SUPREME COURT COPY

No. S122611

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	(Orange County Sup. Court No. 99ZF0023)
vs.	
MAURICE G. STESKAL,	
Defendant and Appellant.	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Orange
Hon. Frank F. Fasel, Judge

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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I. After Forty Years' Experience With Capital Punishment Under *Gregg v. Georgia*, Whether the Death Penalty is Unconstitutional Is Now An Open Question.

A. A Question of Life or Death, Reopened.

Forty years ago, specifically noting "the absence of more convincing evidence," the Supreme Court concluded that the death penalty for murder was not cruel and unusual punishment in violation of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Then, the Supreme Court measured the penalty of death against the "evolving standards of decency that mark the progress of a maturing society," as of 1976. *Id.* at 173.

Now, the experience of four decades of capital punishment under *Gregg* has produced over 8,000 death sentences, more than 1,400 executions of prisoners, and a body of knowledge about the death penalty's real-world application that previously did not exist.

Now we know, for example, that the death penalty is regularly imposed on actually innocent human beings. We know as well that in selecting which defendants are to die for the murders of which victims, race matters: White lives matter more. We know, after extensive studies, that there is no evidence that the death penalty deters homicides.

Justice Breyer's dissenting opinion in *Glossip v. Gross*, 576 U.S. ___, 192 L.Ed.2d 761, 793, 135 S.Ct. 2726 (2015), joined by Justice Ginsburg, newly and powerfully raises this question: is the death penalty, in light of what we now know about its real-world application, consistent with the Eighth Amendment's evolving standards of decency?

> Nearly 40 years ago, this Court upheld the death penalty .... 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.

Glossip v. Gross, 192 L.Ed.2d at 793-794 (Breyer, J., dissenting). And less than two months after Justice Breyer's dissent in *Glossip*, the Supreme Court of Connecticut reviewed the evidence, and held:

> the death penalty ... is so out of step with our contemporary standards of decency as to violate the state constitutional ban on excessive and disproportionate punishment.

State v. Santiago, 122 A.3d 1, 32, 318 Conn. 1 (Conn. 2015) (striking down death penalty for prisoners who remained on the state's Death Row after the state's abolition of capital punishment for post-2012 offenses).

Under our living constitution, Supreme Court precedents are not all made to last forever. *Plessy v. Ferguson,* 163 U.S. 537 (1896) gave way to *Brown v. Board of Education*, 347 U.S. 483 (1954), which repudiated its constitutional reasoning, and then to *Loving v. Virginia*, 388 U.S. 1 (1967), which formally overruled it. Similarly, *Bowers v. Hardwick*, 478 U.S. 186 (1986) gave way to *Lawrence v. Texas*, 539 U.S. 558 (2003), and then to *Obergefell v. Hodges,* ___ U.S. ___, 192 L.Ed.2d 609, 135 S.Ct. 2584 (2015).

The Court in *Gregg v. Georgia* itself recognized that the Eighth Amendment's cruel and unusual punishments clause "is not fastened to the obsolete ...." *Gregg*, 428 U.S. at 171, quoting *Weems v. United States,* 217 U.S. 349, 378 (1910). *Gregg* was not a decision for all time. Recognizing that standards of decency *do* evolve, *Gregg* was a time-limited decision, holding within it the eventuality of its own obsolescence.

That eventuality has now arrived. In the light of 40 years' experience, the death penalty can no longer be justified as consistent with evolving standards of decency under the Eighth Amendment.

California has the largest Death Row in the nation. Because California is a leading death penalty state, and because this Court is one of the nation's leading appellate courts, this Court should address the constitutional question presented. As shown in Part II of this brief, this Court has the authority to do so, and the responsibility.

This Court should conclude that the death penalty violates the Eighth Amendment's cruel and unusual punishments clause.

As this brief will discuss in Part III.B, research that was not available even a few years ago casts new and unforgiving light on the question of reliability. There is now "convincing evidence that, in the past three decades, innocent people have been executed." *Glossip v. Gross*, 192 L.Ed.2d at 794 (Breyer, J., dissenting). More than one hundred persons sentenced to die in the last four decades have been exonerated. Two years ago, a conservative, peer-reviewed analysis published by the multidisciplinary journal of the National Academy of Sciences came to the conclusion that 4.1 percent of those sentenced to death in the United States in the period 1973 through 2004 were actually innocent. (See pp. 16-23, *infra*.)

Forty years of experience have shown that the selection of who is to die is not proportionate, consistent, or neutral; instead, as discussed in Part III.C of this brief, the death-selection process is arbitrary and discriminatory. Quantitative analysis has demonstrated, to an empirical certainty, this truth: White lives

matter more. Racial discrimination, rooted deeply in culture and perhaps the human unconscious, inescapably taints the death penalty. Gender discrimination and local geography improperly yet significantly determine who is sentenced to die. The broad sweep of capital punishment statutes, which make most murders in death penalty jurisdictions subject to the death penalty, combined with the wide scope of unreviewable prosecutorial discretion, and the absolute discretionary power of juries to impose death, or not, in any given case, result in a populous death pool, from which only an unlucky few from the eligible many are selected to die. Defendants who are sentenced to death enter a death lottery -- only about one in every six will be actually executed. (See pp. 23-43, *infra*.)

A death sentence in the United States is, in reality, not that; it is a sentence to a lengthy yet indefinite term of imprisonment, accompanied by the *possibility* of execution. The death penalty is cruel due to extreme delays. As shown in Part III.D below, nearly half of the inmates now on death rows have been there 15 years or more. For that unfortunate fraction of death row inmates who are actually executed, the median time from sentence to death is almost two decades. (See pp. 43-46, *infra*.)

The Eighth Amendment requires that capital punishment be justified as "measurably contribut[ing]" to one or both of two recognized penological goals, deterrence or retribution. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

Decades of capital punishment have been extensively analyzed by social scientists and legal scholars to determine the existence and extent of any deterrent effect of capital punishment

on homicide rates. In recent years, the picture has become clear, as discussed in Part III.E. A National Research Council study in 2012 reviewed all the available evidence, and all previous studies to determine the deterrent effect of capital punishment, if any, and found there was no evidence showing that the death penalty had any deterrent effect on homicide rates at all. The death penalty does not measurably contribute to the penological goal of deterrence. (See pp. 47-53, *infra.*)

The death penalty also fails to "measurably contribute" to the objective of retribution, as set forth in Part III.F. Vengeance is not retribution. The retributive justifications for capital punishment under the Eighth Amendment are self-referential and cannot survive scrutiny. (See pp. 54-60, *infra.*)

The legal and moral legitimacy of capital punishment is invalidated by the knowledge that we regularly sentence to death the innocent, and the ever-present risk that we will actually execute the innocent. When illegitimate factors such as race affect capital sentencing verdicts, through unconscious bias or otherwise, or arbitrary factors unrelated to culpability determine who is sentenced to die, the legitimacy of the verdict is destroyed. And any hypothetical interest in retribution is in any event vitiated by lengthy delays and freakish inconsistency in implementing the penalty. (See pp. 60-67, *infra.*)

Our standards of decency continue to evolve, as shown in Part III.G. In only the last ten years, seven states -- Connecticut (2012), Illinois (2011), Maryland (2013), Nebraska (2015), New Jersey (2007) New Mexico (2009) and New York (2007) -- have

abolished the death penalty. In states where it remains available, the death penalty is imposed with diminishing frequency. There were just 49 new death sentences in 2015, the fewest annually since the reinstatement of the death penalty under *Gregg*. The number of executions continues to decline -- although there were approximately 3,000 death row inmates in 2015, there were just 28 executions that year, the lowest yearly number in a quarter-century. (See pp. 68-74, *infra*.)

In light of the erosion and collapse of the factual and legal premises on which it was based, and the progress of four decades of societal evolution and legal change, taken on its own terms, *Gregg v. Georgia* is no longer vital precedent. As Justice Breyer put it:

> the death penalty, in and of itself, *now* likely constitutes a legally prohibited "cruel and unusual punishmen[t]." U. S. Const., Amdt. 8.

Glossip v. Gross, 192 L.Ed.2d at 794 (Breyer, J., dissenting) (emphasis added).

B. The Invitation.

The powerful dissent of Justice Breyer in *Glossip*, joined by Justice Ginsberg, is properly understood as an invitation for cases raising the question of the constitutionality of the death penalty after four decades under *Gregg* to be brought to the Court for resolution.

The Supreme Court sets its own agenda, primarily through its discretionary certiorari docket. By the legitimate exercise of their judicial functions, Justices of the Supreme Court shape and move the law, including sending signals to lower courts and issuing invitations to bring cases to the Court. See Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How*

Supreme Court Justices Move the Law, 61 Emory. L.J. 779, 785-89 (2012); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681, 684 (1984).

Though there are, as yet, no published scholarly commentaries on Justice Breyer's dissent in *Glossip*, one law professor has characterized Justice Breyer's dissent as "more of an invitation than a manifesto." Robert J. Smith, *The End of the Death Penalty?*, Slate.com, July 1, 2015 (http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/death_penalty_at_the_supreme_court_kennedy_may_vote_to_abolish_capital_punishment.single.html) (last visited July 7, 2016). The New York Times has taken the same view. Adam Liptak, *With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear,* New York Times, July 6, 2015. Justice Breyer, joined by Justice Ginsberg, has issued an invitation.

Of course, the Supreme Court might simply order briefing on the question of the constitutional validity of the death penalty in any death penalty case before it. The high court is not required to await the further development of the law in lower courts.

But any opinion of the Supreme Court holding the death penalty unconstitutional will be, when it comes, a major development commanding national and international attention. Before the Justices take such major decisions, they ordinarily do, and should, proceed with care.

It is implicit in Rule 10 of the Supreme Court's Rules of Court, setting forth the criteria the Justices consider in deciding whether to

grant certiorari, that the Court institutionally prefers to adjudicate controversies that have been the subject of development in the nation's appellate courts.[1]

II. Due to California's Role As A Leading Death Penalty State, As Well As This Court's National Judicial Leadership Role, It Is Particularly Appropriate for This Court to Address Whether the Death Penalty Is Now Unconstitutional.

It is particularly appropriate that this Court should take the lead in addressing the once-again open question whether the death penalty violates the Eighth Amendment. This is true for several reasons.

First, because of the unique position of California as a death penalty state, it's especially fitting that this Court address the question of the constitutionality of the death penalty.

California has the most populous Death Row in the United States, by far. As of January 1, 2016, California confined 743 persons on Death Row; the next most populous Death Row was Florida's, with 396 inmates. Death Penalty Information Center (hereafter, "DPIC"), *Death Row Inmates by State and Size of Death Row by*

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1 Scholars of the Court refer to the process as "percolation," and approve of it:

> It is ... generally unwise, and inconsistent with the percolation principle, for the Court to remake law in wholesale fashion without the benefit of lower court consideration of the issue....

Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. at 684.

Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188 (last viewed July 6, 2016).[2]

There were, as of January 1, 2016, 2,943 people under sentence of death in our nation. *Id.* Thus, one out of every four Death Row inmates (25.24%) in the United States is an inmate of California's Death Row.

California is the national leader in the field. For this reason alone, the issue warrants this Court's attention.

Second, by virtue of the automatic appeals process, and its original jurisdiction over capital habeas corpus petitions, this Court has long had an active death penalty docket. It is a leader in death penalty jurisprudence.

This Court has long assumed a leadership role in our nation's judiciary. "[O]ver the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues." Jake Dear & Edward W. Jessen, *"Followed Rates" and Leading State Cases*, 1940-2005, 41 U.C. Davis L.Rev. 683, 710 (2007); Hon. Ronald M. George, *The Supreme Court of California 2007-2008: Foreword: Achieving Impartiality in State Courts*, 97 Calif. L.Rev. 1853, 1856 (2009).

It is appropriate that, as foremost after the Supreme Court among the nation's appellate courts that deal with capital

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2 California has more inmates on its Death Row than the next two leading states -- Florida, with 396 inmates, and Texas, with 263 -- combined. DPIC, *Death Row Inmates by State*, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188 (last viewed July 6, 2016).

punishment cases, this Court should address the question of the constitutionality of capital punishment.

Third, the California Supreme Court has a duty to decide federal constitutional questions when presented.[3] As this Court recognized, only three years after the high court's decision in *Gregg*:

> we possess *unrestricted authority* to measure and appraise the constitutionality of the death penalty under the federal Constitution, in accordance with the guidelines established by the United States Supreme Court.

People v. Frierson, 25 Cal.3d 142, 187 (1979) (emphasis added).

This Court holds not just the authority to speak, but also the responsibility to do so. Addressing both federal and state claims of unconstitutionality in *Frierson*, the Court recognized that "fundamental principles of fairness demand that, as the final legal arbiters in this state to whom all death sentences are automatically appealed, we should speak on the issue of constitutionality." *People v. Frierson*, 25 Cal.3d at 172.

A possible objection should be noted. It might be argued that even if *Gregg*'s analysis can no longer be said to comport with "the evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles,* 356 U.S. 86, 101 (1958)) on which *Gregg* was based, since the Supreme Court itself has not yet overruled *Gregg,* this Court has no authority to determine that the Eighth Amendment is violated by capital punishment.

This argument is incorrect.

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3 This brief makes no argument regarding the California Constitution. See Art. I section 27, Cal.Const.; *People v. Houston,* 54 Cal.4th 1186 (2012).

This Court's own cases demonstrate this. As noted above, just three years after *Gregg*, this Court found it had "unrestricted authority to measure and appraise the constitutionality of the death penalty ...." *People v. Frierson*, 25 Cal.3d at 187.

And eleven years ago, in *People v. Moon,* 37 Cal.4th 1 (2005), the Court directly addressed the argument that "the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." *Id.* at 48.

Moon did not reject the appellant's argument on the theory it was foreclosed by the supposed compulsion of *Gregg v. Georgia.* Instead, this Court considered the appellant's argument that the death penalty was unconstitutional on the merits. *People v. Moon, supra*, 37 Cal.4th at 47-48. The *Moon* Court observed that it had rejected the argument in previous years, "a conclusion consistent with that of the United States Supreme Court." *Id.* at 47 (citation omitted). Immediately thereafter, however, the *Moon* Court stated:

> Whether a given punishment is cruel and unusual, however, is not a static concept.

People v. Moon, supra, 37 Cal.4th at 47. The *Moon* Court reaffirmed the necessity of "referring to 'the evolving standards of decency that mark the progress of a maturing society'" in determining whether a given punishment violates the Eighth Amendment. *Id.* The *Moon* Court then went on to find that, even in light of later developments, the death penalty was not, at that time, unconstitutional per se. *Id.* at 48.

Moon demonstrates that the question whether, under today's evolving standards of decency, the death penalty violates the Eighth

Amendment, was not foreclosed from reexamination by *Gregg* more than a decade ago, and is not foreclosed today.

The propriety of a state supreme court addressing Eighth Amendment standards in a capital punishment case, and coming to a conclusion that former Supreme Court precedents have been superseded, is confirmed by the decision of the Missouri Supreme Court in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003).

In *Stanford v. Ky.*, 492 U.S. 361, 369 (1989), the high court held that the Eighth Amendment was not violated by the execution of offenders who were 16 or 17 years old at the time of their crimes. Only fourteen years later, in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, the Missouri Supreme Court considered the very same claim in a case involving a defendant who, just like the defendant in *Stanford*, was 17 at the time of his offense. The Missouri Supreme Court applied the same Eighth Amendment principles as the federal Supreme Court, expressly invoking the " 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 401 . But applying these principles, the Missouri Supreme Court found that circumstances had changed: a national consensus against the execution of juvenile offenders had developed, and "the imposition of the juvenile death penalty ha[d] become truly unusual over the last decade." *Id.* at 399. Accordingly, the Missouri Supreme Court held that the Eighth Amendment categorically prohibited capital punishment for offenders who were 17 or younger at the time of their offenses.

The United States Supreme Court affirmed the Missouri Supreme Court, in an opinion with no criticism of the state supreme

court's Eighth Amendment analysis, or of the state court's view that *Stanford* no longer expressed a correct constitutional analysis. Instead, the federal supreme court agreed with the state supreme court:

> *Stanford v. Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, 492 U.S., at 370-371, 106 L.Ed.2d 306, 109 S.Ct. 2969, it suffices to note that those indicia have changed.

Roper v. Simmons, 543 U.S. 551, 574 (2005).

The Missouri Supreme Court's opinion in *State ex rel. Simmons* is an important example of a state supreme court implementing the Eighth Amendment's evolving standards of decency in the death penalty context, even before the federal Supreme Court has done so.

While the United States Supreme Court remains the final arbiter of the federal constitution, that does not mean the constitution is a living constitution only as to that Court. In interpreting the Eighth Amendment, *State ex rel. Simmons* shows that state supreme courts are not required or permitted to ignore evolving standards of decency any more than the Supreme Court itself may do so.

III. Under the Eighth Amendment's Evolving Standards of Decency, the Death Penalty Is Now Unconstitutional.

A. Introduction.

The Supreme Court's decision in *Glossip v. Gross* involved a narrow question about a state's use of the drug mizadolam in its lethal injection protocol. But the case is remarkable because in it, for the first time in decades, in separate opinions, several Justices addressed the very foundational issue of death penalty law.

Justice Breyer's dissent, joined by Justice Ginsberg, set forth key reasons why, in light of four decades of experience with the regime of *Gregg v. Georgia*, capital punishment is unconstitutional in the second half of the second decade of the twenty-first century. *Glossip v. Gross*, 192 L.Ed.2d at 793 (Breyer, J., dissenting).

Justice Breyer's dissent states:

> 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.

Glossip v. Gross, 192 L.Ed.2d at 794 (Breyer, J., dissenting).

Justice Scalia (joined by Justice Thomas) and Justice Thomas (joined by Justice Scalia) produced separate concurring opinions responding to Justice Breyer's analysis. Both Justice Scalia and Justice Thomas rejected the line of opinions that interprets the Eighth Amendment as part of a living constitution. Both adhered to what was, in their view, the original understanding of the Cruel and Unusual Punishments Clause. Justices Scalia and Thomas regarded *Trop* as wrongly decided, concluding it should be overruled. *Glossip*

v. Gross, 192 L.Ed.2d at 787 (Scalia, J., concurring). Neither Justice Scalia nor Justice Thomas responded to Justice Breyer's dissent by systematically defending the death penalty in the terms of settled Eighth Amendment doctrine. Instead, both Justices favored dismantling the doctrine.

Justice Scalia characterized Justice Breyer's opinion as "full of internal contradictions and ... gobbledy-gook." *Glossip*. 192 L.Ed.2d at 785 (Scalia, J., concurring). Justice Scalia stated that Justice Breyer, in his view, "does not just reject the death penalty, he rejects the Enlightenment." *Id.* at 788 (Scalia, J., concurring).

Justice Thomas's opinion criticized Justice Breyer for failing to take sufficiently into account the repugnant details of death penalty cases, and expressed his view that the Court's opinions in a line of modern Eighth Amendment capital punishment cases -- including *Atkins v. Virginia*, 536 U.S. 304, *Coker v. Georgia*, 433 U.S. 584 (1977), *Roper v. Simmons*, 543 U.S. 551, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), and *Hall v. Florida*, 572 U.S. ___, 188 L.Ed.2d 1007, 134 S.Ct. 1986 (2014) -- were all based on "unfounded claims." *Glossip v. Gross*, 192 L.Ed.2d at 793 (Thomas, J., concurring).

Justice Thomas also would revisit, and presumably reverse, *Woodson v. North Carolina*, 428 U.S. 280 (1976), in which the Court held mandatory death penalty schemes unconstitutional. *Glossip v. Gross*, 192 L.Ed.2d at 793 n. 4 (Thomas, J., concurring).

Taken together, the separate opinions of Justices Breyer, Scalia and Thomas comprise something exceptional and perhaps unprecedented in American law: the divergent views of several Supreme Court Justices on an important constitutional question that

is yet to come before the Court.[4]

Most importantly, as Justice Breyer's analysis demonstrates, under the Eighth Amendment, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 356 U.S. at 101), the death penalty is now unconstitutional.

B. Cruelty: The Death Penalty Is Unreliable Because It Is Regularly Imposed on the Actually Innocent.

When is it fair to sentence to death an innocent person? When is justice served by executing an innocent person? In a civilized society, the only acceptable answer to these questions is "never."

The wrongfully imprisoned can be freed; the wrongfully executed cannot be brought back to life. Because death is an irreversible punishment, the Supreme Court has long recognized that death is different. *Woodson v. North Carolina*, 428 U.S. at 305; *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). The "qualitative difference" between execution and all other punishments gives rise to "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson, supra,* 428 U.S. at 305.

As Justice Breyer explained:

> There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability.

Glossip v. Gross, 192 L.Ed.2d at 794 (Breyer, J., dissenting). In his analysis, Justice Breyer emphasized the knowledge-gap between

4 While Justice Scalia's departure from the Court due to his death in February 2016 affects the composition of the Court, it does not alter the constitutional analysis.

what was not known about the imposition of the death penalty in 1976, and what is known after almost four decades of experience with capital punishment post-*Gregg*.

First, there is now "convincing evidence that, in the past three decades, innocent people have been executed." *Glossip v. Gross*, 192 L.Ed.2d at 794 (Breyer, J., dissenting). Justice Breyer discussed several cases in which there are now compelling reasons to believe that innocent men were put to death. *Id.* (citing the cases of Carlos DeLuna, Cameron Todd Willingham, Joe Arridy and William Jackson Marion).

More than 1,400 people have been executed in the United States since 1976. DPIC, *Number of Executions by State and Region Since 1976*, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last viewed July 6, 2016). There is no way to confidently ascertain precisely how many of these 1,436 persons were, in fact, actually innocent of the crimes for which they paid with their lives. Generally, defense investigations cease when capital defendants die, and their cases are moot due to their deaths. There is no judicial process for post-execution exoneration.

But based on what is now known about the rate of wrongful convictions of innocent persons in capital cases -- estimated at 4.1% of all death sentences, as discussed in the following paragraphs (*Glossip*, 192 L.Ed.2d at 797 (Breyer, J., dissenting)) -- it is probable that, in the last four decades, a substantial number of innocent defendants have not only been sentenced to death, but have been actually, unconscionably, put to death.

Second, "the evidence that the death penalty has been wrongly

imposed (whether or not it was carried out), is striking." *Glossip v. Gross*, 192 L.Ed.2d at 795 (Breyer, J., dissenting) (original emphasis).

> [T]here is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent ... .

Glossip, 192 L.Ed.2d at 798 (Breyer, J., dissenting). The exonerations of persons on Death Row proves Justice Breyer's point:

> 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, 153 L.Ed.2d 335; 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). ... Since 2002, the number of exonerations in capital cases has risen to 115.

Glossip, 192 L.Ed.2d at 794-795 (Breyer, J., dissenting) (emphasis added).

There were five Death Row exonerations in 2015 alone, bringing the current total to 116. National Registry of Exonerations, online at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited July 6, 2016).[5] Moreover,

> exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at

5 Using a slightly different definition of exoneration, the Death Penalty Information Center's list of Death Row prisoners who have been exonerated through October 15, 2015 stands at 156. DPIC, *Innocence: List of Those Freed From Death Row*, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110 (last viewed July 6, 2016).

> 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.

Glossip, 192 L.Ed.2d at 796 (Breyer, J., dissenting).

Justice Breyer identified several reasons for this phenomenon, including (a) "the fact that courts scrutinize capital cases more closely," (b) the "greater likelihood of an initial wrongful conviction" due to pressure on police and prosecutors in cases involving heinous crimes, (c) the process of death-qualification of prospective jurors, which has been empirically shown to "'skew[] juries toward guilt and death,'" and (d) "the general problem of flawed forensic testimony." *Glossip*, 192 L.Ed.2d at 796 (Breyer, J., dissenting).

> 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 Proceeding 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%).

Glossip, 192 L.Ed.2d at 797 (Breyer, J., dissenting).

Indeed, the 2014 National Academy of Sciences study cited by Justice Breyer determined that:

> *a conservative estimate* of the proportion of erroneous convictions of defendants sentenced to death in the United States from 1973 through 2004 [is] 4.1%.

Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proceedings of the National Academy of Sciences of the United States of America 7230, 7234 (2014) (emphasis added) (online at http://www.pnas.org/content/111/20/7230.full.pdf?with-ds=yes)[6] (last viewed July 6, 2016).[7]

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6 One of the world's foremost multidisciplinary scientific journals, the Proceedings of the National Academy of Sciences of the United States of America publishes only peer-reviewed studies. See Proceedings of the National Academy of Sciences, *About PNAS*, http://www.pnas.org/site/aboutpnas/index.xhtml (last viewed July 6, 2016).

7 The National Academy of Sciences study reviewed the outcomes of the 7,482 death sentences that were imposed in the United States from 1973 to 2004. Of that group, 117 defendants, or 1.6%, were exonerated. The study explained:

> [A] high proportion of false convictions that do come to light and produce exonerations are concentrated among the tiny minority of cases in which defendants are sentenced to death. This makes it possible to use data on death row exonerations to estimate the overall rate of false conviction among death sentences. . . . We use survival analysis to model this effect, and estimate that if all death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated. We conclude that this is a conservative estimate of the proportion of false conviction among death sentences in the United States.

Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proceedings of the National Academy of Sciences of the United States of America 7230, 7230. Survival analysis is a statistical method commonly used in medicine to evaluate the effectiveness of clinical trials of new treatments in a population subject to special risks -- for example, mortality from cancer or other serious disease. From 1973 to 2004, more than 35 percent of death row inmates were spared from capital punishment, but remained incarcerated. If inmates no longer facing execution due to reasons other than exoneration (such as death from other causes, or resentencing) had remained on death row, the application of survival analysis indicates that the percentage of

Thus, about one out of every twenty-five defendants sentenced to death during this three-decade period is actually innocent.

Third, "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)." *Glossip*, 192 L.Ed.2d at 797 (Breyer, J., dissenting).

Thus, Justice Breyer concluded:

> 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.

Glossip, 192 L.Ed.2d at 798 (Breyer, J., dissenting).[8]

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exonerations would rise. Applying the 4.1% rate of false convictions would mean that 120 of the 2,943 people on death row nationally in 2016 are actually innocent.

8 The National Academy of Sciences study did not include data after 2004, but the researchers found that the use of DNA identification technology was "unlikely to have much impact" on false conviction rates. Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proceedings of the National Academy of Sciences of the United States of America 7230, 7235. DNA evidence is primarily used in cases such as rape rather than homicide, and only about 13 percent of death row exonerations have resulted from DNA testing, "so the availability of preconviction testing will have at most a modest effect on th[e] rate" of death sentences imposed on innocent defendants.

In his opinion, Justice Thomas made no mention of the execution of innocent people, or the presence of the actually innocent on death rows.

Justice Scalia did not dispute Justice Breyer's conclusions regarding the evidence developed in recent decades that shows a substantial number of people sentenced to death are actually innocent.

Instead, Justice Scalia responded to Justice Breyer's analysis with two arguments.

First, Justice Scalia wrote:

> He [Justice Breyer] says that the death penalty is cruel because it is unreliable; but it is *convictions*, not *punishments*, that are unreliable.

Glossip, 192 L.Ed.2d at 785 (Scalia, J., concurring) (orig. emphasis).

Constitutional substance must be what matters. Justice Breyer showed that the death penalty is unreliable (and hence cruel) because it is based on death sentences which are, in turn, based on convictions that have a high incidence of unreliability, and thus result in unmerited death sentences and the execution of actually innocent people. To say that it is "convictions, not punishments" that are unreliable does not change the nature of the constitutional problem -- capital punishment in the United States today means sentencing to death, and executing, people who are actually innocent.

Id. Even making the unrealistic assumption that the rate of death row exonerations resulting from DNA analysis after 2004 dropped to zero, the resultant 13 percent reduction of the 4.1 percent rate of false convictions would still result in a false conviction rate of 3.56 percent.

Second, while Justice Scalia did not take issue with Justice Breyer's recognition that the process of death-qualifying prospective jurors "'skew[s] juries toward guilt and death,'"[9] Justice Scalia did dispute one of the several reasons Justice Breyer identified as leading to a higher rate of exoneration for persons sentenced to death. Specifically, Justice Scalia stated that the pressure to secure a conviction in capital cases arises from the nature of the facts of the crimes themselves, which he thought would give rise to the same risk of wrongful convictions even if there were no death penalty. *Glossip*, 192 L.Ed.2d at 785 (Scalia, J., concurring).

But this critique fails to address the substance of Justice Breyer's constitutional point. The death penalty is unreliable because, in practice, it is frequently imposed against people who are actually innocent. The fact that there are *other*, non-death penalty prosecutions that *also* carry the risk of convicting innocent persons does not alter in any way the fact that innocent people are sentenced to death, and some are actually executed. That is the fact of constitutional significance identified by Justice Breyer.

To exist in prison under a pending sentence of death for a crime one did not commit is an astonishingly cruel and completely undeserved punishment, under any standard. To die for a crime one did not commit is a barbarity. A regime of punishment that regularly produces such outcomes is unreliable -- it does not separate out "the

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9 The effect of the death-qualification of jurors in capital cases on the reliability of capital murder convictions, as compared with non-capital murder convictions, has been empirically demonstrated. See Nicholas Petersen and Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. Crim. L. & Criminology 1233, 1252 (2012).

worst of the worst," failing in its essential task, with horrible consequences. The experience of four decades has shown that capital punishment is unreliable because it is regularly imposed on the actually innocent.

It is cruel in the constitutional sense to impose and apply capital punishment when there is a known likelihood that one out of every twenty-five defendants sentenced to death is actually innocent, and that some of these actually-innocent human beings will have their lives extinguished by the State.

C. Cruelty: The Death Penalty is Imposed Arbitrarily.

The Eighth Amendment requires that, if the death penalty is to be imposed, it must be imposed fairly, solely on the basis of legitimate penological factors, and not arbitrarily or capriciously. In *Gregg*, the Supreme Court posited that a fair, non-arbitrary capital punishment system was achievable. Yet,

> 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.

Glossip, 192 L.Ed.2d at 798 (Breyer, J., dissenting). As Justice Breyer discussed, empirical evidence "indicate[s] that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not." *Id.* at 799. Moreover, four decades of experience have shown that

> irrelevant or improper factors ... significantly determine who receives the death penalty ....

Glossip, 192 L.Ed.2d at 801 (Breyer, J., dissenting). The improper or irrelevant factors which have been shown to significantly affect

who is sentenced to death include gender, local geography, and the availability (or lack thereof) of defense resources. *Id.*

Chief among these improper factors is race.

1. White Lives Matter More: Race Discrimination and the Death Penalty.

> A cardinal feature of the death penalty in the United States has always been its racially biased use.

Anthony G. Amsterdam, *Opening Remarks, Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 34 (2007).

The history of the death penalty in this country is deeply marked with racism, including lynchings, the spectacles of public executions, and the use of the death penalty for the crime of rape, which was overwhelmingly directed against African-American males for the rapes of white females. *Id.* at 37; see *Furman v. Georgia*, 408 U.S. 238, 364 n.149 (1972) (Marshall, J., concurring). Any discussion of race and the death penalty must be informed by, and understood in the context of, this tragic American history.

The race of the victim is a key factor that, the research over four decades overwhelmingly shows, does significantly affect who is sentenced to death. Justice Breyer wrote:

> Numerous studies ... 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).

Glossip, 192 L.Ed.2d at 799 (Breyer, J., dissenting).

Thus, empirical analysis reveals a stark truth about capital punishment in the United States:

> White lives matter more.

This highly disagreeable truth is not, unfortunately, confined to the distant past, or limited to the Deep South, or to a comparison of only two racial groups. For example, a statistical analysis of all homicides in California in 1990-1999 revealed these results:

> 2.1% of the offenders suspected of killing non-Hispanic whites were sentenced to death, compared to .68% of those suspected of killing non-Hispanic African American[s], .48% of those suspected of killing Hispanics, and 1.5% of those suspected of killing non-Hispanics of other races.

Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L. Rev. 1, 21-22 (2005); see John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities*, 11 J. Empirical Legal Stud. 637, 648-649 (2014) (data covering thirty-four years in Connecticut shows that "minority defendants who commit capital-eligible murders of white victims are over five times as likely to receive a death sentence as minority defendants who commit capital-eligible murder of minority victims (11.8 percent vs. 2.2 percent)."); Michael

L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. Rev. 2119, 2145 (2011) (conducting twenty-eight year study and concluding that victim race "is a strong predictor of who is sentenced to death in North Carolina").

Studies also show that the race of the defendant matters. A study of 339 death verdict cases in Philadelphia between 1978 and 2000 showed "the odds of receiving a death sentence at the weighing stage of the penalty trial were, on average, 3.8 times higher for black defendants than for similarly situated non-black defendants." David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 Colum. Hum. Rts. L. Rev. 143, 155 (2007); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Empirical Legal Stud. at 649 ("Minority defendants who murder white victims are almost three times as likely to receive a death sentence as white defendants who murder white victims (11.8 percent vs. 4.1 percent).").

When the victim is white and the defendant is black, the combination results in a much higher likelihood of a death sentence. John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. Empirical L. Stud. 165, 167 (2004) ("a racial hierarchy clearly exists. Black defendants who murder white victims receive death sentences at the highest rate; white defendants who murder white victims receive death sentences at the next highest rate; and black defendants who

murder black victims receive death sentences at the lowest rate.").

The largest single-county study of death penalty charging and sentencing practices involves Alameda County, California, and it, too, strongly confirms racial bias. The study, cited by Justice Breyer, involved 473 first-degree murder convictions over a twenty-three-year period. Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227 (2013).

The Alameda County study compared death-charging practices and death-sentencing in the two racially-dissimilar halves of the county -- the South County, which was about 5% African-American, and the North County, which was more than 30% African-American. African-Americans were homicide victims roughly four and a half times as often as Whites; while, in South County, Whites were homicide victims three times as often as African-Americans.

Yet a death-eligible defendant in a South County murder case was 2.47 times more likely to be capitally-charged than a defendant in a North County case. Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1262, 1267. At the sentencing stage, the disparity was even greater: "The likelihood of a death sentence in a South County case was 3.60 times greater than in a North County case." *Id.* at 1268. The authors concluded:

> Given the very different racial demographics of the two halves of the county and the racially skewed distribution of homicide victims, and viewed in light of the overwhelming empirical evidence of race effects in death-charging and death-sentencing throughout the country, *an obvious explanation is that racial considerations, conscious or unconscious, underlie*

those choices.

Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. at 1281 (emphasis added).

A recent study looking at 445 jury-eligible citizens in six death penalty states, including California, is also illuminating as to implicit and explicit racial bias:

> We found that jury-eligible citizens harbored two different kinds of the implicit racial biases we tested: implicit racial stereotypes about Blacks and Whites generally, as well as implicit associations between race and the value of life. We also found that death-qualified jurors - those who expressed a willingness to consider imposing both a life sentence and a death sentence - harbored stronger implicit and self-reported (explicit) racial biases than excluded jurors.

Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 515 (2014).

It has been forty years since the Supreme Court held that discretionary imposition of the death penalty does not offend the Eighth Amendment when "'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" *Gregg, supra*, 428 U.S. at 198.

But race has proven, in study after study, to make a real and substantial difference in who is capitally charged, and who is sentenced to death. The statutory schemes designed to insure that the death penalty is not imposed arbitrarily, but only on the basis of specified factors, have failed. The death penalty is imposed on a racially discriminatory basis.

In their separate opinions in *Glossip*, neither Justice Scalia nor Justice Thomas disputed Justice Breyer's conclusion that race has played and continues to play a significant role in determining who is charged with capital offenses, and who is sentenced to death.

Indeed, Justice Scalia accepted the proof that race influences capital charging and capital sentencing. In a memorandum made public through the release of the late Justice Thurgood Marshall's papers, Justice Scalia wrote, with reference to *McCleskey v. Kemp,* 481 U.S. 279 (1987):

> Since it is my view that *the unconscious operation of irrational sympathies and antipathies including racial,* upon jury decisions and (hence) prosecutorial decisions *is real,* acknowledged in the decisions of this court, *and ineradicable,* I cannot honestly say that all I need is more proof.

Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811-*McCleskey v. Kemp,* Jan. 6, 1987. *McCleskey v. Kemp* File, Thurgood Marshall Papers, The Library of Congress, Washington, D.C. (emphasis added), quoted in Scott E. Sundby, *"McCleskey at 25": The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure,* 10 Ohio St. J. Crim. L. 5, 33 (2012); see Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's McCleskey Memorandum,* 45 Mercer L. Rev. 1035, 1037-38 (1994).

In *McCleskey v. Kemp,* 481 U.S. 279, despite evidence showing racially disparate outcomes in the Georgia capital punishment regime, the Court held that the defendant could not show a denial of equal protection or a violation of the Eighth Amendment, because he could not prove that the decision-makers in his particular case acted

with an intent to discriminate on the basis of race.

Racial bias in capital charging decisions and capital sentencing decisions are not manifestations of racism that can be successfully addressed and eliminated by further judicial regulation under the aegis of *Gregg v. Georgia*.

As Justice Scalia recognized, the "unconscious operation" of racial "sympathies and antipathies" is deeply rooted. While racial prejudice may or may not be, in the very long run of human history, "ineradicable," as Justice Scalia believed, race bias will plainly *not* be eradicated in the foreseeable future -- certainly not within the lifetimes of anyone living today.[10]

Racial bias, both conscious and unconscious, can operate, and affect important decisions at multiple points in the progress of a case

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10 See generally Andrew Scott Baron and Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, Psychological Science, Volume 17, Number 1, January 2006, pp. 53-58(6):

> we measured race attitudes in White American 6-year-olds, 10-year-olds, and adults by first developing a child oriented version of the Implicit Association Test (Child IAT). Remarkably, implicit pro-White/anti-Black bias was evident even in the youngest group, with self-reported attitudes revealing bias in the same direction. In 10-year-olds and adults, the same magnitude of implicit race bias was observed . . . .

See also Kathleen Schmidt, Brian A. Nosek, *Implicit (and explicit) racial attitudes barely changed during Barack Obama's presidential campaign and early presidency*, 46 Journal of Experimental Social Psychology 308–314 (2010) ("We explored the possibility that the pervasive implicit and explicit preference for White people compared to Black people declined during Barack Obama's political rise to power and found that, essentially, it did not.").

that ultimately results in a sentence of death.[11]

The influence of race is particularly apparent at two critical stages in death penalty cases. First, at the charging stage, when the decision is made by prosecutors whether to charge a given homicide as a murder, and if so, whether to seek the death penalty; and second, at the sentencing stage, when the jury considers both the life of the victim, in the form of victim-impact evidence, and weighs the background and life of the defendant.

At the first stage, the exercise of prosecutorial discretion -- engirded by the Separation of Powers doctrine and a long tradition of judicial deference -- is virtually unreviewable. "The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law." Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 Fordham Urb. L.J. 513, 513 (1993).

Even apart from traditional deference and separation of powers concerns, proof of discrimination in seeking the death penalty presents extraordinary obstacles. While "the decision to

11 From the earliest stages, whether to investigate a particular death as a homicide, or to resolve investigative doubts on some other basis, may be influenced by unconscious assumptions as to the relative value of the lives of victims of different races. The decisions whether to focus investigation on a particular suspect is susceptible to unconscious racial bias. There is a long history of discrimination in the exercise of peremptory challenges by prosecutors in capital cases. There are many points elsewhere in the course of a capital trial when discretionary decisions or case-critical judgments may be materially affected by "the unconscious operation of irrational sympathies and antipathies including racial" -- for example, the decision whether a capital defendant should be restrained with shackles, or the judgement whether a witness of a different race is trustworthy and believable.

prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,'" under the high court's cases proof of a constitutional violation requires a defendant to show by admissible evidence that the prosecution's case-specific choice to prosecute him "was motivated by a discriminatory purpose." *Wayte v. United States,* 470 U.S. 598, 608 (1985); see *McCleskey v. Kemp*, 481 U.S. 279; *United States v. Armstrong*, 517 U.S. 463 (1996); *In re Seaton*, 34 Cal.4th 193, 202-203 (2004) (a statistical showing is not sufficient to prove that the death penalty charging decision in a given case was racially motivated, or even to entitle a defendant to discovery). A claim of unconscious discrimination, even when substantiated by statistical evidence showing a pattern of selectivity based on victim race, will not suffice to prove "the existence of purposeful discrimination."

Thus, despite the overwhelming evidence that, in prosecutorial capital case charging decisions in the aggregate, white lives matter more, proving racial discrimination in specific death penalty charging decisions by prosecutors has, as a practical matter, proved to be impossible. In four decades, there has apparently not been even one successful challenge. There is no reason to suppose that will change, any more than there is any reasonable possibility that prosecutorial charging decisions will, in the aggregate, somehow self-correct to eliminate racial disparities.

Nor is it realistic to imagine that racial discrimination at the death penalty sentencing stage can be successfully addressed by further judicial regulation under the regime of *Gregg v. Georgia.* As the Connecticut Supreme Court observed, after 40 years of experience

> it has become apparent that the dual federal constitutional requirements applicable to all capital sentencing schemes—namely, that the jury be provided with objective standards to guide its sentence, on the one hand, and that it be accorded unfettered discretion to impose a sentence of less than death, on the other—are fundamentally in conflict and *inevitably open the door to impermissible racial and ethnic biases.*

State v. Santiago, 122 A.3d at 13 (emphasis added). Once a capital defendant has been found death-eligible, Supreme Court doctrine grants juries expansive discretion at the sentencing stage. Indeed, the Court has made clear that

> complete jury discretion is constitutionally permissible. See *Tuilaepa, supra*, at 978-979, 114 S.Ct., at 2638-2639 (noting that at the selection phase, the state is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); *Stephens, supra*, at 875, 103 S.Ct., at 2741-2742 (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional, and noting that accepting that argument would require the Court to overrule *Gregg, supra*).

Buchanan v. Angelone, 522 U.S. 269, 275-277 (1998). Thus, it is nothing less than central to the Supreme Court's death penalty jurisprudence that, once a defendant has been found to be within a class of persons for whom death is deemed a permissible punishment, the sentencers' decision whether to actually impose that punishment on that defendant is within the sentencers' complete, unbridled and subjective discretion.

Racial bias, both positive and negative, is persistent and pervasive in American life -- it may well be, as Justice Scalia observed, "ineradicable." The high court itself has recognized that

> [b]ecause of the range of discretion entrusted to a jury in a

> capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.

Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion). As long as capital sentencing juries have discretion in imposing the harshest penalty, it is inevitable that racial prejudice, both implicit and express (but unexplored or unadmitted), will play a substantial role in determining who is sentenced to death, and who is spared.

No extensive discussion should be necessary to demonstrate that race, whether that of the victim or the defendant, is an arbitrary and illegitimate factor in capital case charging decisions, and in death penalty sentencing determinations.[12]

> To the extent that the population of death row has been chosen on grounds other than the atrocity of the offenders' crimes, this would undermine all confidence that capital punishment, as applied, is morally proportionate and serves a legitimate retributive function ....

State v. Santiago, 122 A.3d at 71.

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12 When illegitimate factors such as race operate to affect capital sentencing verdicts, whether through unconscious bias or otherwise, the legitimacy of the verdict is destroyed:

> [R]acial discrimination in capital selection matters greatly. The race of a capital offender or of his victim has no relevance in determining the moral deserts of the offender for the capital crime. Because the Eighth Amendment function of the capital sentencer is to ensure as a prerequisite to a death sentence that the offender deserves death, consideration of race renders the sentencing judgment improper. When capital sentencers rely on inappropriate factors like race, the death sentences they issue are not deserved.

Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 Wm. & Mary L. Rev. 2083, 2145-2146 (2004).

2. Gender Discrimination and Geography Improperly Impact Who Is Sentenced To Die.

Even if we were to wake up tomorrow in a magically-changed world in which race had zero impact on who was sentenced to die, the death penalty would nevertheless fail to meet the conditions required by *Furman* and *Gregg* for a constitutional death penalty regime. As Justice Breyer observed, improper factors other than race do significantly determine who receives the death penalty. *Glossip*, 192 L.Ed.2d at 801 (Breyer, J., dissenting).

As to gender, Justice Breyer stated:

> 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.

Glossip, 192 L.Ed.2d at 799-800 (Breyer, J., dissenting), citing Shatz & Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1251-53. For example, one study of the death penalty in California considered 1,299 cases of defendants convicted of first degree murder during the three-year period from 2003 through 2005, finding that

> women murderers are sentenced to death at a significantly lower rate than men. In the cases examined, fifty-one women were convicted of capital murder (5.1% of the 1000 defendants convicted of capital murder), and only one . . . was sentenced to death. . . . [T]hese numbers confirm the findings of previous researchers. Combining the data from all three California studies, women constituted 5.3% of the death-eligible defendants convicted of first degree murder and not sentenced to death, but only 1.2% of the defendants sentenced to death.

Steven F. Shatz and Naomi R. Shatz, *Chivalry Is Not Dead: Murder,*

Gender, and the Death Penalty, 27 Berkeley J. Gender L. & Just. 64, 105-106 (2011). That there is gender discrimination in the selection of who is sentenced to death is, of course, not a new development. Justice Marshall, concurring forty-three years ago in *Furman*, stated:

> There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate.

Furman v. Ga., 408 U.S. at 365 (Marshall, J., concurring).

> It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

Id. The empirical explanation, discussed by the authors of the California study, is that prosecutors and sentencing juries stereotypically view women defendants, including those convicted of first degree murder, "as weak, passive, and in need of male protection," and infer that they are by virtue of gender alone, less deserving of death, and that they present a lesser risk of future dangerousness; thus, women are less likely to be charged capitally, and less likely to be sentenced to death. Steven F. Shatz and Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 Berkeley J. Gender L. & Just. at 106.

Yet gender bias, no matter how deeply rooted in unconscious assumptions about the roles of the sexes, cannot *legitimately* play any more role in who is sentenced to die than can similarly-embedded racial bias.

Consider a hypothetical jury instruction informing the jury

that in determining whether to impose the death penalty, the jurors should

> consider the defendant's gender. If the defendant is female, you must [or may] weigh that factor as mitigating, and if the defendant is male, you must [or may] weigh that factor as aggravating.

Such an instruction -- just like a comparable instruction regarding the race of a defendant as mitigating or aggravating -- would be impermissible for two reasons: First, that it "serves to ratify and perpetuate invidious . . . stereotypes" (*J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 131 (1994)), and second, that it is irrelevant to a proper determination of deserts under the Eighth Amendment, because the gender of a death penalty defendant does not make that defendant any more or less deserving of death.

But even beyond the impermissible effects of racial and gender bias, other arbitrary factors unrelated to the individual "death-worthiness" of specific defendants also significantly impact death penalty decisions. One is locality. As Justice Breyer explained:

> Geography also plays an important role in determining who is sentenced to death. . . . *[W]ithin* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. . . . 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. 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).

Glossip, 192 L.Ed.2d at 800 (Breyer, J., dissenting) (orig. emphasis) (citations omitted). Of course, under a system that rationally selected which offenders would be sentenced to death from among

the "worst of the worst," geographical disparities would not be extreme -- there is no reason to believe that the most egregious crimes are committed in only a small fraction of counties, or the most death-deserving offenders are identified in just a few locales. The irrationality of who is selected for death is confirmed by "studies [that] indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not." *Glossip*, 192 L.Ed.2d at 799 (Breyer, J., dissenting). Justice Breyer further noted that empirical studies show other factors irrelevant to proper penological purposes, such as the availability of resources for capital defense counsel, and political pressures on elected judges, also significantly determine which offenders are sentenced to die. *Glossip,* 192 L.Ed.2d at 800-801 (Breyer, J., dissenting).

> 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.

Glossip, 192 L.Ed.2d at 801 (Breyer, J., dissenting) (orig. emphases).

3. The Death Pool and the Death Lottery: Arbitrary Selection and Freakish Execution.

Two other factors further support the conclusion that the death penalty under the regime of *Gregg v. Georgia* does not succeed in either selecting only the few, most "death-worthy"

offenders to be sentenced to death, or in actually executing those most deserving of death.

Instead, the death penalty is essentially a death lottery. It has two stages: in the first stage, from the large pool of statutorily-eligible potential capital defendants, a small number are arbitrarily selected for death penalty prosecution, and from that group a smaller number are actually sentenced to die; and in the second stage, from among those few sentenced to death, a small percentage are arbitrarily, and after much delay, actually executed.

At the first stage, the breadth of death-eligible crimes opens the door to arbitrary discrimination and defeats the objective of narrowly confining capital punishment to "the most deserving." As the Supreme Court has repeatedly emphasized:

> 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.

Kennedy v. Louisiana, 554 U.S. at 420, citing *Roper*, *supra*, 543 U.S. at 568 (internal quotation marks omitted).

Yet in the decades since *Gregg v. Georgia* was decided in 1976, states have increased the number of aggravating circumstances (or special circumstances) that can be alleged to bring a capital murder prosecution, and expanded the breadth of such circumstances as well. One scholar writing in 2006 found "there are now more than fifty different eligibility factors used throughout the country in various combinations." Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in*

the United States, 34 Pepp. L. Rev. 1, 39 (2006); see T. Snell, Dept. of Justice, Bureau of Justice Statistics (BJS), Capital Punishment, 2013 at 6 (Table 1) (rev. Dec. 2014) (hereinafter BJS 2013 Stats) (http://www.bjs.gov/content/pub/pdf/cp13st.pdf) (last visited July 6, 2016); see DPIC, *Aggravating Factors for Capital Punishment By State*, http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state (last visited July 6, 2016).

California's statute, for example, now includes thirty-three special circumstances (counting subsections) which make a murder punishable by death. Cal. Penal Code section 190.2.

The result is that *most murders* in death penalty states are now punishable by death.

The empirical evidence bears this out. A study of 1,182 cases of adult defendants convicted of first-degree murder in California during a three-year period from 2003-2005 determined that in just 182 cases, the murder was not a special circumstance murder; of the remaining 1,000 cases, "a special circumstance was found in 509 cases and could have been found based on the facts set forth in the other 491 cases. Thus, 84.6% of the adult first degree murder cases were factually capital cases." Steven F. Shatz and Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 Berkeley J. Gender L. & Just. at 93. In just 55 of 1,000 potential capital cases (5.5%), the defendant was sentenced to death. *Id.*

Similarly, an analysis of all homicide convictions in Missouri over a five-year period ending in 2001 showed that 76% of those convicted of homicide offenses (including second-degree murder and manslaughter) were death-eligible under the state's statute, though

only 2.5% of the homicide cases yielded sentences of death. Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305, 309, 372 (2009).[13]

The constitutional problem of the death pool is clear. Broadly sweeping statutes fail to limit eligibility for capital punishment to "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. at 420. In addition to failing at the essential narrowing task set by the Supreme Court, such wide-net death penalty schemes, by making most murderers death-eligible, open wide the doors to discriminatory selection of the small fraction of eligible offenders who actually are sentenced to death:

> a system providing a large pool of death candidates . . . allow[s] for increased arbitrary discretion by prosecutors and jurors.

Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 Pepp. L. Rev. at 40.

The arbitrariness of capital punishment in the United States is further confirmed by the relative infrequency of instances in which

13 *See* Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. Colo. L. Rev. 1069 (2013) (Colorado: database of 539 death-eligible homicides, death sentence rate of 0.56%); John J. Donohue III, *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, 638 (2014) (Connecticut: 205 death-eligible homicides, death sentence rate 4.4%).

the death penalty is actually carried out.

Federal Bureau of Justice Statistics reports show that 8,466 people were sentenced to death in the period 1973 through 2013. BJS 2013 Stats at 20, Table 17. 2,979 remained under sentence of death at the end of 2013. Of the remaining 5,487 whose cases had concluded, only 1,359 had been executed; more than twice that number (3,194) had their convictions or sentences overturned, and 509 had died of other causes. *Id.* Thus, an offender who was one of the small fraction of death-eligible defendants to be sentenced to death during this period had a 16.1% chance that he would actually be executed. *Id.*

In *Furman*, Justice Brennan observed:

> When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. ... When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

Furman v. Georgia, 408 U.S. at 293 (Brennan, J., concurring). As Justice Breyer put it:

> 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.

Glossip, 192 L.Ed.2d at 803 (Breyer, J., dissenting).

D. Extreme Delays on Death Row Are Inherently Cruel.

The post-*Gregg* administration of capital punishment in the United States is characterized by extreme delay in the execution of that struck-by-lightning fraction of death-eligible defendants who are sentenced to death and, after many years, actually put to death.

> 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. . . . .
>
> 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).[14]

Glossip, 192 L.Ed.2d at 804 (Breyer, J., dissenting). Justice Breyer explained that "a lengthy delay in and of itself is especially cruel because it 'subjects death row inmates to decades of especially

14 As of the end of 2013, more than 39% of those living under sentences of death were 50 years of age or older. BJS 2013 Stats, at 10, Tables 5.

severe, dehumanizing conditions of confinement.'" *Glossip*, 192 L.Ed.2d at 804 (Breyer, J., dissenting).

Justice Breyer's conclusion that a lengthy delay between imposition and execution of capital punishment is cruel was, in Justice Scalia's view, "nonsense." *Glossip*, 192 L.Ed.2d at 786 (Scalia, J. concurring). "Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty." *Id.*

This rejoinder fails to address the substance of the constitutional issue. Solitary confinement on the nation's death rows is frequent, and lengthy, and harmful. See generally *Davis v. Ayala*, ____ U.S. ____, 192 L.Ed.2d 323, 135 S.Ct. 2187, 2208 (2015) (Kennedy, J., concurring). But modifying prison environments to end the widespread practice of routinized solitary confinement would not eliminate the fundamental problem. As the Supreme Court recognized more than a century ago:

> 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.

In re Medley, 134 U.S. 160, 172 (1890).

The threat of death at the hands of the State is, itself, a sword of Damocles that exacts a toll of immense psychological punishment and anxiety, even when, as in *In re Medley*, it is virtually certain that the execution will follow in a matter of just four weeks, as the statute considered in *Medley* required.

But the monthlong cruelty of a century and a quarter ago is multiplied by time, and multiplied by uncertainty. When the near-certainty of execution is reduced to the uncertainty of a 16.1% possibility, and the post-sentence legal process -- and thus the uncertainty that one really *will* be put to death -- stretches over a period of more than a decade-and-a-half, the screw is turned. The screw stays turned. The real sentence is not death -- it is life in prison, with the possibility of State-administered death after many years.[15]

This Court recognized this inherent cruelty in *People v. Anderson,* 6 Cal.3d 628, 649 (1972) (superseded as stated in *People v. Bean*, 46 Cal.3d 919, 957 (1988)):

> The cruelty of capital punishment lies ... also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

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15 The inherent cruelty of lengthy delay on death row inflicted on a condemned prisoner is not eliminated -- or even lessened -- by the fact that the delay may result, to some extent, from the efforts on the part of the judicial system to assure that the defendant was fairly tried and sentenced. In *Furman*, Justice Brennan observed:

> The State, of course, does not purposely impose the lengthy waiting period in order to inflict further suffering. The impact upon the individual is not the less severe on that account. It is no answer to assert that long delays exist only because condemned criminals avail themselves of their full panoply of legal rights. The right not to be subjected to inhuman treatment cannot, of course, be played off against the right to pursue due process of law ....

Furman v. Ga., 408 U.S. at 289 n.37 (Brennan, J., concurring).

E. Capital Punishment Fails to "Measurably Contribute" to the Objective of Deterrence.

Retribution and deterrence are the two recognized rationales for capital punishment.[16] The Supreme Court has stated:

> capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.

Kennedy v. Louisiana, 554 U.S. at 441. Unless the imposition of the death penalty

> *measurably contributes* to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.

Atkins v. Virginia, supra, 536 U.S. at 319 (emphasis added); see *State v. Santiago, supra,* 122 A.3d at 56.

But as reflected in Justice Breyer's opinion in *Glossip, supra,* after four decades of experience with capital punishment under the regime of *Gregg v. Georgia,* it is now clear that capital punishment fails to meaningfully fulfill the objectives of either deterrence or retribution.

First, it cannot be said that the death penalty has been shown to "measurably contribute" to the objective of deterrence.

If the death penalty did *measurably* deter murders, it is

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16 The Court has explained the "[r]ehabilitation, it is evident, is not an applicable rationale for the death penalty." *Hall v. Florida,* ____ U.S. ____, 188 L. Ed. 2d 1007, 134 S. Ct. 1986, 1992-1993 (2014). The Court has also made clear that incapacitation is not a sufficient justification for capital punishment under the Eighth Amendment. *See Spaziano v. Florida,* 468 U.S. 447, 461 (1984).

reasonable to expect that, after 40 years of death sentences in the United States, under factual circumstances that have been extensively analyzed for any deterrent effect on homicides by social scientists and legal scholars, there would be a substantial body of credible empirical evidence demonstrating that "measurable" deterrent effect.

There is none. As Justice Breyer observed:

> [T]he 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).

Glossip, 192 L.Ed.2d at 807 (Breyer, J., dissenting) (emphasis added). In light of the fact that "30 years of empirical evidence" has failed to demonstrate a deterrent effect, and noting the infrequency of actual executions of those sentenced to death, as well as the long delays between sentencing and execution when it does occur, Justice Breyer concluded it was unlikely the death penalty has a deterrent effect.

Justice Scalia did not respond to Justice Breyer's discussion of delay and arbitrariness as diminishing any possible deterrent effect. But, Justice Scalia asserted, a significant deterrent effect "seems very likely to me, and there are statistical studies that say so." *Glossip*, 192 L.Ed.2d at 786 (Scalia, J. concurring). Justice Scalia cited two studies, from 2004 and 2003: Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J.

Applied Econ. 163, 166 (2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average"), and Hashem Dezhbakhsh, Paul Rubin, & JoannA M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344, ___ (2003) ("[E]ach execution results, on average, in eighteen fewer murders" per year). *Glossip*, 192 L.Ed.2d at 786 (Scalia, J. concurring).

But the 2003 and 2004 studies on which Justice Scalia relied were authoritatively rejected by the 2012 National Research Council study.

The Zimmerman and Dezhbakhsh, Rubin, and Shepherd studies relied on by Justice Scalia for evidence of a deterrent effect are instrumental variables studies, which attempt to infer a causal relationship between two sets of data points -- here, the homicide rate and the imposition of capital punishment -- by reference to other selected sets of data points representing independent variables.[17] Both studies were found by the National Research Council to be deeply flawed. A critical problem with these instrumental variable studies

> is that inferences on the impact of the death penalty rest heavily on unsupported assumptions.

National Research Council, Deterrence and the Death Penalty (Daniel S. Nagin & John V. Pepper eds. 2012) at 54. The studies did not measure or account for the deterrent effects of non-capital

17 To demonstrate a causal effect of executions on lower homicide rates, variations in the instrumental variables selected should affect only the rate of executions, and not the rate of homicides.

punishment -- generally, life imprisonment -- that may alternatively be imposed for murders, and thus could not show any additional deterrent effect of the death penalty over life imprisonment.[18] Moreover, the instrumental variable studies used incomplete or implausible models of potential murderers' perceptions of and response to the use of capital punishment, and derived estimates of the effect of capital punishment based on statistical models that made assumptions that were not credible, particularly in the choices of implausible instrumental variables.[19]

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18 [T]he relevant question regarding the deterrent effect of capital punishment is the differential or *marginal deterrent effect* of execution over the deterrent effect of other available or commonly used penalties.

National Research Council, Deterrence and the Death Penalty (Daniel S. Nagin & John V. Pepper eds. 2012) at 29 (emphasis added). *See* Richard O. Lempert, *Desert and Deterrence*, 79 Mich. L.Rev. 1177, 1192 (1981) ("it is only the *marginal* deterrent effect of capital punishment that is important. The issue is not whether we slay murderers or free them; it is whether we send them to their death or to prison for life.") (orig. emphasis).

19 The National Research Council report gave examples of the implausible variables on which the studies relied, which included:

> police payroll, judicial expenditures, Republican vote share in each separate presidential election, prison admissions, the proportion of a state's murders in which the assailant and victim are strangers, the proportion of a state's murders that are nonfelony, the proportion of murders by nonwhite offenders, an indicator (yes/no) for whether there were any releases from death row due to a vacated sentence, and an indicator (yes/no) for whether there was a botched execution.
>
> ....
>
> [T]he committee does not find the assumptions to be credible. To take two examples, it seems highly unlikely that police expenditures or the Republican vote share in a particular presidential election affect homicide rates only through the intensity with which the death penalty is exercised. . . .

Tellingly, even authors of the two studies that Justice Scalia found persuasive on the question of deterrence have, in later publications, dramatically altered and restricted their sweeping claims about deterrence.[20]

In sum, the studies that purport to show that capital punishment in the United States in the post-*Furman* era

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National Research Council, Deterrence and the Death Penalty (Daniel S. Nagin & John V. Pepper eds. 2012) at 68.

20 Shepherd, one of the authors of the 2003 study deemed persuasive by Justice Scalia, two years later reexamined the same data used in that study, and came to a starkly different conclusion:

> [E]xecutions have a deterrent effect in only twenty-two percent of states. In contrast, *executions induce additional murders in forty-eight percent of states. In seventy-eight percent of states, executions do not deter murder.*

Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 Mich. L. Rev. 203, 205 (2005) (emphasis added).

Zimmerman, the author of the 2004 deterrence study Justice Scalia found persuasive, also two years later dramatically modified his thesis; re-analyzing the same set of data, Zimmerman found that any deterrent effect was *entirely* restricted to executions carried out by electrocution:

> None of the other four methods of execution (lethal injection, gas chamber asphyxiation, hanging, and/or firing squad) are found to have a statistically significant impact on the per capita incidence of murder.

Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1978-2000*, 65 American Journal of Economics and Sociology 909, 934 (2006).

Electrocution is authorized in only eight states, not including California, and in no state is it the primary method of execution. See DPIC, *Methods of Execution,* http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=245#ok (last visited July 6, 2016). Executions by electrocution comprise just over 11% of the 1,413 executions in the United States in the post-*Furman* era, and there has been only *one* execution by electrocution in the last five years, in Virginia. DPIC, *Searchable Execution Database,*

"measurably contribute" to the objective of deterrence (*Atkins, supra*, 536 U.S. at 319) fail to show any such thing.[21]

In 1976, it may have been reasonable to believe that the death penalty might be shown in the future to deter capital crimes. After four decades of capital punishment in the United States, the only reasonable conclusion from the extensive empirical evidence is that net deterrence benefits from the death penalty have not been shown, and are very unlikely to exist.[22] There is an overwhelming

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http://www.deathpenaltyinfo.org/views-executions (last visited July 6, 2016). Thus,

> Zimmerman's work suggests that whatever deterrent effect the death penalty may have had is now history.

Michale L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489, 498 (2009).

21 The National Research Council's rejection of these deterrence studies confirms prior analyses discrediting the same research. *See, e.g.*, Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 Ohio St. J. Crim. L. 255, 260 (2006); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791, 843 (2005).

22 Apart from considerations of delay, uncertainty, and arbitrariness, a basic reason why the prospect of capital punishment is an ineffective deterrent of murder is found in what is most likely to concern that fraction of prospective murderers who might make rational risk/reward calculations -- what they fear is not execution, but *arrest*:

> As criminologists have . . . shown empirically, *differences in the probability of capture and sureness and swiftness of punishment are likely to have more of an effect on deterrence than differences in the amount of punishment once an offender is apprehended, convicted and sentenced.* This is especially likely to be so when the choice is between punishments that in all cases are extremely harsh, as is true of the exclusive life without parole and death penalty options for capital murder.

James S. Liebman and Peter Clarke, *Minority Practice, Majority's*

consensus among criminologists that "the empirical research has revealed the deterrence hypothesis for a myth." Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology at 503-504. Four decades of experience have failed to demonstrate any deterrent effect, let alone one even arguably sufficient to justify continued executions. After forty years, it cannot be said that the death penalty "measurably contributes" to the objective of deterrence.[23]

Burden: The Death Penalty Today, 9 Ohio St. J. Crim. L. 255, 322 (2011) (emphasis added); see Steven D. Leavitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. Econ. Persp. 163, 175 (2004) ("it is hard to believe that fear of execution would be a driving force in a rational criminal's calculus in modern America").

23 Assuming that murder *is*, in fact, capable of being substantially deterred by punishment, it is not difficult to imagine a capital punishment scheme that might be *designed* to serve as a measurably effective deterrent to murder and other serious crimes. A system of capital punishment could:

(1) apply to a wide range of crimes, including all intentional homicides and rapes, as well as kidnapping, armed robbery and other serious offenses;
(2) make the death penalty mandatory for all on conviction of those crimes;
(3) provide for mandatory executions within a few weeks or months of sentencing; and
(4) require executions to be accomplished by dramatic means such as hanging, firing squad or decapitation, and to be televised and webcast, live, to the widest possible audience.

F. The Death Penalty Fails to "Measurably Contribute" to the Objective of Retribution.

1. Vengeance Is Not Retribution.

The death penalty also fails to "measurably contribute" to the second recognized penological objective, retribution.

Retribution is, of course, a legitimate purpose of punishment for violation of law. But retribution is not vengeance. Vengeance is

> the Hyde to retribution's Jekyll. Vengeance, unlike retribution, is personal in nature; it is motivated by emotion, and may even relish in the suffering of the offender. See R. Nozick, Philosophical Explanations (1981) p. 367. Accordingly, vengeance traditionally has not been considered a constitutionally permissible justification for criminal sanctions. *See Ford v. Wainwright*, 477 U.S. 399, 410, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (finding no retributive value in "the barbarity of exacting mindless vengeance"). On the contrary, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (plurality opinion).

State v. Santiago, 122 A.3d at 71-72. Vengeance is not rational, impersonal, proportionate, or rule-bound. Retribution is -- or, at least, under any coherent theory of punishment under the Eighth Amendment, should be -- all those things.

But what is retribution? Or, more precisely, what does the Supreme Court mean when it speaks of retribution in the context of the Eighth Amendment?

In *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), the Supreme Court held that when a defendant does not rationally understand why he is being executed, capital punishment is

impermissible. In so holding, the High Court set forth two retributive justifications for capital punishment:

> Considering the last--whether retribution is served--it might be said that capital punishment is imposed because [1] it has the potential to make the offender recognize at last the gravity of his crime and [2] to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.

Panetti v. Quarterman, 551 U.S. at 958 (bracketed numbers added).[24] However, as this brief will discuss, the Supreme Court's retributive rationales justifying capital punishment are problematic and unpersuasive.

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24 There are other theories of retribution and capital punishment that have not been embraced by the Supreme Court. For example, Justice Scalia, in dissent, quoted Immanuel Kant, a strict retributivist:

> "Whoever has committed Murder, must die .... Even if a Civil Society resolved to dissolve itself with the consent of all its members[,] ... the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds ...."

Morgan v. Illinois, 504 U.S. 719, 752 n. 6 (1992) (Scalia, J., dissenting), *quoting* Immanuel Kant, *The Philosophy of Law* 198 [1796] (William Hastie transl. 1887).

Kant's view that *all* murderers deserve death may accord with Justice Thomas's declared receptivity to the idea that the death penalty may be made mandatory (*Glossip*, 192 L.Ed.2d at 793 n. 4 (Thomas, J., concurring)), but it does not accord with modern Eighth Amendment jurisprudence.

2. The Retributive Justifications for Capital Punishment Are Illogical and Incoherent.

a. The communicative-purpose rationale.

The first justification for capital punishment is that it carries "the potential to make the offender recognize at last the gravity of his crime ...." *Panetti v. Quarterman*, 551 U.S. at 958. This is the communicative-purpose hypothesis -- it is directed at the consciousness of the offender.

The problems with the communicative hypothesis of retribution as applied to capital punishment are apparent.

First, in meeting the objective of "mak[ing] the offender recognize at last the gravity of his crime," capital punishment is, drastically, both under-inclusive and over-inclusive The Court itself dealt with the contingent nature of the epiphany rationale by describing the death penalty as having only "*the potential*" to compel an offender to recognize the gravity of his offense. *Panetti v. Quarterman*, 551 U.S. at 958 (emphasis added). There is nothing in the nature of imprisonment preventing an offender, whether during the course of a life sentence, or during the many years of lonely imprisonment that typically precede any execution, from coming to grips with the full reality of his offense. Indeed, that epiphany could happen upon arrest, or entering a plea of guilty, or conviction on a jury verdict. There is time for reflection.

If, as the Court concluded in *Panetti*, the communicative purpose of retribution is not served by executing offenders who do not rationally understand the gravity of their offenses, then that purpose is also not served by executing offenders who *already*

understand the gravity of the offenses for which they are being punished. *See* Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment,* 103 Nw. U.L. Rev. 1163, 1177-1178 (2009).

Even being strapped to a gurney in the death chamber cannot guarantee, for those who have never had such an epiphany, that they will, while being executed, finally recognize the gravity of their offenses -- rather than dying in a state of defiance, or denial, or unreflective, abject animal fear.

An offender who is executed learns nothing from the experience. He is dead. The lesson is wasted.

Second, the constitutional inquiry is whether capital punishment "measurably contributes" to the goal of retribution. There is no reason to believe that "the potential to make the offender recognize at last the gravity of his crime" is not served just as well by a life sentence that insures -- and communicates to the defendant -- that the defendant will die in prison for his crime. Obviously there is no way to measure the comparative degree of recognition of the seriousness of their underlying offenses among those who die serving life sentences against those who are put to death in prison. We might probe the minds of the living, but we cannot interview the dead. The hypothesis that the death penalty has the potential to make the offender realize the gravity of his crime is immeasurable, and speculative in nature, and cannot be said to "measurably contribute" to the objective of retribution.

b. The community-centered hypothesis.

Perhaps in tacit recognition of the conceptual flaws of the communicative justification, the Supreme Court has not mentioned it since deciding *Panetti.* Instead, the Court has reiterated the second retributive justification for capital punishment, which centers on the community:

> In considering whether retribution is served, among other factors we have looked to whether capital punishment "has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."

Kennedy v. Louisiana, 554 U.S. at 442, quoting *Panetti,* 551 U.S. at 958.

This community-centered rationale is, however, conceptually defective and unsatisfactory as a matter of constitutional law for at least two reasons.

First, on examination, the proposition that the death penalty is justified because it allows the community "to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be ... imposed" is *purely self-referential and circular.* It asserts that the death penalty is justified in particular cases because the community feels that in such cases, the defendant's culpability is so serious that the death penalty is justified.

The constitutional justification for putting prisoners to death should not rest on circular reasoning.

Second, the concept that the death penalty is justified under

the community-centered rationale is based on an unexamined -- and incorrect -- assumption: that the death penalty is "the ultimate penalty."

But the Supreme Court could accurately describe the death penalty as "the ultimate penalty" *only* because it is the most severe penalty the Supreme Court itself allows. As one scholar has observed:

> [T]here is no inherent reason to presuppose that the death penalty must be the most severe penalty a society imposes.

Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment,* 103 Nw. U.L. Rev. at 1175.

One can imagine -- and history demonstrates -- even more severe punishments, calculated to inflict the maximum pain and terror, such as death by being burned alive at the stake, or under torture and mutilation, as described, for example, in Justice Thomas's concurring opinion in *Baze v. Rees*, 553 U.S. 35, 95 (2008), or punishment by death of not just the offender, but his children and his entire family.

In a jurisdiction in which life imprisonment without parole was the most severe sanction, it might be said that the sanction was permissible because it allowed the community "to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be ... imposed." Similarly, in a jurisdiction in which the most severe penalty was death to the offender and his family members, it might equally be said that the penalty allowed the community "to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be ... imposed."

Applied to the death penalty, this same formula has no more substance.

Thus, the community-centered theory of retribution incorrectly *presumes* that capital punishment is the ultimate punishment, and from that presumption reasons, in a conceptual circle, that the community is justified in determining that some crimes merit capital punishment because capital punishment is the ultimate punishment, and the community may determine that some crimes merit the ultimate punishment. This is reasoning that would not suffice in an introductory college-level course in logic, and should not survive active constitutional scrutiny.

3. Actual Innocence, Caprice and Bias, Extreme Delay and Infrequency Invalidate Any Retributive Justification for the Death Penalty.

Even if a compelling retributive justification for capital punishment in the abstract could be constructed, when tested against the reality of capital punishment in the United States it would fail, because *any* retributive justification for capital punishment is invalidated (a) by the reality that a substantial number of innocent persons will be sentenced to death and some will actually be executed, (b) by the reality that the death penalty is imposed under the improper influence of discrimination and arbitrariness, and (c) by the extreme delay and infrequency of execution that characterize the death penalty.

a. Death sentences for the innocent.

We condemn the innocent. As shown above, since the restoration of the death penalty in 1973, at least 116 people have been sentenced to die, and later determined to have been factually innocent. *See Glossip*, 192 L.Ed.2d at 794-795 (Breyer, J., dissenting); National Registry of Exonerations, online at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited July 6, 2016). As also discussed above, using reliable statistical techniques commonly used to measure the efficacy of life-saving drugs for terminal conditions such as cancer, a peer-reviewed National Academy of Sciences study estimated, with a high degree of confidence, that the rate of false convictions in cases resulting in a death sentence over a thirty-one year period (1973-2004) was 4.1%. Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proceedings of the National Academy of Sciences of the United States of America at 7230.

We also kill the innocent. As Justice Breyer recognized, there is now "convincing evidence that, in the past three decades, innocent people have been executed." *Glossip*, 192 L.Ed.2d at 794 (Breyer, J., dissenting) (citing the cases of Carlos DeLuna, Cameron Todd Willingham, Joe Arridy and William Jackson Marion); *see* Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proceedings of the National Academy of Sciences of the United States of America at 7235 ("it is all but certain that several of the 1,320 defendants executed since 1977 were innocent").

Retribution is not served by sentencing the innocent to death, or by executing them.[25] "[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). The argument for retribution is vitiated by our knowledge of actual innocence:

> "We know that persons have been condemned who were innocent; we know that future scientific evidence can overturn the seemingly most safe of convictions; and we know that we could easily avoid such problems in adopting an alternative sanction, such as life imprisonment. Therefore, we knowingly, foreseeably, and avoidably sentence innocent people to death . . . if we continue to endorse capital punishment . . . ."

State v. Santiago, 122 A.3d at 65 (emphasis added) (orig. ellipses), *quoting* Thom Brooks, "Retribution and Capital Punishment," in Retributivism: Essays on Theory and Practice (Mark D. White ed., 2011) at 238. "The fact that we did not want to design such a system does not mean we can close our eyes to what we have built." Richard O. Lempert, *Desert and Deterrence*, 79 Mich. L.Rev. at 1227.

Thus, the Connecticut Supreme Court wrote in *State v. Santiago*:

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25 Even the philosopher Immanuel Kant, that most committed retributivist -- who would punish *all* intentional homicides with death (excepting murders committed for honor) -- presumed that only the actually guilty would be capitally punished.

> Capital punishment of the innocent is incompatible with Kant's fundamental principle that persons may never be used as a means to an end.
>
> Kant's position on capital punishment . . . would never justify the execution of any except those actually guilty, no matter how beneficial the execution might be to community welfare.

Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 Pepp. L. Rev. 949, 971 (2004).

> we recognize that the legal and moral legitimacy of any future executions would be undermined by the ever present risk that an innocent person will be wrongly executed.

State v. Santiago, 122 A.3d at 66.

It is not too much to say that the practice of imposing the irreversible punishment of death on a population that we know includes a substantial number of actually innocent people invalidates the legitimacy of our entire system of capital punishment.

b. Discrimination and irrationality prevail.

To serve retribution, punishment must be proportional and reasonably consistent, not arbitrary or tainted by bias. Yet, as Justice Breyer recognized, 40 years of 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." *Glossip*, 192 L.Ed.2d at 798 (Breyer, J., dissenting).

Improper factors significantly determine who is sentenced to die, and chief among the improper factors is race. As shown above, the empirical evidence based on four decades of experience with capital punishment after *Furman* demonstrates that the race of defendants and of victims have played, and continue to play, a substantial role in determining who is charged with capital offenses, and who is sentenced to death. Racism is deeply rooted, and even if it is not ineradicable, it will not be soon eradicated from human consciousness, or from the human unconscious. It is also clear that gender bias arising from the genders of both defendants and victims plays a significant role in determining

who is sentenced to die, and that geographical disparities, equally unrelated to culpability or proportionality, play a material part.

Indeed, given (a) the breadth of permissible capital circumstances, (b) the scope of unreviewable prosecutorial discretion to charge most murders as capital offenses, and to choose not to pursue the death penalty, and (c) the unlimited discretion of capital juries to impose or not impose death, the selection of the small fraction of eligible persons convicted of murder is actually sentenced to die is inevitably arbitrary.

As explained by the Connecticut Supreme Court, the retributive justification for the death penalty is vitiated by arbitrariness and discrimination:

> the selection of which offenders live and which offenders die appears to be *inescapably tainted by caprice and bias*. "[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." (Internal quotation marks omitted.) *Graham v. Florida, supra*, 560 U.S. 71. In other words, the death penalty must be equally available for similarly culpable offenders if a capital sentencing scheme is to fulfill a valid retributive purpose. To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, *tarnishes the moral order*.

State v. Santiago, 122 A.3d at 66 (emphasis added).

c. Extreme delay and infrequency.

The average time between conviction for a capital offense and executions in 2014 was almost 18 years, an increase of more than 50% in the last decade and a nine-fold increase since 1960,

when the average interval was two years. Now, it is not unusual for a death sentence, if it is ever carried out, to be executed 25 years or more years after the conviction.[26] Not only is extreme delay itself especially cruel (*Glossip*, 192 L.Ed.2d at 804 (Breyer, J., dissenting)); lengthy delay "undermines the death penalty's penological rationale." *Id.*

The death penalty is not just inordinately delayed, but is actually executed only infrequently, in a small fraction of cases. "In a word, executions are *rare*." *Glossip*, 192 L.Ed.2d at 809 (Breyer, J., dissenting) (orig. emphasis). As summarized by Justice Breyer:

> 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.

Glossip, 192 L.Ed.2d at 808 (Breyer, J., dissenting).[27] The combination of lengthy delays and low probability of execution

may well attenuate the community's interest in retribution to

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26 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.
Glossip, 192 L.Ed.2d at 804 (Breyer, J., dissenting).

27 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).
Glossip, 192 L.Ed.2d at 808 (Breyer, J., dissenting).

the point where it cannot by itself amount to a significant justification for the death penalty.

Glossip, 192 L.Ed.2d at 808-809 (Breyer, J., dissenting).

In *State v. Santiago*, the Connecticut Supreme Court evaluated the meaning of retribution when capital punishment is imposed, if it ever is, after decades on Death Row:

> What then remains of retribution when one who commits a heinous crime is not executed until after he has spent half a lifetime or more on death row, if ever? Unlike with deterrence, the retributive value of an execution defies easy definition and quantification, shrouded as retribution is in metaphysical notions of moral restoration and just deserts. What is clear, however, is that the most tangible retributive fruit of capital punishment—providing victims and their families with a sense of respite, empowerment, and closure—is grievously undermined by the interminable delays in carrying out the sentence imposed. ... Psychologically, the capital punishment system actually may impede the healing process. ...

State v. Santiago, 122 A.3d at 64.[28] Infrequency also vitiates any

28 There has been one empirical study investigating how the impact of a death sentence affects the healing and psychological well-being of homicide survivors:

> [T]his Study found that the critical dynamic was the control survivors felt they had over the process of getting to the end. In Minnesota, survivors had greater control, likely because the appeals process was successful, predictable, and completed within two years after conviction; whereas, the finality of the appeals process in Texas was drawn out, elusive, delayed, and unpredictable. It generated layers of injustice, powerlessness, and in some instances, despair. Although the grief and depth of sorrow remained high for Minnesotans, no longer having to deal with the murderer, his outcome, or the criminal justice system allowed survivors' control and energy to be put into the present to be used for personal healing.

Marilyn Peterson Armour and Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A*

interest in retribution:

> "[W]hen imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. . . . Nor could it be said with confidence . . . that community values are measurably reinforced by authorizing a penalty so rarely invoked." *Furman v. Georgia*, supra, 408 U.S. 311-12 (White, J., concurring).

State v. Santiago, 122 A.3d at 63.

When delays averaging almost two decades between sentence and execution, and the sentence of death itself actually carried out in only a small fraction of cases in which prisoners are sentenced to death, it cannot be said that the death penalty "measurably contributes" to any societal interest in retribution.[29]

Two State Comparison, 96 Marq. L. Rev. 1, 98 (2012).

29 Extreme delays and infrequency of execution also reveal an inescapable dilemma for capital punishment in the United States. As explained by Justice Breyer:

> 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, 145 L. Ed. 2d 370 (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

G. The Decline in Our Use of the Death Penalty Confirms that Execution is Now Cruel and Unusual Punishment.

As we have seen, it has been 40 years since the Supreme Court last considered the constitutionality of the death penalty under our evolving standards of decency. *Gregg v. Georgia*, 428 U.S. 153. More recently, however, in *People v. Moon*, 37 Cal.4th 1, this Court considered the question, and found:

> [N]o national consensus has emerged against the imposition of capital punishment in general. . . . Thirty-eight of our nation's states have some form of the death penalty, as does the federal government and the federal military; 12 states, as well as the District of Columbia, do not. (<http://www.deathpenaltyinfo.org/FactSheet.pdf>
>
> [as of Aug. 18, 2005].)

People v. Moon, 37 Cal.4th at 48. That was more than a decade ago.

The legal landscape has changed. Now there are only thirty-one states that retain "some form of the death penalty." DPIC, *Facts About the Death Penalty*, http://www.deathpenaltyinfo.org/FactSheet.pdf (last viewed July 7, 2016). Since this Court decided *People v. Moon* in 2005, seven states -- Connecticut (2012), Illinois (2011), Maryland (2013), Nebraska (2015), New Jersey (2007) New Mexico (2009) and New

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> or procedurally unfair would violate the Eighth Amendment. *Woodson*, 428 U.S., at 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (plurality opinion); *Hall*, 572 U.S., at ____, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (slip op., at 22); *Roper*, 543 U.S., at 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose.

Glossip, 192 L.Ed.2d at 812 (Breyer, J., dissenting).

York (2007) -- have abolished the death penalty, though several states did so prospectively only. See DPIC, *States With and Without the Death Penalty*, online at http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited July 7, 2016); *Glossip*, 192 L.Ed.2d at 813 (Breyer, J., dissenting).[30]

Thus, the direction of change of our evolving standards of decency, as shown by the seven-state decrease in death penalty jurisdictions in just the time since this Court's decision in *People v. Moon* in 2005, is unequivocally *away* from the death penalty as an acceptable punishment.

Under the Eighth Amendment, it is not just the number of states that maintain some form of the death penalty on their statute books, and the direction of change in that number over time, that are significant. Actual state practice materially matters:

> In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether " 'objective indicia of society's standards, as expressed in legislative enactments *and state practice*,' " show a "national consensus" against a sentence for a particular class of offenders.

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30 The number of states that currently retain the death penalty is also similar to the number that maintained life-without-parole sentences for juveniles when the Supreme Court ruled such sentences violated the Eighth Amendment, see *Miller v. Alabama*, 567 U. S. ___, 183 L.Ed.2d 407, 132 S. Ct. 2455, 2471 (2012) (28 states and the Federal Government provided for life-without-parole sentences for some juveniles convicted of murder); and significantly fewer than the 39 jurisdictions that provided for such sentences in non-homicide cases at the time of the Court's similar decision in *Graham v. Florida*, 560 U.S. at 97 (Thomas, J., dissenting).

Miller v. Alabama, 183 L.Ed.2d at 425 (emphasis added), quoting *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quoting *Roper*, 543 U.S. at 563).

This Court as well has recognized the importance of actual state practice. In 2005 in *People v. Moon,* this Court observed:

> Nor can we say capital punishment is used with diminishing frequency in those states in which it is legal.

People v. Moon, 37 Cal.4th at 48.

In 2016, history compels an opposite conclusion. When we consider the number of annual death sentences nationwide, the trajectory is clear:

> 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).

Glossip, 192 L.Ed.2d at 813 (Breyer, J., dissenting) (emphasis added).

In 2004, the last full year for which data was available when *People v. Moon* was decided, there were 138 new death sentences handed down in the United States. DPIC, *Death Sentences in the United States From 1977 By State and By Year*, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last viewed July 7, 2016). In this century, the annual number of new death sentences peaked at 223, in the year 2000.[31]

31 The high-water mark for new death sentences came in 1996,

The next-highest annual total was 166, in the year 2002. There were 140 new death sentences in 2005. After four years of consecutive declines, in 2011, the number dropped to 85, and has not risen beyond that since. *Id.*

This clear and marked nationwide trend -- fewer death sentences every year -- continues. In 2015, there were only 49 new death sentences handed down in the United States. DPIC, *Death Sentences in 2015*, http://www.deathpenaltyinfo.org/2015-sentencing (last viewed July 7, 2016). This is the lowest annual number of new death sentences since the death penalty was reinstated in 1976. DPIC, *Death Sentences in the United States*, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last viewed July 7, 2016).

In determining evolving standards of decency, the Supreme Court has also looked to the number of states that actually conduct executions. See *Atkins*, 536 U.S. at 316 ("[E]ven among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry [v. Lynaugh*, 492 U.S. 302]."); *Roper*, 543 U.S. at 564-565 (noting that though twenty states authorized death for juveniles, the practice was infrequent, with only three states actually executing juveniles in the prior ten years).

Most states that retain the death penalty in theory do not, in practice, execute anyone.

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when 315 people were sentenced to die. DPIC, *Death Sentences in the United States*, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

In the past five years, governors of Oregon, Pennsylvania, and Washington have declared statewide moratoria on executions, all of which remain in place.[32]

Seventeen states that maintain the death penalty in theory have not, in fact, executed anyone in the last five years. See DPIC, *Number of Executions by State and Region Since 1976,* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

As of January 17, 2016, California has gone ten years without an execution. California is one of eight states that retains the death penalty on its books but has not conducted an execution in ten years or more. The other states are New Hampshire (1939), Kansas (1965), Wyoming (1992), Colorado and Oregon (1997), Pennsylvania (1999), and Arkansas (2005). By the end of 2016, three more states may join this list: Montana, Nevada, and North

32 Oregon: William Yardley, *Oregon Governor Says He Will Block Executions*, The New York Times, Nov. 22, 2011, http://www.nytimes.com/2011/11/23/us/oregon-executions-to-be-blocked-by-gov-kitzhaber.html; Jonathan J. Cooper, Associated Press, *New Oregon Governor Will Continue Death Penalty Moratorium*, Feb. 20, 2015, *available at* http://abcnews.go.com/Politics/print?id=29114589.

Pennsylvania: Gov. Tom Wolf, *Death Penalty Moratorium Declaration* (Feb. 13, 2015), available at https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration.

Washington: Gov. Jay Inslee, *Remarks Announcing a Capital Punishment Moratorium* (Feb. 11, 2014), available at http://www.americanbar.org/content/dam/aba/publications/.criminaljustice/scj2016_ch19_capital_punishment.authcheckdam.pdf. Governor Jay Inslee, Remarks Announcing a Capital Punishment Moratorium, Feb. 11, 2014, *available at* http://governor.wa.gov/news/speeches/20140211_death_penalty_moratorium.pdf.

Carolina, each of which last executed anyone in 2006. DPIC, *Executions by State and Year,* http://www.deathpenaltyinfo.org/node/5741.[33]

"[I]n 2014, only seven States carried out an execution." *Glossip*, 192 L.Ed.2d at 812 (Breyer, J., dissenting). In 2015, the number was six. DPIC, *Number of Executions by State and Region Since 1976*, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976. By comparison, 20 states conducted executions in 1999. *Id.*

The number of executions continues to decline.

> 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 [2014], that number was only 35.

Glossip, 192 L.Ed.2d at 813 (Breyer, J., dissenting).

In 2015, the number of executions nationwide was even less than the year before: 28. DPIC, *Number of Executions by State and Region Since 1976,* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976. This is the fewest in a quarter-century. DPIC, *Facts About The Death Penalty,* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf .

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33 The last federal government execution was also more than 10 years ago, in 2003. DPIC, *Executions by State and Year,* http://www.deathpenaltyinfo.org/node/5741 (last visited July 8, 2015). The U.S. military has not executed anyone since 1961. DPIC, *The U.S. Military Death Penalty*, http://www.deathpenaltyinfo.org/us-military-death-penalty (last visited Nov. 2, 2015).

When we consider the declining number of death penalty jurisdictions, the diminishing totals of death sentences year-after-year, and the falling numbers of actual executions, one conclusion is inescapable:

> [I]n the last two decades, the imposition and implementation of the death penalty have increasingly become unusual.

Glossip, 192 L.Ed.2d at 812 (Breyer, J., dissenting).

Finally, in determining evolving standards of decency, the Supreme Court has expressly looked to international law and practice. *Roper*, 543 U.S. at 575 ("[F]rom the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'").

The United States has long been the world's foremost champion of human rights -- yet the remaining use of capital punishment makes this Nation an outlier among advanced civilized societies. For example, the death penalty is banned under Article 2 of the Charter of Fundamental Rights of the European Union, 2012/C 326/02, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last visited Feb. 27, 2016) ("No one shall be condemned to the death penalty, or executed."). As Justice Breyer has pointed out, in executing more than ten people in 2013, the United States was in the company of only seven other nations: China, Iran, Iraq, Saudi Arabia, Somalia, Sudan and Yemen. *Glossip*, 192 L.Ed.2d at 816 (Breyer, J., dissenting).

IV. Conclusion.

For the foregoing reasons, as well as those set forth in briefs previously submitted, the Court should reverse the judgment of death.

Dated: July 11, 2016 Respectfully submitted,

Gilbert Gaynor
Attorney for Appellant
Maurice G. Steskal

CERTIFICATE OF WORD COUNT

I certify that the forgoing Appellant's Second Supplemental Brief contains 20,029 words, exclusive of tables, according to the word-count feature of Open Office.

Dated: July 11, 2016 Respectfully submitted,

Gilbert Gaynor
Attorney for Appellant
Maurice G. Steskal

PROOF OF SERVICE

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is Gilbert Gaynor, Cal. Bar No. 107109, Law Office of Gilbert Gaynor, 244 Riverside Drive, No. 5C, New York, NY 10025-6142.

On July ___, 2016, I served the documents entitled APPELLANT'S MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL BRIEF IN EXCESS OF 2,800-WORD LIMIT and APPELLANT'S SECOND SUPPLEMENTAL BRIEF by placing true and correct copies of the documents in an envelope addressed as indicated on the attached Service List.

X (BY US MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at New York, NY, in the ordinary course of business.

__ (BY FEDERAL EXPRESS) I placed such envelope in the federal express drop off on July 11, 2016 for delivery the next business day.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July ___, 2016 at New York, NY.

_____

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