mental illnesses, and his father's repeatedly beating, sexually abusing, and even torturing him. Moreover, because Barrett "never requested the initial

case file from" his client's prior lawyer "and never checked the public court files," what should have been "a critical piece of exculpatory evidence" was used as "the most damning evidence at trial."[211]

Despite Barrett's concessions of prejudicial ineffectiveness, Abdur'Rahman has gotten no relief. After he lost his first habeas corpus appeal -- in which he tried to combine an ineffectiveness assistance of counsel claim, a prosecutorial misconduct claim, and individual *Brady* claims, the Sixth Circuit did not allow him to combine those claims again. Therefore, his ineffectiveness of counsel claim was not considered when, on August 17, 2011, the Sixth Circuit again denied him relief.[212]

Dissenting, Judge R. Guy Cole, Jr. pointed out that in 1998, the district court had found the ineffectiveness claim meritorious, but had been reversed in 2000. At that time, the Sixth Circuit's 2-1 majority, while accepting the district court's conclusion that trial counsel had performed ineffectively, said that proof of Abdur'Rahman's terrible upbringing replete with great abuse, combined with psychotic disorders, did not establish sufficient prejudice in light of the aggravating evidence. Judge Cole pointed out that the majority's prejudice analysis "had aged poorly," in light of subsequent Supreme Court decisions.[213]

In 2011, because Judge Cole felt precluded from considering the ineffectiveness claim again, he attacked the majority for rejecting the individual *Brady* claims. The majority maintained that Abdur'Rahman's counsel should have found the important withheld information, even though the majority still did not dispute the district court's finding that trial counsel's performance had been deficient. Justice Cole pointed out that the majority always favored "formalism over every other legal value" and then divided "claims into enough pieces" and ruled on "each in a way that is perfectly abstracted from the reality of the death-penalty courtroom, [so that] all the errors vanish. The spell does break eventually, when someone looks hard enough to see past the sleight of hand. Whether the revelation will come to a person with the authority to spare Abdur'Rahman, and in time, I do not know."[214]

3. The Continuing Danger of Executing Innocent People

a. People Released on Innocence Grounds After Years on Death Row

i. Damien Echols

On August 19, 2011, three men, including Damien Echols, who had been on Arkansas' death row since 1994, were released after agreeing to a plea bargain. The agreement permitted them to assert their innocence while agreeing that prosecutors had enough evidence to convict them. The defendants, whom their supporters called the West Memphis Three, entered into this "Alford guilty plea" to guarantee that Echols would be freed immediately rather than remain under death sentence. The case had been the subject of an HBO documentary and a celebrity-created legal fund. In the autumn of 2010, the Arkansas Supreme Court had ordered a new hearing for all three, in which assertions of juror misconduct and the possibility that new DNA science could be relevant would have been considered.[215]

ii. Gussie Vann

In September 2011, another inmate convicted and sentenced to death in Tennessee in 1994, Gussie Vann, was released after the state dropped all charges against him for the alleged sexual assault and murder of his daughter. In 2008, a state postconviction judge had ordered a

new trial due to his trial lawyers' failure to hire forensic experts to attack the sexual abuse allegations. Forensic experts had testified in the postconviction hearing that the victim exhibited no signs of recent sexual abuse. The postconviction judge said trial counsel's errors were "not only prejudicial, but disastrous." The state at first contemplated seeking a retrial on a lesser offense before deciding to end the prosecution. In the postconviction proceeding, there had been evidence that Vann's daughter's death may have been an accident or due to her mother's actions.[216]

iii. Joe D'Ambrosio

On January 23, 2012, the exoneration of former Ohio death row inmate Joe D'Ambrosio effectively became final, when the Supreme Court denied certiorari with regard to the State's effort to appeal a ruling precluding his retrial.[217] D'Ambrosio had been released in 2009 after 21 years on death row for a 1988 murder. A federal district judge had ruled in 2006 that prosecutors had violated D'Ambrosio's constitutional rights by withholding 10 pieces of evidence that might have exonerated him at trial. Retrial was pending in 2010, when United States District Judge Kate O'Malley ordered that D'Ambrosio not be retried in light of a crucial witness' death – a decision that the Sixth Circuit affirmed in 2011.[218]

iv. Michael Keenan

On September 6, 2012, Michael Keenan, who had spent nearly 25 years on Ohio's death row for the same murder at issue in D'Ambrosio's case, was freed. Judge John Russo dismissed the murder charge against Keenan, because evidence that the harm he suffered from the prosecution's withholding of evidence "cannot be resolved by a new trial." The prosecution said it would appeal.[219] Federal District Judge David A. Katz had ordered in April 2012 that Keenan be retried or released.[220]

v. Edward Lee Elmore

Edward Lee Elmore's death sentence was vacated in 2010 due to his having mental retardation, and the State said it would not seek to reinstate it. In November 2011, he was granted habeas relief on his ineffective assistance of counsel claim. The Fourth Circuit majority said, "[W]e recognize that there are grave questions about whether it really was Elmore who murdered Mrs. Edwards," and concluded "that Elmore is entitled to habeas corpus relief … premised on his trial lawyers' blind acceptance of the State's forensic evidence."[221] After that decision, the prosecution could have sought to secure Elmore's conviction at a new trial. However, on March 2, 2012, "his 11,000th day in jail," he became "a free man" under an agreement similar to Echols'. Mr. Elmore "denied any involvement in the crime but pleaded guilty in exchange for his freedom."[222]

vi. Larry Smith

On April 6, 2012, former Alabama death row inmate Larry Smith was freed under an agreement similar to Echols' and Elmore's. His death sentence for a robbery-related murder was based on his statement after four hours of interrogation without counsel that, contrary to police guidelines, was unrecorded. He was not tied to the crime either by physical evidence or any eyewitness. Pro bono counsel from a large law firm (Covington & Burling), who began working

on Smith's case in 2001, came up with significant proof that (a) the investigation by Smith's trial counsel was woefully incomplete, (b) Smith's "confession" had been coerced, and (c) discredited the testimony of the "informant" who had first led the police to think that Smith had committed the crime.[223] Based on this evidence, the Alabama Circuit Court in 2007 ordered a retrial. After years in which the prosecution unsuccessfully appealed this decision,[224] the parties entered into a plea agreement on the eve of the retrial. Mr. Smith was released after pleading guilty to conspiracy to commit robbery, and the murder charges against him were dismissed.

vii. Erskine Leroy Johnson

On June 1, 2012, Erskine Leroy Johnson was freed under an agreement similar to Echols', Elmore's, and Smith's.[225] Under a "best-interests plea," he pleaded guilty to second-degree murder in return for being released immediately. He had served almost 27 years in prison, including 19 years under death sentence. A prosecutor said that prison personnel had called Johnson "an exemplary prisoner" and that the parole board had ordered his release for later in June.[226]

On December 9, 2011, the Court of Criminal Appeals of Tennessee had remanded Johnson's case for a new trial.[227] It held that the trial court had erred concerning newly discovered evidence that a principal prosecution witness had a close personal relationship with a gang member and had a motive to protect that friend by testifying against Johnson. The appeals court held that this new evidence could have resulted in a different judgment.[228]

In 1999, the same appellate court, although affirming Johnson's conviction, had remanded his case for a new death penalty hearing. It held that the prosecution's failure to disclose a police report stating that Johnson "did not fire the shot that grazed [a] bystander" and that "the victim was carrying a gun" arguably had led the jury to misapply an aggravating circumstance.[229] After that holding was affirmed by the Tennessee Supreme Court, the prosecution had not again sought capital punishment, and Johnson had been sentenced to life imprisonment.[230]

viii. Seth Penalver

On December 21, 2012, a jury found Seth Penalver not guilty of three 1994 murders, armed robbery, and armed burglary. This was Penalver's third trial, the first having ended in a hung jury and the second, in 1999, having resulted in his being convicted and sentenced to death.[231]

In 2006, the Florida Supreme Court had vacated Penalver's conviction and ordered a new trial. It stated: "In light of the scant evidence connecting Penalver to this murder and the consequent importance of identifying the individual depicted on the videotape in sunglasses and hat, we conclude that the improperly admitted evidence and the State's suggestion [at the second trial] that the defense tampered with or suborned perjury by an identification witness meet the cumulative error requirements … and require reversal."[232]

After Penalver's acquittal at his third trial, his defense counsel said that one reason for the outcome was previously unavailable evidence that a government investigator had caused an informant to receive a Crimestoppers award. Penalver had been in custody for more than 18 years before being released after the acquittal.[233]

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

i. Kevin Cooper

There is substantial doubt about the guilt of California death row inmate Kevin Cooper. In 2009, at the outset of a 101-page dissent from a Ninth Circuit order denying Mr. Cooper's effort to avoid execution, Judge William A. Fletcher said, "The State of California may be about to execute an innocent man." Judge Fletcher stated that the police and prosecution had failed to disclose and had tampered with evidence.[234] On December 1, 2010, Professor Alan Dershowitz and attorney David Rivkin Jr. (who served in the Justice Department and the White House Counsel's Office under President Reagan and the first President Bush) wrote an op-ed about Cooper's case. They said that while they had differing views on capital punishment, they both felt that "too many of the facts allegedly linking Cooper to the murders just don't add up." These included an initial statement that the perpetrators were white (Cooper is black), law enforcement's "blatantly mishandl[ing]" some crucial "evidence pointing to other" possible killers and the strong possibility that the chief prosecution forensic witness had "falsified evidence."[235] However, Governor Arnold Schwarzenegger did not commute Cooper's death sentence before leaving office, and Cooper remains on death row.

ii. Justin Wolfe

On July 12, 2011, Federal District Judge Raymond A. Jackson vacated the murder conviction and death sentence of Justin Wolfe, after he had served almost a decade on death row for allegedly leading a conspiracy to kill his marijuana supplier. Judge Jackson's decision was based on Virginia prosecutors' permitting the use of false testimony connecting Wolfe to the slaying, not revealing evidence that other people may have wished the victim to be killed and conspired to have him killed, and the recanting of a crucial prosecution witness' testimony. Judge Jackson said that the prosecution's actions violated due process and were "abhorrent to the judicial process." Moreover, he found that a potential juror had been erroneously disqualified, in violation of the Sixth Amendment.[236] Wolfe still faced a potential new trial. The prosecution appealed to the Fourth Circuit, which affirmed.

On December 26, 2012, Judge Jackson determined that the prosecution had not retried Wolfe during the time frame he had set, and ordered Wolfe released within 10 days.[237] After staying Judge Jackson's order, the Fourth Circuit heard oral arguments on January 28, 2013. According to the Associated Press, the court appeared "uncomfortable" with the idea of barring a new state court trial, despite evidence that after Judge Jackson's July 12, 2011 decision, prosecutors had met with the prosecution witness who had recanted his crucial testimony and had told him that he could face capital punishment for having changed his testimony.[238]

iii. Tyrone Noling

In January and February 2012 *The Atlantic*'s Andrew Cohen wrote about two death row inmates whose convictions he found to be highly questionable.

Cohen wrote first about Tyrone Noling, who had been convicted and sentenced to death in 1996 for the murder of an elderly couple in 1990. Initially, there was neither physical evidence nor any witness against him. After a new investigator became involved in 1992,

Noling was indicted, but the charges were dropped after Noling passed a polygraph test and his co-defendant recanted his incrimination of Noling. Several years later, having been (they now say) threatened by an investigator, some witnesses testified against Noling, saying that he had been at the scene of the crime and had confessed to the murders.[239]

Cohen asserted that particularly given Ohio's lengthy history of erroneous capital convictions, it was troubling that Noling was indicted for the second time five years after the murders, based on witnesses who now say they were threatened by the prosecution when they identified Noling and who have recanted their testimony. Moreover, there still is no physical evidence against Noling, and the prosecution has failed to investigate "other viable suspects." Unfortunately, Cohen said, this does not suffice to establish any constitutional claim that the federal habeas law, as amended in 1996, would permit to be the considered on its merits. Cohen stated that even if the jury could legitimately have found Noling guilty beyond a reasonable doubt, "given the serious questions that have been raised regarding Noling's prosecution, we wonder whether the decision to end his life should not be tested by a higher standard."[240]

Moreover, Cohen expressed great concern about the prosecution's preventing DNA testing of a cigarette butt that could be tied to Daniel Wilson, whom Noling's lawyers say was the actual murderer. Wilson was executed for a murder committed one year later than the murders at issue, and had previously gone to a home and attacked a man who was elderly, as were the victims killed at home in Noling's case. Furthermore, it was not until 2009 that the prosecutors very belatedly produced handwritten police notes from 1990 in which Wilson's foster brother apparently identified his "brother" as the murderer in *this* case.[241]

On January 8, 2013, the Ohio Supreme Court heard oral argument regarding whether Noling had a right to have DNA testing on the cigarette butt, in light of a new state law.[242]

iv. Thomas Arthur

Cohen wrote in late February 2012 about Alabama death row inmate Thomas Arthur, who was convicted and sentenced to death for a murder that took place 30 years before. Cohen noted many similarities between the problems with Noling's case and troublesome aspects of Arthur's case. He added that Arthur "has the unwelcome distinction of being one of the few prisoners in the DNA-testing era to be this close to capital punishment after someone else confessed under oath to the crime." Arthur's lawyers were prepared to pay for DNA testing, but Alabama opposed allowing the testing.[243]

Cohen's main concern was that the prosecution had based its whole case on the testimony of the victim's wife. A few months after the murder, she had been convicted of the murder and sentenced to life, for having hired someone to kill her husband. Some years later, she had reached the following agreement with the prosecution: it would recommend that she be released early if she would alter her original testimony and accuse Arthur. Her revised testimony led to Arthur's third conviction – the first two having been reversed. Years later, in 2008, Bobby Ray Gilbert confessed under oath to having committed the killing after he had started an affair with the victim's wife. Gilbert said he finally came forward because the Supreme Court had fairly recently held that someone who at the time of the crime was under age 18 (as Gilbert had been) could not be sentenced to death. Thereafter, though, at a hearing, Gilbert "took the Fifth Amendment" – which Arthur's counsel said resulted from Gilbert's having been punished by prison officials after admitting to this murder. The State took a different view, and the victim's wife said Gilbert's confession was false. The trial judge then ruled against Arthur.[244]

Arthur's counsel sought "more advanced DNA testing on the wig" that Gilbert's statement said he had used during the killing – earlier DNA testing having not resulted in any

link to either Gilbert or Arthur. Arthur's counsel said that everyone involved had agreed that the perpetrator wore this wig during the crime, and stated that they were willing to pay for the additional DNA testing. The State maintained that the requested DNA testing would be no better than the prior testing, and that the wig had no additional DNA that could be tested.[245]

Cohen ended his piece by asking, "Should a state ever be able to block a new DNA test if it doesn't have to pay for it? The questions from the past tell us how arbitrary and capricious capital cases can be. The questions about the future tell us how much of a fight is left ahead over capital punishment in America."[246]

c. Significant Doubts About Particular Past Executions

i. Three North Carolina Cases

In 2010, former FBI agents completed an audit of North Carolina's State Bureau of Investigation (the SBI) requested by North Carolina Attorney General Roy Cooper. It found that SBI agents repeatedly helped prosecutors secure convictions, and that there were instances in which "information that may have been material and even favorable to the defense of an accused defendant was withheld or misrepresented." The former FBI agents recommended that 190 criminal cases in which the SBI reports were, at best, incomplete be thoroughly reviewed. These included three cases in which the defendants had been executed and four others in which people were still on death row. Although the audit did not determine that any innocent person had been convicted, it pointed out that even where defendants had confessed (as all three executed people had done) or pleaded guilty, tainted SBI reports may have helped secure confessions or guilty pleas.[247] One of the executed men, Desmond Carter, had been represented by inexperienced counsel who had simply assumed that the SBI lab evidence was accurate. Counsel for another of those executed, John Hardy Rose, said that if they had known about the undisclosed negative results from a test for blood, the sentence might not have been death – since there already was a question as to whether the crime was premeditated or impulsive. Counsel for the third executed man, Joseph Timothy Keel, having begun to consider what impact the undisclosed evidence might have had, said, "[T]here are no do-overs with the death penalty. We can't go back and fix these errors."[248]

ii. Joe Arridy

On January 7, 2011, Colorado Governor Bill Ritter, Jr. "granted a full and unconditional pardon … to Joe Arridy, who was convicted of killing a 15-year-old girl, sentenced to death and executed by lethal gas seven decades ago." Governor Ritter said that "an overwhelming body of evidence indicates" that Mr. Arridy (whose IQ was 46) "was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else."[249]

iii. Cameron Willingham

There continues to be controversy over Texas' 2004 execution of Cameron T. Willingham for arson/murder.

It was revealed in 2009 that Governor Rick Perry had failed in 2004 to grant a 30-day reprieve to Mr. Willingham despite receiving material from a renowned arson expert, working with the defense, who had found major problems with the prosecution's trial evidence about

arson. It was unclear whether Governor Perry had reviewed that material, and he refused to make public his general counsel's memorandum from 2004. In September 2009, shortly before the State Forensic Science Commission was to have held hearings at which its arson expert, Craig L. Beyler, would have testified about his conclusion that the evidence failed to prove that Willingham had set the fatal fire, Governor Perry replaced the Commission's chair and two other members. As a result, the hearings were cancelled.[250] Mr. Beyler, "a nationally known fire scientist" had prepared "a withering critique" which concluded – as had a *Chicago Tribune* investigation published in December 2004 – that there was no proof that the fire was set and that it may instead have been an accident. Beyler's report said the state Fire Marshal's findings "are nothing more than a collection of personal beliefs that have nothing to do with science-based fire investigation."[251]

The new chair of the Texas Forensic Science Commission, John Bradley, tried to have the Commission close the case and conclude that there had been no professional misconduct. However, other Commission members disagreed. After lengthy delay, the Commission held a special hearing on January 7, 2011, at which it heard from several arson experts, including Beyler (who was then chair of the International Association of Fire Safety Science). Although the state Fire Marshal's Office and some others from within Texas supported the arson finding, John DeHaan, author of *Kirk's Fire Investigation*, "the most widely used textbook in the field," joined in Beyler's criticism. He stated, "There was no evaluation, at least as reported in the documents I reviewed, to determine arson." He added that "[e]verything that was documented post-fire was consistent with accidental rather than intentional fire. There was no basis for concluding that this was arson."[252]

After the State Senate chose not to confirm Bradley's nomination to continue to lead the panel, Texas Attorney General Greg Abbott issued a ruling in July 2011 that the Texas Forensic Science Commission was not entitled to investigate evidence collected or tested prior to 2005, when it was created.[253]

On October 28, 2011, the Commission closed its investigation into the Willingham case. But the October 2011 addendum to its report recognized that unreliable science about fires had played a role in Willingham's conviction. The Commission found that arson investigators who testified for Willingham's trial prosecutors had relied on what were then common beliefs, but which by 2011 were generally recognized to be incorrect.[254]

On October 24, 2012, members of Mr. Willingham's family filed a petition with the Texas Board of Pardons and Appeals asking that he be posthumously pardoned because, they alleged, he had been wrongfully executed for a crime he did not commit.[255]

iv. Claude Jones

New DNA tests completed in November 2010 raised significant doubts about the guilt of Claude Jones, whom Texas had executed in December 2000. Mr. Jones' conviction was based principally on a strand of hair recovered from the scene of the crime – hair that the prosecution had asserted was Jones'. The hair was the only *physical* evidence that purportedly tied Jones to the crime scene. The only other evidence tying him there was testimony (later recanted) by an a alleged accomplice. Under Texas law, the alleged accomplice's testimony was insufficient to convict Jones in the absence of independent corroborating evidence.

The technology to do proper DNA testing did not exist at the time of Jones' trial. Prior to his execution, Jones unsuccessfully asked the Texas courts and Governor George W. Bush to issue a stay so that the hair could be subjected to DNA testing. Governor Bush was not advised by lawyers in his office that Jones was seeking DNA testing or that it might tend to exonerate

him – even though Governor Bush had issued a stay to permit DNA testing in another death row inmate's case.[256]

The testing in 2010 showed that the hair was not Jones'. Instead, the tests, done by Mitotyping Technologies in Pennsylvania, showed that the hair was from the victim. The Innocence Project's Barry Scheck said, "The DNA results prove that testimony about the hair sample on which this entire case rests was just wrong." He added, "Unreliable forensic science and a completely inadequate post-conviction review process cost Claude Jones his life."[257] Mr. Scheck said, "I have no doubt that if President Bush had known about the request to do a DNA test of the hair he would have issued a 30-day stay in this case and Jones would not have been executed."[258] The *Texas Observer* reported that the DNA test results mean that "Jones' case now falls into the category of a highly questionable execution – a case that may not have resulted in a conviction were it tried with modern forensic science."[259]

v. Carlos DeLuna

In May 2012, the *Columbia Human Rights Law Review* published a book-length article concluding that Texas had executed Carlos DeLuna in 1989 for a murder actually committed by Carlos Hernandez.[260] The authors concluded, after a five-year investigation, that DeLuna had been convicted, death-sentenced, and executed solely based on contradictory eyewitness accounts that mistakenly identified him as his "spitting image": Hernandez. The report said that the law enforcement investigation was extremely inadequate and was fatally flawed by many mistakes, failure to follow up on clues, and numerous other omissions. Moreover, DeLuna's court-appointed lawyer had been so inept that he had said it was likely that Hernandez had never existed – much as the lead prosecutor had told the jury at trial that Hernandez was a "phantom" made up by DeLuna. To the contrary, Hernandez had a history of using a knife in attacking people and was once jailed for killing a woman using the same knife as in the killing for which DeLuna was executed.[261]

After reading the study, *The Guardian*'s Ed Pilkington said, "It is now clear that a person was executed for a crime he did not commit."[262] Andrew Cohen, writing in *The Atlantic*, said "[T]his intense piece establishes beyond any reasonable doubt" that Texas executed Carlos DeLuna "for a murder" committed by Carlos Hernandez. Cohen noted that in investigating a pathbreaking three-part *Chicago Tribune* series about this case in June 2006, *Tribune* reporters had found five people to whom Hernandez had admitted killing both (a) the victim for whose killing DeLuna had been executed and (b) another woman four years earlier for which Hernandez had been indicted but not tried. One of the *Tribune* reporters told Cohen that what really had caught his attention was that whereas the crime scene photos showed tremendous amounts of blood, DeLuna, arrested nearby soon after the crime, had no blood on him. Moreover, as Cohen pointed out, DeLuna's fingerprints were not found at the crime scene, and when arrested he did not have on him either the hair or fibers from the victim. Cohen said that "the only eyewitness to the crime" itself – as opposed to eyewitnesses to, for example, someone's being near the crime scene -- had "identified DeLuna" when DeLuna "was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene." In short, Cohen said -- after presenting a top 10 list of serious problems with the case against DeLuna -- that this case involved "epic malfeasance and misfeasance."[263]

vi. Troy Davis

Georgia's execution of Troy Davis on September 21, 2011 was the most controversial in many years. Herein, after summarizing briefly some of the last significant legal developments, there is a discussion of some of the ongoing issues illustrated by Davis' case.

On August 17, 2009, the Supreme Court took the highly unusual action of transferring Davis' petition for an original writ of habeas corpus to a federal district court in Georgia. The district court was instructed to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence."[264] In responding to the two dissenting justices, Justice Stevens' concurrence, joined by Justices Ginsburg and Breyer, noted that "seven of the State's key witnesses have recanted their trial testimony; [and] several individuals have implicated the State's principal witness as the shooter."[265]

Following a hearing, the district judge found that Davis had not met the extraordinarily high burden set by the Supreme Court.[266] The district judge also questioned the credibility of several witnesses who had, in whole or part, recanted their trial testimony prior to the hearing.[267]

Among the many high-profile people who attacked Davis' execution (in addition to the former prison officials and conservatives discussed above) was former President Jimmy Carter – who in 1973 as Governor had signed into law Georgia's post-*Furman* death penalty statute. As far as this chapter's author can discern, President Carter, while eventually supporting a moratorium on executions, had never before called for abolition of capital punishment. But on the night of Davis' execution, he said that this execution called into question the whole capital punishment system. He stated, "If one of our fellow citizens can be executed with so much doubt surrounding his guilt, then the death penalty system in our country is unjust and outdated."[268] Conservative former Republican Congressman and United States Attorney Bob Barr of Georgia stated, "Imposing a death sentence on the skimpiest of evidence does not serve the interest of justice."[269]

(a) Extraordinarily High Burden on a Death Row Inmate to Disprove Guilt, If Evidence Emerges Belatedly

The courts' disposition of Troy Davis' case has implications for future cases in which there are doubts about innocence.

The first implications involve 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 an initial state postconviction proceeding may be raised in federal habeas corpus, although the circumstances under which the federal court may grant relief even in a first federal habeas corpus proceeding have been substantially curtailed by the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA) – the statute that has been referred to repeatedly above as amending the federal habeas law to make it far more difficult for federal courts to rule in favor of meritorious constitutional claims.[270]

Where, as in Mr. Davis' case, 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 subsequent federal habeas corpus proceedings.

Even when the newly developed evidence creates a real question about whether the defendant is actually innocent, the federal courts' doors are usually effectively closed to second or subsequent habeas proceedings. The AEDPA has a very narrow exception for 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."[271]

When that provision of the AEDPA, along with Georgia's severe restrictions, made it impossible for Mr. Davis to secure relief based on his new evidence, he filed a petition to the United States Supreme Court for an original writ of habeas corpus, asserting that it would be unconstitutional to execute him because the new evidence created a grave danger that an innocent man would be executed. When, as noted above, the Supreme Court transferred Davis' petition for an original writ of habeas corpus to a federal district court in Georgia "for hearing and determination," the Supreme Court set forth an extremely high legal standard for Mr. Davis to meet: that "evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[272]

That legal standard could virtually never be met. Undoubtedly, many people who would never have been convicted (by proof of guilt beyond a reasonable doubt) if the new evidence had been presented at trial will not be able "clearly" to prove their innocence via evidence that even an effective trial lawyer could not have secured at the time of trial.

(b) Clemency Proceedings Theoretically Might Be, but Usually Are Not, Fail-safes to Permit Consideration of Facts and Equitable Arguments That Are Barred from Judicial Consideration

Clemency proceedings could be fail-safes to permit consideration of facts and equitable arguments that emerge so late that the AEDPA and other legal hurdles prevent their consideration by the courts. However, clemency proceedings have become far less likely to be fail-safes in recent decades than in the pre-1972 incarnation of capital punishment. The death penalty has become considerably more politicized since the death penalty re-emerged in the mid-1970s, making it far more difficult to secure clemency than before.

One of the few contexts in which some death row inmates – but not Troy Davis – have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt. Yet, even where such doubt should exist, governors, pardons and paroles boards, and other clemency bodies usually deny relief. When they do so, they often cite the number of different occasions when the death row inmate unsuccessfully attempted to present claims in court. These recitations almost always fail to mention that the courts either completely failed to consider the new evidence bearing on guilt/innocence, or else 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) Failure in Clemency to Consider the Unavailability of Life Without Parole When the Death Row Inmate Was Tried, Where It Became Available for Those Sentenced Thereafter

Life without parole was not an available alternative to the death penalty for capital murder at the time of Troy Davis' trial. If it had been, it is quite possible that he might have received life without parole rather than death. Interviews of actual jurors by the National Jury Project have revealed that many jurors have voted for capital punishment for defendants they did not believe should be executed. They did so because they had the misimpression that the alternative was parole eligibility in as little as seven years. To the extent that life without parole is now an alternative and jurors believe that it really means – as it does – that there is no possibility of parole, it is quite possible that they will vote for life without parole instead of the death penalty. This is particularly likely to occur where jurors have lingering doubt about guilt, or believe that the defendant should be severely punished but not executed.

The fact that life without parole is now, but was not at the time of trial, an available alternative to the death penalty in Georgia is one of many reasons to believe that if Davis' case had been tried in recent years, he would not – even if convicted – have received the death sentence. Yet, this was not considered in his clemency proceeding. The same is likely true in many cases in various states.

A particular example of the impact of life without parole's now being a recognized sentencing alternative in Georgia is the case of Brian G. Nichols. Nichols was convicted of four murders of government employees, including a judge and court reporter killed in a courtroom. No one doubted that Nichols had killed these people. After a highly contested and extremely expensive trial in 2008 (almost two decades after Davis was death-sentenced), Nichols was sentenced to multiple life sentences without parole.[273]

(d) Studies Regarding Reliance on Eyewitness "Identifications" and "Confessions"

(1) Eyewitness Errors: The Single Largest Cause of Wrongful Convictions

Much of the public furor about Troy Davis' execution arose from the fact that there was no physical evidence linking him directly to the capital crime and that the principal evidence against him was the testimony of eyewitnesses – most of whom recanted their testimony thereafter, either completely or partially.

There was, by the time of Davis' execution, a growing awareness that reliance on eyewitness identifications is fraught with danger. Much of this awareness has been generated by analyses of what led to the convictions of people whose innocence was later proven.

Most often, these exonerations have been based on DNA evidence. Yet, DNA evidence does not exist in over 80% of capital murder cases. Hence, it is not available to exonerate people – like Troy Davis – in whose cases such evidence does not exist. But there is no reason to believe that the problems that caused the convictions of people whom DNA has been able to exonerate exist only in the small minority of cases in which DNA evidence is available. Rather, there is every reason to believe that these problems exist in cases in which DNA is not available to exonerate people.

Accordingly, these analyses raise great cause for concern about basing convictions – and, in particular, executions – on the types of evidence, like eyewitness identifications, that are so frequently responsible for convicting innocent people.

One of these analyses was issued by the Center on Wrongful Convictions at Northwestern Law School in 2001. The Center analyzed the cases of 86 death row exonerees. It found various reasons why innocent people had been wrongly convicted in capital cases. Some cases involved more than one reason. These reasons were: eyewitness error – *from confusion or faulty memory*: 46 cases; government misconduct – *by both the police and the prosecution*: 17 cases; junk science – *mishandled evidence or use of unqualified "experts"*: 9 cases; snitch testimony – *often given in exchange for a reduction in sentence*: 10 cases; false confessions – *resulting from mental illness or retardation, as well as from police torture*: 8 cases; and other, such as *hearsay, questionable circumstantial evidence, etc.*: 29 cases.[274]

Consistent with the Center's results, the Innocence Project has reached the following conclusion, based on analysis not limited to death penalty cases: "Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing. While eyewitness testimony can be persuasive evidence before a judge or jury, 30 years of strong social science research has proven that eyewitness identification is often unreliable."[275]

Eyewitnesses can be honestly incorrect, even without any effort by the police or prosecutors to affect their testimony. The *Chicago Tribune*'s Steve Chapman noted that "[i]n one experiment, a 'customer' went into a convenience store to buy a soft drink with a traveler's check, which required him to provide an ID and spend a few minutes conversing with the clerk. Later, the clerks were asked to find the person in a group of photos. Forty-one percent made a wrong pick."[276]

Such errors can occur, as Chapman also recognized, when the witness is very confident. For example, rape victim Jennifer Thompson made an intense effort while being raped to study and note "every single detail on the rapist's face" so she could identify him. Nonetheless, the person whom she repeatedly identified was innocent. After many years, DNA exonerated him and implicated the real perpetrator. Thereafter, Ms. Thompson and the person wrongfully convicted have made numerous public appearances together to discuss the problems that can exist with eyewitness identifications.[277]

Very often, as in the Troy Davis case, the eyewitnesses' encounters with the crime are far briefer and more confusing than in either the convenience store experiment or the Jennifer Thompson case. This further increases the chance of error.

In August 2011, the New Jersey Supreme Court set new guidelines for assessing eyewitness identifications in the context of lineups, if the defense presents a basis for challenging the identifications.[278] The court issued the guidelines when deciding a case in which, prior to trial, the eyewitness (whose testimony was the key prosecution evidence) said a detective was "nudging" him to identify the defendant.[279] Writing for the unanimous court, Chief Justice Stuart Rabner noted that eyewitness misidentification is the largest cause of wrongful convictions in the United States.[280] The *New York Times*, reporting in the wake of the New Jersey Supreme Court's decision, said, "The idea that human memory is frail and suggestible has gradually gained acceptance among leaders in law enforcement, buttressed by more than 2,000 scientific studies demonstrating problems with witness accounts and the DNA exonerations of at least 190 people whose wrongful convictions involved mistaken identifications. About 75,000 witness identifications take place each year, and the studies suggest that about a third are incorrect."[281]

In July 2012, the New Jersey Supreme Court adopted a rule that contained instructions that must be given to jurors before they begin deliberating in criminal cases, in order to deal with what it called the "troubling lack of reliability in eyewitness identifications." One instruction, to be given when a witness and the person identified are of different races, is that "research has

shown that people may have greater difficulty in accurately identifying members of a different race." Another instruction points out that "memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex." In another rule, the New Jersey Supreme Court requires that law enforcement officers make a detailed record regarding how an identification took place.[282]

(2) False Confessions by Innocent People

A study released in 2010 concerned another important reason – not presented by Troy Davis' case – why many innocent people have been convicted of crimes: confessing to crimes they did not commit. Professor Brandon L. Garrett of the University of Virginia School of Law studied over 40 cases since 1976 in which people had confessed to crimes that DNA evidence subsequently proved they did not commit. He reviewed trial transcripts, recorded confessions, and other materials to determine how apparently incriminating facts had ended up in false confessions. He found that during interrogations, police – intentionally or not – had provided important case facts to people from whom they then secured "confessions."[283] He was surprised by how complex the "confessions" were. He told the *New York Times* that "almost all of these confessions looked uncannily reliable," replete with details that must have come from the police. He said that while he would have expected there to be some cases in which the police had introduced facts into the questioning process, "I didn't expect to see that almost all of them had been contaminated." Over half of the innocent people whose cases Professor Garrett studied were "mentally" disabled, under age 18 when questioned, or both. "Most were subjected to lengthy, high-pressure interrogations, and none had a lawyer present."[284]

In the Virginia case of Earl Washington, Jr., "a mentally impaired man who spent 18 years in prison and came within hours of being executed for a murder he did not commit," the police fed him erroneous information that he included in his "confession." That inaccurate "fact" had appeared in an early police report. Steven A. Drizin, director of Northwestern University's Center on Wrongful Convictions, told the *New York Times* that law enforcement's providing suspects with details about crimes "is the primary factor in wrongful convictions," because "[j]uries demand details from the suspect that make the confession appear to be reliable – that's where these cases go south." Videotaping entire interrogations, which is required in some circumstances in some places, could alleviate the extent in which such "contamination" occurs and goes uncorrected.[285] Other suggestions are to bar police "from lying about nonexistence evidence [and] from inducing a suspect to imagine leniency"; to require police "to corroborate a confession with stringent evidence"; and to assign postconviction "challenges of confessions … to judges and prosecutors other than those who tried the original cases."[286]

4. Mental Retardation

a. Apparent Misapplication of Atkins by Texas Leads to Execution in 2012

In *Atkins v. Virginia*,[287] the Supreme Court held it unconstitutional to execute a person with mental retardation. However, some states, "looking often to stereotypes of persons with mental retardation," have applied "exclusion criteria that deviate from and are more restrictive than the accepted scientific and clinical definitions," and thus arguably are permitting executions of people whose execution is unconstitutional under *Atkins*.[288]

Texas seems to be the worst of these, as exemplified by the legal test it used – far from the first time – in sanctioning the August 7, 2012 execution of Marvin Wilson. The two

organizations whose expertise in the field the Supreme Court specifically cited in *Atkins* are the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly the American Association on Mental Retardation) and the American Psychiatric Association.[289] Both organizations have long recognized that strengths can co-exist with weaknesses and that what is crucial in assessing mental retardation are the weaknesses and not the strengths (or such things as whether the person can tell lies). However, Texas has "a separate set of questions, known as the Briseño standard, that ask psychologists to determine whether the defendant has demonstrated leadership abilities or planning skills, whether their families thought the defendant was mentally retarded during development, or whether the defendant can lie."[290]

As the AAIDD stressed in its Supreme Court amicus brief in support of Marvin Wilson, Texas' standard, first enunciated in *Ex parte Briseño,*[291] "is based on false stereotypes and tethered to no scientific criteria. … Texas courts' departure from clinical standards has negated the constitutional protection for all but the most severely retarded offenders in Texas." In *Briseño*, the Texas Court of Criminal Appeals invented "a lay test to identify whether a claimant suffers such a 'level and degree of mental retardation' that 'a consensus of Texas citizens' would agree that the individual should be exempt from execution." This test "departs from the scientific definition of mental retardation and supplants clinical criteria with non-scientific factors, resulting in a grossly underinclusive definition of mental retardation. The Briseño factors … have no basis in research and capitalize on entrenched prejudices."[292]

Moreover, as the AAIDD stated, the *Briseño* court seemed to think that the 85% of the officially characterized mentally retarded people who are "mildly mentally retarded" are inconsistent with "the Texas outlook" and therefore cannot get relief in Texas' *Atkins* cases. So, the AAIDD said, in the absence of any guidance from the Texas legislature, "*Briseño* introduced seven non-clinical factors to the *Atkins* inquiry to reflect the subjective consensus in Texas about who *among* the mentally retarded should be subject to the death penalty." Accordingly, despite "*Atkins*'s wholesale ban on capital punishment for the mentally retarded, … *Briseño* reasoned that only a subset of individuals clinically deemed mentally retarded merit constitutional protection."[293]

Thus, the AAIDD said, the Texas Court of Criminal Appeals requires the use of "factors [that] were dictated without reference to scientific or professional authority and instead appear to be based entirely on the judges' own impressions and assumptions. The contra-clinical inquiry circumvents *Atkins* and subjects to capital punishment those who are death-ineligible under AAMR/AAIDD and APA standards," to which the Supreme Court referred in footnote 22 of *Atkins*.[294]

Applying these factors, the Texas Court of Criminal Appeals upheld the death sentence of Marvin Wilson, despite his IQ of 61 and his having been "diagnosed with mild mental retardation by a court-appointed specialist, the only expert in the case."[295] Wilson got no relief from the federal courts and was executed on August 7, 2012.[296]

b. Georgia's Uniquely Harsh Burden of Proof Almost Results in February 2013 Execution of Inmate Now Believed to Be Mentally Retarded by All Experts in His Case

Georgia's death penalty law – ironically, the first in the country to bar executions of people with mental retardation – is unique in requiring that defendants at trial must establish their mental retardation beyond a reasonable doubt. The *en banc* Eleventh Circuit upheld the

constitutionality of this burden of proof in deciding Warren Lee Hill's case in November 2011.[297]

Mr. Hill was on the verge of being executed on February 19, 2013 – and was "being prepared for lethal injection" – when the Eleventh Circuit granted a stay, by a 2-1 vote.[298] The court's order said, "At issue is whether the newly filed affidavits by the State's psychiatric experts that the petitioner is mentally retarded entitle the petitioner to a brief stay" -- and the majority held that a "provisional stay" was warranted. In 2000, Hill's four experts had testified that he had mental retardation, but the prosecution's three experts had "testified" that he was not mentally retarded. The state court had concluded that Hill had shown "by a preponderance of the evidence" that he *was* mentally retarded, but not "beyond a reasonable doubt." Then, in February 2013, Hill presented affidavits in which "*all* three of the State's experts … [have] revised [their] opinion[s] and now testif[y] that Hill meets the criteria for mental retardation." The Eleventh Circuit ordered Hill to demonstrate that he could meet the federal habeas statute's "stringent requirements … for leave to file a second or successive petition."[299]

c. Texas Psychologist Whose Testimony Helped Put on Death Row 16 Men Who Asserted Mental Retardation Is Reprimanded

A Texas psychologist, George Denkowski, examined and found not to be retarded 14 people who were as of April 2011 on Texas' death row and two others who had been executed after he examined them. In settling and dismissing its complaint against him in April 2011, the Texas State Board of Examiners of Psychologists issued Dr. Denkowski a reprimand, and he agreed not to perform such evaluations in any more criminal cases and to pay a $5,500 fine.[300] Earlier, in February 2009, the Board, in upholding a complaint against Dr. Denkowski, found that he had made "administration, scoring and mathematical errors" in three capital punishment case evaluations, in a manner that caused him to conclude that the defendants did not have mental retardation.[301]

After the April 2011 settlement, Denkowski's critics stated that the settlement could provide arguments for the 14 still living death row inmates whom he had found not to have mental retardation. Various psychologists and the American Association on Intellectual and Developmental Disabilities have attacked Dr. Denkowski's techniques in assessing people for mental retardation. His methods have been attacked as having "no scientific basis," for not being "firmly supported by empirical evidence," and for being "a pretty radical departure" from accepted assessment methodologies.[302]

However, although the Texas Court of Criminal Appeals remanded at least three of the 14 cases, it affirmed the death sentences when the first two cases returned to it. In both cases, there was a strong dissent joined in by two justices – who concluded that these two death row inmates were both mentally retarded under the extremely stringent *Briseño* test (discussed above in the context of Marvin Wilson's case).[303]

5. Mental and Physical Disabilities

a. Policies of Three Leading Professional Groups

The ABA, the American Psychiatric Association, and the American Psychological Association all have adopted three policies concerning mental disability and capital punishment.[304] The first would ensure that *Atkins* is implemented in a manner that comports with the definition of mental retardation most recently endorsed by the American Association of

Mental Retardation (now the American Association on Intellectual and Developmental Disabilities). It would also exempt from execution people who have dementia or traumatic injury at the time of the crime, since these disabilities have very similar impact on intellectual adaptive functioning as mental retardation but may not come within the definition of mental retardation because they always (dementia) or usually (head injury) arise after age 18.

The second policy is designed to prohibit the execution of people with severe mental disabilities where demonstrated impairments of mental and emotional functioning at the time of the offense would make a death sentence disproportionate to their culpability.[305]

The third policy deals with a death-sentenced prisoner: (a) whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly impaired by a mental disorder or disability, (b) whose mental illness impairs his ability to assist counsel or otherwise to take part meaningfully in postconviction proceedings with regard to one or more specific issues as to which his participation is necessary, or (c) whose understanding of the nature and purpose of the punishment has become so impaired as to render him incompetent for execution.[306]

As discussed below in Part II.G., the Supreme Court's January 8, 2013 decision in *Ryan v. Gonzales* stated that if a death row inmate's mental inability to help his counsel is likely to continue *indefinitely*, his execution should not be stayed – even if there are one or more issues on which the inmate's help would be important to his counsel. The three professional organizations' policy on that kind of situation provides that the sentence should be changed to life imprisonment.

b. Examples of Executions of People with Serious Mental Disabilities

In October 11, 2010, Cheryl Hendrix, who as an Arizona judge had sentenced Jeffrey Landrigan to death, stated in an affidavit that she would instead have sentenced him to life without parole if she had known of available evidence that was never presented to her. In particular, a psychologist had concluded that Landrigan's childhood made him predisposed, in Judge Hendrix's words, to "non-conforming conduct, that is to commit criminal activities."[307] Other evidence not presented at trial included documentation that Landrigan "has brain damage [and] suffered from fetal alcohol syndrome" and that the psychologist who interviewed Landrigan before the sentencing hearing had recommended additional psychological or psychiatric testing. Moreover, his childhood included being abandoned by his biological parents and having an adoptive mother who drank heavily and beat him often – once hitting him with a frying pan in a way that left a dent in his head. In addition, a neuropsychologist said that Landrigan's genetic make-up as well as prenatal and early development circumstances diminished his ability to deal with daily living and to understand what leads to and results from his actions.[308] Landrigan, who had insisted that his trial counsel not present mitigating evidence,[309] was denied relief and was executed on October 26, 2010.[310]

Virginia executed Teresa Lewis on September 23, 2010.[311] Among the many who had urged that she be granted clemency was author (and lawyer) John Grisham. He noted that the trial judge had sentenced the two triggermen in the gruesome murder-for-hire to life without parole but had sentenced Mrs. Lewis to death, on the premise that she was the mastermind and more responsible than the actual killers. However, Mr. Grisham said, evidence (mostly developed after the trial, which was held without a jury) showed that Lewis' IQ was slightly above 70 – so she did not have "the basic skills necessary to organize and lead a conspiracy to commit murder for hire"; she had "dependent personality disorder," leading her to follow the lead of people upon whom she relied, particularly men; she had numerous physical problems that

led her to become addicted "to pain medication" and therefore had impaired judgment; and "[s]he had not a single episode of violent behavior in the past." One of her two co-defendants, Matthew Shallenberger, had an IQ of 113. When interviewed by a private investigator two years before committing suicide, Mr. Shallenberger "described Lewis as not very bright and someone who could be easily duped into a scheme to kill her husband and stepson for money." The other co-defendant stated in an affidavit that "[a]s between Mrs. Lewis and Shallenberger, Shallenberger was definitely the one in charge of things, not Mrs. Lewis." Grisham concluded, "In this case, as in so many capital cases, the imposition of a death sentence had little to do with fairness. Like other death sentences, it depended more upon the assignment of judge and prosecutor, the location of the crime, the quality of the defense counsel, the speed with which a co-defendant struck a deal, the quality of each side's experts and other such factors."[312]

On November 15, 2011, Ohio executed Reginald Brooks. His counsel asserted that Brooks was a paranoid schizophrenic who had severe mental illness long before he shot his sons. His attorneys said Brooks thought his co-workers and wife were poisoning him and had asserted conspiracy theories about the killings that included police, his relatives, and a look-alike. Prosecutors conceded that Brooks was mentally ill but said this neither led to the killings nor made him incompetent. Brooks' counsel stated that the prosecution had withheld information that would have helped a mental health defense and led to a different court ruling. Indeed, former Judge Harry Hanna, who had been a member of the three-judge panel that convicted Brooks and voted to impose the death penalty, told the Ohio Parole Board he would not have voted for the death penalty if had known of information in the police reports that had been provided to Brooks' counsel only shortly before his execution. Governor John Kasich decided not to commute Brooks' death sentence.[313]

Less than two months earlier, Governor Kasich reacted differently to the mental illness and other mitigating evidence presented on behalf of Joseph Murphy, whose death sentence he commuted to life without parole on September 26, 2011. The Governor issued a statement noting that "as a child and adolescent Murphy suffered uniquely severe and sustained verbal, physical and sexual abuse from those who should have loved him," that when the Ohio Supreme Court voted 4-3 to uphold his death sentence, the late Chief Justice Thomas Moyer, dissenting, "said that 'in all of the death penalty cases I have reviewed, I know of no other case in which the defendant … was as destined for disaster as was Joseph Murphy,'" and that "I agree with Chief Justice Moyer [a conservative Republican], the National Association of Mental Illness and the Parole Board's unanimous 8-0 decision that considering Joseph Murphy's brutally abusive upbringing and the relatively young age at which he committed this terrible crime, the death penalty is not appropriate in this case."[314] The Ohio Public Defender's Office also asserted that Murphy was "borderline mental[ly] retard[ed]."[315]

On November 6, 2012, Oklahoma executed Garry Allen. He had been diagnosed as having schizophrenia. In 2005, the Oklahoma Board of Pardons and Paroles had recommended that his sentence be commuted to life without parole. In that same year an Oklahoma State Penitentiary doctor had concluded, after a psychological examination, that Allen had dementia arising from seizures, drug abuse, and having been shot in the face. During his execution, he spent his last minutes making "unintelligible ramblings."[316]

Two days later, Rachel Petersen, having witnessed and reported on Allen's execution – the eighth she had witnessed, wrote an opinion column. She said that as she had sat down to write her story on the night of the execution, she had "searched for the words within me to describe the huge injustice I had just witnessed" – but did not write of "injustice" because that would reflect her opinion. Now, she did opine: "I watched as … one of Allen's attorneys lowered her head in her hands as Allen rambled on unintelligibly about Obama, Romney and

Jesus. In fact, Allen said a lot of things in his lengthy ramblings – I just couldn't understand what he was saying. … My judgment, my bias, my opinion: Allen had no idea he was about to be executed. … And when the deputy warden said 'Let the execution begin,' Allen turned his head and looked at him and said 'Huh? What?' And then when the lethal dose of drugs ran through his body, he looked again at the deputy warden and loudly groaned. I truly believe he didn't know what was happening to him. And now, … I am questioning myself. I was a witness, I was there, and I sat quietly taking notes with a pen and paper. I watched an injustice take place before my own eyes and I did nothing. I merely scribbled words on a piece of paper."[317]

c. New Consideration of Mental Disabilities Following Multiple Killings

Jared Loughner was charged with capital murder for his January 8, 2011 mass-shootings in Tucson, Arizona, in which he shot Representative Gabrielle Giffords, killed six (including a federal judge), and wounded 12 others. After the shootings, Loughner was diagnosed with schizophrenia and forcibly received psychotropic drug treatments. After a federal judge held that Loughner could understand the allegations against him, the prosecution (which initially had said it might seek the death penalty) and defense agreed upon a plea that led him to be sentenced to life without possibility of parole. Having resigned her seat due to her injuries, Former Representative Giffords attended Loughner's sentencing hearing on November 8, 2012. She was one of the victims who favored the plea agreement. The judge, in sentencing Loughner, recommended that he remain indefinitely in a Missouri prison medical facility. "The court-appointed psychologist who treated Loughner ha[d] warned" that Loughner "remained severely mentally ill and his condition could deteriorate under the stress of a trial."[318]

Notably, in the wake of this and other mass shootings, in some of which (as with Loughner) the shooters have survived, there has been no discernible mention of the death penalty in the public discourse about steps that could make such crimes less likely. Among the major topics has been what to do about people who have displayed strong indications of, or have been diagnosed with, severe mental illness.

A particularly notable journalistic series, *Trouble In Mind*, on "the intersections of the mental health and criminal justice systems in Texas," ran, in six installments, in the *Texas Tribune* from February 20 to February 26, 2013. The series focuses on Texas death row inmate Andre Thomas, who "began exhibiting signs of mental illness as a boy," then in 2004 "committed a brutal triple murder," and while imprisoned became blind "because he pulled out both of his eyes." In part one, writer Brandi Grissom says this "case offers a lens through which to examine the effects of a mental health system in Texas that is too fractured and too underfunded to care for the mentally ill[,] … a system that often punishes the deluded instead of helping them to recover and protecting society from them."[319]

The series' final story notes that "[i]n 2009, months after he pulled out his second eye and ate it, the Texas Court of Criminal Appeals denied Thomas' appeal."[320] In Judge Cathy Cochran's concurring statement she said, "This is an extraordinary tragic case." She noted that Thomas "has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia. He also has a long history of drug and alcohol abuse. … [His] behavior in the months before the killings became increasingly 'bizarre' … ." Twice within 20 days before the killings, he tried to kill himself, was taken to places where he could be observed or get psychiatric treatment but left before being seen. The concurrence ended by saying, "This is a sad case. Applicant is 'clearly "crazy," but he is also "sane" under Texas law.'"[321] As of March

2013, with his federal court litigation pending, "Thomas is still at the Jester IV psychiatric prison, and his eyelids are surgically closed."[322]

On March 1, 2013, the *Dallas Morning News* editorialized that Andre Thomas' "saga … resembles a medieval horror story featuring madness, a family's homicidal slaughter, … and a waiting executioner. Knowing it's real makes the story almost too grotesque to stomach." It is a case, the editorial said, that "challenges this state's collective conscience." The editorial concluded by quoting from the concurrence in the Texas Court of Criminal Appeals (quoted in the preceding paragraph above), and then saying: "It seems, rather, that the world has gone mad. That this human being is responsible for his psychotic actions is a preposterous notion. To strap down and terminate the life of such a tortured creature is the way a medieval society would deal with its embarrassments. Texas must be better than that, and the courts should save us from insane ideas of what constitutes justice."[323]

6. Costs of the Capital Punishment System

As is evident from materials cited earlier in this chapter, the costs of the death penalty system have been playing an increasing role in the public discourse over capital punishment.

In Utah, the first-ever comparative analysis of the costs to Utah's state and local governments of capital punishment and life without parole was performed at the request of Representative Steve Handy, a Republican. He told the Law Enforcement and Criminal Justice Interim Committee in November 2012 that a fiscal analyst for the legislature had "unofficially" stated that seeking the death penalty resulted in an extra $1.6 million cost per inmate from trial on.[324]

A three-year cost analysis by Ninth Circuit Senior Judge Arthur L. Alarcón and Loyola Los Angeles Law School Adjunct Professor Paula M. Mitchell was published in 2011. After discussing the "true costs of administering the death penalty in California,"[325] they concluded, among other things, that since 1978, "California taxpayers have spent roughly $4 billion to fund a dysfunctional death penalty system." Noting the absence of legislative action to "improve th[e] death row deadlock," they said that the voters have instead exacerbated the problem by adding to the list of death-eligible crimes.[326] They "estimated that the additional costs of capital trials, enhanced security on death row and legal representation for the condemned adds $184 million to the budget each year," and that this number would increase greatly without ameliorative action. They concluded that keeping the death penalty system intact would require $85 million more per year, reducing the number of death-eligible crimes would save $55 million per year, and abolishing the death penalty would save about $1 billion every five or six years.[327]

Particularly in New York, there has been growing criticism, most notably by federal judges, of federal prosecutors' costly but predictably unsuccessful efforts to secure federal death sentences. For example, in 2010, Judge Nicholas G. Garaufis said it would be a useless expenditure of time and money to seek the death penalty for Vincent Basciano, who was serving life without parole "under extremely restrictive conditions in one of the nation's most secure penal institutions." After pretrial preparation, extensive jury selection, and trial, the jury took only two and a half hours on June 1, 2011 to vote unanimously against imposing the death sentence. The estimated cost of this unsuccessful attempt to seek the death penalty exceeded $10 million.[328]

In his 2012 book, Judge Frederic Block (who, as does Judge Garaufis, sits in the Eastern District of New York) pointed out that during the guilt phase of the trial of Kenneth McGriff, "it became clear to me that there was no realistic chance" that the jury would vote for the death penalty. He figured that the government also realized "that the prosecutors would simply be

going through the motions and wasting everybody's time and valuable judicial resources, as well as the taxpayers' money," by continuing to seek capital punishment. So, before the jury rendered its guilt phase verdict, Judge Block suggested that the prosecutors tell Attorney General Alberto Gonzalez "that in this judge's opinion, there is not a chance in the world there would be a death verdict in this case." The Attorney General declined to change his mind. After the penalty phase evidence and argument, "It took the jurors less than an hour – over lunch – to do what everyone following the case believed would happen. They rejected the death penalty in favor of life imprisonment." After the trial, Judge Block said in a *New York Times* op-ed that the Eastern District's judges and prosecutors would be hard pressed to perform their other duties if so many death prosecutions continued to take place there at a time of federal budget cuts.[329]

Through mid-March 2013, only one federal death sentence has been imposed in New York – and that one was reversed and remanded on appeal. That case is likely to have a new penalty phase trial later in 2013.

7. Lack of Substantial Evidence of Deterrence

In April 2012, the National Research Council, associated with the National Academy of Sciences, issued a report by its Committee on Deterrence and the Death Penalty. After analyzing past studies regarding deterrence and capital punishment, the committee stated:

> The committee concludes that research to date is not informative about whether capital punishment decreases, increases, or has on effect on homicide rates. Therefore, these studies should not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Claims that research demonstrates that capital punishment decreases or increases the homicide rate or has no effect on it should not influence policy judgments about capital punishment.[330]

Commenting on the committee's work, Betsey Stevenson and Justin Wolfers of the University of Pennsylvania's Wharton School said, "[W]e have no evidence at all on how would-be murderers perceive the risk of execution if they are caught, which is what really matters for deterrence."[331] . They added, in light of the "lockstep" movement of homicide rates across states and with Canada, that "the data do allow one conclusion that the National Academy should have emphasized more strongly: The death penalty isn't the dominant factor driving the fluctuations in the U.S. homicide rate."[332]

8. Possible Change in Way of Determining Opt-In to Prosecution-Friendly Habeas Provisions

As part of its re-authorization of the Patriot Act in 2006, Congress provided for a way to change the manner in which a state can be found to have "opted-in" to Chapter 154 of the Judicial Code, whose "special Habeas Corpus Procedures in Capital Cases"[333] for such states would "restrict access to habeas corpus relief and include, among other things, accelerated deadlines for the filing and resolution of federal habeas corpus petitions." To opt-in, a state must establish "in a statutorily specified way, a 'mechanism for the appointment, compensation, and reimbursement of [state postconviction counsel] that satisfies certain statutory standards.'"[334]

Once the change is implemented, the initial decision on opt-in will be made by the Attorney General of the United States (rather than federal courts in the jurisdictions from which the cases come), subject to *de novo* review by the United States Court of Appeals for the District

of Columbia. Opponents of this change (including the ABA) assert that Congress has created the strong possibility of 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, many opponents have observed that – unlike the circuit courts around the country that have hitherto considered and uniformly rejected states' efforts to opt in – the D.C. Circuit has *no* experience with the determinative issue regarding "opt-in," that is, the quality of postconviction counsel in state court proceedings in capital cases.

In 2007, the Justice Department issued proposed regulations for implementing its new opt-in role. The Judicial Conference of the United States and the ABA expressed concerns that the proposal would allow states to opt-in without ensuring that there would be capable and properly compensated counsel.[335] Attorney General Mukasey approved the proposed regulations, but a temporary restraining order followed by a permanent injunction in January 2009 prevented the Justice Department from giving them effect unless the Department reopened the period for public comment for at least 30 more days and thereafter published a response to any newly received comments.[336] After soliciting more comments, the Obama Justice Department on November 23, 2010 withdrew the proposed regulations and said it would have to determine, through a new rulemaking process, what standards to apply in assessing state compliance with Chapter 154.[337] On March 2, 2011, the Justice Department submitted a notice, published in the *Federal Register* on March 3, 2011, announcing a new proposed rule that would create regulations on this subject.[338] On February 13, 2012, the Justice Department published a notice of certain changes to the proposed rule, thereby initiating a further public comment period.[339] On March 14, 2012, the ABA submitted significantly critical (although less so than previously) comments on the revised proposed rule.[340]

II. SIGNIFICANT LEGAL DEVELOPMENTS

A. ***Smith v. Cain,*** 132 S. Ct. 627 (2012), preceded by ***Connick v. Thompson***

In 2011, in *Connick v. Thompson*,[341] the Court dealt with a 42 U.S.C. § 1983 civil rights lawsuit by John Thompson, who was imprisoned for 18 years, 14 of them on death row. His convictions were vacated after his investigator found evidence of a crime lab report that, in violation of *Brady v. Maryland*,[342] the Orleans Parish District Attorney's Office had not disclosed to the defense during Thompson's earlier armed robbery case. His armed robbery conviction had led Thompson not to testify at his capital murder trial.

Thompson won his § 1983 trial against the District Attorney's Office for its failure to train the case prosecutors. But the Supreme Court reversed, stating that a district attorney is entitled to rely on prosecutors' professional training and their ethical obligation to understand *Brady* and to undertake legal research when they are unsure. The Court said that a district attorney has no constitutional obligation in these regards, unless there is some particular reason, such as a pattern of violations, to believe the prosecutors may not carry out their obligations. The Court noted that unlike police officers, attorneys have the tools to find, interpret, and apply legal principles. The Court said it was irrelevant that the District Attorney's Office had had many other convictions reversed due to its *Brady* violations, because those other violations did not involve scientific evidence.[343]

The four dissenting justices said that the evidence revealed that "[f]rom the top down … , members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations." Due to the District Attorney's misunderstanding of *Brady* (as reflected in his testimony at the § 1983 trial),

similar lack of understanding of *Brady* by other office leaders with direct training responsibility, office prosecutors' failure to receive training about *Brady*, and the office's failure to keep prosecutors aware of legal developments about *Brady* requirements, the dissenters said that "it was hardly surprising that *Brady* violations in fact occurred" in Thompson's case. The dissenters stressed that Thompson's concern was about the failure to communicate accurately the obligations under *Brady* and to enforce those obligations effectively.[344]

Smith v. Cain involved another claim that the Orleans Parish District Attorney's Office had violated *Brady*. Here, the context was a postconviction proceeding involving the office's failure to disclose the chief police investigator's notes. Those notes included statements by a key state witness that conflicted with his identification of the defendant as a perpetrator. The Court held that the witness' statements in the undisclosed notes were "material" because there was a reasonable probability that their disclosure would have led to the case's result being different. Accordingly, Smith's conviction was reversed and the case was remanded for further proceedings.[345]

B. ***Maples v. Thomas,*** 132 S. Ct. 912 (2012)

An Alabama death row inmate, Cory Maples, was being represented in his state postconviction proceedings by two associates from a major law firm. After the particular associates handling the case left the firm and took on jobs at which they could not have continued their representation, they failed to notify either the court or their client (or local counsel) that they were withdrawing (in violation of Alabama law that required them to seek and secure leave to withdraw). Even though a partner at their firm had been involved to some extent all along and remained involved, no one else from the firm sought *pro hac vice* admission, entered an appearance, or otherwise told the Alabama court that the two departed associates no longer represented Maples. A local counsel had appeared, but as was frequently so in Alabama, he felt his role was limited to seeking *pro hac vice* admission for the out-of-state lawyers.

After a very long period of time, the postconviction petition filed by the since-departed lawyers was dismissed. The circuit court clerk in Alabama mailed a notice of that decision to those associates and to the local counsel. The firm's mail room returned to the clerk two envelopes that the clerk had addressed to the now-departed associates. The mail room noted on the unopened envelopes that those lawyers had left the firm.

If the envelopes had been opened and their contents analyzed, the partner and any newly involved associates would have learned of a ruling as to which a notice of appeal had to be filed within 42 days of its issuance. Since these lawyers did not know about the ruling, and local counsel paid no attention to it (because he assumed that the out-of-state lawyers would deal with it), no notice of appeal was filed prior to the deadline.

The clerk's office had received back – well before the 42-day time limit had expired – the two unopened envelopes bearing notations that the two associates were no longer at the large law firm. But the Alabama Circuit Court (the trial-level court) made no effort to find out from anyone (including the two departed associates, who had provided to the Alabama court system their personal phone numbers and home addresses; the law firm; or the local counsel) who (if anyone) was now handling the matter.

After the deadline had passed, Maples finally learned (in a letter from the prosecutor, who, notably, did not send a copy to Maples' attorneys of record – including his local counsel – or to anyone else acting on Maples' behalf) that although the state postconviction appeal deadline had passed, he still could file a federal habeas corpus petition. After getting the prosecutor's letter, Maples acted quickly. Through his mother, he contacted the out-of-state firm

and learned of the two associates' departures. Thereafter, different associates at the large firm sought unsuccessfully to have the Alabama Circuit Court order re-issued so that a timely appeal could be filed.[346] Then, due to the failure to appeal within the time limit, the Alabama Court of Criminal Appeals and the Alabama Supreme Court barred all of Maples' claims.[347]

Maples then sought to raise his federal constitutional claims in federal court. However, in a 2-1 decision, the Eleventh Circuit held that as a result of the failure to meet the state court's deadline for filing the notice of appeal, Maples' constitutional claims – regardless of how meritorious they might be and how much they might undermine confidence in the outcome of the case – had been irrevocably waived.[348]

The Supreme Court reversed, holding that under the circumstances the "cause" requirement for an exception to a procedural bar had been met. The question of whether the "prejudice" requirement for that exception had also been met was left for decision on remand.

The Court held that the facts were "extraordinary," because Maples' lawyers had abandoned him without leave of court, without informing him, and without there being any recorded substitution of counsel. Thus, he "was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door."[349] The Court added that whatever might have been done by other lawyers at the large firm after the two associates had left, the other lawyers did not secure any legal authority to act on Maples' behalf until his time to appeal had lapsed, and they were not his authorized agents. The Court also found it noteworthy that the State had acted as though the local counsel had no continuing role in the case – for example, not copying him on its response to Maples' postconviction petition or on its subsequent letter to Maples. Moreover, because none of his counsel had withdrawn, Maples "had no right personally to receive notice" of the decision dismissing his state postconviction petition, and he got none.[350]

The Court's opinion began its analysis by pointing out that, as found by the ABA's Alabama Death Penalty Assessment Report, "Alabama sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial." Alabama also does not provide for or mandate appointed counsel to get any death penalty-specific education or training. The Court further cited the ABA report in pointing out that these appointed counsel are undercompensated. In further reliance on the ABA report, the Court said, "Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings." Instead, Alabama has chosen to depend on the work of usually well-funded out-of-state volunteers. Sometimes, however, as the ABA report had noted, death-sentenced prisoners get "no postconviction representation at all."[351]

C. ***Wetzel v. Lambert,*** 132 S. Ct. 1195 (2012) (*per curiam*)

This is case involving a federal habeas corpus court's granting the writ on the basis that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Quoting *Harrington v. Richter*,[352] the Court said, "Under § 2254(d) [as amended in 1996], a habeas court must determine what arguments or theories supported … the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."[353]

The Court held that the Third Circuit had erred in granting the writ, because it had focused only on part of the Pennsylvania Supreme Court's rationale. The Third Circuit had "overlooked" the Pennsylvania Supreme Court's alternative conclusion that "notations" on a

"police activity sheet" that had not been disclosed to the defense were (in the federal district court's words) "not exculpatory or impeaching" but rather "entirely ambiguous" and "speculative at best." Instead, the Third Circuit had looked only at a different conclusion by the state court: that even if the notations had impeachment value, that value "would have been cumulative." The Court said that if the state court's ambiguous/speculative conclusion about the document's content "was reasonable – not necessarily correct, but reasonable," then what the state court stated about cumulative impeachment was "beside the point." The Court found the Third Circuit's "failure … even to address the 'ambiguous' point" – and petitioner's purportedly "speculative" interpretation of the withheld notations – was "especially surprising, given that this was the basis of the District Court ruling."[354]

The Court did "not now opine" on the state court's ruling about ambiguity and speculation but said the ruling "may well be reasonable." Noting that any retrial would occur "*three decades* after the crime," which the Court said would be a "most daunting" challenge for the prosecution, the Court stated that a retrial should not be required "unless *each* ground supporting the state court decision is examined and found to be unreasonable under the AEDPA." Accordingly, the case was remanded so that this examination could be made with regard to the "overlooked" ground for the state court's ruling.[355]

The three dissenters (with Justice Breyer writing) disagreed with the majority's view that the "notations" could have been "entirely ambiguous." In any event, they said, the reason why the Third Circuit had not considered a state court ruling on ambiguity was because the state court *had not made* any such ruling. The dissenters stated that to the extent the state trial court had said anything on the point, it was that the "notation was *not* ambiguous," and that the Pennsylvania Supreme Court had simply noted that the State had asserted that the notations were ambiguous, and did not "adopt that rationale." Moreover, the dissent said that the Pennsylvania Supreme Court's use of the word "speculative" was merely a reference to the petitioner's assertion that the notation demonstrated his innocence – and thus related to the "materiality" basis for the state court's decision.[356]

As for materiality, the dissent pointed to the Third Circuit's apparent view that the State's "case against Lambert was unusually weak." The dissent said if that view were correct, "an innocent man has spent almost 30 years in prison under sentence of death for a crime he did not commit."

The dissent concluded that certiorari should not have been granted, because the issues were "fact-specific questions about whether a lower court properly applied the well-established legal principles that it sets forth in its opinion."[357]

D. ***Martel v. Clair,*** 132 S. Ct. 1276 (2012)

In 1994, death row inmate Kenneth Clair secured counsel for his federal habeas corpus case by seeking counsel's appointment under 18 U.S.C. § 3599. When two associates from the law firm representing him became employed by the Office of the Federal Public Defender (FPD), FPD became counsel of record. Following an August 2004 evidentiary hearing and the filing by February 2005 of posthearing briefs, the federal district court subsequently told the parties that it did "not wish to receive any additional material about the petition." The next month, Clair made a motion seeking substitute counsel, asserting that his FPD lawyers were attempting to overturn only his capital sentence and were not seeking to show that he was innocent. When the district court inquired about this motion, the FPD lawyers said they had met with Clair, and that he now desired the FPD's further representation. Six weeks later, Clair submitted a second motion seeking substitution, this time also alleging that his FPD lawyers had

not pursued properly newly found physical evidence from the scene of the crime. The district court denied this motion without making any "further inquiry" and denied the habeas petition that same day.[358]

The first of the Court's two unanimous holdings was that in assessing substitution of counsel motions in death penalty cases under 18 U.S.C. § 3599, "courts should employ the same 'interests of justice' standard that applies in non-capital cases under [§ 3006A]." The Court decided this issue because § 3599(e) does not say "*how"* this type of motion should be adjudicated. The State had asserted that the substitution could only be made when the inmate has had an "actual or constructive denial" of counsel, such as when counsel does not have the required legal qualifications, is conflicted out, or "has completely abandoned the client." The Court rejected that argument in light of the fact that § 3599 was clearly designed to give death row inmates greater rights with regard to counsel than provided by § 3006A. Hence, the Court concluded, Congress did not intend for substituting counsel to be more difficult under § 3599 than under § 3006A.[359]

The Court's second unanimous holding was that the district court did not violate the "interests of justice" standard by rejecting Mr. Clair's second substitution of counsel motion. The Court emphasized that this type of district court decision "is so fact-specific, it deserves deference" and may be overturned "only for an abuse of discretion." Despite the "new and significant charge of attorney error" in the new motion, the district court had acted within its discretion by rejecting it – in view of the "timing." After more than a decade of litigation, the district court was "putting the finishing touches" on its ruling dismissing the habeas petition when it got Mr. Clair's new letter. It had already told the parties that no further materials would be received after the evidentiary hearing and the ensuing briefing. "The case was all over but the deciding; counsel, whether old or new, could do nothing more in the trial court proceedings." In light of this particular fact pattern, the Court held that the district court did not abuse its discretion – "although the [district] court's failure to make any inquiry into Clair's allegations makes this decision harder than necessary."[360]

E. ***Martinez v. Ryan,*** 132 S. Ct. 1309 (2012)

Although this is not a capital case, it modifies language from a capital case, and it will have significant effects in a significant number of capital cases. These consequences will occur as a direct result of this decision – even if it is never extended as the dissent fears it inevitably will be.

The procedural context is that Arizona permitted claims of trial counsel's unconstitutional ineffectiveness to be raised for the first time *only* in a state postconviction proceeding (referred to by the Court as "an initial-review collateral proceeding"). As in many other states, such claims could not be raised on direct appeal. Moreover, the court-appointed postconviction lawyer failed to raise a postconviction claim that trial counsel had been ineffective. Hence, that claim was held procedurally barred when new postconviction counsel attempted to assert it in a *second* postconviction proceeding. When federal habeas counsel tried to raise the claim, it was held to be procedurally barred – by both the federal district court and the Ninth Circuit. These federal courts held that negligence or other ineffectiveness of the initial state postconviction counsel could not be "cause" for the failure to raise a claim at the time when state law required it to be raised.

The Court reversed, without reaching the issue of whether it would be *unconstitutional* to apply a procedural bar in this context: the failure to raise a claim of trial counsel's ineffectiveness on the first occasion where such a claim could have been raised. Instead, the

Court made an "equitable" holding. In so doing, it distinguished this situation from that in *Coleman v. Thompson*,[361] because in *Coleman* the state postconviction trial-level counsel *did* raise the issue of trial counsel's ineffectiveness and got a ruling on it (albeit an adverse ruling). The default in *Coleman* had been the failure to appeal that adverse decision within the state court system's time limit. The key distinction, in the Court's view, was that Martinez, unlike Coleman, never got – and, if procedural default were applied in federal habeas, never could get – a ruling by *any* court on his ineffective assistance of trial counsel claim.

In order to reach this holding, the Court found it "necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." The modification was "a narrow exception: Inadequate assistance of counsel at initial-review capital proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[362]

In justifying this conclusion, the Court pointed out that having an inadequate lawyer in the initial state postconviction proceeding presents a prisoner with "similar difficulties vindicating a substantial ineffective-of-assistance-of-trial-counsel claim" as would having an ineffective appointed counsel on direct appeal. There *is* a constitutional right to effective counsel on direct appeal.

The Court noted that ineffective assistance claims concerning trial counsel "often require investigative work and an understanding of trial strategy," and when such claims cannot be raised on direct appeal, there is not even "a court opinion or" the prior efforts of an appellate attorney to criticize or build upon thereafter. The Court added, "To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney" and the same is also "true" where the State does not appoint counsel for the initial-review collateral proceeding.

The Court said it could confine its holding to ineffective assistance of trial counsel claims, because an inmate's "inability to present a claim of trial error is of particular concern where the claim is one of ineffective assistance of counsel," which deals with "a bedrock principle in our justice system." In this context, by advertently deciding "to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims." Hence, the Court concluded, in this limited context the initial postconviction counsel's ineffectiveness can be "cause" for a procedural default. The Court said that a similar result would occur if state courts fail to appoint counsel who could raise an ineffectiveness of trial counsel claim in "the initial review collateral proceeding."

In an apparent reference to the "prejudice" part of the "cause" and "prejudice" exception to procedural default, the Court said that the inmate also must show that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, *i.e.*, the prisoner must demonstrate that the claim has some merit."[363]

The Court characterized its holding as an equitable one, not a constitutional one. However, Justice Scalia's dissent (joined by Justice Thomas) said that if the holding had been expressed in constitutional terms, it would have had "precisely the same consequences."

Justice Scalia stated that "no one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised." Justice Scalia pointed to several examples of these "many other cases," including where constitutional claims are developed in light of "newly discovered" evidence that is exculpatory or that impeaches State witnesses.[364]

Justice Scalia predicted that whenever a state-appointed postconviction counsel does not assert ineffectiveness of trial counsel, "*all* those cases can (and where capital punishment is at issue assuredly *will*) proceed to federal habeas on the issue of whether state-appointed counsel was ineffective in failing to raise the ineffective-assistance-of-trial-counsel issue."[365] In the dissent's concluding paragraph, Justice Scalia said that "today's holding as a practical matter requires States to appoint counsel in initial-review collateral proceedings – and, to boot, eliminates the pre-existing assurance of escaping federal-habeas review for claims that appointed counsel fails to present."[366]

Notwithstanding the dissent, there is no way of knowing whether the *Martinez* holding will be extended beyond its immediate context. What *is* sure is that a great many death row inmates have been executed without ever having *any* court rule on a claim with – in the Court's words, "some merit" – that trial counsel had been ineffective. These executions have occurred without any such court ruling, either because there was no postconviction counsel or there was ineffectual postconviction counsel.

These executions have occurred despite many efforts over a great many years to get the Court to adjudicate the very issue it finally decided on March 20, 2012. People were executed because the lower courts felt constrained by *Coleman v. Thompson*, and the Court never chose to consider this issue before.

F. ***Blueford v. Arkansas,*** 132 S. Ct. 2044 (2012)

The jury said in open court that it had unanimously found the defendant not guilty on the capital charge, but the judge then sent the jury back to re-deliberate on a lesser charge. After 35 additional minutes of deliberation, the jury reported that it was still "hung." Thereafter, the trial court held a retrial on the capital charge.

The Court held that this retrial did not constitute double jeopardy, because jurors might have reconsidered their views on the capital charge during the 35 additional minutes of deliberation, and they had not been asked whether they had done so.

G. ***Ryan v. Gonzales,*** 133 S. Ct. 696 (2013)

The Court decided two cases in which federal circuit courts had held that death row inmates were entitled to indefinite stays of execution for as long as the inmates were incompetent during federal habeas corpus proceedings. In Valencia Gonzales' case, there had been no determination that there would be any issues decided on the basis of anything outside of the existing record. In Sean Carter's case, the federal district court had determined that Carter's counsel needed Carter's help in developing four claims.

The Court first ruled that neither 18 U.S.C. § 3599 nor 18 U.S.C. § 4241 provides a statutory basis for staying federal habeas proceedings due to a petitioner's incompetence.

The Court determined that it need not, in deciding either case, consider "the outer limits" of a federal district court's discretionary power to issue stays. The Court said that if it were to turn out that one of Carter's claims were unexhausted and not barred by procedural default, "an indefinite stay would be inappropriate," because that would allow Carter to undermine the AEDPA's goal of promoting finality.

The Court said that where there is a competency-based stay based on a type of incompetence other than incompetence to be executed, "[a]t some point, the State must be allowed to defend its judgment of conviction." The Court concluded, by saying:

> If a district court concludes that a petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptive valid judgment.[367]

H. Noteworthy Lower Court Developments

In addition to these Supreme Court decisions, there were (in addition to the New Jersey Supreme Court decisions discussed above about eyewitnesses) a noteworthy decision by the Arkansas Supreme Court and a notable dissent by a new Ohio Supreme Court Justice.

In December 2011 in *Dimas-Martinez v. State*,[368] the Arkansas Supreme Court reversed the defendant's conviction and death sentence, due to two jurors' misconduct. One juror, even after being asked about it by the judge and specifically admonished not to tweet, had continued to tweet about the case during the trial. These tweets, the court said, "were very much public discussions" and inappropriate. Another juror had slept during the trial's guilt phase.[369]

On January 25, 2013, Ohio Supreme Court Justice William O'Neill, who had joined the court 23 days earlier, dissented from the scheduling of an execution. After saying that if there were ever a case in which the death sentence would be proper, this was it, Justice O'Neill said he believes the death penalty violates both the United States and Ohio Constitutions. He stated: "The death penalty is inherently both cruel and unusual," a remnant of "barbaric days" in which "decapitations, hangings, and brandings were also the norm." Justice O'Neill noted that "the death penalty is becoming increasingly rare both around the world and in America" and thus is "unusual." He added that even when lethal injection is used, death "is a cruel punishment" -- citing Ohio's failure after more than two hours of effort to administer a lethal injection to Romell Broom in 2011. Almost two years later, Broom is still on death row.[370]

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

A. Representation Project

The ABA Death Penalty Representation Project (the "Representation Project") was created in 1986 to address a growing problem with the quality and availability of defense counsel for death row prisoners. Since that time, the Representation Project has recruited hundreds of volunteer law firms to represent death-sentenced prisoners in state postconviction and federal habeas corpus appeals as well as direct appeal, clemency, and re-sentencing proceedings. Volunteer firms have also written amicus briefs on behalf of the ABA and other organizations (such as mental health groups), and have participated in systemic litigation challenging death row conditions or other impediments to effective representation at the state level. As of 2012, the thousands of lawyers whom the Representation Project has recruited have devoted well over $100,000,000 worth of billable time to pursuing justice in death penalty cases.

In at least 54 of the cases that the Representation Project has placed with volunteer counsel, inmates have been either exonerated or had their death sentences commuted.

In the past decade, the Representation Project's work has greatly expanded to meet the demands for its help. It provides technical assistance, expert testimony, training, and resources to the capital defender community and to the volunteer counsel whom it has recruited. Its staff members frequently speak at public events to raise awareness about significant problems with the fair administration of the death penalty. And over 1,100 capital defenders and volunteer

attorneys subscribe to its secure on-line practice area, containing information about all aspects of the capital defense effort.[371]

The Representation Project organizes coalitions of judges, bar associations, civil law firms, and government lawyers in jurisdictions that use the death penalty to champion meaningful systemic reforms designed to ensure that all capital defendants and death row prisoners have the assistance of effective, well-trained, and adequately resourced lawyers. In particular, the Representation Project has endeavored to secure the implementation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Its 2003 revision of these Guidelines was approved as ABA policy in 2003 (the ABA Guidelines). The ABA Guidelines have now been adopted in many death penalty jurisdictions by court rule and state statute. They have also been widely adopted by state bar associations, indigent defense commissions, and judicial conferences.[372] The ABA Guidelines are now the widely accepted standard of care for the capital defense effort and have been cited in more than 300 state and federal cases, including decisions by the United States Supreme Court.[373]

The Representation Project participates as faculty in more than a dozen state and national training seminars for judges and defense counsel each year in the United States, on the elements of capital defense and the importance of an effective capital defense function. It also works internationally: since 2003, it has organized training seminars for capital defenders and judges in other countries that retain use of the death penalty – including Japan, Malaysia, and Vietnam, and extensive work in China. It has also participated as faculty at international conferences on the death penalty in Canada, France, Ireland, and Switzerland.

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

From 2004-2007, the ABA Death Penalty Moratorium Implementation Project, whose name is likely to be changed in 2013 to the ABA Death Penalty Due Process Review Project (referred to herein as the Review Project), assessed the extent to which the capital punishment systems in eight states comported with ABA policies designed to promote fairness and due process. These assessments were not intended as substitutes for comprehensive studies that the ABA hopes will be undertaken during moratoriums on executions. Rather, they were intended to provide insights on the extent to which these states were acting in a manner consistent with relevant ABA policies. The assessment reports were prepared by in-state assessment teams and Review Project staff, for these states: Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. Serious problems were found in every state death penalty system, although the problems were not precisely the same in each state.[374] As noted above, the Supreme Court discussed the Alabama assessment in its 2012 decision in *Maples v. Thomas*.

On December 7, 2011, the Review Project released an assessment report concerning Kentucky.[375] The report found that in some respects, Kentucky had made significant progress. However, the Assessment Team concluded "that Kentucky fails to comply or only is in partial compliance with many of the" ABA policies it assessed, "and that many of these shortcomings are substantial." It noted that while some of the individual problems it identified "may not appear to be significant, we caution that their harms are cumulative. The capital system has many interconnected parts; problems in one area may undermine sound procedures in others." The Team, therefore, "unanimously agree[d] to endorse key proposals that address these shortcomings."[376] The Team also recommended that Kentucky suspend executions to in order to address areas in which it had found significant problems.[377]

The Assessment Team concluded that the "following areas are most in need of reform": "Inadequate Protections to Guard Against Wrongful Convictions"; "Inconsistent and Disproportionate Capital Charging and Sentencing"; "Deficiencies in the Capital Defender System"; "Inadequacies in Post-Conviction Review"; "Capital Juror Confusion"; "Imposition of a Death Sentence on People with Mental Retardation or Severe Mental Disability"; and "Lack of Data."[378] The Team made a great many detailed recommendations regarding these and other areas. Two examples of these recommendations are that "[s]hortcomings of the Kentucky Racial Justice Act (KRJA) must be fixed so that the Act serves as an effective remedy for racial discrimination in death penalty cases" – with several fixes being identified,[379] and that Kentucky should enact "legislation that would exempt severely mentally ill individuals from the death penalty … as well as permit a tolling of the statute of limitations in post-conviction cases due to a death row inmate's mental incompetence."[380]

In October 2012, the Kentucky Assessment Report led the Kentucky Commission on Human Rights to adopt a resolution urging the Commonwealth to abolish the death penalty. The resolution states, in part:

> WHEREAS, Since 1976, when Kentucky reinstated the death penalty, 50 of the 78 people sentenced to death have had their death sentence or conviction overturned due to misconduct or serious errors that occurred during their trial. This represents an unacceptable error rate of more than 60 percent. Nationwide, 140 people have been released from death rows due to evidence of their wrongful conviction. …
> AND,
> WHEREAS, Recently, based on findings of a two year study conducted by the American Bar Association (ABA), former Kentucky Supreme Court Justices, James E. Keller and Martin Johnstone, as well as the President of the ABA and former President of the Kentucky Bar Association, William T. Robinson, have called for a suspension of executions in Kentucky until its death penalty system has been reformed. Writing in the December 18, 2011 issue of the *Louisville Courier-Journal*, the Justices concluded that, "The list of problematic cases is staggering, and review of the system is deeply troubling. Fairness, impartiality, and effectiveness of counsel have been undermined by serious flaws that reveal systemic problems in administration of the death penalty in the Commonwealth." …
> NOW, THEREFORE, BE IT RESOLVED,
> The Kentucky Commission on Human Rights … urges members of the Kentucky General Assembly to repeal the law allowing the use of the death penalty and calls upon the Governor to sign the same.[381]

On March 1, 2012, the Review Project released an assessment report concerning Missouri.[382] The Missouri Assessment Team commended Missouri for complying or nearly complying with ABA policies "in some areas," which it identified. It said some of these "may serve a model for other capital jurisdictions."[383] The Assessment Team went on to say that it unanimously "endorses several measures [set forth in 'specific recommendations'] to ameliorate the problems identified throughout this Report." It identified "the areas viewed by the Team to be most in need of reform" as falling within the following categories: "(1) Aggravating Circumstances, (2) Areas for Reform at the Pretrial Stage, (3) Areas for Reform at the Trial Stage, (4) Areas for Reform at the Post-trial Stage, (5) Data Collection, and (6) Funding Issues."[384]

Examples of the great many specific recommendations are: "Missouri should substantially revise its aggravating circumstances, such that only a 'narrow category of the most serious' murder cases are eligible for the death penalty";[385] "Missouri should require law enforcement agencies to adopt eyewitness identification policies consistent with" ABA-identified best practices; "Missouri should amend its custodial interrogation recording statute"; "Missouri should require that all biological evidence be preserved and properly stored for as long as the defendant remains incarcerated";[386] All prosecutors "should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty [to] disclose evidence in a case, including any exculpatory information" and should get "training on the importance of divulging all evidence to the prosecutor in all criminal cases, especially anything that might constitute exculpatory material";[387] and "Missouri should ban the application of the death penalty to anyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (1) to appreciate the nature, consequences or wrongfulness of his/her conduct; (2) to exercise rational judgment in relation to conduct; or (3) to conform his/her conduct to the requirements of the law."[388]

Moreover, the Team said that Missouri should be aware of "independent studies on the impact of racial discrimination in Missouri's system of capital punishment," which "support the conclusion that Missouri's capital punishment system is not free from the influence of race and, indeed, that racial considerations may play an improper role in determining outcomes in capital cases." The Team concluded that "[t]hese studies, coupled with the findings of state-based investigations on the administration of juvenile justice and on gender bias in the justice system, demonstrate the need for a contemporary investigation regarding racial discrimination in Missouri's criminal justice system."[389]

The Review Project anticipates the future issuance of assessment reports regarding Virginia and Texas.

C. International Activities

On December 6 and 7, 2005, the European Commission, the ABA, and the Japan Federation of Bar Associations sponsored an International Leadership Conference on Human Rights and the Death Penalty, in Tokyo, Japan. The sponsoring organizations are contemplating possible follow-up activities. The *Thomas M. Cooley Law Review* published in 2012 a special edition containing numerous articles based on presentations at the 2005 conference, including some updates covering some of the ensuing years, plus my introductory commentary written in 2011.[390]

IV. THE FUTURE

There is increasing recognition of major, systemic problems with capital punishment. In six states – most recently Maryland in March 2013 – this has led in recent years to abolition or discontinuation of capital punishment. Elsewhere, it remains to be seen what reaction – if any – there will be to studies documenting egregious problems with the capital punishment system.

The events leading up to Troy Davis' execution in 2011 led to greater appreciation of serious issues regarding the death penalty's implementation. Moreover, that case and others have increasingly led to people who are or have been in law enforcement to speak out about capital punishment's operation. Indeed, several authors of death penalty laws have now called for their repeal.

There is also growing recognition that the financial and other costs of capital punishment are far greater than any purported benefits and are especially dubious at a time of severe governmental cutbacks on law enforcement, education, and other important areas. This may be of even greater concern once more people become aware of the recent analyses indicating that a very small number of counties are responsible for very disproportionate percentages of capital punishment prosecutions and executions – many of the costs of which are borne by taxpayers from other jurisdictions.

The number of new death sentences has continued in recent years to be at a much lower level than in recent decades. To the extent that efforts to improve the quality of defense representation in capital cases succeed, there would likely be even fewer new death sentences.

It has been shown repeatedly that providing competent counsel reduces drastically the number of death outcomes. This should – but is not likely to – lead to a systematic re-examination of the quality of representation received by those *already* on death row. The Supreme Court's decisions concerning defense representation in capital sentencing proceedings have been fact-specific and, when handed down in a federal habeas context, constrained by the AEDPA. Most lower courts seem unlikely to focus realistically on the deadly impact of many capital defense counsel.

On this, as on so many other issues, it will be crucial to inform the legal profession and the public about what is really going on in the capital punishment system. This includes the ever-increasing reliance on procedural technicalities that bar consideration of fundamental and highly prejudicial constitutional errors.

Ultimately, our society must decide whether to continue with a system that has been found in study after study, and has been recognized by a growing number of leading judges, to be far more expensive than the actual alternative – in which life without parole is the most severe punishment. In view of the lack of persuasive evidence of societal benefits from capital punishment, this is one ineffectual, wasteful government program whose elimination deserves serious consideration.

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[132] *Id*. at 264-65.

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[136] They define "parochial" to "mean the attribution of innate importance and validity to the values and experiences one shares with the members of – and thus to the security, stability and continuity of – one's closely proximate community," that is, "something like 'localism for its own sake.'" They also say the concept involves "a sense of anxiety or threat," including "fears that prized local values and experiences are embattled, slipping into the minority and at risk from modernity, cosmopolitanism, immigration-driven demographic change, and a coterie of 'progressive' and secular influences, including permissiveness and crime." They believe that "the perceived agents of this unwanted change include government officials at the state and especially federal levels, including 'unelected,' 'elitist' judges and the outside lawyers who appeal to them." *Id.* at 268-69.

[137] They say that libertarian beliefs, in their analysis, refer to "preferences for more rather than less protection of acts of individual autonomy, for less over more frequent exercise of state power, and for low taxes over high services. Libertarianism also is associated with a vigilante streak – a willingness to take the law into one's own hands and out of the untrustworthy hands of government. In other words, the uneasy combination of a desire for seriously retributive responses to non-consensual acts interfering with another's autonomy, yet little or no spending on police, prosecutors, investigators, courts, corrections, rehabilitative services, and other methods of combating crime may dispose libertarians towards self-help, even in the realm of criminal justice and law enforcement." *Id*. at 273-74 (footnote omitted).

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

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[225] In a July 2012 Cornell Legal Studies Research Paper, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, John H. Blume and Rebecca K. Helm discuss the phenomenon of guilty pleas by factually innocent people. They say this happens most often in two contexts: pleading guilty quickly for "low level offenses" to get out of jail quickly; and accepting a plea bargain after winning the right to a new trial, in order to get released right away or very quickly. The authors discuss some possible ameliorative steps, such as requiring "more judicial supervision of the plea bargaining process," but conclude that most of their proposals would have no chance of being adopted. *See* John H. Blume and Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* (July 11, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103787 (follow "Download This Paper" hyperlink).

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