[*Published in The State of Criminal Justice 2024. © 2024 by the American Bar Association. Reproduced with permission. Visit www.ambar.org/cjsbooks for more information*.]

CHAPTER 19

CAPITAL PUNISHMENT

Ronald J. Tabak

I. CONTINUING DECLINE IN NEW DEATH SENTENCES AND CONTINUING MUCH LOWER LEVELS OF EXECUTIONS

The vast majority of condemned inmates are sentenced at a state level. Just five of the twenty-seven states that allow executions executed anyone in 2023: Texas, Florida, Missouri, Oklahoma and Alabama.[1] The total number of people executed was twenty-four.[2] In only seven states were people sentenced to death: Alabama, Arizona, California, Florida, Louisiana, North Carolina and Texas.[3] The total number of people sentenced to death was twenty-one.[4] This is the first time since executions resumed in 1977 that the number of people executed was greater than the number of new death sentences.[5] Total new death sentences have declined consistently over the last two decades. 2023 was the ninth consecutive year in which fewer than thirty people were executed and fewer than fifty people were sentenced to death.[6]

A. Reasons for These Declines

The Death Penalty Information Center attributed the continuing decrease in new death sentences over the last twenty years to jurors' gradually becoming more skeptical about capital punishment's impact, the difficulty of avoiding executing innocent people and racial discrimination.[7] Prosecutors have, on the whole, sought capital punishment substantially less often.[8] And the quality of defense counsels' performance has improved in many places and has affected the results, especially with regard to sentencing.[9] Counsel today are much more likely than in the past to challenge questionable prosecution evidence and to present evidence regarding mental illness and other mitigating factors concerning the lives of defendants. Many changes in sentencing procedures, such as Texas' finally specifying that the alternative to execution is life without possibility of parole, have contributed further to these declines.[10]

Moreover, as Austin Sarat pointed out in a May 1, 2024 op-ed, Oklahoma's disastrously botched execution of Clayton Lockett a decade earlier, on April 29, 2014, along with three other botched executions that year, had "changed the national conversation about

---

[1] *The Death Penalty in 2023: Year End Report*, Death Penalty Info. Ctr. (2023), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2023.pdf.
[2] *Id* at 2.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 21.
[8] *Id.*
[9] *Id.*
[10] *Id.*

botched executions. It raised the public's consciousness about what can go wrong during executions and moved the problem of botched executions from the periphery to the center of abolitionist efforts to end capital punishment."[11] Although the Oklahoma Corrections Department initially said that Lockett had died from a "massive heart attack" minutes after the execution was stopped, the official autopsy gave the cause of death as "judicial execution by lethal injection."[12]

B. Many of Those Who Are Being Executed Now Would Not Be Sentenced to Death (and Even Fewer Would Be Executed) If Their Cases Arose Now

The improvements discussed in the first paragraph of Part A, above, are the key reasons why it is clear that many people who are executed now would not be sentenced to death or, if death-sentenced, would not be executed if their cases had begun in recent years. Indeed, many trial jurors who sat on juries many years ago that sentenced defendants to death are astonished when they find out about evidence in mitigation or concerning innocence when this evidence is belatedly presented in postconviction, habeas or clemency proceedings. These jurors frequently say that they would not have voted to impose the death sentence if they had known about this evidence. Yet, Supreme Court, legislative and state court doctrines usually preclude consideration of evidence that was not presented at trial or on direct appeal. And clemency proceedings have mostly ceased to serve as backstops against unfairness in the cases before them. So, we continue to have executions that seem contrary to today's standards of decency.

C. There Continue to Be Death Sentences Handed Down or That Remain in Place Despite Clear Questions Regarding Guilt

Each year there are new death sentences handed down and previously imposed death sentences that are permitted to proceed toward execution, despite evidence that seems strongly inconsistent with the defendant's guilt. Some examples of these are discussed in the section below concerning controversial efforts to increase the number of executions. There are also some cases each year in which a death row inmate – or a former death row inmate – is found to have been convicted or sentenced in such an egregiously improper way that his conviction and/or death sentence is vacated. In many such cases, they are released. The Lucio and Johnson cases discussed in the next two paragraphs could end up in executions, in the death row inmates' releases, or in some other way.

Texas district judge Arturo Nelson was the trial judge at Melissa Lucio's trial in 2008, at which she was convicted of murdering her two-year-old daughter and was sentenced to death.[13] In April 2024, Judge Nelson recommended that the Texas Court of Criminal Appeals vacate Lucio's conviction and death sentence.[14] He did so after the Cameron County District Attorney cosigned filings with Lucio's counsel stating that the prosecution had withheld from the defense evidence that seriously undercut the evidence that had led to Lucio's conviction

---

[11] Austin Sarat, Opinion, *What Oklahoma Did to Clayton Lockett Ten Years Ago Changed the National Conversation About Botched Executions*, Verdict: Justia (May 1, 2024), https://verdict.justia.com/2024/05/01/what-oklahoma-did-to-clayton-lockett-ten-years-ago-changed-the-national-conversation-about-botched-executions.

[12] *Id.*

[13] William Melhado, *State District Judge Recommends Overturning Melissa Lucio's Death Sentence*, Tex. Trib. (Apr. 15, 2024), https://www.texastribune.org/2024/04/15/melissa-lucio-death-penalty-judge-overturn/.

[14] *Id.*

[15] *Id.*

and death sentence.[15] Judge Nelson's recommendation was also supported by a transcript in which a man discussing how the crime occurred said that Lucio's conviction and death sentence should be vacated because her daughter's death was an accident, not murder. The Texas Court of Criminal Appeals vacated Lucio's sentence just two days before her execution date. On June 19, 2024, it remanded her case to the trial court, which it ordered to "make findings of fact, conclusions of law and a recommendation" within ninety days.[16]

In Alabama, Toforest Johnson remains under sentence of death. The trial prosecutor, a Republican former Chief Justice and a former state Attorney General have all urged that a new trial be ordered, due to evidence of innocence. In an April 22, 2024 op-ed, trial juror Monique Hicks said, "I voted to send a man to death row. It turns out he is innocent."[17] She said there was no physical evidence against him and no eyewitnesses at the scene of the crime.[18] The key witness was a woman claiming to have overheard Johnson confess during a three-way-call on which she eavesdropped.[19] The jury, and the defense team, did not know that she was paid $5,000 for her testimony and that she has provided similar testimony for the prosecution in other cases.[20]

II. THE SUPREME COURT DID NOT RECONSIDER PRECEDENT PRECLUDING A FURTHER HABEAS PETITION BY A DEATH ROW INMATE WHOSE LAWYER SAID WITHOUT A REAL INVESTIGATION THAT HIS CLIENT'S FEDERAL HABEAS PETITION WAS BASELESS

For many more months than customary, the Supreme Court had pending an appeal from a Texas death row inmate, Joseph Gamboa, who sought a ruling to allow his new counsel to file a habeas corpus petition in federal district court because of what he understandably asserted was his having been abandoned by the lawyer who had been appointed to represent him.[21] That lawyer met with Gamboa once. At the meeting, Gamboa brought documents that appeared to show that prosecutors had withheld from Gamboa's trial counsel evidence supporting a potential defense that someone else had killed the people – not Gamboa.[22] The lawyer, rather than taking and reviewing the documents, told Gamboa that he had read the state court record and thought Gamboa was guilty.[23] Almost a year later, the lawyer submitted a habeas petition that was a cut-and-paste version of a petition he had previously prepared for a different client.[24] The petition he submitted included that other client's name, not Gamboa's.[25] It was not signed and did not include any claim that Gamboa had asked the

---

[16] *Id.;* Steven Masso, *Melissa Lucio case sent back to trial court*, Valley Central.com (June 24, 2024), https://www.valleycentral.com/news/local-news/melissa-lucio-case-sent-back-to-trial-court/.
[17] Monique Hicks, *Op-Ed: I Voted To Send A Man To Death Row. It Turns Out He Is Innocent.*, AL.com (Apr. 22, 2024), https://www.al.com/opinion/2024/04/op-ed-i-voted-to-send-a-man-to-death-row-it-turns-out-he-is-innocent.html.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Adam Liptak, *A Death Row Lawyer Blunders. Must His Client Pay the Price?*, N.Y. Times (Jan. 15, 2024), https://www.nytimes.com/2024/01/15/us/supreme-court-death-row-inmate.html.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

lawyer to consider raising.[26] In a reply brief he wrote after looking at the state's opposition, Gamboa's lawyer said that all the claims in the petition were foreclosed under settled law.[27]

A federal district court first denied Gamboa's motion to dismiss his appointed counsel and then, based on that lawyer's concession in the reply, dismissed the habeas petition.[28] Thereafter, once Gamboa found new lawyers and filed a motion to reopen the judgment due to his counsel's having abandoned him, the federal district court denied that motion and the Fifth Circuit affirmed.[29] Concurring, Judge James Dennis said the full court should reconsider and overrule existing precedent because sometimes a motion alleging attorney abandonment "can … attack a defect in the integrity of the habeas proceedings"[30] and therefore would be appropriate.

As Adam Liptak pointed out in the *New York Times,* if the procedural rules had been applied strictly, Gamboa would have been much better off if the lawyer had not filed anything in federal court.[31] In a sworn statement, the lawyer who had "represented" Mr. Gamboa in his initial federal habeas case said he "could not in good conscious" concede that he had performed deficiently.[32] Liptak said: "He may have meant 'in good conscience,' but that is not what he wrote."[33]

Although Mr. Liptak's January 15, 2024 column said the Supreme Court was "set to consider" on January 19, 2024, "whether to hear Mr. Gamboa's case," the case's record was later distributed many times but was rescheduled every time until May 13, 2024, when the Court denied the petition without any opinion, further briefing or oral argument.[34]

III. TEXAS' HIGHEST CRIMINAL COURT'S UNUSUAL APPROACH TO SUPREME COURT ORDERS

Another Texas death row inmate, Areli Escobar, was sentenced to death for the murder in 2011 of Bianca Maldonado Hernandez. After a state court postconviction hearing, the postconviction judge wrote a lengthy opinion and held that Escobar's conviction should be vacated because it was secured through the presentation of junk science from a police DNA lab that had made so many errors that it had been shut down.[35] When Escobar's case got to the Texas Court of Criminal Appeals (the "TCCA"), Texas' highest criminal court, it upheld Escobar's conviction in view of other evidence connecting him to the murder.[36]

At some point, before the U.S. Supreme Court considered the case, the district attorney whose office had secured Escobar's conviction decided to confess error by stating that the office had used erroneous evidence to secure the conviction.[37] The Supreme Court

---

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*; Ali Sullivan, *Justices Reject Incarcerated Man's Atty Abandonment Claim*, Law360 (May 13, 2024), https://www.law360.com/articles/1835177/justices-reject-incarcerated-man-s-atty-abandonment-claim.
[35] Adam Liptak, *In Death Penalty Cases, a Texas Court Tests the Supreme Court's Patience*, N.Y. Times (Mar. 11, 2024), https://www.nytimes.com/2024/03/11/us/supreme-court-texas-death-penalty.html.
[36] *Id.*
[37] *Id.*
[38] *Id.*

remanded the case to the TCCA "for further consideration in light of the confession of error by Texas."[38]

However, the TCCA, by a 6-3 vote, "had other ideas," Adam Liptak wrote in *The New York Times*.[39] Presiding Judge Sharon Keller, writing for five judges, said that although the State's confession of error "is important and carries great weight, we are not bound by it."[40] The TCCA cleared the way for Escobar to be executed. Liptak said that Professor Jordan M. Steiker had remarked that this was not the first time that the TCCA appeared to defy the Supreme Court. Steiker said that the TCCA "has a remarkable history of treating Supreme Court opinions as optional guideposts rather than the commands of a higher tribunal."[41]

In 2017, for example, the Supreme Court remanded the case of death row inmate Bobby Moore after it ruled that the state court had used the wrong standard in deciding that Moore was not intellectually disabled. On remand, the TCCA continued to use the wrong standard and again decided that Moore was not intellectually disabled – even though the prosecutor by this point had sided with Moore. When the case came before the Supreme Court again in 2019, the Court, Liptak said, "scolded the state court as it reversed its ruling."[42] Chief Justice John Roberts said in a concurring opinion that the TCCA had "repeated the same errors that this court previously condemned." Moore was resentenced to life in prison and was granted parole in 2020.[43]

As of May 13, 2024, the *Escobar* case had been fully briefed (and amicus briefs had been filed) and the papers had been distributed to the Conference twice. There was no decision as of July 15, 2024.[44]

Meanwhile, on March 6, 2024, Presiding Judge Keller and two of her conservative allies, Barbara Hervey and Michelle Slaughter, were defeated in the Republican primary, thereby ending their campaigns for re-election to the TCCA.[45] They had been targeted for defeat by Texas Attorney General Ken Paxton, due to a TCCA ruling in 2021 about Paxton's authority in dealing with alleged voter fraud.[46] Their primary opponents were described as even more conservative than they.

IV. RACIAL AND GENDER DISCRIMINATION CONTINUE TO BE PROBLEMS

Additional studies in 2023-2024 continue to show discrimination by race and gender in implementing capital punishment. These include DPIC's study in December 2023 of racial disparities in Missouri, including correlating (a) where lynchings and discrimination took place in the past with (b) where capital crimes take place now.[47]

---

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Escobar v. Texas*, SCOTUSblog.com, https://www.scotusblog.com/case-files/cases/escobar-v-texas-2/ (last visited July 15, 2024).
[45] William Melhado, *Ken Paxton Successfully Ousts Three Republican Criminal Appeal Court Judges*, Tex. Trib. (Mar. 6, 2024), https://www.texastribune.org/2024/03/05/texas-court-of-criminal-appeals-republican-primary/.
[46] *Id.*

(cont'd)

A study issued by Reprieve in April 2024 showed that Black people were far more likely than other people to suffer a botched lethal injection execution in Arkansas, Oklahoma and Georgia. The study found that secrecy and haste were factors contributing to increased rates of botched executions.[48]

In April 2024, the California Office of the State Public Defender, along with several civil rights groups, filed an original writ petition to the California Supreme Court.[49] It asserted that racial and ethnic disparities against Blacks and Latinos in California's implementation of capital punishment violated California's Constitution.[50]

On April 22, 2024, Alameda County District Attorney Pamela Price revealed that a federal district judge had ordered her to review 35 death penalty convictions after evidence emerged that former prosecutors had used discriminatory jury selection methods in the 1990s and had intentionally excluded Black and Jewish people from serving on capital juries.[51]

V. CHANGE IN SUPREME COURT'S ATTITUDE TOWARDS CHALLENGES TO DEATH SENTENCES

It is apparent from the Supreme Court's decisions in capital cases, as well as its mode of decision-making in other cases, that with regard to substantive Constitutional issues it is considerably less likely than in the past to rule in favor of the types of claims often made by death row inmates.

Professor Lara Bazelon wrote on January 21, 2024, in *Politico* that "the justices are far more likely to propel an execution forward than intercede to stop it, including in cases where guilt is in doubt or where the means of carrying it out could result in a grotesque spectacle of pain and suffering."[52]

On April 7, 2024, John Oliver devoted his award-winning HBO program *Last Week Tonight* to carrying out executions in Trump's final months in office – which Oliver said was Trump's "end of term killing spree."[53] He then discussed new state laws that conceal vital information about the execution process – including the names of those performing executions and the suppliers of drugs used in executions.[54] He provided several examples of botched executions, several of which involved the use of pentobarbital, a drug designed for use in animals. Pentobarbital is very hard to find, and death penalty proponents said secrecy

---

[47] *Compromised Justice: How a Legacy of Racial Violence Informs Missouri's Death Penalty Today*, Death Penalty Info. Ctr. (Dec. 1, 2023), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-reports/compromised-justice-how-a-legacy-of-racial-violence-informs-missouris-death-penalty.
[48] Reprieve, *Lethal Injection in the Modern Era: Cruel, Unusual and Racist* (Apr. 2024), https://reprieve.org/wp-content/uploads/sites/2/2024/04/2024_04_17_PUB-Botched-lethal-injection-report-FINAL.pdf.
[49] Bob Egelko, *California's Death Penalty Is Irreparably Racist, Lawsuit Contends*, S.F. Chron., (Apr. 9, 2024), https://www.sfchronicle.com/politics/article/california-death-penalty-lawsuit-19392576.php.
[50] *Id.*
[51] Salvador Hernandez, *Federal Judge Orders Alameda County To Review Death Penalty Cases*, L.A. Times (Apr. 23, 2024), https://www.latimes.com/california/story/2024-04-23/federal-judge-orders-alameda-county-to-review-death-penalty-cases.
[52] Lara Bazelon, *An 'Execute-Them-At-Any-Cost Mentality': The Supreme Court's New Bloodthirsty Era*, Politico (Jan. 21, 2024), https://www.politico.com/news/magazine/2024/01/21/supreme-court-death-penalty-executions-00136646.
[53] *Last Week Tonight with John Oliver: Death Penalty* (HBO television broadcast Apr. 7, 2024), https://www.hbo.com/last-week-tonight-with-john-oliver/season-11/7-april-7-2024-death-penalty.
[54] *Id.*

about executions and executioners made it much easier to hide manufacturers of drugs used in executions.[55] He focused on Absolute Standards Inc.'s role in the Trump Administration's thirteen executions, and pointed out that it had never registered with the FDA, as manufacturers of execution drugs are required to do.[56] He said that states such as South Carolina and Arizona, which had promised to disclose their sources of execution drugs, have failed to do so.[57] Oliver then described the new trend to consider using nitrogen hypoxia in executions, and Alabama's pride in having become the first state to use it in an execution.[58] He ended by discussing numerous things the Biden Administration and state governments could do to forbid executions or at least to shed light on what is really happening in executions in this country.[59]

Justices Ketanji Brown Jackson and Sonia Sotomayor, on April 15, 2024, issued dissents over the Supreme Court's refusal to hear the petitions of two death-sentenced prisoners who alleged official misconduct in their cases.[60] The Death Penalty Information Center reported that, in the first case, Dillion Compton alleged that Texas prosecutors illegally used thirteen of their fifteen peremptory strikes to remove female prospective jurors because of their gender and, in the second case, Kurt Michaels argued that California police officers unlawfully continued to question him after he invoked his *Miranda* rights, leading Michaels to eventually confess, and to his conviction.[61] As Justice Jackson wrote, "courts must be careful to [protect constitutional rights], perhaps especially when evaluating errors made in cases stemming from a terrible crime."[62]

VI. RECENT CONTROVERSIAL STATE EFFORTS TO INCREASE EXECUTIONS

Alabama attracted international attention (including, as discussed above, John Oliver's special coverage) for its use of nitrogen hypoxia gas to execute Kenneth Eugene Smith on January 25, 2024.[63] Alabama was the first jurisdiction in the world to use this untested method. Starting just minutes after his "execution" began, Smith shook and writhed on the gurney for at least two minutes.[64]

South Carolina claimed that it could use a method of execution other than lethal injection (it had last used lethal injection in 2011).[65] Its courts said electrocution and the firing squad were also possible means of execution.[66] But in the autumn of 2022, Judge Jocelyn Newman held that all three methods of execution were unconstitutional.[67]

---

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Justices Sotomayor and Jackson Issue Dissents Over Supreme Court's Refusal to Review Two Capital Misconduct Cases*, Death Penalty Info. Ctr. (Apr. 17, 2024), https://deathpenaltyinfo.org/news/justices-sotomayor-and-jackson-issue-dissents-over-supreme-courts-refusal-to-review-two-capital-misconduct-cases.
[61] *Id.*
[62] *Id.*
[63] Kim Bellware & Ann E. Marimow, *Alabama puts Kenneth Smith to death in first execution with nitrogen gas*, Wash. Post (Jan. 25, 2024), https://www.washingtonpost.com/nation/2024/01/25/alabama-execution-nitrogen-gas-kenneth-smith/.
[64] *Id.*
[65] Jeffrey Collins, *South Carolina Wants To Restart Executions With Firing Squad, Electric Chair And Lethal Injection*, AP News (Feb. 6, 2024), https://apnews.com/article/death-penalty-south-carolina-39930569f7ed5182f6ce9866916714aa.

In Missouri, death row inmate Brian Dorsey was executed on April 9, 2024, despite communications protesting his execution by more than seventy correctional officers and other state personnel who knew Dorsey during his almost two decades on death row.[68] They provided written letters to Governor Mike Parson, who declined to grant clemency.[69] Dorsey's execution greatly upset not only current corrections staff but also former staff who had worked with him.[70]

Missouri has found it considerably more difficult to execute Marcellus Williams. In 2017, Missouri Governor Eric Greitens had stayed Williams' execution date to allow consideration of newly available DNA evidence. Governor Greitens also appointed a special board of inquiry consisting of retired judges to look into the case.[71] After Mike Parson became Governor, he dissolved the special board of inquiry before the board could finish its work and make a recommendation.[72]

In 2024, the Missouri Supreme Court set September 24, 2024, as Williams' execution date.[73] St. Louis Prosecuting Attorney Wesley Bell said he would pursue a motion to vacate Mr. Williams' murder conviction, stating that he did not believe Williams was involved in the killing.[74] Bell had filed the motion in the 21st Judicial Circuit. A Missouri law adopted in 2021 permits Bell to proceed in this way because he heads the district attorney's office that prosecuted Mr. Williams. Bell's motion is set for hearing on August 21, 2024, in St. Louis County.[75]

Oklahoma's Court of Criminal Appeals was attempting to implement a plan it had adopted in 2022 under which 25 death row inmates would be executed in less than three years.[76] Gentner F. Drummond, who became Attorney General in January 2023, had initially asked the Court of Criminal Appeals to require at least sixty days between executions, but in early spring 2024 Drummond asked for at least ninety days between executions.[77] He was particularly troubled by corrections officers' concerns about trauma, staffing shortages and botched executions that could occur under the existing execution plans.[78]

At a legislative hearing, Court of Criminal Appeals Judge Gary Lumpkin told Attorney General Drummond that "people need to suck it up, realize they have a hard job to do, and get it done in a timely, proficient, professional way."[79] He added that thirty days between scheduled executions is "more than enough time."[80]

Drummond's efforts intensified. In May 2024, the Oklahoma Court of Criminal Appeals adopted a much more moderate schedule of executions. Drummond's spokesperson said that the ninety-day gap would be followed.[81]

Attorney General Drummond (a Republican) had already, in January 2024, succeeded in persuading the Supreme Court to consider the certiorari petition of longtime Oklahoma death row inmate Richard Glossip.[82] Drummond switched sides in the case in light of new evidence that the prosecution had failed to disclose its having promised leniency to its star witness, Justin Sneed, in return for his testimony that Glossip had paid him to kill the victim, and because Sneed denied having received psychiatric treatment whereas he had been treated for bipolar disorder and had been prescribed lithium.[83]

VII. ACTUAL OR CONTEMPLATED CHANGES IN DEATH PENALTY LAWS

The numbers of legislators in both houses of Ohio's legislature who co-sponsor death penalty repeal bills have continued to increase.[84] The only person elected to statewide office in Ohio who favors executions continues to be Attorney General Dave Yost, whose latest annual report on capital crimes, issued on April 1, 2024, denounced other state leaders for failing to do anything about what Yost said was Ohio's costly and ineffective capital punishment system.[85]

In Washington, Governor Jay Inslee signed a bill in 2023 that formally abolished the state's death penalty law and removed from state law provisions for capital punishment.[86]

Pennsylvania's Governor Josh Shapiro has continued the state's moratorium on executions. On February 16, 2023, he urged the legislature to pass a bill abolishing capital punishment.[87]

On the other hand, in March 2023, Kentucky enacted a law that added the intentional killing of a child under twelve to the list of "aggravated circumstances" in capital cases.[88]

---

[66] *Id.*
[67] *Id.*
[68] Ben Brasch, *Missouri executes Brian Dorsey despite pleas from 70 prison guards*, Wash. Post (Apr. 9, 2024), https://www.washingtonpost.com/nation/2024/04/08/brian-dorsey-execution-missouri/.
[69] *Id.*
[70] *Id.*
[71] Jack Suntrup, *Parson lifts stay of execution for man six years after Greitens issued it*, St. Louis Post-Dispatch (June 30, 2023), https://www.stltoday.com/news/local/crime-courts/p arson-lifts-stay-of-execution-for-man-six-years-after-greitens-issued-it/article_e3341fca-16ca-11ee-bfc3-1b87733707a2.html.
[72] *Id.*
[73] Joey Schneider, *Missouri Supreme Court denies motion to withdraw execution of Marcellus Williams*, Fox 2 Now (St. Louis) (July 12, 2024), https://fox2now.com/news/missouri/missouri-supreme-court-denies-motion-to-withdraw-execution-of-marcellus-williams/.
[74] *Id.*
[75] *Id.*
[76] *Oklahoma Court Modifies Execution Scheduling Process, Granting Attorney General's Request to Extend the Interval Between Executions But Choosing to Set Execution Dates Individually*, Death Penalty Info. Ctr. (May 10, 20124), https://deathpenaltyinfo.org/news/oklahoma-court-modifies-execution-scheduling-process-granting-attorney-generals-request-to-extend-the-interval-between-executions-but-choosing-to-set-execution-dates-individually.
[77] *Id.*
[78] Ed Pilkington, *Prison officers traumatized by rate of executions in US death penalty states*, The Guardian (Apr. 28, 2024), https://www.theguardian.com/world/2024/apr/28/prison-guard-trauma-execution-death-penalty.
[79] Ashlynd Huffman, *A judge says 'suck it up' after executions put strain on Oklahoma prison staff*, The Frontier (Mar. 28, 2024), https://www.readfrontier.org/stories/a-judge-says-suck-it-up-after-executions-put-strain-oklahoma-prison-staff/.
[80] *Id.*
[81] Ashlynd Huffman, *Oklahoma court changes how executions are scheduled after concerns raised about rate of killings*, The Frontier (May 8, 2024), https://www.readfrontier.org/stories/oklahoma-court-changes-how-executions-are-scheduled-after-concerns-raised-about-rate-of-killings/.
[82] Amy Howe, *Justices take up bid to overturn Oklahoma death sentence*, SCOTUSblog.com (Jan. 22, 2024), https://www.scotusblog.com/2024/01/justices-take-up-bid-to-overturn-oklahoma-death-sentence/.
[83] *Id.*
[84] Office of the Att'y Gen., *2023 Capital Crimes Annual Report* (2024), https://www.ohioattorneygeneral.gov/2023capitalcrimesreport.
[85] *Id.*
[86] Lisa Baumann, *Washington state officially abolishes death penalty*, AP News (Apr. 20, 2023), https://apnews.com/article/death-penalty-abolished-washington-cf9f7ebced0fdbadc704d362109ac162.

(cont'd)

In March 2024, Louisiana enacted a law adding nitrogen hypoxia gas and electrocution as alternative methods of execution and making confidential records or information relating to an execution. Governor Jeff Landry supported the legislation.[89] His predecessor, John Bel Edwards, had very belatedly announced his opposition to capital punishment during his lame duck year as Governor.[90]

VIII. PERHAPS THE MOST CYNICAL DEATH PENALTY DEVELOPMENT: FLORIDA GOVERNOR RON DESANTIS' KEY ROLE IN DRASTICALLY INCREASING THE POSSIBILITIES OF BEING SENTENCED TO DEATH AND THEN EXECUTED

Florida Governor Ron DeSantis set many more execution dates (six) in 2023, the first year of his second term, than during his entire first term, and three men were executed that year, as compared with one during this entire first term.[91]

What led to this change in 2023? The most apparent reason was that when Governor DeSantis announced in 2023 that he was running for the Republican Presidential nomination, he wanted to be portrayed as "tough on crime."[92] His strategy for securing the nomination included emphasizing divisive social issues, especially the death penalty, in hopes of outflanking former President Trump on the political right while attracting moderate voters with a less abrasive campaign style.[93]

Florida's capital sentencing scheme was in flux in 2023, as it had been for a few years. In early 2023, Governor DeSantis strongly supported a bill making it possible to impose capital punishment if at least eight jurors (*e.g.*, an 8-4 jury vote) voted to impose the death penalty.[94] After the bill quickly was enacted, it was soon used to overturn a Florida judge's decision that an 8-4 jury vote was insufficient under Florida law.[95]

IX. INTERNATIONAL DEVELOPMENTS

The United States remained one of the world's leading executioners in 2023. Among the others were China, Iran, Saudi Arabia, Somalia, North Korea, Iraq, Yemen and Vietnam.[96]

Notable developments elsewhere included Malaysia's resentencing seven death row inmates to thirty-year life imprisonment in keeping with its ending the mandatory death penalty for eleven capital crimes imposed before a particular date and Pakistan's July 2023 repeal of capital punishment for drug-related offenses.[97] Ghana's parliament voted in July

---

[87] Ellie Rushing, Gillian McGoldrick & Vinny Vella, *Gov. Josh Shapiro asks Pennsylvania lawmakers to abolish the death penalty*, Phila. Inquirer (Feb. 16, 2023), https://www.inquirer.com/politics/pennsylvania/josh-shapiro-calls-for-pennsylvania-abolish-death-penalty-20230216.html.
[88] *Kentucky House passes bill to strengthen penalties for those convicted of killing children*, WLKY (Louisville) (Mar. 11, 2023), https://www.wlky.com/article/kentucky-house-bill-penalties-killing-children-harsh/.
[89] Sara Cline, *Louisiana governor signs bills that expand death row execution methods and concealed carry*, AP News (Mar. 5, 2024), https://apnews.com/article/louisiana-crime-execution-landry-3d8eeb4990e1960f0629a2d47fdd4e92.
[90] *Id.*
[91] Ed Pilkington, *Florida's revival of death penalty fuels rise in US executions in 2023,* The Guardian (Dec. 1, 2023).
[92] *Id.*
[93] *Id.*

2023 to remove the death penalty from two statutes; however, in November, President Nana Akufo-Addo said that the proposed bills could not become effective pursuant to Ghana's constitution because they had been introduced as private member bills rather than by or on behalf of the President.[98] Uganda passed a law in May 2023 making it possible to impose capital punishment for "aggravated homosexuality"– a law held constitutional on April 3, 2024, by Uganda's Constitutional Court but still awaiting appeal to Uganda's Supreme Court.[99]

In 1996, Russia joined the Council of Europe and promised to ratify within three years the 6th Protocol of the European Convention on Human Rights, prohibiting the death penalty.[100] Although Russia did not ratify that protocol, it ended all executions in 1996, and did not resume them even after horrible terrorist acts in the early 21st century led to many calls to bring back capital punishment.[101] In 2009, the Russian Constitutional Court declared a moratorium on the death penalty.[102] In recent years, political assassinations widely believed to be at least tacitly supported by President Putin occurred more often, constitutional amendments in 2020 extended and reinforced Putin's power, and there were widespread international sanctions against Russia after it invaded Ukraine in 2022.[103] Russia left the Council of Europe and denounced the European Convention on Human Rights, including the 6th Protocol.[104] After the terrorist attack on a popular music venue on the outskirts of Moscow killed at least 144 people and injured hundreds more on March 22, 2024, there were calls for ending the moratorium on the death penalty – at least for terrorist acts.[105] However, the Kremlin stated that it was not participating in discussions about bringing back the death penalty.[106]

X. CAPITAL PUNISHMENT IN PRESIDENTIAL ELECTIONS AFTER 1988

Because of the dramatic changes in the Supreme Court's jurisprudence in recent years, many more people are considering what differences there will be in the Supreme Court's decisions if there is a second Trump term or a second Biden term. Accordingly, I begin with a political analysis of Supreme Court decisions. This analysis gives the people who vote in presidential elections a potentially major role in future Court decisions.

1988 was the last year that the death penalty played a significant role in a presidential election – at least in the minds of most of the electorate.[107] The percentage of those preferring the death penalty as the punishment for convicted murderers fell from 80% in 1994 to 53% last year.[108] In a poll in November 2023, Gallup found for the first time that more Americans believe the death penalty is applied unfairly (50%) than that it is applied fairly (47%).[109]

---

[94] Patricia Mazzei, *DeSantis Signs Law Lowering Death Penalty Threshold in Florida,* N.Y. Times (Apr. 20, 2023), https://www.nytimes.com/2023/04/20/us/desantis-death-penalty-florida.html.
[95] *State v. Lobato*, Case No. 6D23-3201 (Fla. Ct. App. May 31, 2024), https://law.justia.com/cases/florida/sixth-district-court-of-appeal/2024/6d23-3201.html.
[96] Amnesty Int'l, *Death Sentences and Executions 2023*, at 4 (2024), https://www.amnesty.org/en/documents/act50/7952/2024/en/.
[97] *Id.* at 21, 27.
[98] *Id.* at 37.
[99] Risdel Kasasira, *Ugandan court upholds anti-gay law that allows the death penalty in some cases*, AP News (Apr. 3, 2024), https://apnews.com/article/uganda-antigay-law-constitution-court-651623657b0a971e755080c7bda40a8b.
[100] Sergei Korotkov, *Capital Punishment in Vladimir Putin's Russia,* Human Rights Found. (May 3, 2024), https://hrf.org/capital-punishment-in-vladimir-putins-russia/.

(cont'd)

But because the Republican presidents elected in that time frame changed their approach to judicial nominations, the Supreme Court became dramatically more willing to affirm convictions and death sentences. Republicans became unwilling to consider nominating for a Supreme Court vacancy anyone whose support for the death penalty was less than rock-solid. In particular, Republican leaders vowed that they would never again appoint or vote to confirm for a seat on the Supreme Court people such as the following Republican-appointed justices whom Republican leaders now derided as having been "Republicans in Name Only": Earl Warren, William Brennan, Potter Stewart, Sandra Day O'Connor, David Souter and Anthony Kennedy.[110]

Republican presidents beginning with President George W. Bush stressed in their campaigns the importance of their getting to make appointments to the Supreme Court. Democrats' presidential campaigns did not make Supreme Court nominations important issues until the very end of the 2020 campaign, when soon-to-be lame duck President Trump pushed through Justice Amy Coney Barrett's confirmation after Justice Ruth Bader Ginsburg died less than two months before election day.[111] This was accomplished when the Senate Republicans rushed through Justice Barrett's confirmation after having refused to permit hearings or a vote on President Obama's nominee to succeed Justice Antonin Scalia, who died on February 13, 2016, almost nine months prior to election day.[112]

XI. TRUMP'S AND BIDEN'S RECORDS ON CAPITAL PUNISHMENT

For decades before seeking public office, Donald Trump was a strident supporter of capital punishment. This included his paying for full-page newspaper ads advocating the death penalty for the alleged attackers of the "Central Park jogger." Even now, long after they were exonerated, Trump continues to insist that they were guilty.

Capital punishment touches on two cornerstones of Trump's politics since his first run for president: playing on anti-immigrant sentiments about the U.S.-Mexico border and reviving with a vivid but unsupported twist a longtime Republican mainstay – support for asserting that law and order justified the death penalty for violent crimes – now with special emphasis on people entering the country through weakly protected borders. As in the past, Trump has failed to show any valid evidence of any deterrent effect from capital punishment. In his 2024 campaign, Trump has cited China's President Xi favorably for executing drug dealers.

In his final six months in office, Trump resumed federal death row inmates' executions for the first time since June 2003, forcing through thirteen executions in his final six months in office, including three after his defeat for re-election.[113]

---

[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Megan Brenan, *New 47% Low Say Death Penalty Is Fairly Applied in U.S.*, Gallup (Nov. 6, 2023), https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx.
[108] *Id.*
[109] *Id.*
[110] Lawrence Baum, *The Supreme Court*, at 27, 36-38 (14th ed. 2022).

President Biden is the first president to oppose capital punishment openly. His 2020 campaign website declared that he would "work to pass legislation to eliminate the death penalty at the federal level and incentivize states to follow the federal government's example."[114]
Similar language does not appear on Biden's 2024 campaign website.

Biden's 2020 position was a major change from his position in 1994, when he sponsored a landmark crime bill that expanded federal capital punishment to cover around sixty offenses – including terrorism, murder of law enforcement officers, large-scale drug trafficking and drive-by shootings.[115]

After Biden became President, Attorney General Merrick Garland oversaw a moratorium on federal executions that Garland said would permit the Justice Department to study capital punishment.[116] Thereafter, the Department of Justice reversed more than twenty decisions to seek the death penalty but did not take action with regard to seven other potential or actual death penalty authorizations.[117] In January 2024, federal prosecutors announced that they would seek the death sentence for Payton Gendron, who killed ten Black people at a Tops supermarket in Buffalo, New York, two years earlier.[118] In August 2023, prosecutors secured the death penalty for Robert Bowers, who was convicted of mass killings at Pittsburgh's Tree of Life – Or L'Simcha Congregation synagogue in 2018.[119]

XII. SYSTEMIC INSIGHTS

When the nation's murders and its capital punishment case outcomes are treated as if they are parts of a single national system, we see that the scale of the system has become much smaller than in the past. But it will require continuing efforts and persistence to get us to the point where the bulwarks of the much-diminished capital punishment system crumble.

---

[111] Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. Times (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.
[112] *Id.*; Eric Brander, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court nomination*, CNN (Sept. 19, 2020), https://www.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html.
[113] Michael Tarm, *Fuller picture emerges of the 13 federal executions at the end of Trump's presidency*, AP News (Oct. 3, 2023), https://apnews.com/article/trump-executions-biden-death-penalty-brandon-bernard-c1b26807c5c40b337d14485c3d6df2de.
[114] Quint Forgey, *How Joe Biden Would Address Criminal Justice Reform*, Politico (July 23, 2019), https://www.politico.com/story/2019/07/23/joe-biden-criminal-justice-reform-1428017.
[115] Will Weissert, Associated Press, *Biden backed off a pledge to abolish the federal death penalty. That's left an opening for Trump.*, AP News (Feb. 27, 2024), https://apnews.com/article/death-penalty-politics-biden-trump-federal-moratorium-a76fe555f61c3cf6e09b87433f77966f.
[116] Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions; Orders Review of Policies and Procedures (July 1, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review.
[117] Sadie Gurman, Aruna Viswanatha & Corinne Ramey, Garland Raises Bar for Federal Use of Death Penalty, Wall St. J. (Feb. 18, 2023), https://www.wsj.com/articles/merrick-garland-raises-the-bar-for-death-penalty-686d6418.
[118] Lindsay Whitehurst, *Mass shooting at Buffalo supermarket now Justice Department's first death penalty case under Garland*, AP News (Jan. 13, 2024), https://apnews.com/article/buffalo-supermarket-shooting-death-penalty-justice-department-0efd37a5a4fe5f4786695d01a718c132.
[119] *Id.*

Those who have long believed that the capital punishment system will disappear from American society can draw hope from one consistent factor that has been essential to the tremendous decline in the capital punishment system thus far: The more that most people learn about how capital punishment actually functions, the more they will oppose it. We have even seen this in the evolving attitudes of many Justices and judges as they are exposed to more and more capital cases.

But it is dangerous in 2024 to base one's approach to the death penalty on such optimism. Instead, serious analysis and hard work will be needed more than ever before.