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IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,  
  
Plaintiff-Respondent,  
  
v.  
  
CONNER SCHIERMAN,  
  
Defendant-Appellant.

No. 84614-6  
  
FOURTH SUPPLEMENTAL  
AUTHORITY

Pursuant to RAP 10.8, Schierman submits the following citation as supplemental authority regarding the issue of statutory review.

*Glossip v. Gross*, – S.Ct. – 2015 WL 2473454 (June 29, 2015) (Dissenting Opinion of Justice Breyer, beginning at \*27). A copy of the dissent is attached.

DATED this 8th day of July, 2015.



David B. Zuckerman, WSBA 18221  
Attorney for Conner Schierman

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on July 8<sup>th</sup>, 2015, I mailed one copy of this document in the U.S. Mail, postage prepaid, to:

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each of these crimes was egregious enough to merit the severest condemnation that society has to offer. The only constitutional problem with the fact that these criminals were spared that condemnation, while others were not, is that their amnesty came in the form of unfounded claims. Arbitrariness has nothing to do with it.<sup>4</sup> To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

\*27 For the reasons stated in Justice SOTOMAYOR's opinion, I dissent from the Court's holding. But rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

The relevant legal standard is the standard set forth in the Eighth Amendment. The Constitution there forbids the "inflict[ion]" of "cruel and unusual punishments." Amdt. 8. The Court has recognized that a "claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Indeed, the Constitution prohibits various gruesome punishments that were common in Blackstone's day. See 4 W. Blackstone, Commentaries on the Laws of England 369–370 (1769) (listing mutilation and dismembering, among other punishments).

Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. See *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. 242, 247, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Jurek v. Texas*, 428 U.S. 262, 268, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); but cf. *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) (striking down mandatory death penalty); *Roberts v. Louisiana*, 428 U.S. 325, 331, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion) (similar). The circumstances and the

evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

\*28 I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishment[t]." U.S. Const., Amdt. 8.

## I

### "Cruel"—Lack of Reliability

This Court has specified that the finality of death creates a "qualitative difference" between the death penalty and other punishments (including life in prison). *Woodson*, 428 U.S., at 305, 96 S.Ct. 2978 (plurality opinion). That "qualitative difference" creates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Ibid.* There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability. Cf. *Kansas v. Marsh*, 548 U.S. 163, 207–211, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (Souter, J., dissenting) (DNA exonerations constitute "a new body of fact" when considering the constitutionality of capital punishment).

For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed. See, e.g., Liebman, Fatal Injustice; Carlos DeLuna's

Execution Shows That a Faster, Cheaper Death Penalty is a Dangerous Idea, L.A. Times, June 1, 2012, p. A19 (describing results of a 4-year investigation, later published as *The Wrong Carlos: Anatomy of a Wrongful Execution* (2014), that led its authors to conclude that Carlos DeLuna, sentenced to death and executed in 1989, six years after his arrest in Texas for stabbing a single mother to death in a convenience store, was innocent); Grann, *Trial By Fire: Did Texas Execute An Innocent Man?* The New Yorker, Sept. 7, 2009, p. 42 (describing evidence that Cameron Todd Willingham was convicted, and ultimately executed in 2004, for the apparently motiveless murder of his three children as the result of invalid scientific analysis of the scene of the house fire that killed his children). See also, e.g., Press Release: Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s, Jan. 7, 2011, p. 1 (Colorado Governor granted full and unconditional posthumous pardon to Joe Arridy, a man with an IQ of 46 who was executed in 1936, because, according to the Governor, "an overwhelming body of evidence indicates the 23-year-old Arridy 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"); R. Warden, *Wilkie Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions 157-158* (2005) (in 1987, Nebraska Governor Bob Kerrey pardoned William Jackson Marion, who had been executed a century earlier for the murder of John Cameron, a man who later turned up alive; the alleged victim, Cameron, had gone to Mexico to avoid a shotgun wedding).

For another, the evidence that the death penalty has been wrongly *imposed* (whether or not it was carried out), is striking. As of 2002, this Court used the word "disturbing" to describe the number of instances in which individuals had been sentenced to death but later exonerated. At that time, there was evidence of approximately 60 exonerations in capital cases. *Atkins*, 536 U.S., at 320, n. 25, 122 S.Ct. 2242; National Registry of Exonerations, online at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (all Internet materials as visited June 25, 2015, and available in Clerk of Court's case file). (I use "exoneration" to refer to relief from *all* legal consequences of a capital conviction through a decision by a prosecutor, a Governor or a court, after new evidence of the defendant's innocence was discovered.) Since 2002, the number of exonerations in capital cases has risen to 115. *Ibid.*; National Registry of Exonerations, *Exonerations in the United States, 1989-2012*, pp. 6-7 (2012) (*Exonerations 2012 Report*) (defining

exoneration); accord, Death Penalty Information Center (DPIC), *Innocence: List of Those Freed from Death Row*, online at <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (DPIC Innocence List) (calculating, under a slightly different definition of exoneration, the number of exonerations since 1973 as 154). Last year, in 2014, six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations. National Registry of Exonerations, *Exonerations in 2014*, p. 2 (2015).

\*29 The stories of three of the men exonerated within the last year are illustrative. DNA evidence showed that Henry Lee McCollum did not commit the rape and murder for which he had been sentenced to death. Katz & Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. Times, Sept. 3, 2014, p. A1. Last Term, this Court ordered that Anthony Ray Hinton, who had been convicted of murder, receive further hearings in state court; he was exonerated earlier this year because the forensic evidence used against him was flawed. *Hinton v. Alabama*, 571 U.S. —, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (*per curiam*); Blinder, *Alabama Man on Death Row for Three Decades Is Freed as State's Case Erodes*, N.Y. Times, Apr. 4, 2014, p. A11. And when Glenn Ford, also convicted of murder, was exonerated, the prosecutor admitted that even "[a]t the time this case was tried there was evidence that would have cleared Glenn Ford." Stroud, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, Shreveport Times, Mar. 27, 2015. All three of these men spent 30 years on death row before being exonerated. I return to these examples *infra*.

Furthermore, exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue. Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue. They are nine times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue. *Exonerations 2012 Report* 15-16, and nn. 24-26.

Why is that so? To some degree, it must be because the law that governs capital cases is more complex. To some degree, it must reflect the fact that courts scrutinize capital cases more closely. But, to some degree, it likely also reflects a *greater likelihood of an initial wrongful conviction*. How could that be so? In the view of researchers who have conducted these studies, it could be so because the crimes at issue in capital cases are typically horrendous murders,

and thus accompanied by intense community pressure on police, prosecutors, and jurors to secure a conviction. This pressure creates a greater likelihood of convicting the wrong person. See Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 531–533 (2005); Gross & O'Brien, Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases, 5 J. Empirical L. Studies 927, 956–957 (2008) (noting that, in comparing those who were exonerated from death row to other capital defendants who were not so exonerated, the initial police investigations tended to be shorter for those exonerated); see also B. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) (discussing other common causes of wrongful convictions generally including false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, and ineffective defense counsel).

\*30 In the case of Cameron Todd Willingham, for example, who (as noted earlier) was executed despite likely innocence, the State Bar of Texas recently filed formal misconduct charges against the lead prosecutor for his actions—actions that may have contributed to Willingham's conviction. Possley, Prosecutor Accused of Misconduct in Death Penalty Case, Washington Post, Mar. 19, 2015, p. A3. And in Glenn Ford's case, the prosecutor admitted that he was partly responsible for Ford's wrongful conviction, issuing a public apology to Ford and explaining that, at the time of Ford's conviction, he was “not as interested in justice as [he] was in winning.” Stroud, *supra*.

Other factors may also play a role. One is the practice of death-qualification; no one can serve on a capital jury who is not willing to impose the death penalty. See Rozelle, The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation, 38 Ariz. S.L.J. 769, 772–793, 807 (2006) (summarizing research and concluding that “[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death”); Note, Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification, 10 Roger Williams Univ. L. Rev. 211, 214–223 (2004) (similar).

Another is the more general problem of flawed forensic testimony. See Garrett, *supra*, at 7. The Federal Bureau of Investigation (FBI), for example, recently found that flawed microscopic hair analysis was used in 33 of 35 capital cases under review; 9 of the 33 had already been executed. FBI,

National Press Releases, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, Apr. 20, 2015. See also Hsu, FBI Admits Errors at Trials: False Matches on Crime–Scene Hair, Washington Post, Apr. 19, 2015, p. A1 (in the District of Columbia, which does not have the death penalty, five of seven defendants in cases with flawed hair analysis testimony were eventually exonerated).

In light of these and other factors, researchers estimate that about 4% of those sentenced to death are actually innocent. See Gross, O'Brien, Hu, & Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, 111 Proceedings of the National Academy of Sciences 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007) (examination of DNA exonerations in death penalty cases for murder–rapes between 1982 and 1989 suggesting an analogous rate of between 3.3% and 5%).

\*31 Finally, if we expand our definition of “exoneration” (which we limited to errors suggesting the defendant was actually innocent) and thereby also categorize as “erroneous” instances in which courts failed to follow legally required procedures, the numbers soar. Between 1973 and 1995, courts identified prejudicial errors in 68% of the capital cases before them. Gelman, Liebman, West, & Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. Empirical L. Studies 209, 217 (2004). State courts on direct and postconviction review overturned 47% of the sentences they reviewed. *Id.*, at 232. Federal courts, reviewing capital cases in habeas corpus proceedings, found error in 40% of those cases. *Ibid.*

This research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care. But, at a minimum, they suggest a serious problem of reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime. See Earley, A Pink Cadillac, An IQ of 63, and A Fourteen–Year–Old from South Carolina: Why I Can No Longer Support the Death Penalty, 49 U. Rich. L. Rev. 811, 813 (2015) (“I have come to the conclusion that the death penalty is based on a false utopian premise. That false premise is that we have had, do

have, will have 100% accuracy in death penalty convictions and executions”); Earley, I Oversaw 36 Executions. Even Death Penalty Supporters Can Push for Change, *Guardian*, May 12, 2014 (Earley presided over 36 executions as Virginia Attorney General from 1998–2001); but see *ante*, at ——— (SCALIA, J., concurring) (apparently finding no special constitutional problem arising from the fact that the execution of an innocent person is irreversible). Unlike 40 years ago, we now have plausible *evidence* of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law’s view) do not warrant the death penalty’s application.

## II

### “Cruel”—Arbitrariness

\*32 The arbitrary imposition of punishment is the antithesis of the rule of law. For that reason, Justice Potter Stewart (who supplied critical votes for the holdings in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), and *Gregg*) found the death penalty unconstitutional as administered in 1972:

“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed.” *Furman*, 408 U.S., at 309–310, 92 S.Ct. 2726 (concurring opinion).

See also *id.*, at 310, 92 S.Ct. 2726 (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed”); *id.*, at 313, 92 S.Ct. 2726 (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not”).

When the death penalty was reinstated in 1976, this Court acknowledged that the death penalty is (and would be) unconstitutional if “inflicted in an arbitrary and capricious

manner.” *Gregg*, 428 U.S., at 188, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *id.*, at 189, 96 S.Ct. 2909 (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”); *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion) (similar).

The Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called “‘the worst of the worst.’” *Kansas v. Marsh*, 548 U.S., at 206, 126 S.Ct. 2516 (dissenting opinion); see also *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution” (internal quotation marks omitted)); *Kennedy v. Louisiana*, 554 U.S. 407, 420, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (citing *Roper*, *supra*, at 568, 125 S.Ct. 1183).

Despite the *Gregg* Court’s hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the “reasonable consistency” legally necessary to reconcile its use with the Constitution’s commands. *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Thorough studies of death penalty sentences support this conclusion. A recent study, for example, examined all death penalty sentences imposed between 1973 and 2007 in Connecticut, a State that abolished the death penalty in 2012. Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 *J. Empirical Legal Studies* 637 (2014). The study reviewed treatment of all homicide defendants. It found 205 instances in which Connecticut law made the defendant eligible for a death sentence. *Id.*, at 641–643. Courts imposed a death sentence in 12 of these 205 cases, of which 9 were sustained on appeal. *Id.*, at 641. The study then measured the “egregiousness” of the murderer’s conduct in those 9 cases, developing a system of metrics designed to do so. *Id.*, at 643–645. It then compared the egregiousness of the conduct of the 9 defendants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases (those in

which the defendant, though found guilty of a death-eligible offense, was ultimately not sentenced to death). Application of the studies' metrics made clear that only 1 of those 9 defendants was indeed the "worst of the worst" (or was, at least, within the 15% considered most "egregious"). The remaining eight were not. Their behavior was no worse than the behavior of at least 33 and as many as 170 other defendants (out of a total pool of 205) who had not been sentenced to death. *Id.*, at 678–679.

\*33 Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.

Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty. See GAO, Report to the Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (GAO/GGD–90–57, 1990) (82% of the 28 studies conducted between 1972 and 1990 found that race of victim influences capital murder charge or death sentence, a "finding ... remarkably consistent across data sets, states, data collection methods, and analytic techniques"); Shatz & Dalton, Challenging the Death Penalty with Statistics: *Furman, McCleskey*, and a Single County Case Study, 34 *Cardozo L. Rev.* 1227, 1245–1251 (2013) (same conclusion drawn from 20 plus studies conducted between 1990 and 2013).

Fewer, but still many, studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference. *Id.*, at 1251–1253 (citing many studies).

Geography also plays an important role in determining who is sentenced to death. See *id.*, at 1253–1256. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Smith, The Geography of the Death Penalty and its Ramifications, 92 *B. U. L. Rev.* 227, 231–232 (2012) (hereinafter Smith); see also Donohue, *supra*, at 673 ("[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether

the crime occurred in Waterbury [County]"). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. Smith 233. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide. DPIC, The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All 9 (Oct. 2013).

\*34 What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decisionmaking authority, the legal discretion, and ultimately the power of the local prosecutor. See, e.g., Goelzhauser, Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions, 96 *Judicature* 161, 162–163 (2013); Barnes, Sloss, & Thaman, Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases, 51 *Ariz. L. Rev.* 305 (2009) (analyzing Missouri); Donohue, An Empirical Evaluation of the Connecticut Death Penalty System, at 681 (Connecticut); Marceau, Kamin, & Foglia, Death Eligibility in Colorado: Many Are Called, Few Are Chosen, 84 *U. Colo. L. Rev.* 1069 (2013) (Colorado); Shatz & Dalton, *supra*, at 1260–1261 (Alameda County).

Others suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences. See, e.g., Smith 258–265 (counties with higher death-sentencing rates tend to have weaker public defense programs); Liebman & Clarke, Minority Practice, Majority's Burden: The Death Penalty Today, 9 *Ohio S. J. Crim. L.* 255, 274 (2011) (hereinafter Liebman & Clarke) (similar); see generally Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 *Yale L. J.* 1835 (1994).

Still others indicate that the racial composition of and distribution within a county plays an important role. See, e.g., Levinson, Smith, & Young, Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, 89 *N.Y.U. L. Rev.* 513, 533–536 (2014) (summarizing research on this point); see also Shatz & Dalton, *supra*, at 1275 (describing research finding that death-sentencing rates were lowest in counties with the highest nonwhite population); cf. Cohen & Smith, The Racial Geography of the Federal Death Penalty, 85 *Wash. L. Rev.* 425 (2010) (arguing that the federal death penalty is sought disproportionately where the federal district, from which the

jury will be drawn, has a dramatic racial difference from the county in which the federal crime occurred).

Finally, some studies suggest that political pressures, including pressures on judges who must stand for election, can make a difference. See *Woodward v. Alabama*, 571 U.S. —, —, 134 S.Ct. 405, 408, 187 L.Ed.2d 449 (2013) (SOTOMAYOR, J., dissenting from denial of certiorari) (noting that empirical evidence suggests that, when Alabama judges reverse jury recommendations, these “judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures”); *Harris v. Alabama*, 513 U.S. 504, 519, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (Stevens, J., dissenting) (similar); Gelman, 1 J. Empirical L. Studies, at 247 (elected state judges are less likely to reverse flawed verdicts in capital cases in small towns than in larger communities).

\*35 Thus, whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as “egregiousness”—do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

Justice THOMAS catalogues the tragic details of various capital cases, *ante*, at — — — (concurring opinion), but this misses my point. Every murder is tragic, but unless we return to the mandatory death penalty struck down in *Woodson*, 428 U.S., at 304–305, 96 S.Ct. 2978, the constitutionality of capital punishment rests on its limited application to the worst of the worst, *supra*, at — — —. And this extensive body of evidence suggests that it is not so limited.

Four decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence. See *Gregg*, 428 U.S., at 195, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) (“[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met”). But that no longer seems likely.

The Constitution does not prohibit the use of prosecutorial discretion. *Id.*, at 199, and n. 50, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *McCleskey v. Kemp*,

481 U.S. 279, 307–308, and n. 28, 311–312, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). It has not proved possible to increase capital defense funding significantly. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 355 (2008) (“Capital defenders are notoriously underfunded, particularly in states ... that lead the nation in executions”); American Bar Assn. (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1, Commentary (rev. ed. Feb. 2003), in 31 Hofstra L. Rev. 913, 985 (2003) (“[C]ompensation of attorneys for death penalty representation remains notoriously inadequate”). And courts cannot easily inquire into judicial motivation. See, e.g., *Harris*, *supra*.

Moreover, racial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury's evaluation of mitigating evidence, see *Collins v. Collins*, 510 U.S. 1141, 1153, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting from denial of certiorari) (“Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death”). Nevertheless, it remains the jury's task to make the individualized assessment of whether the defendant's mitigation evidence entitles him to mercy. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604–605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.); *Woodson*, 428 U.S., at 304–305, 96 S.Ct. 2978 (plurality opinion).

\*36 Finally, since this Court held that comparative proportionality review is not constitutionally required, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), it seems unlikely that appeals can prevent the arbitrariness I have described. See Kaufman–Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 Wash. L. Rev. 775, 791–792 (2004) (after *Pulley*, many States repealed their statutes requiring comparative proportionality review, and most state high courts “reduced proportionality review to a perfunctory exercise” (internal quotation marks omitted)).

The studies bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years. I see discrepancies for which I can find no rational explanations. Cf. *Godfrey*, 446 U.S., at 433, 100 S.Ct. 1759 (plurality opinion) (“There

is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not"). Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime. Compare *State v. Badgett*, 361 N.C. 234, 644 S.E.2d 206 (2007), and Pet. for Cert. in *Badgett v. North Carolina*, O.T. 2006, No. 07-6156, with Charbonneau, Andre Edwards Sentenced to Life in Prison for 2001 Murder, WRAL, Mar. 26, 2004, online at <http://www.wral.com/news/local/story/109648>. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another defendant does not, despite having committed a "triple murder" by killing a young man and his pregnant wife? Compare *Commonwealth v. Boxley*, 596 Pa. 620, 948 A.2d 742 (2008), and Pet. for Cert., O.T. 2008, No. 08-6172, with Shea, Judge Gives Consecutive Life Sentences for Triple Murder, Philadelphia Inquirer, June 29, 2004, p. B5. For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept? See Donohue, Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution, pp. 128-134 (2013), online at [http://works.bepress.com/john\\_donohue/87](http://works.bepress.com/john_donohue/87). In each instance, the sentences compared were imposed in the same State at about the same time.

The question raised by these examples (and the many more I could give but do not), as well as by the research to which I have referred, is the same question Justice Stewart, Justice Powell, and others raised over the course of several decades: The imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?

### III

#### "Cruel"—Excessive Delays

\*37 The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That is to say, delay is in part a problem that the Constitution's own demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty "with special force." *Roper*, 543 U.S., at 568, 125 S.Ct. 1183. Those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. —, —, 134 S.Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014). At the same time, the Constitution insists that "every safeguard" be "observed" when "a defendant's life is at stake." *Gregg*, 428 U.S., at 187, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U.S., at 306, 92 S.Ct. 2726 (Stewart, J., concurring) (death "differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson, supra*, at 305, 96 S.Ct. 2978 (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two").

These procedural necessities take time to implement. And, unless we abandon the procedural requirements that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.

#### A

Consider first the statistics. In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death. DPIC, Execution List 2014, online at <http://www.deathpenaltyinfo.org/execution-list-2014> (showing an average delay of 17 years, 7 months). In some death penalty States, the average delay is longer. In an oral argument last year, for example, the State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before execution. Tr. of Oral Arg. in *Hall v. Florida*, O.T. 2013, No. 12-10882, p. 46.

The length of the average delay has increased dramatically over the years. In 1960, the average delay between sentencing and execution was two years. See Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment? 29 Seton Hall L. Rev. 147, 181 (1998). Ten years ago (in 2004) the average delay was about 11 years. See Dept. of Justice, Bureau of Justice Statistics (BJS), T. Snell, Capital Punishment, 2013—Statistical Tables 14 (Table 10) (rev. Dec. 2014) (hereinafter BJS 2013 Stats). By last year the average had risen to about 18 years. DPIC, Execution List 2014, *supra*. Nearly half of the 3,000 inmates now on death row have been there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an additional 37.5 years there before being executed. BJS 2013 Stats, at 14, 18 (Tables 11 and 15).

\*38 I cannot find any reasons to believe the trend will soon be reversed.

## B

These lengthy delays create two special constitutional difficulties. See *Johnson v. Bredesen*, 558 U.S. 1067, 1069, 130 S.Ct. 541, 175 L.Ed.2d 552 (2009) (Stevens, J., statement respecting denial of certiorari). First, a lengthy delay in and of itself is especially cruel because it “subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.” *Ibid.*; *Gomez v. Fierro*, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996) (Stevens, J., dissenting) (excessive delays from sentencing to execution can themselves “constitute cruel and unusual punishment prohibited by the Eighth Amendment”); see also *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (memorandum of Stevens, J., respecting denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 993, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (BREYER, J., dissenting from denial of certiorari). Second, lengthy delay undermines the death penalty’s penological rationale. *Johnson, supra*, at 1069, 130 S.Ct. 541; *Thompson v. McNeil*, 556 U.S. 1114, 1115, 129 S.Ct. 1299, — L.Ed.2d — (2009) (statement of Stevens, J., respecting denial of certiorari).

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Turning to the first constitutional difficulty, nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day. American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report). This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days. See *id.*, at 2, 4; ABA Standards for Criminal Justice: Treatment of Prisoners 6 (3d ed. 2011). And it is well documented that such prolonged solitary confinement produces numerous deleterious harms. See, e.g., Haney, Mental Health Issues in Long-Term Solitary and “Supermax” Confinement, 49 Crime & Delinquency 124, 130 (2003) (cataloguing studies finding that solitary confinement can cause prisoners to experience “anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,” among many other symptoms); Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Policy 325, 331 (2006) (“[E]ven a few days of solitary confinement will predictably shift the [brain’s] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium”); accord, *In re Medley*, 134 U.S. 160, 167–168, 10 S.Ct. 384, 33 L.Ed. 835 (1890); see also *Davis v. Ayala*, — U.S. —, 135 S.Ct. 2187, — L.Ed.2d — (2015) (KENNEDY, J., concurring).

The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, this Court recognized that, “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.” *Medley, supra*, at 172, 10 S.Ct. 384. The Court was there *describing a delay of a mere four weeks*. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in decades. *Supra*, at — — — —.

\*39 Moreover, we must consider death warrants that have been issued and revoked, not once, but repeatedly. See, e.g., Pet. for Cert. in *Suárez Medina v. Texas*, O.T. 2001, No. 02–5752, pp. 35–36 (filed Aug. 13, 2002) (“On fourteen separate occasions since Mr. Suárez Medina’s death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains”);

Lithwick, Cruel but not Unusual, *Slate*, Apr. 1, 2011, online at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/cruel\\_but\\_not\\_unusual.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html) (John Thompson had seven death warrants signed before he was exonerated); see also, e.g., WFMZ-TV 69 News, Michael John Parrish's Execution Warrant Signed by Governor Corbett (Aug. 18, 2014), online at <http://www.wfmz.com/news/Regional-Poconos-Coal/Local/michael-john-parrishs-execution-warrant-signed-by-governor-corbett/27595356> (former Pennsylvania Governor signed 36 death warrants in his first 3.5 years in office even though Pennsylvania has not carried out an execution since 1999).

Several inmates have come within hours or days of execution before later being exonerated. Willie Manning was *four hours* from his scheduled execution before the Mississippi Supreme Court stayed the execution. See Robertson, *With Hours to Go, Execution is Postponed*, *N.Y. Times*, Apr. 8, 2015, p. A17. Two years later, Manning was exonerated after the evidence against him, including flawed testimony from an FBI hair examiner, was severely undermined. Nave, *Why Does the State Still Want to Kill Willie Jerome Manning?* *Jackson Free Press*, Apr. 29, 2015. Nor is Manning an outlier case. See, e.g., Martin, *Randall Adams, 61, Dies; Freed With Help of Film*, *N.Y. Times*, June 26, 2011, p. 24 (Randall Adams: stayed by this Court three days before execution; later exonerated); N. Davies, *White Lies* 231, 292, 298, 399 (1991) (Clarence Lee Brandley: execution stayed twice, once 6 days and once 10 days before; later exonerated); M. Edds, *An Expendable Man* 93 (2003) (Earl Washington, Jr.: stayed 9 days before execution; later exonerated).

Furthermore, given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. See, e.g., ACLU Report 8; Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 *UMKC L. Rev.* 295 (2014) (11% of those executed have dropped appeals and volunteered); ACLU Report 3 (account of “ ‘guys who dropped their appeals because of the intolerable conditions’ ”). Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 *J. Crim. L. & C.* 860, 869 (1983). Nor is it surprising that many inmates consider, or commit, suicide. *Id.*, at 872, n. 44 (35% of those confined on death row in Florida attempted suicide).

\*40 Others have written at great length about the constitutional problems that delays create, and, rather than repeat their facts, arguments, and conclusions, I simply refer to some of their writings. See, e.g., *Johnson*, 558 U.S., at 1069, 130 S.Ct. 541 (statement of Stevens, J.) (delay “subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement”); *Furman*, 408 U.S., at 288, 92 S.Ct. 2726 (Brennan, J., concurring) (“long wait between the imposition of sentence and the actual infliction of death” is “inevitable” and often “exact[s] a frightful toll”); *Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting) (“In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon”); *People v. Anderson*, 6 Cal.3d 628, 649, 493 P.2d 880, 894 (1972) (collecting sources) (“[C]ruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out” (footnote omitted)); *District Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty unconstitutional under State Constitution in part because “[it] will be carried out only after agonizing months and years of uncertainty”); see also *Riley v. Attorney General of Jamaica*, [1983] 1 A.C. 719, 734–735 (P.C. 1982) (Lord Scarman, joined by Lord Brightman, dissenting) (“execution after inordinate delay” would infringe prohibition against “cruel and unusual punishments” in § 10 of the “Bill of Rights of 1689,” the precursor to our Eighth Amendment); *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A.C. 1, 4 (P.C. 1993); *id.*, at 32–33 (collecting cases finding inordinate delays unconstitutional or the equivalent); *State v. Makwanyane* 1995 (3) SA391 (CC) (S. Afr.); *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zim. L. R. 242, 282 (inordinate delays unconstitutional); *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), p. 439 (1989) (extradition of murder suspect to United States would violate the European Convention on Human Rights in light of risk of delay before execution); *United States v. Burns*, [2001] 1 S.C.R. 283, 353, ¶ 123 (similar).

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\*41 The second constitutional difficulty resulting from lengthy delays is that those delays undermine the

death penalty's penological rationale, perhaps irreparably so. The rationale for capital punishment, as for any punishment, classically rests upon society's need to secure deterrence, incapacitation, retribution, or rehabilitation. Capital punishment by definition does not rehabilitate. It does, of course, incapacitate the offender. But the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates. See *Ring v. Arizona*, 536 U.S. 584, 615, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (BREYER, J., concurring in judgment).

Thus, as the Court has recognized, the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution. See, e.g., *Gregg*, 428 U.S., at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.). Many studies have examined the death penalty's deterrent effect; some have found such an effect, whereas others have found a lack of evidence that it deters crime. Compare *ante*, at — (SCALIA, J., concurring) (collecting studies finding deterrent effect), with e.g., Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 *Crime & Delinquency* 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A Special Report, States With No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, p. A1 (from 1980–2000, homicide rate in death-penalty States was 48% to 101% higher than in non-death-penalty States); Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 *J. Crim. L. & C.* 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification); Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 *Stan. L. Rev.* 791, 794 (2005) (evaluating existing statistical evidence and concluding that there is “profound uncertainty” about the existence of a deterrent effect).

Recently, the National Research Council (whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine) reviewed 30 years of empirical evidence and concluded that it was insufficient to establish a deterrent effect and thus should “not be used to inform” discussion about the deterrent value of the death penalty. National Research Council, *Deterrence and the Death Penalty* 2 (D. Nagin & J. Pepper eds. 2012); accord, *Baze v. Rees*, 553 U.S. 35, 79, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008)

(Stevens, J., concurring in judgment) (“Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders”).

I recognize that a “lack of evidence” for a proposition does not prove the contrary. See *Ring*, *supra*, at 615, 122 S.Ct. 2428 (one might believe the studies “inconclusive”). But suppose that we add to these studies the fact that, today, very few of those sentenced to death are actually executed, and that even those executions occur, on average, after nearly two decades on death row. DPIC, Execution List 2014, *supra*. Then, does it still seem likely that the death penalty has a significant deterrent effect?

\*42 Consider, for example, what actually happened to the 183 inmates sentenced to death in 1978. As of 2013 (35 years later), 38 (or 21% of them) had been executed; 132 (or 72%) had had their convictions or sentences overturned or commuted; and 7 (or 4%) had died of other (likely natural) causes. Six (or 3%) remained on death row. BJS 2013 Stats, at 19 (Table 16).

The example illustrates a general trend. Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row. *Id.*, at 20 (Table 17); see also Baumgartner & Dietrich, Most Death Penalty Sentences Are Overturned: Here's Why That Matters, Washington Post Blog, Monkey Cage, Mar. 17, 2015 (similar).

Thus an offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place. In a word, executions are *rare*. And an individual contemplating a crime but evaluating the potential punishment would know that, in any event, he faces a potential sentence of life without parole.

These facts, when recurring, must have some offsetting effect on a potential perpetrator's fear of a death penalty. And, even if that effect is no more than slight, it makes it difficult to believe (given the studies of deterrence cited earlier) that such a rare event significantly deters horrendous crimes. See *Furman*, 408 U.S., at 311–312, 92 S.Ct. 2726 (White, J., concurring) (It cannot “be said with confidence that society's

need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient”).

But what about retribution? Retribution is a valid penological goal. I recognize that surviving relatives of victims of a horrendous crime, or perhaps the community itself, may find vindication in an execution. And a community that favors the death penalty has an understandable interest in representing their voices. But see A. Sarat, *Mercy on Trial: What It Means To Stop an Execution* 130 (2005) (Illinois Governor George Ryan explained his decision to commute all death sentences on the ground that it was “cruel and unusual” for “family members to go through this ... legal limbo for [20] years”).

The relevant question here, however, is whether a “community’s sense of retribution” can often find vindication in “a death that comes,” if at all, “only several decades after the crime was committed.” *Valle v. Florida*, 564 U.S. —, —, 132 S.Ct. 1, 2, 180 L.Ed.2d 940 (2011) (BREYER, J., dissenting from denial of stay). By then the community is a different group of people. The offenders and the victims’ families have grown far older. Feelings of outrage may have subsided. The offender may have found himself a changed human being. And sometimes repentance and even forgiveness can restore meaning to lives once ruined. At the same time, the community and victims’ families will know that, even without a further death, the offender will serve decades in prison under a sentence of life without parole.

\*43 I recognize, of course, that this may not always be the case, and that sometimes the community believes that an execution could provide closure. Nevertheless, the delays and low probability of execution must play some role in any calculation that leads a community to insist on death as retribution. As I have already suggested, they may well attenuate the community’s interest in retribution to the point where it cannot by itself amount to a significant justification for the death penalty. *Id.*, at —, 132 S.Ct., at 2. In any event, I believe that whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole (a sentence that every State now permits, see ACLU, *A Living Death: Life Without Parole for Nonviolent Offenses* 11, and n. 10 (2013)).

Finally, the fact of lengthy delays undermines any effort to justify the death penalty in terms of its prevalence when the Founders wrote the Eighth Amendment. When

the Founders wrote the Constitution, there were no 20- or 30-year delays. Execution took place soon after sentencing. See P. Mackey, *Hanging in the Balance: The Anti-Capital Punishment Movement in New York State, 1776–1861*, p. 17 (1982); T. Jefferson, *A Bill for Proportioning Crimes and Punishments* (1779), reprinted in *The Complete Jefferson* 90, 95 (S. Padover ed. 1943); 2 *Papers of John Marshall* 207–209 (C. Cullen & H. Johnson eds. 1977) (describing petition for commutation based in part on 5-month delay); *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A. C., at 17 (same in United Kingdom) (collecting cases). And, for reasons I shall describe, *infra*, at — — —, we cannot return to the quick executions in the founding era.

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The upshot is that lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale. And this Court has said that, if the death penalty does not fulfill the goals of deterrence or retribution, “it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment.” *Atkins*, 536 U.S., at 319, 122 S.Ct. 2242 (quoting *Emmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); internal quotation marks omitted); see also *Gregg*, 428 U.S., at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) (“sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”); *Furman*, *supra*, at 312, 92 S.Ct. 2726 (White, J., concurring) (a “penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment”); *Thompson*, 556 U.S., at 1115, 129 S.Ct. 1299 (statement of Stevens, J., respecting denial of certiorari) (similar).

Indeed, Justice Lewis Powell (who provided a crucial vote in *Gregg*) came to much the same conclusion, albeit after his retirement from this Court. Justice Powell had come to the Court convinced that the Federal Constitution did not outlaw the death penalty but rather left the matter up to individual States to determine. *Furman*, *supra*, at 431–432, 92 S.Ct. 2726 (Powell, J., dissenting); see also J. Jeffries, *Justice Lewis F. Powell, Jr.*, p. 409 (2001) (describing Powell, during his time on the Court, as a “fervent partisan” of “the constitutionality of capital punishment”).

\*44 Soon after Justice Powell's retirement, Chief Justice Rehnquist appointed him to chair a committee addressing concerns about delays in capital cases, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Committee). The Committee presented a report to Congress, and Justice Powell testified that "[d]elay robs the penalty of much of its deterrent value." Habeas Corpus Reform, Hearings before the Senate Committee on the Judiciary, 100th Cong., 1st and 2d Sess., 35 (1989 and 1990). Justice Powell, according to his official biographer, ultimately concluded that capital punishment:

" 'serves no useful purpose.' The United States was 'unique among the industrialized nations of the West in maintaining the death penalty,' and it was enforced so rarely that it could not deter. More important, the haggling and delay and seemingly endless litigation in every capital case brought the law itself into disrepute." Jeffries, *supra*, at 452.

In short, the problem of excessive delays led Justice Powell, at least in part, to conclude that the death penalty was unconstitutional.

As I have said, today delays are much worse. When Chief Justice Rehnquist appointed Justice Powell to the Committee, the average delay between sentencing and execution was 7 years and 11 months, compared with 17 years and 7 months today. Compare BJS, L. Greenfeld, Capital Punishment, 1990, p. 11 (Table 12) (Sept. 1991) with *supra*, at 18–19.

### C

One might ask, why can Congress or the States not deal directly with the delay problem? Why can they not take steps to shorten the time between sentence and execution, and thereby mitigate the problems just raised? The answer is that shortening delay is much more difficult than one might think. And that is in part because efforts to do so risk causing procedural harms that also undermine the death penalty's constitutionality.

For one thing, delays have helped to make application of the death penalty more reliable. Recall the case of Henry Lee McCollum, whom DNA evidence exonerated 30 years after his conviction. Katz & Eckholm, N.Y. Times, at A1. If McCollum had been executed earlier, he would not have lived to see the day when DNA evidence exonerated him and implicated another man; that man is already serving a life sentence for a rape and murder that he committed just a few weeks after the murder McCollum was convicted of. *Ibid.*

In fact, this Court had earlier denied review of McCollum's claim over the public dissent of only one Justice. *McCollum v. North Carolina*, 512 U.S. 1254, 114 S.Ct. 2784, 129 L.Ed.2d 895 (1994). And yet a full 20 years after the Court denied review, McCollum was exonerated by DNA evidence. There are a significant number of similar cases, some of which I have discussed earlier. See also DPIC Innocence List, *supra* (Nathson Fields, 23 years; Paul House, 23 years; Nicholas Yarris, 21 years; Anthony Graves, 16 years; Damon Thibodeaux, 15 years; Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu, all exonerated for the same crime 39 years after their convictions).

In addition to those who are exonerated on the ground that they are innocent, there are other individuals whose sentences or convictions have been overturned for other reasons (as discussed above, state and federal courts found error in 68% of the capital cases they reviewed between 1973 and 1995). See Part I, *supra*. In many of these cases, a court will have found that the individual did not merit the death penalty in a special sense—namely, he failed to receive all the procedural protections that the law requires for the death penalty's application. By eliminating some of these protections, one likely could reduce delay. But which protections should we eliminate? Should we eliminate the trial-related protections we have established for capital defendants: that they be able to present to the sentencing judge or jury all mitigating circumstances, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973; that the State provide guidance adequate to reserve the application of the death penalty to particularly serious murders, *Gregg*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; that the State provide adequate counsel and, where warranted, adequate expert assistance, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); or that a jury must find the aggravating factors necessary to impose the death penalty, *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; see also *id.*, at 614, 122 S.Ct. 2428 (BREYER, J., concurring in judgment)? Should we no longer ensure that the State does not execute those who are seriously intellectually disabled, *Atkins*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335? Should we eliminate the requirement that the manner of execution be constitutional, *Baze*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420, or the requirement that the inmate be mentally competent at the time of his execution, *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)? Or should we get rid of the criminal protections that all criminal defendants

receive—for instance, that defendants claiming violation of constitutional guarantees (say “due process of law”) may seek a writ of habeas corpus in federal courts? See, e.g., *O’Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). My answer to these questions is “surely not.” But see *ante*, at ——— (SCALIA, J., concurring).

\*45 One might, of course, argue that courts, particularly federal courts providing additional layers of review, apply these and other requirements too strictly, and that causes delay. But, it is difficult for judges, as it would be difficult for anyone, *not* to apply legal requirements punctiliously when the consequence of failing to do so may well be death, particularly the death of an innocent person. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (“[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error”); *Kyles v. Whitley*, 514 U.S. 419, 422, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (“[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case” (internal quotation marks omitted)); *Thompson*, 556 U.S., at 1116, 129 S.Ct. 1299 (statement of Stevens, J.) (“Judicial process takes time, but the error rate in capital cases illustrates its necessity”).

Moreover, review by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court, see *Hinton v. Alabama*, 571 U.S. ———, 134 S.Ct. 1081, 188 L.Ed.2d 1, he may well have been executed rather than exonerated. In my own view, our legal system's complexity, our federal system with its separate state and federal courts, our constitutional guarantees, our commitment to fair procedure, and, above all, a special need for reliability and fairness in capital cases, combine to make significant procedural “reform” unlikely in practice to reduce delays to an acceptable level.

\*46 And that fact creates a dilemma: A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. See *Knight*, 528 U.S., at 998, 120 S.Ct. 459 (BREYER, J., dissenting from denial of certiorari) (one of the primary causes of the delay is the States’ “failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing”). But a death penalty system that minimizes delays would

undermine the legal system's efforts to secure reliability and procedural fairness.

In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact, demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment. A death penalty system that is unreliable or procedurally unfair would violate the Eighth Amendment. *Woodson*, 428 U.S., at 305, 96 S.Ct. 2978 (plurality opinion); *Hall*, 572 U.S., at ———, 134 S.Ct., at 2001; *Roper*, 543 U.S., at 568, 125 S.Ct. 1183. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose. *Furman*, 408 U.S., at 312, 92 S.Ct. 2726 (White, J., concurring); *Gregg*, *supra*, at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Aikins*, *supra*, at 319, 122 S.Ct. 2242.

#### IV

##### “Unusual”—Decline in Use of the Death Penalty

The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual. I can illustrate the significant decline in the use of the death penalty in several ways.

An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970's to present day. In 1977—just after the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Many States having revised their death penalty laws to meet *Furman*'s requirements, the number of death sentences then increased. Between 1986 and 1999, 286 persons on average were sentenced to death each year. BJS 2013 Stats, at 14, 19 (Tables 11 and 16). But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since. See Appendix A, *infra* (showing sentences from 1977–2014). In 1999, 279 persons were sentenced to death. BJS

2013 Stats, at 19 (Table 16). Last year, just 73 persons were sentenced to death. DPIC, *The Death Penalty in 2014: Year End Report 1* (2015).

That trend, a significant decline in the last 15 years, also holds true with respect to the number of annual executions. See Appendix B, *infra* (showing executions from 1977–2014). In 1999, 98 people were executed. BJS, *Data Collection: National Prisoner Statistics Program (BJS Prisoner Statistics)* (available in Clerk of Court's case file). Last year, that number was only 35. DPIC, *The Death Penalty in 2014*, *supra*, at 1.

\*47 Next, one can consider state-level data. Often when deciding whether a punishment practice is, constitutionally speaking, “unusual,” this Court has looked to the number of States engaging in that practice. *Atkins*, 536 U.S., at 313–316, 122 S.Ct. 2242; *Roper*, *supra*, at 564–566, 125 S.Ct. 1183. In this respect, the number of active death penalty States has fallen dramatically. In 1972, when the Court decided *Furman*, the death penalty was lawful in 41 States. Nine States had abolished it. E. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* 145 (2013). As of today, 19 States have abolished the death penalty (along with the District of Columbia), although some did so prospectively only. See DPIC, *States With and Without the Death Penalty*, online at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>. In 11 other States that maintain the death penalty on the books, no execution has taken place for more than eight years: Arkansas (last execution 2005); California (2006); Colorado (1997); Kansas (no executions since the death penalty was reinstated in 1976); Montana (2006); Nevada (2006); New Hampshire (no executions since the death penalty was reinstated in 1976); North Carolina (2006); Oregon (1997); Pennsylvania (1999); and Wyoming (1992). DPIC, *Executions by State and Year*, online at <http://www.deathpenaltyinfo.org/node/5741>.

Accordingly, 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years. Of the 20 States that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time, making an execution in those States a fairly rare event. BJS *Prisoner Statistics* (Delaware, Idaho, Indiana, Kentucky, Louisiana, South Dakota, Tennessee, Utah, Washington). That leaves 11 States in which it is fair to say that capital punishment is not “unusual.” And just three of those States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014. See DPIC, *Number of Executions by State and Region Since*

1976, online at <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>. Indeed, last year, only seven States conducted an execution. DPIC, *Executions by State and Year*, *supra*; DPIC, *Death Sentences in the United States From 1977 by State and by Year*, online at <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008>. In other words, in 43 States, no one was executed.

In terms of population, if we ask how many Americans live in a State that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% or 70%. Today, that number is 33%. See Appendix C, *infra*.

\*48 At the same time, use of the death penalty has become increasingly concentrated geographically. County-by-county figures are relevant, for decisions to impose the death penalty typically take place at a county level. See *supra*, at ———. County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed. Liebman & Clarke 264–265; cf. *id.*, at 266. (counties with 10% of the Nation's population imposed 43% of its death sentences). By the early 2000's, the death penalty was only actively practiced in a very small number of counties: between 2004 and 2009, only 35 counties imposed 5 or more death sentences, *i.e.*, approximately one per year. See Appendix D, *infra* (such counties colored in red) (citing Ford, *The Death Penalty's Last Stand*, *The Atlantic*, Apr. 21, 2015). And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. See Appendix E, *infra*. In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties. Liebman & Clarke 265–266, and n. 47; cf. *ibid.* (counties with less than 5% of the Nation's population carried out over half of its executions from 1976–2007).

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i.e.*, three States, account for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in

the United States, at least when we consider the Nation as a whole. See *Furman*, 408 U.S., at 311, 92 S.Ct. 2726 (1972) (White, J., concurring) (executions could be so infrequently carried out that they “would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system ... when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied”).

Moreover, we have said that it “ ‘is not so much the number of these States that is significant, but the consistency of the direction of change.’ ” *Roper*, 543 U.S., at 566, 125 S.Ct. 1183 (quoting *Atkins*, *supra*, at 315, 122 S.Ct. 2242) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court’s decision in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)). Judged in that way, capital punishment has indeed become unusual. Seven States have abolished the death penalty in the last decade, including (quite recently) Nebraska. DPIC, States With and Without the Death Penalty, *supra*. And several States have come within a single vote of eliminating the death penalty. Seelye, Measure to Repeal Death Penalty Fails by a Single Vote in New Hampshire Senate, N.Y. Times, Apr. 17, 2014, p. A12; Dennison, House Deadlocks on Bill To Abolish Death Penalty in Montana, Billings Gazette, Feb. 23, 2015; see also Offredo, Delaware Senate Passes Death Penalty Repeal Bill, Delaware News Journal, Apr. 3, 2015. Eleven States, as noted earlier, have not executed anyone in eight years. *Supra*, at ———. And several States have formally stopped executing inmates. See Yardley, Oregon’s Governor Says He Will Not Allow Executions, N.Y. Times, Nov. 23, 2011, p. A14 (Oregon); Governor of Colorado, Exec. Order No. D2013–006, May 22, 2013 (Colorado); Lovett, Executions Are Suspended by Governor in Washington, N.Y. Times, Feb. 12, 2014, p. A12 (Washington); Begley, Pennsylvania Stops Using the Death Penalty, Time, Feb. 13, 2015 (Pennsylvania); see also Welsh–Huggins, Associated Press, Ohio Executions Rescheduled, Jan. 30, 2015 (Ohio).

Moreover, the direction of change is consistent. In the past two decades, no State without a death penalty has passed legislation to reinstate the penalty. See *Atkins*, *supra*, at 315–316, 122 S.Ct. 2242; DPIC, States With and Without the Death Penalty, *supra*. Indeed, even in many States most associated with the death penalty, remarkable shifts have occurred. In Texas, the State that carries out the most executions, the number of executions fell from 40 in 2000

to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015). DPIC, Executions by State and Year, *supra*; BJS, T. Snell, Capital Punishment, 1999, p. 6 (Table 5) (Dec. 2000) (hereinafter BJS 1999 Stats); BJS 2013 Stats, at 19 (Table 16); von Drehle, Bungled Executions, Backlogged Courts, and Three More Reasons the Modern Death Penalty Is a Failed Experiment, Time, June 8, 2015, p. 26. Similarly dramatic declines are present in Virginia, Oklahoma, Missouri, and North Carolina. BJS 1999 Stats, at 6 (Table 5); BJS 2013 Stats, at 19 (Table 16).

\*49 These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter. Wilson, Support for Death Penalty Still High, But Down, Washington Post, GovBeat, June 5, 2014, online at [www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down](http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down/); see also ALL, Report of the Council to the Membership on the Matter of the Death Penalty 4 (Apr. 15, 2009) (withdrawing Model Penal Code section on capital punishment section from the Code, in part because of doubts that the American Law Institute could “recommend procedures that would” address concerns about the administration of the death penalty); cf. *Gregg*, 428 U.S., at 193–194, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.) (relying in part on Model Penal Code to conclude that a “carefully drafted statute” can satisfy the arbitrariness concerns expressed in *Furman* ).

I rely primarily upon domestic, not foreign events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is “unusual.” Those circumstances are sufficient to warrant our reconsideration of the death penalty’s constitutionality. I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. Oakford, UN Vote Against Death Penalty Highlights Global Abolitionist Trend and Leaves the U.S. Stranded, Vice News, Dec. 19, 2014, online at <https://news.vice.com/article/un-vote-against-death-penalty-highlights-global-abolitionist-trend-and-leaves-the-us-stranded>. In 2013, only 22 countries in the world carried out an execution. International Commission Against Death Penalty, Review 2013, pp. 2–3. No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. *Id.*, at 3. Only eight countries executed more than

10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). *Id.*, at 2. And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia. Amnesty International, *Death Sentences and Executions 2013*, p. 3 (2014). (This figure does not include China, which has a large population, but where precise data cannot be obtained. *Id.*, at 2.)

## V

\*50 I recognize a strong counterargument that favors constitutionality. We are a court. Why should we not leave the matter up to the people acting democratically through legislatures? The Constitution foresees a country that will make most important decisions democratically. Most nations that have abandoned the death penalty have done so through legislation, not judicial decision. And legislators, unlike judges, are free to take account of matters such as monetary costs, which I do not claim are relevant here. See, e.g., Berman, *Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor's Veto*, Washington Post Blog, Post Nation, May 27, 2015 (listing cost as one of the reasons why Nebraska legislators recently repealed the death penalty in that State); cf. California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California* 117 (June 30, 2008) (death penalty costs California \$137 million per year; a comparable system of life imprisonment without parole would cost \$11.5 million per year), online at <http://www.ccfaj.org/rr-dp-official.html>; Dáte, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, p. 1A (cost of each execution is \$23 million above cost of life imprisonment without parole in Florida).

The answer is that the matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the

unfair, cruel, and unusual infliction—of a serious punishment upon an individual. I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. See *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803); *Hall*, 572 U.S., at —, 134 S.Ct., at 2000 (“That exercise of independent judgment is the Court’s judicial duty”). We have made clear that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Id.*, at —, 134 S.Ct., at 1999 (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion)); see also *Thompson v. Oklahoma*, 487 U.S. 815, 833, n. 40, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion).

For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.

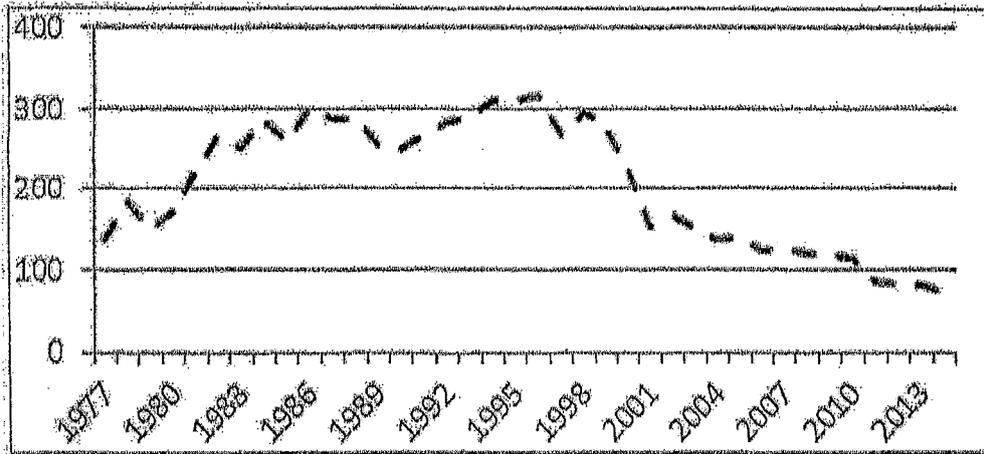
\*51 With respect, I dissent.

## Appendix A

### APPENDICES

#### A

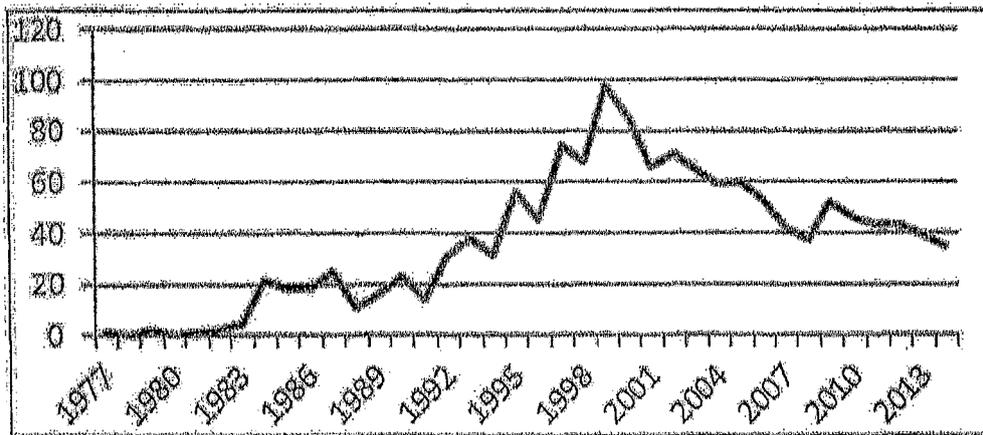
#### Death Sentences Imposed 1977–2014



Appendix B

B

Executions 1977-2014



Appendix C

Percentage of U.S. population in States that conducted an execution within prior 3 years

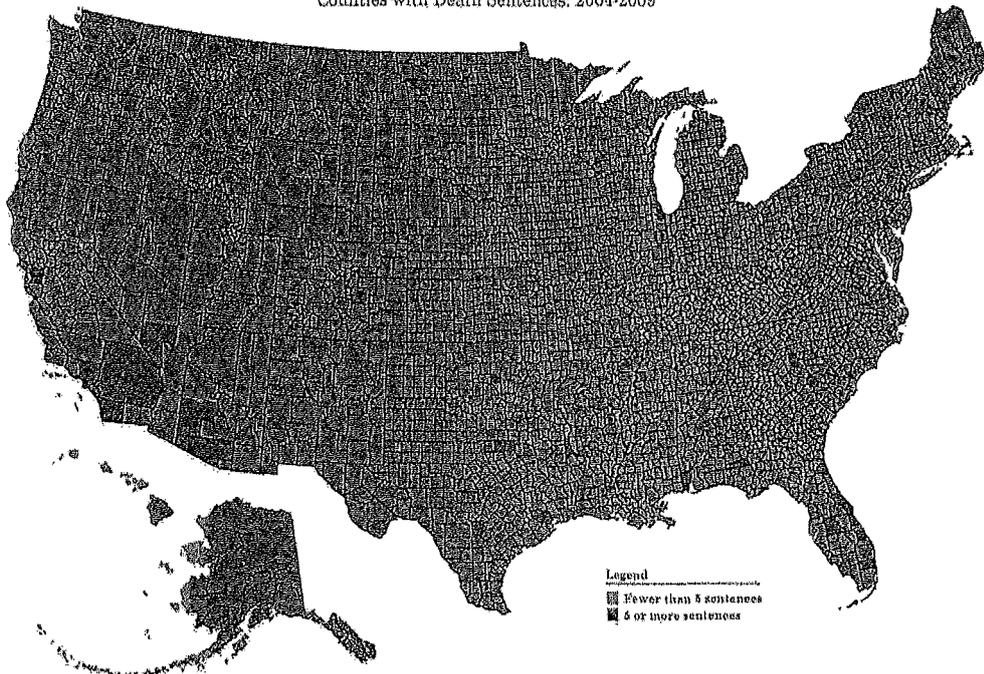
C

Year	Percentage
1994	54%
1995	60%
1996	63%
1997	63%
1998	61%
1999	70%
2000	68%
2001	67%
2002	57%
2003	53%
2004	52%
2005	52%
2006	55%
2007	57%
2008	53%
2009	39%
2010	43%
2011	42%
2012	39%
2013	34%
2014	33%

Appendix D

APPENDIX D

Counties with Death Sentences: 2004-2009



Source: Ford, *The Death Penalty's Last Stand*, *The Atlantic*, Apr. 21, 2015.

Appendix E

APPENDIX E

Counties with Death Sentences: 2010-Present



Source: The underlying data was compiled with research assistance from the Supreme Court Library (current as of June 22, 2015).

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Dear Sir/Madame:

Enclosed for filing in the Washington State Supreme Court in *State of Washington v. Connor Schierman*, Supreme Court No. 84614-6, is the **Fourth Supplemental Authority**.

Feel free to contact me with any questions or concerns.

Thank you for your kind attention to this matter.

Best,

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