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## CHAPTER 19

### CAPITAL PUNISHMENT

Ronald J. Tabak

#### I. OVERVIEW

##### *Recent Trends*

##### *States Ending or Limiting the Death Penalty or Considering Repeal*

On March 9, 2011, Illinois abolished the death penalty.<sup>1</sup> In signing the repeal bill, Governor Pat Quinn said that “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 decided to commute the sentences of those on Illinois’ death row to life without parole.<sup>2</sup> 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,<sup>3</sup> which a columnist said had revealed that huge amounts had been spent in seeking the death penalty although very few death sentences had been imposed and that the threat of capital punishment had been used to secure guilty pleas and lesser sentences.<sup>4</sup> 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 17 people (out of 500 against whom capital charges had been brought) were sentenced to death, 4 of whom were no longer on death row (2 due to reversals on appeals and 2 due to suicide).<sup>5</sup>

On March 18, 2009, New Mexico abolished the death penalty, although the two people already on death row still face execution.<sup>6</sup> New Jersey abolished the death penalty in December 2007.<sup>7</sup>

Illinois, New Jersey and New Mexico are the first three 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.<sup>8</sup> After comprehensive hearings, the New York legislature did not correct the constitutional flaw.<sup>9</sup> In October 2007, New York’s highest court vacated New York’s final death sentence.<sup>10</sup> In 2008, New York Governor Paterson ordered the dismantling of New York’s death row.<sup>11</sup>

Maryland enacted a law in 2009<sup>12</sup> that limits “capital cases to those with biological or DNA evidence, a videotaped confession or a videotape linking the defendant to a homicide.”<sup>13</sup>

Both houses of the Connecticut legislature voted in 2009 to abolish the death penalty. Governor M. Jodi Rell vetoed the bill, and her veto was not overridden.<sup>14</sup> 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 an extremely high profile death penalty trial that was nearing its conclusion on election day.<sup>15</sup> His election has led many capital punishment opponents to hope that Connecticut would repeal the death penalty sometime during Governor Malloy’s tenure.<sup>16</sup>

In Colorado, the House approved a death penalty repeal bill in 2009, but the Senate defeated it by a one vote.<sup>17</sup> In Montana, a death penalty repeal bill passed the Senate in 2009 but was tabled in the House Judiciary Committee on March 30, 2009. Montana's Senate again passed a death penalty repeal bill in February 2011.<sup>18</sup>

North Carolina enacted in August 2009 a Racial Justice Act, the second (in addition to Kentucky's) in the country. Under the new law, defendants prior to trial and death row inmates can 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 can be used in seeking relief under the North Carolina Racial Justice Act, but prosecutors can seek to rebut it.<sup>19</sup> In 2011, many Republican legislators made repeal of North Carolina's Racial Justice Act a top priority.<sup>20</sup>

The 22-member New Hampshire Commission to Study the Death Penalty issued its final report in December 2010. The Commission voted 12-10 in favor of keeping the death penalty.<sup>21</sup> The majority report said that there have been only two capital punishment trials under the existing law in the last 50 years. It stated that there "seemed to be little or no disagreement that the state has been well served by its tradition of defining capital murder narrowly" and said that "New Hampshire might find itself challenged" if it expanded the death penalty.<sup>22</sup> The Commission also "concluded that the costs associated with death penalty prosecutions and incarceration significantly exceed the costs associated with First Degree Murder cases."<sup>23</sup>

On January 14, 2011, just before leaving office, Pennsylvania Governor Edward G. Rendell, a former District Attorney who has always ardently supported capital punishment, urged Pennsylvania's legislature to consider the future of the state's death penalty and its possible abolition. He noted that in his eight years as Governor, there had been no executions or even 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. He stated that this type of time frame prevents closure for victims' survivors and friends, and frustrates the police. Noting that Congress and the Pennsylvania legislature already have adopted many measures seeking to accelerate executions, he asked the legislature to consider whether anything more could be done that would "significantly shorten" the number of years before an execution takes place 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."<sup>24</sup>

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.<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> There has been little or no subsequent effort to address these problems or to implement the many recommendations made by the ABA assessment team.

### ***Continuing Significant Decline in Sentences of Death***

There has been a significant drop in the number of death penalties being imposed. In 2009, 112 people were sentenced to death, the lowest number since the re-introduction of capital punishment following *Furman v. Georgia*.<sup>28</sup> The Death Penalty Information Center estimated in December 2010 that the total for 2010 would end up very slightly higher, at 114. Death sentences reached their peak at 315 in 1996 and have dropped 64% since then.<sup>29</sup>

The Death Penalty Information Center's executive director said that the high costs of capital punishment in economic hard times, the dangers of innocent people being executed and unfairness could be among the reasons for the decline in new death sentences. The executive director of the National Association of District Attorneys said that due to the lengthy time between sentences and executions, some families were requesting that prosecutors agree to life without parole instead of the death penalty, in order to have a degree of closure. The Associated Press reported that prosecutors also pointed to "lengthy sentences for violent criminals and programs to lower recidivism." It further reported that death penalty proponents noted the Supreme Court's having barred capital punishment for people with mental retardation and anyone under age 18 at the time of the crime.<sup>30</sup>

In both 2009 and 2010, new Texas death sentences were down 80% from the peak of 48 in 1999. The total for 2010, as of mid-December, was eight.<sup>31</sup> Meanwhile, among the capital punishment states with no new death sentences in 2010 were Georgia (which has over 100 death row inmates) and Missouri (which has about 60 death row inmates).<sup>32</sup>

### ***Modest Decline in Executions in 2010, 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, executions resumed after the Supreme Court upheld Kentucky's lethal injection system. There were 37 executions in 2008. In 2009, executions rose to 52. In 2010, the number of executions dropped to 46. In Texas (which continues by far to lead the country in executions), there were 29% fewer executions in 2010 than in 2009. Part of the reason for the national decline in executions in 2010 was a nationwide shortage of one of the drugs used in lethal injections. Arizona executed one person after importing sodium thiopental from the United Kingdom, which later imposed restrictions on its export.<sup>33</sup>

Oklahoma began using pentobarbital, which has been used in euthanizing animals, first in a December 2010 execution and then on January 6, 2011. Oklahoma 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." Other states were reportedly considering the use of pentobarbital for executions if sodium thiopental continued to be difficult to secure.<sup>34</sup> On January 21, 2011, Hospira, the only United States manufacturer of sodium thiopental, decided to permanently cease producing it. This reportedly could cause delays in many states' ability to execute people.<sup>35</sup>

On March 15, 2011, the Drug Enforcement Administration 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. The attorney asserted that if (as indicated in response to an open records request) Georgia's Department of Corrections was importing sodium thiopental from a British distributor, that would violate the Controlled

Substances Act because Georgia does not have a federal license to important controlled substances. On March 16, 2011, Texas stated that it was going to begin using pentobarbital rather than sodium thiopental in executions – as Ohio (in addition to Oklahoma) had already done. Lundbeck Inc., a Danish company that manufactures pentobarbital, has advised states that it is “adamantly opposed” to pentobarbital's use in executions.<sup>36</sup>

### ***Public Opinion and Views of Law Enforcement, Conservatives and Editorial Boards***

The decrease in capital sentencing in recent years is consistent with a significant drop in public support for capital punishment when the poll question includes life without parole as the (or an) alternative. The Gallup poll released on November 8, 2010 showed that when given that choice, 49% preferred the death penalty and 46% preferred life without parole.<sup>37</sup> Even when no alternative was mentioned, support for capital punishment was far lower than its peak of 80% in 1994. At 64%, it equaled its lowest level in the last 25 years.<sup>38</sup>

Later in November 2010, the Death Penalty Information Center issued the results of a comprehensive national poll conducted by Lake Research Partners in May 2010 that gave more options than in the Gallup poll. It showed that 61% would be prepared to replace the death penalty with life without parole plus restitution for the victim's family (favored by 39%), life without parole regardless of restitution (favored by 13%) or life with possibility of parole (favored by 9%). Also in this poll, 68% said that costs were at least a somewhat convincing argument against the death penalty and 65% favored replacing the death penalty with life without parole if the money saved were spent on crime prevention programs. Moreover, those polled ranked the death penalty as a lower budgetary priority than “emergency services, creating jobs, police and crime prevention, schools and libraries, public health services, and roads and transportation.”<sup>39</sup>

In California (which has the country's largest death row), the Field poll released in July 2010 found that 42% preferred life without parole, compared to 41% preferring capital punishment. A decade earlier, in response to the same question, 37% had preferred life without parole while 44% had preferred capital punishment. When asked only the question of whether they favored capital punishment but without being given an alternative, 70% in the 2010 poll said yes.<sup>40</sup>

A *Washington Post* poll found that Marylanders favored life without parole over capital punishment by 49% to 40% – although when given no alternative, 60% said they supported the death penalty.<sup>41</sup>

Among those who are unenthusiastic about or opposed to capital punishment are many in law enforcement. A poll of 500 randomly selected police chiefs, released in 2009, found that greater use of capital punishment was “ranked last,” at 1%, when they were queried as to the one most important way to lower violent crime. They also considered capital punishment “the least efficient” way to use the public's money to fight crime. Fifty-seven percent felt that “the death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences when engaged in violence.”<sup>42</sup>

Among those who supported the nearly successful effort to repeal Montana's death penalty in 2009 was John Connor, the state's chief special prosecutor for 21 years. He was involved in, among other things, 5 capital punishment cases in which prison inmates had killed other inmates and the prosecutions of 14 inmates for prison riot homicides in 1991. In an op-ed, he stated that he no longer believed that capital punishment is necessary to deter inmates serving life without parole from killing correctional officers. He said that “the death penalty is an incalculable drain on our limited criminal justice resources. It makes bizarre celebrities of the

sentenced inmates while essentially ignoring the suffering that victims' families must endure through decades of legal scrutiny. And frankly, it lessens our own humanity." He added that the drop to zero in homicides in Montana's maximum security unit since the 1991 riots has not been due to capital punishment, which had existed before and didn't prevent those riots, but rather "better procedures and other positive changes to the management of the prison."<sup>43</sup>

In 2010, Washington State's Attorney General Rob McKenna stated that he was uncertain whether capital punishment was a good way to deal with the worst crimes. He said, "I could live without it frankly. I think it's very expensive, and the delays are inordinate, delaying closure for the victims' families."<sup>44</sup>

In November 2010, Indiana Attorney General Greg Zoeller stated, "It is time that we in the criminal justice system have a candid conversation about the economic impact of capital punishment in Indiana." He noted that the costs for a long capital punishment case can be very great for county governments. Given lower government revenues, he urged lawmakers and policymakers to examine the situation carefully.<sup>45</sup> Later that month, Fort Wayne's *Journal Gazette* commented that "[t]he death penalty is too costly and applied too unfairly. Life without the possibility of parole is the appropriate penalty – and far less costly to taxpayers."<sup>46</sup>

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."<sup>47</sup> 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.<sup>48</sup> 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."<sup>49</sup>

At the same hearing, Allen Ault, who oversaw executions as a Georgia warden, gave similar testimony by video. In a follow-up phone interview, he said that capital punishment neither deters crime nor saves money, and it causes suffering to prison staff.<sup>50</sup>

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.<sup>51</sup> On January 18, 2011, Justice Pfeifer 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.<sup>52</sup> 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. Pointing to Ohio's having 157 death row inmates and its having increased the rate of executions, he stated that it is too late to reform the capital punishment system. He said, "I think the best answer is for the governor to just commute them all and that we . . . say we don't need the death penalty in Ohio any longer."<sup>53</sup>

In August 2010, Reginald Wilkinson, the Ohio prison director from 1991 to 2006, said, "I'm of the opinion that we should eliminate capital punishment." He added, "Having been involved with justice agencies around the world, it's been somewhat embarrassing, quite frankly, that nations just as so-called civilized as ours think we're barbaric because we still have capital punishment." Also in August 2010, Republican State Senator David Goodman said he supported an independent assessment of death row cases and a moratorium on executions, as part of his efforts to avoid executing innocent people.<sup>54</sup>

Former United States Solicitor General Charles Fried (who held that position during the Reagan Administration) said in a book published in 2010 that he had changed his mind about capital punishment. Mr. Fried is a long-time leading conservative scholar, a former member of the Massachusetts Supreme Judicial Court and an eminent Professor at Harvard Law School. Interviewed about the book, he said, "To my surprise, I came to conclude that arguments against torture, why torture is absolutely wrong, had a carry-over to the death penalty, which I had not expected." He now believes it is morally wrong to execute someone who is totally in the government's power, in the same way it is morally wrong to torture that person.<sup>55</sup>

Among numerous newspapers editorializing against the death penalty in 2010 was the *Chicago Sun-Times*. On November 8, 2010, it wrote, "In the past, we've supported the death penalty as long as the legal system gives the accused a fair trial that results in a verdict of guilt beyond reasonable doubt. Sadly, in light of experiences in recent years, that goal seems unrealistic."<sup>56</sup> The *Salt Lake Tribune* wrote on April 17, 2010 that "[t]here simply is no denying that our system of capital punishment in the United States is unalterably broken. To continue to adhere to it is to tread beyond the bounds of what constitutes a humane, moral and just society."<sup>57</sup>

### *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.<sup>58</sup>

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."<sup>59</sup> It acted for the "reasons stated in Part V of [its] Council's [April 15, 2009] report to the membership."<sup>60</sup> Part V 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 added that many members of the ALI's "Council have concerns," described in the report's Part VI, about the way in which capital punishment laws based on the Model Penal Code section were being administered. 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." Part V went on to conclude that the ALI would 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."<sup>61</sup>

The "concerns" referred to in Part V were set forth in Part VI, as follows:

- (a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice



system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of political elections, where – even though nearly all state judges perform their tasks conscientiously – candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.<sup>62</sup>

The *New York Times*' Adam Liptak stated on January 5, 2010 that “the [ALI], which created the intellectual framework for the modern capital justice system almost 50 years ago, pronounced its project a failure and walked away from it.” Mr. Liptak said this “represents a tectonic shift in legal theory” and that the ALI was saying “that the capital punishment system in the United States is irretrievably broken.”<sup>63</sup>

Michael Traynor, President Emeritus of the ALI, said the ALI's action “was a striking repudiation from the very organization that provided the blueprint for death penalty laws in this country.” Writing on his own behalf, he stated that the combination of “entrenched” problems in the capital punishment system have made executions “as random as lightning strikes, or more so” – just what the ALI's “model statute [had] intended to fix,” and, in addition, many innocent people were being sentenced to death. He said that, almost half a century after the ALI developed its model statute, extensive efforts to implement capital punishment plus the addition of life without parole as “an important alternative in nearly every state” had made it clear that we could harshly sentence convicted murderers “far more effectively . . . than through an ineffective and extravagant death penalty.” He has concluded that since the death penalty cannot be implemented “consistently and fairly,” capital punishment “should not remain a punishment option in this country.”<sup>64</sup>

### ***Justice Stevens' Concerns About Capital Punishment's Implementation***

One of the Supreme Court Justices who was in the majority when, in 1976, the Court upheld the constitutionality of capital punishment laws based on the ALI's model statute was Justice John Paul Stevens. In an interview in the summer of 2010, shortly after retiring from the Court, Justice Stevens stated that he regretted having joined in these holdings (the lead case being *Gregg v. Georgia*)<sup>65</sup> – not necessarily because they had been wrong at the time but because of how the Court had later eviscerated their key premises. He said, “I thought at the time . . . that if the universe of defendants eligible for the death penalty is sufficiently narrow so that you can be confident that the defendant really merits that severe punishment, that the death penalty was appropriate,” but thereafter, “the court constantly expanded the cases eligible for the death penalty, so that the underlying premise for my vote disappeared, in a sense.” He added, “Not only is it a larger universe, but the procedures have become more prosecution-friendly.” He stated that “the death penalty today is vastly different from the death penalty that we thought we were authorizing.” He observed that if the procedures “we expected to be in place” were being used, he probably would still view a narrow death penalty regime as constitutional. Instead, he stated, his vote in 1976 to uphold the constitutionality of the death penalty was “the

one vote I would change.” He said that the decision on capital punishment’s constitutionality was “incorrect” because in 1976 the Court “did not foresee how it would be interpreted” after the Court’s membership changed.<sup>66</sup>

Justice Stevens discussed this subject further in a book review in the December 23, 2010 issue of *The New York Review of Books*. Among other things, Justice Stevens stated that post-1976 decisions “have unwisely rejected” the “narrowing approach” that in concurring in *Furman v. Georgia*<sup>67</sup> Justice Potter Stewart had said was necessary to avoid death sentences being “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” Among the many later decisions in which Justice Stevens said he “firmly believe[d]” that Justice Stewart would not have joined was *Tison v. Arizona*,<sup>68</sup> which altered a 1982 holding by saying that a person can be executed for “major participation in the felony committed, combined with reckless indifference to human life” despite neither killing, trying to kill, nor intending to kill. Justice Stevens said that unlike today’s jurisprudence, what would occur “[u]nder Justice Stewart’s approach [would be that] a jury composed of twelve local citizens selected with less regard to their death penalty views than occurs today – in that respect, a truer cross-section of the community – would determine individual defendants’ fates” by weighing their “culpability against relevant mitigating circumstances” without being “inflamed by victim-impact statements” and after being “insulated from race-based decisions by prosecutors.”<sup>69</sup>

Justice Stevens concluded the book review by discussing whether capital punishment benefits any of “the five classes of persons affected.” He said it couldn’t help the actual murder victims, since they were dead. He said the victims’ survivors could not have their losses reversed or “adequately compensate[d]” by any punishment and that any desire for “revenge” or any “therapeutic benefits” were insufficient to “justify death sentences” – given that, “after all, [we do not] execute drunken drivers who cause fatal accidents.” As for the various people who participate in the legal system, “[w]hile support of the death penalty wins votes for some elected officials, all participants in the process must realize the monumental costs that capital cases impose on the judicial system.” In addition to the “obvious” extra “financial costs,” Justice Stevens discussed the toll taken on a juror who feels required to decide on life or death “despite residual doubts about a defendant’s guilt.” As for the “general public,” given that life without parole is an available alternative, “partisan and cultural considerations provide woefully inadequate justifications for putting anyone to death.” The final class, the “thousands of condemned inmates on death row who spend years in solitary confinement,” are prevented from making “positive contributions to society” if they are executed after they “have repented” – as many do; and there is, “[m]ore importantly,” the risk that “an actually innocent person” may be executed. In concluding his book review, Justice Stevens quoted Justice Byron White, who once wrote that capital punishment is “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”<sup>70</sup>

### ***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.” Some anesthesiologists have taken part in lethal injection executions, either as consultants regarding dosages or by inserting catheters and infusing drug cocktails. If an anesthesiologist were to be decertified, (s)he would be prevented from employment in most hospitals but could still be licensed by state medical bodies.<sup>71</sup>

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 just that – guidelines – and not enforceable in most circumstances." Although the American Medical Association once revoked a doctor's membership for participating in an execution, Mr. Alper considers it unlikely that a medical board will ever discipline a doctor for such conduct.<sup>72</sup>

### ***Continuing International Trend Away from Capital Punishment***

The international trend away from capital punishment has continued. In 2009, there were executions in only 18 of the 58 countries that still have the death penalty.<sup>73</sup> 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.<sup>74</sup> In 2009, there was, for the first time, not a single execution in Europe.<sup>75</sup> The United States was the only country in the Americas to execute people in 2009.<sup>76</sup>

One of the most recent countries to abolish the death penalty is Togo, in June 2009.<sup>77</sup> Burundi also abolished the death penalty, in April 2009.<sup>78</sup> On August 3, 2009, Kenya's President Mwai Kibaki announced that he was commuting the death sentences of the over 4,000 people on Kenya's death row.<sup>79</sup> In January 2009, the Supreme Court of Uganda affirmed a lower court's holding that a *mandatory* death penalty for capital crimes is unconstitutional.<sup>80</sup>

Many Asian countries continue to implement the death penalty, with China by far the world leader in executions. However, in July 2009, Zhang Jun, the Vice President of the Supreme People's Court, said China should limit death-eligible crimes and that "[j]udicial departments should use the least number of death sentences as possible, and death penalties should not be given for those having a reason for not being executed." He indicated that the number of death-eligible crimes would be reduced by legislation and that "death penalty with reprieve" could be ordered by lower courts.<sup>81</sup> In February 2010, China's Supreme Court stated that it had issued guidelines to the country's courts, under which capital punishment's use would be limited to "extremely serious" crimes where there is abundant, valid evidence. Under the guidelines, reprieves should occur to the extent legally permitted. The general principle will be "justice tempered with mercy."<sup>82</sup>

On January 14, 2010, Mongolia's President, Tsakhiagiin Elbegdorj, announced that he would commute all death sentences to 30-year prison terms.<sup>83</sup>

Arab countries, Iran, Cuba and some African countries also continue to employ capital punishment, although Cuba has not executed anyone since 1993.<sup>84</sup> According to Amnesty International, the only countries exceeding the United States in executions in 2009 were China, Iran, Iraq and Saudi Arabia.<sup>85</sup>

On December 18, 2007, the United Nations General Assembly voted, for the first time, to call for a worldwide "moratorium on executions, with a view to abolishing the death penalty." The vote was 104 to 54, with 29 abstentions.<sup>86</sup> The General Assembly adopted a second resolution of the same nature in December 2008, by a bigger majority: 106 to 46, with 34 abstentions.<sup>87</sup> In November 2010, the General Assembly adopted a third such resolution by an ever larger margin: 107 to 38, with 36 abstentions.<sup>88</sup>

## ***Important Issues***

The following – many adverted to by the ALI, Justice Stevens and others discussed above – are among the issues concerning capital punishment that have received recent attention.

### ***Disparities in Implementing Capital Punishment***

Disparities in implementing capital punishment, by race or geography, have been found by assessment teams in all eight states analyzed thus far under the auspices of the ABA Death Penalty Moratorium Implementation Project – as discussed in section III below. Assessments under the Project's auspices are being undertaken in additional states.

In July 2010, Professor Michael Radelet discussed the results of a study that he conducted with Glenn Pierce regarding sentencing in North Carolina for homicides between 1980 and 2007. The study, later published in the *North Carolina Law Review*, found that, after controlling for non-racial factors, such as the number of victims and the number of related felonies, the odds of getting capital punishment averaged 2.96 times higher when the victim was white than when the victim was black.<sup>89</sup>

In June 2010, the Equal Justice Initiative issued a report on racial discrimination in jury selection (not limited to death penalty cases) in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina and Tennessee. It found “shocking evidence of racial discrimination in jury selection in every state,” including counties with a majority of African Americans in which death penalty defendants were tried by all-white juries and evidence that some state and local governments had trained prosecutors to make race-based exclusions and to hide what they were doing.<sup>90</sup> The report also found, among many other things, that due to the failure to make retroactive a 1986 Supreme Court decision, “scores of death row prisoners have been executed after convictions and death sentences by all-white juries, which were organized by excluding people of color on the basis of race. Moreover, dozens of condemned prisoners still face execution after being convicted and sentenced by juries selected in a racially discriminatory manner.”<sup>91</sup> The report also found that procedural technicalities have precluded consideration of “many meritorious claims of racial bias,” and that “[m]any defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias.”<sup>92</sup> The report went on to discuss particular jurisdictions. One of these was Houston County, Alabama, where between 2005 and 2009 in cases resulting in the death penalty, prosecutors used discretionary challenges to strike 80% of all African Americans who were eligible to serve on juries. Half of these juries were all-white, in a county whose population is 27% African American.<sup>93</sup>

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.”<sup>94</sup> The authors found that most death-eligible crimes prosecuted by the federal government take place in areas with a concentration of minorities; and that 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” decreased, the jury venires became “whiter,” and the chance that the outcome is affected by “implicit race bias increases.”<sup>95</sup> The authors stated that in the eight federal districts with more than two death sentences, the counties in which the crimes occurred usually had a high

African American population but that the “federal districts [where the trials took place] . . . [were] heavily white.”<sup>96</sup>

### *Inadequacies of or Unavailability of Counsel for People Facing Execution*

In a study published in 2009, Professor Scott Phillips of the University of Denver analyzed the 504 capital punishment cases between 1992 and 1999 in Harris County, Texas. He found that, regardless of socio-economic status, “those who can hire counsel” for even part of a case “appear to be treated in a fundamentally different manner than those” relying on court-appointed counsel. In particular, those who hired counsel for their entire cases did not receive capital punishment and were acquitted more often, and those who retained counsel for a portion of the case had a significantly lower chance of receiving the death penalty. He recommended that Harris County adopt a public defender system to replace its court-appointed system.<sup>97</sup>

Texas decided in 2009 to open a capital defense office to oversee and eventually handle state postconviction proceedings for Texas death row inmates. This office opened in 2010 with a budget of \$1 million and a staff of nine. This was too late to preserve the rights of the many Texas death row inmates whose claims had already been waived.<sup>98</sup>

Prior to the law’s enactment, the *Houston Chronicle* reported on three attorneys who in case after case missed state or federal deadlines, therefore forfeiting their death row clients’ claims,<sup>99</sup> and the Texas Court of Criminal Appeals (the state’s highest court for criminal cases) held two attorneys in contempt for poor postconviction work in capital cases. However, the Court of Criminal Appeals did not restore the claims of the inmates whose lawyers had done such inept work after that court had appointed them.<sup>100</sup>

One particularly notable Texas lawyer is Jerry Guerinot, who “represented” 20 clients who ended up on Texas’ death row. As the *New York Times*’ Adam Liptak noted, “That is more people than are awaiting execution in about half of the 35 states that have the death penalty.”<sup>101</sup> 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.<sup>102</sup>

Systemic problems with capital defense are pervasive well beyond Texas. For example, Georgia’s public defender council voted in October 2010 to seek a special session of the Georgia legislature due to concerns by the Georgia Capital Defender Office about its inability to represent properly the capital defendants whose cases it was assigned. That office, whose finances were first depleted after it spent over \$2 million in a highly publicized case that ended in life without parole, was further hurt by “the legislature’s siphoning off funds from court fees and surcharges supposedly dedicated to the defender system.” Robin Maher, director of the ABA Death Penalty Representation Project, said, “The system has collapsed.”<sup>103</sup> In January 2011, Travis Sakrison, who until his appointment was Deputy Chief DeKalb County District Attorney, became the Georgia Public Defender Standards Council’s executive director.<sup>104</sup> The Associated Press said Sakrison was “perhaps a startling choice” by Georgia’s new Governor, Nathan Deal. Governor Deal proposed cuts to the state’s public defender system budget for the remainder of the current fiscal year and even more cuts for the following fiscal year. Jerry Word, leader of the Georgia Capital Defender Office, said such cuts would “put a huge strain on what’s already a strained budget.”<sup>105</sup>

Earlier, in March 2010, the Georgia Supreme Court, by a 4-3 vote, affirmed a trial judge’s decisions in a case in which the Georgia Capital Defender Office had become unable to pay the lawyers originally appointed to represent capital defendant Jamie R. Weis. At the

prosecutor's recommendation, the judge had replaced those lawyers with two particular salaried public defenders. Thereafter, the judge had not allowed them to withdraw, even though they did not ordinarily handle capital cases and said they lacked the time, finances or qualifications to represent Mr. Weis.<sup>106</sup> The three dissenting judges in the Georgia Supreme Court said, Georgia could not "shirk [its] responsibility because it is experiencing budgetary constraints" and could not "fully arm its prosecutors while it hamstring[s] the defense and blames the defendant for any resultant delays."<sup>107</sup> The Supreme Court denied certiorari on October 4, 2010.<sup>108</sup>

In Mississippi, finances and other issues have "bedeviled Mississippi's Office of Post Conviction Capital Counsel," which was created in 2000 after the Mississippi Supreme Court said that death row inmates must have postconviction counsel. Allegedly, several death row inmates' postconviction petitions had been rejected after deadlines were missed because of the office's understaffing.<sup>109</sup>

In California, 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. What the California Supreme Court has called a "critical shortage" has existed for many years. Chief Justice Ronald M. George said in November 2010 that many attorneys are unqualified to handle these matters and therefore are not appointed. 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."<sup>110</sup>

One state that often has failed to find proper counsel at the trial level is Alabama. In a November 22, 2010 op-ed, former Florida Supreme Court Chief Justice Gerald Kogan (who 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"<sup>111</sup> was its 2-1 decision in *Boyd v. Allen* – a case in which the Supreme Court later denied certiorari.<sup>112</sup> 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; or 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."<sup>113</sup> 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 here, 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).<sup>114</sup>

Even when a death row inmate has *pro bono* counsel from a distinguished law firm, his postconviction claims may be held waived due to a combination of factors beyond the control of either the death row inmate or the particular lawyers currently handling his case. An Alabama death row inmate, Cory Maples, was being represented in his state postconviction proceedings by a major law firm. After the particular associates handling the case left the firm and (unbeknownst to the circuit court in Alabama) were replaced by other associates, the firm's mail

room returned to the circuit court clerk two envelopes that had been addressed to the 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 newly involved associates would have learned of a ruling as to which a notice of appeal had to be filed within 42 days. Since these lawyers never knew about the ruling, they did not file the notice of appeal prior to the deadline. The Alabama circuit court (the trial-level court) apparently made no effort to find out who was now handling the matter after it received back – well before the 42-day time limit had run – the two unopened envelopes bearing notations that the former lawyers were no longer at the firm. Mr. Maples' local counsel, who had become involved for the purpose of enabling the out-of-state *pro bono* lawyers to handle the matter, did receive the court's ruling, but apparently did nothing prior to the deadline. After the deadline had passed, Maples finally learned (from the prosecutor) that although this deadline had passed, he still could file a federal habeas corpus petition. Thereafter, the new associates at the large firm sought unsuccessfully to have the Alabama circuit court order re-issued so that a timely appeal could be filed.<sup>115</sup> Then, due to the failure to appeal within the time limit, the Alabama Court of Criminal Appeals and the Alabama Supreme Court barred Maples' claims.<sup>116</sup>

He 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.<sup>117</sup> As the *New York Times*' Adam Liptak has noted, absent Supreme Court action, Maples will fare far worse than the homeowner in *Jones v. Flowers*,<sup>118</sup> a 2006 case in which a government had sought to sell a house for unpaid taxes. There, the Supreme Court held that after a letter to the homeowner had been returned unopened, the government should have tried harder to find and actually notify the owner.<sup>119</sup> Chief Justice Roberts said, "This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house."<sup>120</sup> On March 21, 2011, the Supreme Court granted certiorari to consider whether there was "cause" to excuse a procedural default under the circumstances of Maples' case.<sup>121</sup>

There have also been situations in which a normally capable defense lawyer has faced circumstances that have led to his representation being highly inadequate. An example is Tennessee lawyer Lionel Barrett, who "was widely recognized as the premier murder defense attorney in Middle Tennessee." However, Barrett says that in representing Abu-Ali Abdur'Rahman in 1987, "Everything I could have done wrong, I did." Barrett told the *ABA Journal*, "Abu-Ali is on death row because of me. I failed him." At that time, Barrett was taking on additional cases – including this one – in hopes of earning more money to help him with his indebtedness. Barrett interviewed Abdur'Rahman for the first time just five days before the start of jury selection, and was wholly unready for the trial. In particular, Barrett never found or presented available evidence about his client's mental illness and mental history – including his having spent a great deal of time in state mental institutions, his having been found to have many mental illnesses, and his having as a child been repeatedly beaten, sexual abused and even tortured by his father. 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." As of the time that the *ABA Journal* published a story about this case in March 2011, Abdur'Rahman continued to face potential execution – because a federal district court's holding of unconstitutionally ineffective assistance of counsel with regard to sentencing had been reversed by the Sixth



Circuit. The Sixth Circuit had before it, as of the article's publication, a claim of prosecutorial misconduct.<sup>122</sup>

### *The Continuing Danger of Executing Innocent People*

In October 2010, Anthony Graves was freed from prison after having served a great many years on Texas' death row. District Attorney Bill Parham, whose office had reinvestigated the case for five months, said, "He's an innocent man." He added, "There is nothing that connects Anthony Graves to this crime." Mr. Graves had been convicted and sentenced to death for assisting Robert Carter in killing six members of a family in 1992. Two weeks before Mr. Carter's execution, he had stated under oath that he had lied in saying that Graves was an accomplice. He repeated this recantation when he was minutes away from execution. The prosecution had relied primarily on Carter's earlier assertions and on statements purportedly made by Graves while in custody and within earshot of law enforcement officers. Graves' life was initially saved after new evidence developed by a journalism class working with the Innocence Project at the University of Houston ultimately led the Fifth Circuit to order a new trial. The new evidence showed that prosecutors had elicited two false witness statements and had withheld two other statements that could have affected the outcome. In preparing for the new trial, District Attorney Parham hired former Harris County Assistant District Attorney Kelly Siegler as a special prosecutor. In October 2010, Ms. Siegler said, "After months of investigation and talking to every witness who's ever been involved in this case, and people who've never been talked to before, after looking under every rock we could find, we found not one piece of credible evidence that links Anthony Graves to the commission of this capital murder."<sup>123</sup> Siegler stated that the District Attorney at the time of the crime had "handled this case in a way that could best be described as a criminal justice system's nightmare." Siegler added, "It's a travesty, what happened in Anthony Graves' trial." She said it was the worst case of prosecutorial misconduct she had ever seen. The misconduct had included indicting Carter's wife without any supporting evidence, fabricating evidence, manipulating witnesses and taking advantage of victims.<sup>124</sup>

In September 2010, Nevada District Judge Richard Wagner ordered the release of Ronnie Milligan, a former death row inmate, after hearing testimony that led the judge to have "grave reservations" regarding Mr. Milligan's guilt. Milligan's death sentence had been overturned in 2006 by the Nevada Supreme Court for a reason unrelated to his possible innocence. At his re-sentencing hearing, 30 years after the crime, an expert on alcohol-caused blackouts testified that Milligan (an honorably discharged Navy veteran) had likely been in a blackout at the time of the crime. There were serious questions about the veracity of a key prosecution witness who had testified at the original trial. A co-defendant signed an affidavit stating that Milligan hadn't been present when the victim was killed and that those who *were* involved had decided to implicate him after realizing he had no memory of the day of the murder. And there were many other issues about Milligan's guilt. Judge Wagner followed the joint recommendation of a deputy attorney general and Milligan's counsel at the re-sentencing by imposing a term of life *with* possibility of parole. The judge found Milligan to be eligible for parole immediately, and ordered the Nevada parole department to "immediately release" him.<sup>125</sup>

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.”<sup>126</sup>

Based on less conclusive doubts about guilt, Ohio Governor Ted Strickland on September 2, 2010 granted clemency that changed the sentence of Kevin Keith from death to life without parole. While Governor Strickland said he believed that Mr. Keith was much more likely to be guilty than innocent, he stated that “many legitimate questions have been raised regarding the evidence in support of the conviction and the investigation which led to it. In particular, Mr. Keith’s conviction relied upon the linking of certain eyewitness testimony with certain forensic evidence about which important questions have been raised. I also find the absence of a full investigation of other credible suspects troubling.”<sup>127</sup>

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.<sup>128</sup> 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 have 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 include 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.”<sup>129</sup> Despite that op-ed and other commentary, including a *Los Angeles Times* editorial<sup>130</sup> and a column by the *New York Times*’ Nicholas Kristof,<sup>131</sup> Governor Arnold Schwarzenegger did not commute Cooper’s death sentence before leaving office.

There was continuing controversy in 2010, continuing into 2011, over Texas’ 2004 execution of Cameron T. Willingham for arson/murder and new concern over Texas’ 2000 execution of Claude Jones.

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 arson evidence at trial. 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.<sup>132</sup> 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 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.”<sup>133</sup>

The new chair of the Texas Forensic Science Commission, John Bradley, tried to have the case closed and the Commission conclude that there had been no professional misconduct. However, other Commission members disagreed, and after lengthy delay, the Commission held a special hearing on January 7, 2011, at which it heard from several arson experts, including Beyer (who is now chair of the International Association of Fire Safety Science). Although the state 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 Beyer's criticism. Mr. DeHaan 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." It was expected that at a later date, a subcommittee would draft a report for the Commission's consideration.<sup>134</sup>

Meanwhile, 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 scene of the crime. The only other evidence tying him to the crime scene was testimony (later recanted) by an accomplice. But under Texas law, the 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 sought 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.

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."<sup>135</sup> 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."<sup>136</sup> 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."<sup>137</sup>

Also in 2010, former FBI agents completed an audit of North Carolina's State Bureau of Investigation (the "SBI"). The audit was requested by North Carolina Attorney General Roy Cooper. It found that SBI agents repeatedly helped the prosecution 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 incomplete at best, 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.<sup>138</sup> 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, said, "[T]here are no do-overs with the death penalty. We can't go back and fix these errors."<sup>139</sup>

A study released in 2010 concerned one reason 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.” 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.” 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.<sup>140</sup>

### ***Mental Retardation***

In *Atkins v. Virginia*,<sup>141</sup> 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*.<sup>142</sup> For example, even though the leading organizations in the field recognize 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), Texas has “a separate set of questions, known as the Briseno 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.”<sup>143</sup>

There is also particularized litigation regarding whether individual inmates have mental retardation. Aside from different legal standards being applied by different courts, there are wide variations in the quality of defense counsels’ investigations and presentations regarding mental retardation.

In January 2010, the *Texas Observer* reported that a Texas psychologist, George Denkowski, who had testified in 29 Texas capital punishment cases involving mental retardation – about 2/3 of all such Texas cases – is the subject of a complaint that might lead to the loss of his license. Were that to occur, it might lead to re-evaluations of the cases of 17 Texas death row inmates whom he found not to have mental retardation. In February 2009, the Texas Board of Examiners of Psychologists upheld the complaint against Mr. Denkowski, finding 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. The Board referred his case to the State Office of Administrative Hearings.<sup>144</sup> Its hearing is scheduled for May 2011.

### *Mental and Physical Disabilities*

The ABA, the American Psychiatric Association and the American Psychological Association all have adopted three policies concerning mental disability and capital punishment.<sup>145</sup> 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.<sup>146</sup>

The third policy deals with a death-sentenced prisoner: (i) whose ability to make a rational decision to cease – or never to initiate – postconviction proceedings is significantly impaired by a mental disorder or disability, (ii) 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 (iii) whose understanding of the nature and purpose of the punishment has become so impaired as to render him incompetent for execution.<sup>147</sup>

In July 2009, the National Alliance on Mental Illness and Murder Victims’ Families for Human Rights issued a report, *Double Tragedies*, asserting that people with serious mental illness should be treated and that such treatment and other steps should be taken to prevent their commission of capital crimes. The report called capital punishment “inappropriate and unwarranted” for people with severe mental disorders.<sup>148</sup>

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. Among that evidence was a psychologist’s conclusion that Mr. Landrigan’s childhood made him predisposed, in Judge Hendrix’s words, to “non-conforming conduct, that is to commit criminal activities.”<sup>149</sup> 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.<sup>150</sup> Landrigan, who had insisted that his trial counsel not present mitigating evidence,<sup>151</sup> was denied relief and was executed on October 26, 2010.<sup>152</sup>

Virginia executed Teresa Lewis on September 23, 2010.<sup>153</sup> 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 violence 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.” Shallenberger reportedly stated, “From the moment I met her I knew she was someone who could be easily manipulated. From the moment I met her I had a plan for how I could use her to get some 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.”<sup>154</sup>

Ohio death row inmate Sidney Cornwell was more fortunate. On November 15, 2010, Governor Ted Strickland, in his final capital punishment decision as governor, rejected the Parole Board's recommendation and commuted Mr. Cornwell's death sentence to life without parole. He did so because of evidence, not presented at trial, that Cornwell has the genetic disorder Klinefelter's syndrome. The National Institutes of Health (the “NIH”) says that this syndrome, also known as the XXY condition, exists in men whose cells mostly include an additional X chromosome. The NIH states, “As teens, XXY males tend to be quiet and shy. They may struggle in school and sports, meaning they may have more trouble ‘fitting in’ with other kids.”<sup>155</sup> The crime took place in June 1996, when Cornwell (who was born in April 1977) was 18 years old.<sup>156</sup> Governor Strickland stated that Klinefelter's syndrome, “which impacts both the body and the mind of its sufferer, was unknown to the jury and judge responsible for determining Mr. Cornwell's sentence despite significant testimony and argument during Mr. Cornwell's trial regarding certain of his physical characteristics.” The Parole Board's chair, who dissented from its recommendation against clemency, had pointed out that this syndrome could have been a strong mitigating factor, whereas at trial, Cornwell “was portrayed by the prosecution as merely overweight and lazy by nature.” Governor Strickland concluded that “there is a substantial possibility” that either the jury or the sentencing judge “would have found that the death penalty was inappropriate in this case, just as one of the Sixth Circuit judges did and as the Parole Board's Chair did.”<sup>157</sup>

### ***Costs of the Capital Punishment System***

The California Commission on the Fair Administration of Justice, established in 2004 by a State Senate resolution, issued its *Report and Recommendations on the Administration of the Death Penalty in California* in 2008.<sup>158</sup> It found that to decrease the average time between sentencing and execution to the national average of 12 years would require spending almost double the current amount, which it estimated to be \$137,700,000 per year (and increasing).<sup>159</sup>

The report said that if the death penalty were replaced by a system in which life without possibility of parole were the maximum sentence, the annual cost would be dramatically lower: \$11,500,000.<sup>160</sup> In 2009, former California Attorney General and former Los Angeles County District Attorney John Van de Kamp said that, given that the Commission's recommendations were going nowhere, "it's time to do away with the death penalty in California." He stated, "A courageous governor facing an unprecedented budget crisis would take this step and use the taxpayer money saved to preserve some of the vital services now on the chopping block."<sup>161</sup>

In an article published in the *American Law and Economics Review* in December 2009, Professor Philip J. Cook of Duke University analyzed North Carolina fiscal years 2005 and 2006. He concluded that "the state would have spent almost \$11 million less each year on criminal justice activities (including appeals and imprisonment) if the death penalty had been abolished" and that "[a]dditional criminal justice resources would have been freed up and available to be redirected to other cases."<sup>162</sup> In a previous study published in 1993, Professor Cook had estimated that \$4 million would be saved each year if North Carolina were to repeal capital punishment.<sup>163</sup>

In 2010, as noted above, Leigh B. Bienen and the New Hampshire commission concerning capital punishment discussed the extensive costs associated with seeking capital punishment.<sup>164</sup>

### ***Lack of Substantial Evidence of Deterrence***

In 2009, Professor Michael L. Radelet and Traci L. Lacock published the results of a survey of a randomly selected group of the world's leading criminologists regarding whether empirical research supports the assertion that capital punishment is superior as a deterrent to a criminal justice system without capital punishment. The survey found "an overwhelming consensus among these criminologists that the empirical research conducted on the deterrence question strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment."<sup>165</sup> This survey, an update of a similar study from 1996, was conducted in a way that ensured that no one surveyed in the earlier study could respond again.

On what was designed to be the "summary question," only "2.6% of . . . respondents agreed that executing people deters others from committing murder, while 89.6% of the experts disagreed."<sup>166</sup> The survey was conducted in the wake of several studies – some of them well-publicized – by economists who purport to have found substantial deterrent effects. In their 2009 article, Professor Radelet and Ms. Lacock discussed each of the best known of these studies, noting major flaws or gaps that have been identified in each.<sup>167</sup>

### ***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 changed 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"<sup>168</sup> 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.'"<sup>169</sup>

Under the change, 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) asserted that Congress had 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 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 on implementing its new role regarding opt-in. The Judicial Conference of the United States expressed concern that under that proposal, states could qualify for opt-in without providing lawyers “sufficient to enable federal court litigation to proceed fairly within the expedited time period.”<sup>170</sup> The ABA was also critical, saying, *inter alia*, that states would be allowed “to obtain streamlined review without ensuring that capital defendants receive competent counsel (or that counsel is appropriately compensated) in post-conviction proceedings.” The ABA recommended that the Attorney General incorporate the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases into the process for evaluating opt-in applications.<sup>171</sup> However, Attorney General Michael Mukasey made few changes and adopted finalized regulations on December 5, 2008, to become effective on January 12, 2009.<sup>172</sup> On January 8, 2009, United States District Judge Claudia Wilken issued a temporary restraining order, followed on January 20, 2009 by a permanent injunction, enjoining the Justice Department from giving effect to the finalized regulations 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.<sup>173</sup> On February 5, 2009, the Justice Department (now under the Obama administration) solicited “further comments” on the regulations.<sup>174</sup> On November 23, 2010, the Justice Department published a notice stating that it was withdrawing the regulations and indicating that it would have to determine, through a new rulemaking process, what standards to apply in assessing state compliance with Chapter 154. The notice stated that the Attorney General believes “[C]hapter 154 reasonably could be construed to allow the Attorney General greater discretion” in making a determination regarding a state's compliance than was reflected in the regulations being withdrawn.<sup>175</sup> 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. Comments on the proposed regulations are due on June 1, 2011.<sup>176</sup>

## II. SIGNIFICANT LEGAL DEVELOPMENTS

### *Smith v. Spisak*, 130 S. Ct. 676 (2010)

Considering the issue of ineffectiveness of counsel in the context of a capital sentencing proceeding, the Court held that the prejudice prong of *Strickland v. Washington*<sup>177</sup> had not been satisfied. Defense counsel, in his penalty phase closing argument, said that his client had not done any good deeds and has had no good thoughts, but rather is “sick,” “demented,” “and is never going to be any different.” The Court pointed to the defendant's growing a mustache like Hitler's, admitting to killing three people and wounding two, expressing remorse solely about one victim because, contrary to what he had thought, that victim was not Jewish, and stating that he wanted to kill again. Justice Breyer, writing for the Court, said, “We . . . do not see how a



less descriptive closing argument with fewer disparaging comments about Spisak could have made a significant difference.”<sup>178</sup> Justice Stevens, concurring in the outcome, said that counsel’s strategy was a “catastrophe” and his “argument was so outrageous that it would have rightly subjected a prosecutor to charges of misconduct.” Nonetheless, he concluded, “Even the most skillful of closing arguments – even one befitting Clarence Darrow – would not have created a reasonable probability of a different outcome in this case.”<sup>179</sup>

The Court also ruled against Mr. Spisak’s claim that the jury instructions and verdict forms unconstitutionally required the jury to be unanimous with regard to any particular mitigating factor. It held that the “instructions and jury forms in this case differ significantly from those” held unconstitutional in *Mills v. Maryland*.<sup>180</sup> In *Smith v. Spisak*, the instructions and jury forms “made clear that, to recommend a death sentence, the jury had to find, unanimously and beyond a reasonable doubt, that each of the aggravating factors outweighed any mitigating circumstances. But the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously. Neither the instructions nor the jury forms said anything about how—or even whether—the jury should make individual determinations that each individual mitigating circumstance existed.”<sup>181</sup> The Court held that this avoided the constitutional problem identified in *Mills*: that “‘reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.’”<sup>182</sup>

The Court also held that the other basis on which the circuit court had held the instructions unconstitutional – namely, that under the instructions, the jury had to reject the death sentence unanimously before considering other possible sentences – could not be considered, given the Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”). Since the Supreme Court had never held jury instructions unconstitutional on that basis, it could not in a habeas case consider the constitutional issue, regardless of what it might hold were it to consider the issue on a direct appeal.<sup>183</sup>

On January 19, 2010, the Court vacated the Third Circuit’s grant of penalty phase relief to well-known Pennsylvania death row inmate Mumia Abu-Jamal on a *Mills* claim, and remanded it to the circuit court for reconsideration in light of the Court’s rejection of the *Mills* claim in *Smith v. Spisak*.<sup>184</sup>

### ***Wellons v. Hall*, 130 S. Ct. 727 (2010) (*per curiam*)**

The Supreme Court held that the Eleventh Circuit had made the same procedural error as a different circuit had made in *Cone v. Bell*.<sup>185</sup> Contrary to the four dissenters, the five justices in the majority said that the Eleventh Circuit had not considered the merits of Mr. Wellons’ claim that his motions for discovery and an evidentiary hearing should have been granted. The majority said it was not clear what the Eleventh Circuit would have decided had it done so. The majority also said that the Eleventh Circuit had given “at most, perfunctory consideration” of whether, notwithstanding the procedural bar it had incorrectly applied, Wellons would in any event have been entitled to an evidentiary hearing, and that any such consideration “may well have turned on” the district court’s having found a procedural bar. Moreover, the majority stated that even if the circuit court had meant to address Wellons’ motions for discovery and an evidentiary hearing, it was not clear that its reasoning was independent of the *Cone* error – particularly because “the absence of a record . . . was in part based on the *Cone* error.”<sup>186</sup> In a footnote, the majority rejected as “bizarre” what it asserted to be Justice Alito’s view that, under the AEDPA, a federal court must “defer to state-court factual findings, made without any



evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual findings were erroneous.”<sup>187</sup>

Accordingly, the Court remanded the case for reconsideration in light of *Cone*. Wellons’ underlying claim was premised on information that, unbeknownst to the defense, “‘either during or immediately following the penalty phase, some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts,’” that “‘there had been unreported *ex parte* contacts between the jury and the judge” and that “‘jurors and a bailiff had planned a reunion.”<sup>188</sup>

**Wood v. Allen**, 130 S. Ct. 841 (2010), *rehearing denied*, 130 S. Ct. 1942 (2010).

This case dealt with a claim of ineffective assistance of counsel in the penalty phase of a capital case. The Court did not reach the merits of the claim. It held that under 28 U.S.C. § 2254(d)(2), the federal courts could not grant the claim because the Alabama court’s adverse decision was based on this reasonable “key factual finding”: defense counsel’s “failure to pursue and present mitigating evidence” regarding Mr. Wood’s mental deficiencies “was a strategic decision rather than a negligent omission.”<sup>189</sup>

The majority pointed out that a state court factual finding is not “unreasonable” under § 2254(d)(2) – which was added to the habeas statute by the AEDPA – whenever reasonable people might disagree or whenever the federal courts would decide otherwise. In finding the state court’s fact finding “reasonable,” the Court pointed to portions of the record that the Eleventh Circuit had cited, as well as a lead counsel’s statement that independent psychological evaluations “would not be needed” and had therefore not been conducted, and another defense lawyer’s having told the judge that the one expert report that had been prepared would not be presented to the jury in the penalty phase.

The Court acknowledged that a lead counsel had testified in the state postconviction proceeding that mental health evidence would have been used in the sentencing phase if counsel had known of it, that the inexperienced lawyer handling the penalty phase preparation did not recall considering the defendant’s mental deficiencies, that the one available expert report had been written for the guilt (not the penalty) phase, that defense counsel sought to get additional mental health evidence for use in mitigation but “failed to pursue it” – partly because they thought they would not be given a continuance to enable that investigation, and that defense counsel did present evidence of Wood’s mental deficits to the judge after the jury’s 10-2 recommendation of the death penalty. However, the Court said this mostly “speaks not to whether counsel made a strategic decision, but rather to whether counsel’s judgment was reasonable – a question we do not reach.” It said that any evidence that could be used to argue that no “strategic decision” was made was insufficient to render “unreasonable” the state court’s perhaps “debatable” factual finding.

The Court said it could not consider Wood’s further contention that the state court had unreasonably applied *Strickland* in rejecting his ineffectiveness claim on the merits, because that contention was not “fairly included” in the issues on which he had sought certiorari.<sup>190</sup>

In dissent, Justice Stevens, joined by Justice Kennedy, said “the only reasonable factual conclusion” was that counsel’s “hasty” decision “to forgo investigating powerful mitigating evidence of Wood’s mental deficits for the penalty phase . . . was the result of inattention and neglect” – “the antithesis of a ‘strategic’ choice.” The dissent pointed out that prior to trial, defense counsel learned that their client’s IQ was “in the borderline range of intellectual functioning,” and he read “on less than a 3rd grade level” and they could have learned that the school system classified him as “educable mentally retarded.”<sup>191</sup> While the majority set forth

various potentially negative byproducts of using such evidence in the penalty phase, the dissent said that this “conflate[d] the strategic decision to present mitigating evidence to the jury with the strategic decision to investigate avenues of mitigating evidence thoroughly.” The dissenters stated that there was “no evidence to support a conclusion that there was a strategic decision on the latter, which is a necessary prerequisite for counsel to make reasoned choices with respect to what evidence” to present. They concluded that any decision not to investigate further was “so obviously unreasonable” as to indicate strongly that no strategy underlay that decision.<sup>192</sup>

Wood was executed on September 9, 2010.<sup>193</sup>

**Thaler v. Haynes**, 130 S. Ct. 1171 (2010) (*per curiam*), *rehearing denied*, 130 S. Ct. 2141 (2010)

The Court reversed the Fifth Circuit’s grant of federal habeas relief to a Texas death row inmate. The Court held that there is no “clearly established” Supreme Court precedent mandating relief under *Batson v. Kentucky*,<sup>194</sup> under the following circumstance: the prosecutor’s explanation for a peremptory challenge that the defense asserts was unconstitutionally racially-based is premised on the juror’s demeanor, but the trial judge either did not personally observe or cannot recall the prospective juror’s demeanor. In reversing and remanding, the Court stated that the Fifth Circuit could still grant *Batson* relief if the Texas Court of Criminal Appeals’ decision were to be “overcome under the federal habeas statute’s standard for reviewing a state court’s resolution of questions of fact.”<sup>195</sup>

**Jefferson v. Upton**, 130 S. Ct. 2217 (2010) (*per curiam*)

In a case not governed by the AEDPA (because of when federal habeas proceedings began), the Court held that the Eleventh Circuit erred by considering “fully” only one of the eight exceptions to the presumption of correctness of state court fact finding.

The federal habeas claim as to which the state court fact finding related was that trial counsel had been ineffective for not investigating Mr. Jefferson’s childhood traumatic head injury. One of Jefferson’s contentions as to why the presumption of correctness should not apply was that “the state court’s *process* was deficient.” The Court stated that the Eleventh Circuit had not considered “the state court’s *process*,” but had only considered one of the eight exceptions to the presumption of correctness – dealing with findings that are “‘not fairly supported by the record.’” The Court held that this was improper, because “[u]nder *Townsend v. Sain*, 372 U.S. 293 (1963)], as codified by the governing statute, a federal court is not ‘duty-bound’ to accept any and all state-court findings that are ‘fairly supported by the record.’”<sup>196</sup> The Court noted that while it had previously criticized a court’s adopting word-for-word a winning litigant’s proposed findings of fact, it had not previously rendered a holding under the circumstances presented here.

The Court left for review on remand whether exception in 28 U.S.C. § 2254(d)(1)-(8) applied. It declined to decide this, particularly because “the facts surrounding the state habeas court’s process are undeveloped.” Thus, while the state conceded that it had prepared the state habeas court’s final order after being requested to submit it and that the state-proposed order had been adopted word-for-word, and although there was no dispute that the state habeas judge had requested the state’s submission *ex parte* and that Jefferson’s counsel had not been notified of this and had not been asked to submit their own proposed order, “the precise nature of what transpired during the state-court proceedings is not fully known.” In particular, there was an issue as to whether Jefferson had had a chance to respond to the final order.<sup>197</sup>

The Court expressed no view regarding the merits of the ineffective assistance of counsel claim.

**Holland v. Florida**, 130 S. Ct. 2549 (2010)

This case concerned equitable tolling of the AEDPA's one-year statute of limitations for filing a federal habeas petition.

Florida appointed Bradley Collins to represent Albert Holland in all state and federal postconviction proceedings. Mr. Collins filed a motion for state postconviction relief. While the state postconviction case remained pending, the AEDPA statute of limitations was tolled, with 12 days left before the federal habeas petition would have to be filed. Mr. Holland wrote to Collins, urging him to ensure that all his claims would be preserved for later federal habeas review. Collins assured Holland he would do so and said he knew about Florida time limits and about how to exhaust federal claims. While Holland's case was pending in the Florida Supreme Court (after he lost in the trial level court), Collins and Holland's communications became very infrequent. Holland twice asked the Florida Supreme Court to remove Collins, saying among other things, "[I have] no idea what is going on with [my] capital case on appeal."<sup>198</sup> It rejected Holland's efforts – agreeing with the state that Holland could not file anything *pro se* because he had counsel. Holland repeatedly wrote to the Florida Supreme Court's Clerk, asking to be told precisely what was happening with his appeal. He also filed a complaint against Collins that the Florida Bar Association denied. Soon after Collins orally argued Holland's appeal, Holland wrote him – stressing that, once that court's decision became final, a federal habeas petition had to be filed before the AEDPA statute of limitations expired. Collins did not respond either to this or to a later letter. Thereafter, the Florida Supreme Court issued a decision that then became final. Twelve days later, no federal habeas petition having been filed, "Holland's AEDPA time limit expired."

But until many weeks later, Holland did not know about the Florida Supreme Court decision, since no one had told him about it. He only found out about it while using the prison library. "He immediately wrote out his own *pro se* federal habeas petition and mailed it to the Federal District Court . . . ." That same day, he got a letter from Collins, who told him that Collins was going to file a certiorari petition from the Florida Supreme Court's ruling. In subsequent correspondence, Collins asserted – incorrectly – that the AEDPA statute of limitations had already elapsed prior to the time that Collins began representing Holland.<sup>199</sup> In reality, the AEDPA statute of limitations had not even *begun* to run when Collins was appointed.

The federal district court dismissed Holland's habeas petition, asserting that Holland had not shown the needed "due diligence" required for there to be "equitable tolling" of the AEDPA statute of limitations. The Eleventh Circuit affirmed, holding that even assuming that Collins had been "grossly negligent," there could not be equitable tolling in the absence of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part."

The Supreme Court reversed, after first agreeing with the Eleventh Circuit (and every other circuit) that the AEDPA's statute of limitations could be "tolled for equitable reasons."<sup>200</sup>

The Court said that the governing principles involving failure to meet a federal deadline were different from the considerations governing federal court review of claims that had not been raised in conformance with a state's procedures. It stated that "at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." This case's facts, the Court said, "present far more serious instances of attorney misconduct" than "garden variety" negligence by counsel.<sup>201</sup>

The Court proceeded to say that “this case may well be an ‘extraordinary’ instance in which petitioner’s attorney’s conduct constituted far more than ‘garden variety’ or ‘excusable neglect.’” It noted that Collins’ numerous “failures violated fundamental canons of professional responsibility” and “seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence.”

The Court did not definitely decide the issue of “equitable tolling,” due to the fact that the federal district court’s decision had been based on its erroneous conclusion that Holland had not acted diligently. Combined with the Eleventh Circuit’s erroneous view of equitable tolling, this meant that “no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief.” Accordingly, the Court remanded the case for further review.<sup>202</sup>

***Magwood v. Patterson*, 130 S. Ct. 2788 (2010)**

Alabama death row inmate Billy Joe Magwood was granted habeas relief by a federal district court, which held that his death sentence had been unconstitutionally secured. The court required that he either be resentenced or released. His resentencing again resulted in the death penalty being imposed. Mr. Magwood filed a federal habeas petition challenging this new death sentence, and the federal district court held that it had been imposed unconstitutionally. The Eleventh Circuit reversed, holding that Magwood was barred from challenging this second death penalty because, in the Eleventh Circuit’s view, this was a “second or successive” habeas petition that raised a claim that could have been asserted when Magwood had challenged his first death sentence.<sup>203</sup>

The Supreme Court reversed. The Court held the restrictions on filing “second or successive” habeas petitions apply only to challenges to a particular judgment. Here, the new death sentence was a new judgment, not the same one that had been the subject of Magwood’s successful habeas challenge to his first death sentence.

The Court stated: “This is Magwood’s *first* application challenging that intervening judgment. The errors he alleges are *new*. It is obvious to us – and the State does not dispute – that his claim of ineffective assistance at resentencing turns upon new errors. But, according to the State, his fair-warning claim [regarding a particular aggravating factor that had also been relied upon in imposing his original death sentence] does not, because the state court made the same mistake before. We disagree. An error made a second time is still a new error. This is especially clear here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh.”<sup>204</sup>

***Sears v. Upton*, 130 S. Ct. 3259 (2010) (*per curiam*)**

In the last of the Term’s numerous *per curiam* decisions involving claims of ineffective assistance of counsel in death penalty cases, the Court dealt with a postconviction case from Georgia. The trial-level state postconviction court, after finding trial defense counsel’s performance constitutionally deficient, “found itself unable to assess whether counsel’s inadequate investigation might have prejudiced Sears.” It denied relief due to trial counsel’s having offered “*some* mitigation evidence during Sears’ penalty phase – but not the significant mitigation evidence a constitutionally adequate investigation would have uncovered.” After the Supreme Court of Georgia summarily denied review, the United States Supreme Court granted certiorari, vacated the judgment and remanded, because it was “plain from the face of the state

court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim."<sup>205</sup>

During the trial's penalty phase, Mr. Sears' counsel had "presented evidence describing his childhood as stable, loving, and essentially without incident." Apparently, counsel's effort was to show the impact that executing Sears would have "on his family and loved ones." This approach "backfired," because the prosecutor pointed out in closing argument that this was not a case of a defendant from a difficult, inner city background against whom society had turned as early as his childhood. Yet, contrary to what the prosecution argued, mitigation evidence that was first presented in the postconviction proceeding showed that "[h]is parents had a physically abusive relationship and divorced when Sears was young; he suffered sexual abuse at the hands of an adolescent male cousin; his mother's 'favorite word for referring to her sons was "little mother fuckers"; and his father was 'verbally abusive' and disciplined Sears with age-inappropriate military-style drills. Sears struggled in school, demonstrating substantial behavior problems from a very young age." He was left back in second grade and was evaluated at a health center at age nine. "By the time Sears reached high school, he was 'described as severely learning disabled and as severely behaviorally handicapped.'" The Court said that "more significantly," there was postconviction evidence that Sears "suffered 'significant frontal lobe abnormalities.'" Experts said he "had substantial deficits in mental cognition and reasoning," that is, "problems with planning, sequencing and impulse control," due to "several serious head injuries he suffered as a child, as well as drug and alcohol abuse." Two assessment tests showed him in several categories to be "at or below the first percentile," so he was "among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." Moreover, his ability to choose from his options deliberately "is grossly impaired." The Court said it was unsurprising that there was also some "adverse evidence," but added that some of this could have been used in support of an effectively presented mitigation theory.<sup>206</sup>

The Court found two errors in the state postconviction court's approach to *Strickland*'s prejudice prong. First, having found that counsel's mitigation investigation had been "constitutionally deficient," the state postconviction court should not have assumed that counsel's "mitigation theory" was reasonable. Even if "a theory might be reasonable, in the abstract," Sears could still have been prejudiced by counsel's failure to conduct a proper "mitigation investigation before arriving at this particular theory." The Court stated, "Second, and more fundamentally, the court failed to apply the proper prejudice inquiry," in that it assumed – incorrectly – that *Strickland*'s prejudice prong could only be satisfied where "little or no mitigation evidence" was introduced at trial. Rather, "we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below." The Court remanded so that the state postconviction court could "undertake this reweighing in the first instance "of "the newly uncovered evidence . . . along with the mitigation evidence" presented at trial, "to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation."<sup>207</sup>

### ***Gamache v. California*, 131 S. Ct. 591 (2010)**

In a statement respecting denial of the certiorari petition, written on behalf of four Justices, Justice Sotomayor discussed what the California Supreme Court had held to be an error – "court personnel inadvertently [giving] the jury a videotape that had not been admitted into evidence," showing "a police interview . . . in which Gamache confessed to the crime in graphic

terms” including his saying that if it had been possible “he would have shot police officers.” The California Supreme Court, in considering the impact of this error in this death penalty case, said that because there was no misconduct involved, the defendant had the burden to demonstrate prejudice. In this direct appeal case, Justice Sotomayor pointed out that “[u]nder our decision in *Chapman v. California*, 386 U.S. 18, 24 (1967), the prosecution must carry the burden of showing that a constitutional trial error is harmless beyond a reasonable doubt.”<sup>208</sup>

Justice Sotomayor and those joining in her statement did not dissent, because it seemed clear from the California Supreme Court’s decision that it would have found the error to be harmless no matter how it had allocated the burden with regard to prejudice. She said, “I nonetheless write . . . because the allocation of the burden of harmlessness can be outcome determinative in some cases.”<sup>209</sup>

***Skinner v. Switzer*, 79 U.S.L.W. 4157 (U.S. March 7, 2011)**

The Court addressed the limited issue of whether when a convicted state prisoner (in this case, a death row inmate) wishes to seek DNA testing of crime-scene evidence, he may attempt to secure that testing through a civil rights case brought under 42 U.S.C. § 1983. The federal circuit courts that had considered this issue had been split, with some (such as the Fifth Circuit in Skinner’s case) holding that the only way to seek such testing was a federal habeas corpus proceeding. Procedural barriers would usually prevent an inmate from getting any ruling on the merits of such a claim in a habeas proceeding.

The Court held “that a postconviction claim for DNA testing is properly pursued in a § 1983 action.” The Court reasoned that winning such a lawsuit would only provide “access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive” and in any event would not necessarily mean that the prisoner’s being in custody was unlawful.

The Court cautioned that it would not be easy to prevail in the civil rights lawsuit. It pointed out that its precedent left only “slim room for the prisoner to show that the governing state law denies him procedural due process.”<sup>210</sup> Skinner’s claim, which will be considered on remand, is that Texas’ postconviction DNA statute, as it has been construed by Texas’ courts, violates procedural due process by entirely preventing any inmate from seeking DNA testing in a postconviction proceeding if the inmate could have but did not seek DNA testing before trial.<sup>211</sup>

***Noteworthy Lower Court Developments***

In addition to these Supreme Court decisions, there was a noteworthy decision by the Texas Court of Criminal Appeals and a significant concurrence by a federal appeals court judge.

The Texas Court of Criminal Appeals concluded in October 2010 that “the prosecution did not satisfy its burden of showing the scientific reliability of Dr. [Richard] Coons’ methodology for predicting future dangerousness by clear and convincing evidence” prior to trial, and it had therefore had been an abuse of discretion to admit his testimony during the penalty phase.<sup>212</sup> Although the court held that this error had been harmless, in part because a defense expert had debunked Dr. Coons’ testimony, its ruling might call into question some of the death sentences handed down in the dozens of other Texas death penalty trials in which he had testified about future dangerousness. It might also call into question the admissibility of similar testimony in future Texas capital trials.<sup>213</sup>

Any further challenge could draw upon a study whose lead author, Dr. Mark Cunningham, was the defense expert who had debunked Dr. Coons’ testimony. That study, published in 2009, found that federal jurors were 90% inaccurate when they predicted that a

defendant in a death penalty case would later commit a seriously “violent act” – although they were right over 93% in cases where they predicted that the defendant would *not* later commit a seriously “violent act.”<sup>214</sup>

Sixth Circuit Judge Boyce Martin, Jr. said the following on April 14, 2009, in concurring in the denial of habeas corpus relief to a death row inmate:

Now in my thirtieth year as a judge on this Court, I have had an inside view of our system of capital punishment almost since the death penalty was reintroduced in the wake of *Furman v. Georgia*. During that time, judges, lawyers and elected officials have expended great time and resources attempting to ensure the fairness, proportionality and accuracy that the Constitution demands of our system. But those efforts have utterly failed. Capital punishment in this country remains “arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.” At the same time, the system’s necessary emphasis on competent representation, sound trial procedure, and searching post-conviction review has made it exceedingly expensive to maintain.

The system’s deep flaws and high costs raise a simple but important question: is the death penalty worth what it costs us? In my view, this broken system would not justify its costs even if it saved money, but those who do not agree may want to consider just how expensive the death penalty really is. Accordingly, I join Justice Stevens in calling for “a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces.” *Baze v. Rees*, [553] U.S. [35, 81], 128 S. Ct. 1520, 1548-49 (2007) (Stevens, J., concurring). Such an evaluation, I believe, is particularly appropriate at a time when public funds are scarce and our state and federal governments are having to re-evaluate their fiscal priorities.<sup>215</sup>

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

#### *Counsel*

The ABA’s Death Penalty Representation Project has recruited numerous firms to take on the representation of death row inmates in state postconviction and federal habeas corpus proceedings. Indeed, in the last decade, it has found counsel for over 200 death row inmates. The Project provides technical assistance and resources to counsel whom it has recruited. In a great many instances, counsel recruited by the Project have secured relief for their clients. Unfortunately, there are still a great many death row inmates without counsel to handle postconviction and federal habeas proceedings.

The Project works with judges, legislators, bar associations and lawyers in jurisdictions that have the death penalty to champion meaningful systemic reforms that would ensure that all capital defendants and death row prisoners have the assistance of effective, well-trained, adequately resourced lawyers. In particular, the Project has endeavored to secure the adoption of

the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which were revised in 2003 (the “ABA Guidelines”).

The Project also seeks to address systemic problems with litigation in a limited number of jurisdictions, including initiating challenges to the method for selecting, appointing and monitoring defense counsel performance; compensation for defense counsel, experts and mitigation specialists; restrictions on the funding for and selection of experts and mitigation specialists; and the structure, workload and operation of capital defender offices.

Finally, the Project participates as faculty at training seminars for judges and defense counsel and speaks at public events to raise awareness about the significant problems with death penalty counsel systems and the urgent need for reform.<sup>216</sup>

### *Assessments of States’ Implementation of the Death Penalty*

From 2004 to 2007, the ABA Death Penalty Moratorium Implementation Project (the “Moratorium Project”) assessed the extent to which the capital punishment systems in eight states comport 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 are acting in consonance with relevant ABA policies. The assessment reports were prepared by in-state assessment teams and Moratorium Project staff.

On October 29, 2007, the ABA released its overall findings based on the eight individual state assessments regarding Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania and Tennessee. The ABA concluded that “serious problems were found in every state death penalty system.”<sup>217</sup> Among many other pervasive problems were “significant racial disparities . . . particularly . . . associated with the race of the victim”; non-existent or cursory proportionality review, so that a defendant’s death penalty is upheld even though others who have committed similar or worse crimes have not received the death penalty; judicial election campaigns in which candidates “discussed and advertised their views of the death penalty”; the failure to ensure that counsel for people with mental retardation or mental illness “fully appreciate the significance” thereof; the failure to comport with the ABA’s policies (summarized above) on mental disability and capital punishment; serious mistakes or even fraud in crime labs; the failure to require accreditation of crime labs or medical examiner offices; crime labs’ not using the best available DNA testing methods; states’ failures to preserve evidence from which DNA testing might be done, and their often making it difficult or impossible for defense counsel to get testing done on such evidence that does exist; failing to adopt identified best practices regarding identification and interrogations; failure to comply with many aspects of the ABA Guidelines; jurors’ not understanding their roles and responsibilities or important jury instructions; truncated postconviction procedures that provide inadequate time for investigation, make discovery difficult or impossible, and make it extremely difficult to secure evidentiary hearings; failure to discipline prosecutors found by courts to have engaged in serious misconduct; and inadequate clemency review.<sup>218</sup> In view of these and other findings, the ABA renewed its call for a nationwide moratorium on executions.

On October 29, 2009, the Supreme Court of Florida revised its standard jury instructions with regard to the penalty phase of capital cases. In doing so, it made some changes suggested by the ABA’s Florida assessment report, while declining to make other changes suggested therein.<sup>219</sup>

Under the auspices of the Moratorium Project, assessments are being made of capital punishment systems in additional states.



## International Activities

On December 6-7, 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. Meanwhile, the *Thomas M. Cooley Law Review* expects to publish in 2011 numerous articles based on presentations at the 2005 conference.

## Vienna Convention Compliance

In February 2010, the ABA adopted a policy in the wake of *Medellin v. Texas*<sup>220</sup> and subsequent developments, most notably the International Court of Justice's opinion in *Avena and Other Federal Nationals*. In order to provide context for the policy, here is some background, followed by a summary of some key parts of the policy.

*Medellin* 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. Not knowing about this right, he did not contact the consulate. He was convicted and sentenced to death. In state habeas, he sought to raise a claim concerning 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*<sup>221</sup> that the United States had violated Article 36(1)(b) of the Vienna Convention, by failing to inform 51 named 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 "will discharge its international obligations" under the ICJ decision "by having State courts give effect to the decision in accordance with general principles of comity." 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 was "binding federal law" that could supersede the state's procedural rules.

The Supreme Court affirmed, holding that none of the various relevant treaties were "self-executing" as "binding" federal law, nor could they bind the states in the absence of a congressionally enacted statute giving the treaties effect in domestic courts. The Court said that when the United States agreed to submit to the ICJ disputes arising from the Vienna Convention, it did not commit to abide by an ICJ judgment. And while the United Nations (the "UN") Charter provides that each UN member "undertakes to comply with" an ICJ decision "in any case to which it is a party," the Court said this was merely an undertaking to take action in the future through the member country's non-judicial branches of government to comply with an ICJ decision. This, the Court held, did not obligate the United States to comply with an ICJ decision to which the United States was a party, nor did it cause ICJ decisions to have instantaneous legal effect in state and federal courts. While the UN Charter provides that the UN Security Council can provide a remedy for non-compliance with an ICJ decision, the Court noted that the United States has always had a veto in the Security Council. The Court also stated that Medellin, not being a UN member, had no right to seek enforcement of the ICJ's decision. Moreover, it held that only Congress, not the President, could make an ICJ decision binding on the states.

Thereafter, Mexico returned to the ICJ and sought a declaration that the United States would violate the ICJ's ruling if Medellín were executed without further legal proceedings. The United States responded that it would continue seeking to effectuate the ICJ's ruling, including in Medellín's case. Medellín's counsel then requested a stay of execution from the Texas courts, Texas' Governor and the Supreme Court, to enable Congress to act on pending legislation to effectuate the ICJ's ruling. All requests were denied, with the Supreme Court's order coming on a 5-4 vote. The four dissenters said that either Congress should be given time to act on the legislation or else the Court should get an explanation from the federal government regarding what it meant by its stating to the ICJ that it would continue to seek to effectuate the ICJ's ruling. Medellín was executed on August 6, 2008.<sup>222</sup>

On January 19, 2009, the ICJ found unanimously that by executing Medellín 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.<sup>223</sup>

The ABA policy adopted in February 2010 provides that the United States, state and territorial governments should "work to ensure" full compliance with the "fundamental protections" of the Vienna Convention's Article 36 "without obstacle to foreign nationals within" our borders; that the United States should also "work to ensure" that Article 36's "fundamental protections" are applied "fully and without obstacle" to American citizens abroad; and that the President and Congress should "renew the United States' commitment to the implementation of the Vienna Convention and to the enforcement of its obligations of the [UN] Charter and the Optional Protocol to the Vienna Convention by": (i) seeking "legislative and other means, where possible" to implement fully the ICJ's decision in *Avena* and *Other Federal Nationals*, (ii) recognizing that the ICJ should decide "disputes arising out of the interpretation of the Vienna Convention and related questions of international law" and (iii) giving ICJ decisions concerning "those disputes binding force within the United States, including honoring and enforcing any [ICJ] judgments to which the United States is a party." The ABA policy further calls upon the President, Congress, and state and territorial governments to take a variety of actions set forth in the policy "to advance the implementation of and compliance with Article 36 of the Vienna Convention in the United States." The ABA policy also "urges prosecutors and criminal defense attorneys" to learn about the Vienna Convention's consular notification requirements and try to achieve their "effective exercise by foreign national defendants." Finally, the policy calls upon "state and territorial bar associations, in matters involving foreign national defendants" to contact foreign consulates in this country and, among other things, help the consulates "in finding counsel for foreign national defendants."<sup>224</sup>

#### IV. THE FUTURE

There is increasing recognition of major, systemic problems with capital punishment. In four states – most recently Illinois in March 2011, this has led to abolition or discontinuation of capital punishment. Other states have come close to repeal in recent years, and two others enacted laws that could constrain the death penalty's use. Elsewhere, it remains to be seen what reaction – if any – there will be to studies documenting egregious problems with the capital punishment system.

Justice Stevens has increasingly pointed to such systemic problems and to what he sees as a lack of discernible societal benefits from the death penalty. He has concluded that the assumptions that he and Justice Stewart (among others) made in 1976 when upholding the constitutionality of the death penalty in *Gregg* and other cases have turned out to be wrong. The ALI acted on the basis of similar concerns when, in 2009, it withdrew the Model Penal Code

provision that had been the basis for most of the statutes upheld in and after *Gregg* and said that it saw no reason to try to develop a new provision.

Meanwhile, the number of new death sentences continues to be at a much lower level than in recent decades. There is no reason to foresee a substantial increase in the number of new death sentences. Indeed, 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.

The fact that providing competent counsel has been shown repeatedly to reduce the number of death outcomes drastically should – but is not likely to – lead to a systematic re-examination of the quality of representation received by those *already* on death row. Although the Supreme Court in its October 2009 term paid increasing attention to defense representation in capital sentencing proceedings, its decisions 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 to be far more expensive than the actual alternative – in which life without parole is the most serious punishment. This question has become substantially more important given the severe economic downturn in 2008-2011. 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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