

CAN THE SUPREME COURT CONTINUE TO LIVE WITH OUR ARBITRARY AND CAPRICIOUS DEATH PENALTY?

Liliana Segura

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Photo: Brendan Smialowski/AFP/Getty Images

Rudolph J. Gerber has never forgotten where he was when the U.S. Supreme Court struck down the death penalty over 45 years ago. He was a new lawyer in Phoenix, working as the associate director of the Arizona Criminal Code Commission. The landmark 1972 ruling in [Furman v. Georgia](#) invalidated death sentences across the country, including those of 16 people on Arizona's death row. Outraged politicians vowed to bring back capital punishment; one Phoenix Republican declared his candidacy for Maricopa County attorney that very day.

The next day, Republican State Sen. Sandra Day O'Connor, a member of Arizona's Senate Judiciary Committee, came to Gerber's office. She dropped the Furman decision on his desk. "I said, 'What do you think we should do about it?'" Gerber recalled in a recent phone interview. "And her exact words were, 'Rudy, I want you to write a death penalty we can live with.'"

To O'Connor – and to the 5-4 majority in Furman – this meant revamping Arizona law to ensure the death penalty was more carefully applied. Gerber was up to the task, although he did not have strong feelings on the matter himself. No one had been executed in Arizona in nearly 10 years. "I thought, well, having a new death penalty law is like having a new tax code," he said. He began to study the ruling.

It was an unusual decision. Each of the nine justices had written a separate opinion in Furman. But the prevailing problem was arbitrariness – there was no uniformity in death sentences across the country, nor in the severity of the crimes that sent people to death row. Race and social status were the real drivers of death sentences, making the punishment discriminatory and "freakishly imposed." Justice Potter Stewart called the death penalty cruel and unusual "in the same way that being struck by lightning is cruel and unusual."

Gerber began drafting some standards to define the subset of murders that could be considered most heinous and deserving of death. Consulting the Model Penal Code, he identified six statutory aggravating factors – for example, killing a police officer, murdering for monetary gain, or having previously been convicted of a violent crime.

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O'Connor had told the press that the future of capital punishment should be up to Arizona voters, who widely supported it. Yet most seemed indifferent to the de-

tails. Public hearings on the law were poorly attended, according to one Arizona Republic columnist, who described “the rooms half empty, the public apparently unconcerned.” As the law went into effect in 1974, O’Connor successfully ran for a seat on the Maricopa County Superior Court, and was later appointed by President Ronald Reagan as the first woman to serve on the U.S. Supreme Court.

Gerber had gone to work as a prosecutor in Maricopa County when the high court handed down its next major ruling on capital punishment in 1976. *Gregg v. Georgia* upheld Georgia’s new death penalty law, a green light to resume executions. To Gerber, the issue was no longer an abstraction. Prosecutors in Arizona had swiftly availed themselves of the law he helped design, without waiting on the court. By the time *Gregg* came down, they had already sent a dozen people to death row.

In 1977, Gerber himself sought the death penalty against a man named Joe Clarence Smith, who had brutally murdered a young waitress, stabbing her genitals and stuffing her mouth with dirt. Yet when the time came for the sentencing phase, Gerber found himself conflicted. “Even though I had convicted him and he was a terrible human being, I didn’t think I wanted to see him executed,” he said. A colleague took over and won a death sentence.

More than 40 years later, Smith has yet to be executed. If Gerber could not have foreseen such a thing in the late ’70s, he soon saw plenty of other problems. “As a draftsman, prosecutor, and then trial judge, watching ‘my’ death penalty statute in action, I came to realize how little I comprehended the nuances and data regarding the day-to-day workings of capital punishment,” he wrote years later in the *Stanford Law and Policy Review*. Among his central concerns was the immense power granted to prosecutors, who weaponized the death penalty in everything from plea bargains to political campaigns. As time passed, he wrote, “I marveled at the enthusiasm of colleagues and politicians in touting a practice they did not seem to understand.”

Gerber watched with dismay as the tough-on-crime era took hold in Arizona. As politicians campaigned on harsh sentencing, they introduced bill after bill adding new aggravators to make people eligible for the death penalty. The once-

narrow list of aggravating factors “crept and expanded to absurd, broad categories,” Gerber said, such as “heinous” and “depraved,” and perhaps most bizarre, “without legal justification.”

Today, there are 14 aggravating factors that can send a defendant to death in Arizona. Ironically, the very mechanism that was supposed to fix the death penalty “has put us right back into the arbitrariness and caprice that was condemned in Furman,” Gerber said. “We have come full circle, even with good intentions.”



A fence surrounds the state prison in Florence, Ariz. on July 23, 2014, where death row inmate Abel Daniel Hidalgo is currently held. Photo: AP

Earlier this year, Gerber, now 79 years old and retired from the Arizona Court of Appeals, joined 20 former judges, prosecutors, and other members of the state’s legal community to sign an amicus brief to a petition pending before the U.S. Supreme Court. The case, [Hidalgo v. Arizona](#), challenges Arizona’s death penalty

law for being overly broad, in violation of the Constitution. Filed on behalf of Abel Daniel Hidalgo – and brought by former Obama Solicitor General Neal Katyal – the petition does not stop there. It argues that the time has come to abolish capital punishment altogether. “The death penalty is unconstitutional,” Hidalgo argues, “full stop.”

Hidalgo has been closely watched for months. It is the latest attempt to rise to a challenge put forth in 2015 by Justice Stephen Breyer in his impassioned dissent in [Glossip v. Gross](#). Breyer famously laid out the myriad problems with death penalty – from the decades prisoners spend in isolation to the risk of executing the innocent – and called for “a full briefing” on the constitutionality of capital punishment. Katyal argues that Hidalgo is the ideal vehicle, describing Arizona as a microcosm of the flaws Breyer described and “an exemplar of the arbitrariness in the imposition of the death penalty in the United States.”

While the chances of success for any petition before the court are slim, some express cautious optimism that it might take at least the first question. “Arizona has reached a point that is pretty clearly in violation of *Gregg v. Georgia*,” Gerber said. The ruling was premised on the notion that the death penalty should be narrowly applied in the most egregious cases. Yet Hidalgo includes data showing that 99 percent of murders over an 11-year period in Maricopa County included at least one aggravator. “When virtually all first-degree murders are eligible for death, the ‘worst of the worst’ requirement turns on its head,” Gerber [wrote](#) in November. Even the Maricopa Superior Court judge who most recently [upheld](#) Arizona’s law found this data disconcerting, calling it “problematic from a constitutional standpoint.”

Hidalgo has been repeatedly listed and re-listed for conference by the court, most recently appearing on its December 8 calendar. But it was delayed again after the justices requested the full record from the state – a sign someone wants to take a closer look. As 2017 comes to a close, the fate of Hidalgo will wait until the new year.

In the meantime, the death penalty continues its precipitous [decline](#). In its end-of-year [report](#) for 2017, which tracks the ever-dwindling executions and death sen-

tences, the Death Penalty Information Center identified three “outlier” counties responsible for a disproportionate percentage of all new death sentences. Maricopa County was one of them. There, prosecutors handed down their latest death sentence just last month, in the case of 29-year-old [John Allen](#), convicted of murder and child abuse. His wife, Sammantha, was [sentenced](#) to die for the same crime just a few months earlier, becoming the third woman on Arizona’s death row.

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The enduring zeal for the death penalty in Maricopa County is partly the legacy of one man: Andrew Thomas, elected county attorney in 2004. In his first two years, death penalty prosecutions [nearly doubled](#) in Maricopa County. In [one](#) of many articles about Thomas, the Phoenix New Times described “one fairly typical case from that era,” in which Maricopa County prosecutors sought death against a man for killing someone while drunken driving – “only the second time in the nation’s history that’s happened.”

“He overused the death penalty,” Gerber recalled. What’s more, Thomas found an ally in his campaign: notorious Sheriff Joe Arpaio, who had campaigned alongside him. Gerber is blunt in saying the two men shared a racist bias against Latinos, who receive death sentences in disproportionate numbers in Arizona. When a crime was committed by a Latino, “for Andrew Thomas, one of the first responses was well, let’s fry ’em. Let’s put ’em to death.”

The effect was partly captured by Arizona Attorney Magazine, which ran a two-part series in 2009 titled “The Capital Case Crisis In Maricopa County: What (Little) We Can Do About It.” The authors had planned to call for an empirical study of the cost of capital cases, only to realize that the situation was too dire; it was clear that there was an alarming backlog of capital cases in the county. There were not enough qualified judges, prosecutors, defense attorneys, and other specialists

available to handle them.

Thomas was ultimately disbarred by the Arizona Supreme Court, which [found](#) he “outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law.” He was expelled in 2012. Today, Maricopa County still stands apart, but prosecutors have wielded their power similarly at different times throughout the state. In Pinal County, which is home to Arizona’s death row, the election of far-right County Attorney Lando Voyles in 2012 brought an unprecedented surge in capital prosecutions. Voyles, who was from Maricopa County, “embarked on a crusade to basically try to get everybody the death penalty that had committed a first-degree murder,” recalls James Mannato, a veteran attorney in Florence, Arizona, and currently the county’s public defender. Within a few years, death penalty cases had tripled in Pinal County. “It serves to highlight the issue that’s now being presented in Hidalgo’s petition,” Mannato said.

To Mannato, the problem comes down to power. “It’s hard, really, for people sometimes to resist the urge to seek death penalty because it’s simply so easy to do it, and it gives any prosecutor the ultimate amount of leverage,” he said. Regardless, voters did not seem to have much patience for Voyles, who lost re-election in 2016 amid accusations of overreach and overspending, including on capital prosecutions, which [cost](#) half a million dollars each.

Mannato was optimistic about Hidalgo’s chances before the Supreme Court. “I think they’re going to take it,” he said, “and I think the reason is because the momentum’s been building across the country against the death penalty.” State legislators continue to [pass](#) abolition legislation, governors keep imposing moratoriums, and fewer and fewer juries are sentencing people to death. “They’ve done what they think is morally correct without waiting for the Supreme Court to tell them.”

Today, Rudy Gerber is retired and living in California, where attempts to end the death penalty by ballot initiative have repeatedly [failed](#). The state is home to Riverside County – another death penalty outlier – as well as the country’s largest death row. The story of how it got this way has parallels to Arizona: a widening net of factors made defendants eligible for the death penalty. “They

don't call them aggravators, they call them special circumstances here," he said. "But the result is exactly the same. Upwards of 90 percent of California murderers fall into one or more of the special circumstances." It is another reason Hidalgo should interest the Supreme Court. "A number of states, not just Arizona, are in the same place."

In California, the issue dates back to 1978, when a lawyer named Don Heller drafted a pro-death penalty ballot initiative that would pass overwhelmingly, expanding the use of special circumstances in capital cases. Like Gerber, Heller soon began questioning what he'd done. A wave of California prosecutors immediately sought death sentences. "Everyone was trying to put a notch on their gun. There were a tremendous number of capital cases filed," he [told me](#) in 2016. The state's death penalty population surged – today it hovers at 750. Yet only 13 executions have been carried out since then. The fight over lethal injection has kept the state mired in costly litigation.

In Arizona, executions have been on hold since the botched killing of [Joseph Wood](#), a harrowing, two-hour ordeal that made headlines across the world. Similar episodes have occurred across death penalty states. In Ohio this year, the state failed to kill 69-year-old [Alva Campbell](#) – the second time in less than a decade a man has left the state's death chamber alive.

Other botched executions are discussed in a 2007 [book](#) co-authored by Gerber, which also shows how, even when all appears to have gone smoothly, people who attend or carry out executions are forever altered. One Arizona woman featured in the book – a former lower court judge named Donna Leone Hamm – describes a sick feeling of complicity, even as a death penalty opponent. "You stood and watched a man die," she said. "You did nothing to stop it. You could not have stopped it, but you didn't even try."

Hamm's husband was incarcerated on drug charges in Arizona during the 1980s. When she began coming to see him in prison in those years, she told me, "I realized they treated me very, very differently when I was touring the prisons as a judge then they did when I became a visitor." When her husband was released, they started an advocacy group called [Middle Ground Prison Reform](#). It was

around this time, in 1992, that Arizona finally carried out its first post-Gregg execution, with Hamm as a witness. It was a major media event. She remembers seeing flowers planted alongside the death house and “velvet ropes” upon entering the viewing room, as if “you’re in line to go see a movie.”

“It was disgusting,” she said. The man, Donald Harding, died in the gas chamber, wearing nothing but an adult diaper. Witnesses commented on his pasty white skin; Hamm became convinced it was primarily for humiliation. Harding stuck up his middle finger as the execution began, which “everybody talked about and wrote about.” Today, Hamm is unsure about Hidalgo’s chances at the Supreme Court. But she does not believe Arizona will end the death penalty on its own.



Juan Melendez, center, and Ray Krone, right – the 99th and 100th people out of 101 to be exonerated from death row since capital punishment’s re-establishment in 1976 – watch Matt Bettenhausen, Illinois deputy governor for criminal justice policy, testify on a Senate Judiciary Subcommittee on the Constitution hearing on Capitol Hill, on June 12, 2002, in Washington. Photo: Kenneth Lambert/AP

In November, as the Supreme Court continued to mull over different cases, the Huffington Post ran an [article](#) by Ray Krone, sentenced to die in Maricopa County on the basis of junk forensic evidence. In 2002, Krone became the 100th person exonerated from death row in the U.S. “I wish I could say my story is unusual,” he wrote. “But the truth is, 160 men and women have been exonerated and freed from death row since 1973.” He called on the Supreme Court to take up Hidalgo and abolish the death penalty for good.

More than perhaps any other issue, a growing awareness of wrongful convictions has likely helped shift public opinion favoring the death penalty to its current historic lows. In Arizona, Hidalgo points out, nine people have been exonerated from death row. (And cases like that of [Barry Jones](#), convicted in 1995, show there is good reason to believe there are other innocent people facing execution in the state.) After the 2015 exoneration of Debra Milke, the Arizona Republic ran a series on capital punishment. As Gerber recalls, the stories generated a great deal of debate, even among “back-row conservatives.” Recent exonerations in Arizona have forced people in Maricopa County to confront the reality that innocent people are sentenced to die – “and that maybe it’s time to just get rid of it.”

This shift in mindset includes Sandra Day O’Connor herself. After 25 years on the Supreme Court bench, often providing a swing vote in death penalty cases, she retired in 2006. One day toward the end of her term, in 2001, she gave a speech before the Minnesota Women Lawyers. It made [headlines](#). “If statistics are any indication,” O’Connor said, “the system may well be allowing some innocent defendants to be executed.”

When Gerber heard of her comments, he was surprised. When he knew her all those years ago in Phoenix, she “would have never said that,” he said. “So something happened in her tenure on the Supreme Court. Maybe studying these capital cases that opened her mind to the possibility that maybe some innocent people have been executed,” he said. “But I cannot speak for her, then or now.”

Whether O’Connor would vote to take Hidalgo if she were still on the bench is impossible to know. But her feelings on capital punishment certainly appear to have

evolved. Speaking to her audience members in Minnesota, she noted that their state did not have the death penalty. “You must breathe a big sigh of relief every day.”

Top photo: A police officer warns activists to leave during an anti-death penalty protest in front of the U.S. Supreme Court on Jan. 17, 2017 in Washington.



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