

Capital Punishment in Missouri: Background and Impetus for an Empirical Examination of the Modern Death Penalty¹

Jennifer Merrigan*, John Mills*, and Joseph Perkovich*

I. INTRODUCTION

Within twenty-two months between November 2013 and September 2015, the State of Missouri executed eighteen men whom, in previous decades, its courts had sentenced to die. Reprieves were rare during this relentless wave in which the Supreme Court of Missouri issued execution warrants for twenty-three men.² The executions proceeded at about a monthly interval, a rate then matched only by Texas—a state with more than four times as many people and many more institutions, organizations, and resources dedicated to capital defense.³ Historically, Missouri is among the United States' most prolific executioners. But during the eight years before this recent onslaught, Missouri had executed just two prisoners.⁴

Upon the Supreme Court of Missouri's issuance of each execution warrant, prison guards arrived in front of the condemned's cell door at the Potosi Correctional Center in Mineral Point. One guard would read the warrant ordering the prisoner to be executed on a specific date, usually about forty days in the future. Each of the condemned men would then be stripped from his cell and placed in solitary confinement with few of his belongings. He would wait for over a month before his transportation twenty minutes away by van to Bonne Terre, Missouri, to spend the remaining 72 hours of his life in an isolated cell in the Eastern Reception, Diagnostic and Correctional Center, looking

through a window to the adjacent room—the state's death chamber, a theater equipped with a lethal injection apparatus and accouterments. For some, these last forty days passed without word from the prisoner's attorney of record; for many, their execution warrant failed to elicit even a token court filing by the man's counsel.

On the night of November 3, 2015, the United States Supreme Court held up and then stayed the execution of Mr. Ernest Johnson, the man

Missouri had scheduled to execute that particular evening in Bonne Terre.⁵ Mr. Johnson's stay came just shy of the two-year anniversary of this wave's November 20, 2013 commencement. During that span, the United States Supreme Court impeded

two other Missouri executions in cases where the absence of basic hallmarks of due process and fairness came to light within enough time to animate the disruption of the state's proceedings.⁶ In two other cases, execution warrants were otherwise vacated, because of concerns as to the prisoners' innocence; one via the governor's commutation of the sentence to life without the possibility of parole⁷ and the other by the Missouri Supreme Court.⁸

On January 21, 2016, the Missouri Supreme Court entered an execution warrant for Mr. Earl Forrest, setting his execution on May 11, 2016—nearly four months from the warrant date. This timetable departs from the court's recent practice of allowing only about forty days lead-time for advocates on behalf of the condemned

Historically, Missouri is among the United States' most prolific executioners.

* The authors are principal attorneys with the Phillips Black Project, a public interest law practice. The authors would like to thank the Saint Louis University School of Law for its ongoing support and the indispensable insight and commitment of Prof. Susan McGraugh and Dean Michael Wolff. The authors are also indebted to many advisors and colleagues who have lent their considerable experience and acumen to research efforts discussed herein. Special thanks are owed to Peter Joy, Lydia Lucente, Sean O'Brien, Margot Ravenscroft, Ken Rose, Christina Swarns, Jessica Sutton, Claudia Van Wyk, and Donald Wallace.

to raise grounds for the courts or the governor to stop the prisoner's execution.⁹

By this date, the large majority of remaining Missouri death sentences is still in the courts, working their way through the ordinary course of review at one procedural stage or another. In the wake of this recent wave beginning with the execution of Mr. Joseph Franklin and ending on September 1, 2015 with the execution of Roderick Nunley—two men who, in a tragic symmetry, had been nominally represented by the same attorney as they faced their death—reflection is warranted on the clearing out of Missouri's death row. This evaluation, in turn, precipitates deeper consideration of the state's modern capital punishment record.

II. BACKGROUND

Over the course of the two decades since President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),¹⁰ the constitutional cases of dozens of Missouri capital prisoners have worked through its state courts and then federal habeas corpus proceedings.¹¹ About fifteen years after the enactment of AEDPA, Missouri's lack of legal resources for its capital cases (especially after federal habeas corpus litigation), and the procedural limitations on further litigation,¹² had rendered over two-dozen prisoners vulnerable to the issuance of an execution warrant.

Around that same time, Missouri and other states had wrought changes to the procedures—including the chemicals—by which its corrections department were to carry out executions. In various ways, these changes precipitated legal challenges to the new protocols introduced in many states around the country.

In Missouri, the state's highest court issues warrants. Over the years, the court abandoned the practice whereby the Chief Judge signed

each execution warrant. Though, these orders are now unsigned and entered per curiam, they are issued at the discretion of the Chief Judge. The Chief Judge of the Supreme Court of Missouri is a rotating position based on the tenure of the

judges comprising the court. The Missouri Plan for the appointment and retention of the court dictates the particular sequence.¹³ On the first day of July in odd-numbered years, a Missouri Justice ascends to Chief Judge for two-years.

At the outset of Chief Judge Mary B. Russell's two-year term on July 1, 2013, federal lethal injection litigation against Missouri's Department of Corrections had been pending in the Western District of Missouri since August 1, 2012.¹⁴ During the pendency of that litigation, the Missouri Supreme Court had abided by its own order, issued on August 14, 2012, in response to four pending motions filed by the Attorney General to set execution dates. At that time, the high court indicated that it would be premature to set any execution before resolution of the federal lethal injection litigation.

On the same day that Chief Justice Russell took office, July 1, 2013—notwithstanding the August 14, 2012 order and the continued active pendency of the federal lethal injection litigation—the Office of Attorney General Christopher Koster, without any public signal from the Court, moved the Missouri Supreme Court to set execution dates for Mr. Joseph Franklin and Mr. Allen Nicklasson. In response, on the first anniversary of the August 14 order, the Missouri Supreme Court issued its first warrant in what would total twenty-four warrants in twenty-five months,¹⁵ setting Mr. Franklin's execution date. Mr. Nicklasson received his warrant on November 8, 2013.

As the following high-level overview of this 2013-15 period indicates, these

capital cases raise very serious concerns about the constitutional implementation of the death penalty in Missouri. However, for several

In Missouri, the state's highest court issues warrants.

Missouri, unlike various other jurisdictions such as Georgia, Illinois, and Maryland, has not been the subject of a systemic examination of the state's modern death penalty.

reasons also set forth below, Missouri, unlike various other jurisdictions such as Georgia, Illinois, and Maryland, has not been the subject of a systemic examination of the state's modern death penalty. In recent years, it has emerged that Missouri possesses the richest set of data in the country for such a study of modern capital punishment. Recently, a comprehensive study of Missouri has commenced. The basic approach of this study is outlined below, along with ways in which the ultimate research may shed light on the workings of Missouri's capital punishment scheme.

III. WAVE OF EXECUTIONS EXPOSED LONG-STANDING FAILINGS OF BELEAGUERED CAPITAL DEFENSE SYSTEM

Of the eighteen executions in those twenty-two months, the same attorney represented seven of the condemned. In 2013, despite the fact that the Missouri Supreme Court had suspended the lawyer's license four months earlier that year,¹⁶ the high court entered execution warrants for two men for whom she was counsel of record in that court.¹⁷ After Joseph Franklin's November execution, the state executed Allen Nicklasson on December 11, 2013. Despite very significant questions surrounding their sanity and thus competence to be executed,¹⁸ neither man even received a hearing to determine whether he met the constitutional standard under *Ford v. Wainwright*, 477 U.S. 399 (1986). Over the coming year, Missouri continued to pick off Ms. Herndon's clients. When investigative reporting brought to light that she had left the practice of law, essentially abandoning her clients in order to build a career as an internet personality—in her words, “a mom, entrepreneur, and business growth specialist”—Ms. Herndon's staggering capital caseload finally garnered national attention.¹⁹ As some of the more than 150,000 words she posted on her blog (as of the period of this execution wave) had put it, she had another “job ‘j-o-b’ that she would like to be rid of.”²⁰

After ushering in this wave with two of her clients, the Missouri Supreme Court ordered

and presided over the executions of five more men nominally represented by her in March 2014, December 2014, February 2015, June 2015, and September 2015.²¹

Many years later, it emerged that evidence the state relied on for its conviction of this aggravated murder had, in fact, been falsified.

Jeffrey Ferguson was Ms. Herndon's third client in this wave, executed on March 26, 2014. St. Louis County prosecuted Mr. Ferguson for the rape and murder of a seventeen-year-old female. Many years later, it emerged that evidence the state relied

on for its conviction of this aggravated murder had, in fact, been falsified. The United States Department of Justice wrote the St. Louis County prosecutor, Robert McCulloch, in August 2013 to advise that results from the FBI's testing of physical evidence used to convict Mr. Ferguson had been falsified, via hair analysis, to the crime scene.²²

Paul Goodwin, another of Ms. Herndon's clients, appears to have been intellectually disabled, and despite the prohibition on executing those with this disability after the landmark decision of *Atkins v. Virginia*, 536 U.S. 304 (2002) Mr. Goodwin was sentenced to die in 1999. Because the Supreme Court decided *Atkins* after Mr. Goodwin's trial (and during his state post-conviction proceedings), his state public defenders obtained an expert evaluation for what was then labeled “mental retardation” and sought to overturn his sentence. The tests administered at that time revealed a full-scale IQ score between 67 and 74, a mark well below the two standard deviations from the mean used in measuring this disability.²³ Further, his test scores from his childhood also are below that threshold and his education records strikingly manifest severe impairment—he was fifteen years old by the time he reached the seventh grade. In state proceedings the trial court discredited Mr. Goodwin's expert and found that he had not established his disability.²⁴ Despite that finding, in federal proceedings Ms. Herndon failed to submit an evaluation by a different expert until just a day before Mr. Goodwin's execution,²⁵ but this time in support of an incompetence claim under *Ford v. Wainwright*, which requires a showing of insanity—not intellectual disability.²⁶ Mr. Goodwin did not receive a hearing in federal court as to his disability and no further litigation

of that issue took place before his warrant and then execution on December 10, 2014.

A couple of months after Mr. Goodwin's death, the Missouri Supreme Court issued an execution warrant for Cecil Clayton. Mr. Clayton was on death row for the 1996 shooting of a Jasper County police officer. At the time of his execution, Mr. Clayton was 74 years old and suffering from dementia and brain damage from a sawmill accident in 1977. An employee at the sawmill, Mr. Clayton was using an electrical saw when a shard of wood shot out as a projectile, lodging in the front of his skull and fragmenting and pressing bone deeply into his frontal lobe. Emergency surgery resulted in the removal of about 20% of his frontal lobe. The injury precipitated severe psychiatric problems that plagued Mr. Clayton the rest of his life. It also reduced his intelligence to the level below that recognized as intellectually disabled.²⁷ In the end, however, the Missouri Supreme Court decided, in a 4-3 decision, that the evidence presented of his claims did not warrant an evidentiary hearing nor were there any other basis to impede his execution.²⁸ The dissent spoke to the outrageous injustice in executing Mr. Clayton when the constitution prohibits both executing the intellectually disabled and the insane and that, because ample evidence supported his being both, an evidentiary proceeding to determine his condition was at least warranted.²⁹

When presented with Mr. Clayton's case on the eve of his scheduled execution, United States District Judge Laughrey opined that she "would have reached a different decision than the Missouri Supreme Court" on the constitutionality of Clayton's death sentence.³⁰ However, due to the procedural circumstances of his case at that juncture and the strictures imposed by AEDPA overall, the judge's hands were tied:

The dissent spoke to the outrageous injustice in executing Mr. Clayton when the constitution prohibits both executing the intellectually disabled and the insane.

St. Louis Public Radio discovered that, despite the Department of Corrections' sworn testimony to the contrary, Missouri was using midazolam in its executions.

Again, at this very late date, the question of whether the death penalty can be imposed against a person such as Clayton with physical brain damage—a hole in his frontal lobe—associated with progressive deterioration over time, has not been litigated here, and it may be too late. In the time available, the Court cannot conclude under the deferential AEDPA standard that the Missouri Supreme Court's decision should be disturbed.³¹

Also emerging during this time period was evidence of serious problems with Missouri's execution protocol and procedure. As explained above, during the term of Chief Judge Teitelman (July 1, 2011 through June 30, 2013), lethal injection litigation commenced in the state court and was promptly removed by the Missouri Attorney General to federal court where it proceeded in the United States Western District of Missouri. In the ensuing year, the parties largely fought over discovery and the basic information concerning the procedures the State of Missouri intended to use—including the drug protocol—in carrying out executions. Missouri's strict secrecy laws – shielding the identity of the executioner and team and large pieces of the protocol – kept prisoners largely in the dark about who and what would execute them.³² As discussed above, the Attorney General

moved again for execution dates on the first day of Chief Judge Russell's tenure and, on the anniversary of the order halting executions during the pendency of the federal litigation, with the lethal injection litigation in the midst of discovery disputes in the Western District of Missouri, the Missouri Supreme Court obliged. Thus, as the DOC began to administer unknown quantities of unknown lethal drugs to prisoners, new problems began to emerge.

Days before Earl Ringo's September 10, 2014 scheduled execution, St. Louis Public Radio

discovered that, despite the Department of Corrections' sworn testimony to the contrary, Missouri was using midazolam in its executions.³³ The same drug had been used in botched executions in Arizona, Ohio, and Oklahoma.³⁴ Mr. Ringo's attorneys unsuccessfully asked for a stay of execution from state and federal courts based on the revelation, requesting to litigate the legality of Missouri's execution protocols.³⁵ He obtained no stay and was executed as scheduled. The Eighth Circuit refrained from ruling on a pending appeal, electing it to be rendered moot by his execution.³⁶

In addition to these grave problems with the execution process, Mr. Ringo's trial in 1999 presented concerns about the role of race in his outcome.³⁷

Mr. Ringo was an African-American man convicted of murdering two white victims during a botched robbery. Though he was indicted in Boone County, the location of the state's flagship university in Columbia, but on a change of venue ruling his jurors were imported from Cape Girardeau, a location about three and one-half hours away that, to this day, is known as a bastion for Ku Klux Klan activity.³⁸ The only African-American questioned was not selected; Mr. Ringo's all-white Cape Girardeau jury sentenced him to die.

In Herbert Smulls's 1992 trial, the St. Louis County prosecutor, Dean Waldemer, used a peremptory strike against the only African-American venire member, a mail sorter for the Monsanto Company. According to Waldemer, this was in keeping with his long-standing practice:

[I]n the nine years that I've been a prosecutor ... I treat people who work as mail sorters and as mail carriers, letter carriers and people who work for the U.S. Post Office with great suspicion in that they have generally – in my experience in many of the trials that I've had – are very disgruntled, unhappy people with

the system and make every effort to strike back.³⁹

In fact, Waldemer's "practice" would come to be known as the "postman gambit," a technique Waldemer invented and *trained his office* to use to eliminate African-Americans from jury empanelment.⁴⁰ Because postal workers in St. Louis County are disproportionately African-American, St. Louis County state and federal prosecutors struck all postal workers in order to eliminate as many African-American jurors as possible.

Andre Cole was also tried before an all-white jury in St. Louis County by Prosecutor Waldemer, who struck the only three African-American

venire members. An African-American alternate, who was sequestered with the jury but dismissed before deliberations, came forward later to reveal that the all white jury made racist comments about Mr. Cole in her presence and discussed the case during court breaks, in violation of the court's instruction:

"The comments were so outright and blatant in terms of racial bias and talking about the case that I felt uncomfortable and wanted to leave, but I was afraid I would be put in jail."⁴¹

There was only one African-American juror on the St. Louis County jury that sentenced John Winfield to death. Long after his trial, it emerged that after a bailiff improperly instructed the jurors to continue to deliberate,⁴² the white jurors intimidated Kimberly Turner, the African-American juror, to vote for death.⁴³ According to Ms. Turner, "Even though I had voted for life without the possibility of parole, when an officer of the Court told me to keep deliberating, I thought I had to."⁴⁴ Only then did the young mother, who was sequestered away from her seven-year-old daughter, cave to the pressure and change her vote to death.⁴⁵ Shortly before Mr. Winfield's execution, she submitted a sworn statement to this effect and reasserted her original desire vote for life without parole: "I feel responsible for Mr. Winfield's fate. If Mr.

***Because postal workers
in St. Louis County are
disproportionately African-
American, St. Louis County state
and federal prosecutors struck
all postal workers in order to
eliminate as many African-
American jurors as possible.***

Winfield were executed, I will have to deal with that forever."⁴⁶

Egregious racial influences upon the imposition of death sentences were not limited to St. Louis. A case out of Kansas City, Missouri, (Jackson County Circuit Court), led to a trial judge sentencing two African-American co-defendants both to death for having murdered a white teenage female. On February 26, 2014, Michael Taylor was executed and his co-defendant, Mr. Nunley, suffered this wave's final execution on September 1, 2015. Under the assurances that their trial judge would not impose death sentences, the co-defendants were advised to plead guilty and waive their respective rights to a jury for sentencing. Their original sentencing hearing took place before the circuit court judge in the afternoon of January 28, 1991.⁴⁷ According to courtroom observers, the trial judge appeared drunk. The judge discarded the deal the men understood they had made and sentenced both of them to death. Both defendants moved to withdraw their guilty pleas based upon the judge's intoxication. The Missouri Supreme Court subsequently summarily vacated the pleas and remanded "for new penalty hearing, imposition of sentence, and entry of new judgment."⁴⁸ On remand, the prior judge recused himself and both defendants moved to withdraw their pleas and waivers of jury sentencing on the basis that the change in sentencer rendered their pleas unknowing and involuntary. The withdrawals were rejected by the circuit court judge who, after five days of evidence, sentenced both men to death. The Missouri Supreme Court upheld the sentences on review.⁴⁹ The unfairness of this, standing alone, is jarring. It is all the more remarkable that this result stood and the men were executed after the decision in *Ring v. Arizona*, 536 U.S. 584, 609 (2002).⁵⁰

Generally, African American men have been strikingly overrepresented during this wave. Of the eighteen executed prisoners, eight (44%) were African-American. To put that in some context, less than 12% of Missouri's population are African-American. Four of these eight men were tried by all white juries.⁵¹ Six of the eight were sentenced to death for killing white victims.⁵² St. Louis County juries sentenced one third of the eighteen men and half of these six individuals were African-American.⁵³ In a recent report examining Ferguson, a now notorious

St. Louis County municipality, the Department of Justice documented deep and systemic racial bias.⁵⁴

A current Missouri post-conviction case sheds further light on the enduring concerns in St. Louis County. In its two capital trials—and then two capital re-trials—of Vincent McFadden, courts held that the prosecutor improperly used race as the basis for striking African-American jurors in *three out of McFadden's four trials*.⁵⁵ Nonetheless, Mr. McFadden remains on death row as his current two post-conviction cases work through the review process.

Adjacent but distinct from St. Louis County is the jurisdiction of the St. Louis City Circuit Court (which includes the downtown and immediately surrounding areas of the inner city). On November 24, 2015, the Missouri Supreme Court vacated Reginald Clemons' 1993 conviction and death sentence from the St. Louis City Circuit.⁵⁶ The court had earlier appointed a special master to take evidence and issue findings of facts and legal conclusions concerning Mr. Clemons's challenge of the constitutionality of his conviction and death sentence.⁵⁷ The master issued a report finding that the state had failed to produce evidence favorable to Mr. Clemons concerning a beating he suffered during police interrogation and that the state had altered documentation of the witness observations of Mr. Clemons's injuries at the hands of the police, all in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).⁵⁸ The Missouri Supreme Court accepted the special master's findings and thus vacated the judgment.⁵⁹

The Missouri Supreme Court gave the state 60 days from the date of its order to determine whether it will retry Mr. Clemons. On January 25, 2016, the St. Louis Circuit Attorney announced her plans to retry him capitally for the 1991 case.⁶⁰ Originally, Mr. Clemons had three co-defendants. One defendant, who was only fifteen years old at the time, negotiated a plea deal and, in exchange for testifying against his co-defendants, received a lesser sentence and was released from prison in 2007. Another co-defendant, Antonio Richardson, who was sixteen at the time, initially received death but was resentenced to life in 2003.⁶¹ Marlin Gray, who was also sentenced to death for the double homicide in question, was executed on October 26, 2005. The three defendants who were

sentenced to death were African-American and the two victims were white teenage girls.

IV. SYSTEMIC EVALUATION OF MISSOURI'S DEATH PENALTY HAS BEEN CONSPICUOUSLY ABSENT

With each execution warrant, new and troubling information about the implementation of Missouri's capital sentencing statute has emerged. But to date, there has been no systemic analysis of Missouri's capital sentencing scheme. This persists despite the availability of a unique data set relating to all capitally charged cases in Missouri since capital punishment was reinstated in 1977⁶² as well as the general availability of case data for the wider class of intentional homicides.

There are several underlying reasons for the absence of systemic scrutiny in Missouri. Trial, appellate, and state post-conviction representation is provided by the state's public defender system, a system grossly under-resourced, under-staffed, and under-trained for this domain, the most demanding area of indigent criminal defense. Yet the defender system has remained firmly in control of capital defense in Missouri's courts for decades.⁶³ Unlike in many other capital-case intensive jurisdictions, the federal public defender system within Missouri has never provided a federal capital post-conviction unit for either of Missouri's two federal districts. Instead, federal capital habeas petitioners, in the best case, are left to rely upon a very small and dissipating group of qualified attorneys practicing within the state. This beleaguered bar is routinely deprived adequate resources and funding for the work. In the worst case, capital prisoners have been channeled from the state public defender system into the charge of patently unqualified attorneys

who have nonetheless obtained federal court appointments for habeas corpus litigation, the final and complex series of stages in capital litigation.

During this wave of executions, the inadequacy of Missouri's scheme has been on display and unmistakable. It is perhaps surprising that this profound dysfunction and deprivation of resources has persisted for decades without attracting a comprehensive examination of its consequences.

With each execution warrant, new and troubling information about the implementation of Missouri's capital sentencing statute has emerged.

In the early 1960s, the growing field of criminology moved into the examination of capital punishment in the United States.⁶⁴ The pioneering study in this research area provided the basis for key capital litigation. In the summer of 1965, Prof.

Marvin Wolfgang relied on the work of 28 first-year law students from across the country to carry out a systematic investigation of capital rape statutes in eleven Southern states. The volunteers scoured case files in approximately 250 counties throughout these states, ultimately enabling a detailed analysis from all capital rape prosecutions between 1945 and 1965.⁶⁵

In 1962, Mr. William Maxwell, an African-American, was convicted of raping a white woman and sentenced to death under Arkansas's capital rape statute.⁶⁶ In the roughly three decades prior to Maxwell's conviction, 446 men had been "executed under civil authority in the United States for rape."⁶⁷ Of those executed, 399 were African American.⁶⁸ Maxwell's federal habeas corpus litigation was the first capital case to present to the courts evidence and analysis

The analysis posited a challenge that Arkansas juries unconstitutionally apply the capital-rape statute in a discriminatory manner against African-American defendants.

under the auspices of empirical research.⁶⁹ Due to the exigencies of time, the data used in the litigation derived from seven states of the eleven within Prof. Wolfgang's overall research project.⁷⁰ The analysis posited a challenge that Arkansas juries unconstitutionally apply the capital-rape statute in a discriminatory

manner against African-American defendants.⁷¹ The implications for Maxwell's sentence were remarkable: "if race were not related to capital sentencing in Arkansas, the results observed in the twenty-year period study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ."⁷² However, the Eastern District of Arkansas was not persuaded and denied Maxwell's petition.⁷³

Maxwell's appeal engaged an Eighth Circuit also apparently ill-suited to recognize the force of the empirical evidence and statistical analysis.⁷⁴ Maxwell's case was then heard by the United States Supreme Court, although the Court avoided the Equal Protection issue based on the empirical research and, instead, granted review of questions concerning capital trial procedures.⁷⁵ Soon thereafter, these procedures would be at the center of the demise of capital punishment in 1972—and in its swift restoration just four years thereafter.⁷⁶

Prof. Wolfgang's groundbreaking research established an area of focus in criminology and dozens of empirical studies examining the death penalty have followed.⁷⁷ These projects have ascertained the actual practices of key actors in death penalty states and have powerfully examined their consequences.⁷⁸

The weight of statistical information began to inform the wider understanding of capital punishment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court famously rendered unconstitutional the death penalty statutes in every capital punishment jurisdiction in the nation. A highly fractured Court decided the case

by a per curiam opinion of just one paragraph followed, in an unprecedented event, by separate opinions from each of the nine justices, amounting to more than 50,000 words and over 240 bound pages combined. In the final count, the Court was divided 5-4 in ruling capital punishment, as it was then carried out, unconstitutional. Statistical analyses were expressly invoked in making sense of whether the death penalty discriminated in an unconstitutional fashion.⁷⁹

In the wake of *Furman*, thirty-five states—including Missouri—enacted statutes to correct their Eighth Amendment failings. Four years after *Furman*, the Supreme Court approved Georgia's new capital sentencing statute, which limited the class of death-eligible cases to a "narrow category of the most serious crimes."⁸⁰ Following suit, Missouri enacted its second post-*Furman* statute, introducing a scheme with a proportionality review modeled after the one upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976).⁸¹

Since enactment, Missouri's legislation has required trial courts to report specified proportionality data to the Clerk of the Supreme Court for each case where death was a sentencing option for the jury.⁸² As described further below, this requirement for trial-court reporting has provided the foundation for comprehensive empirical study of Missouri's capital punishment scheme.⁸³

Little over a decade after the resuscitation of the American death penalty, sentencing research uncovered endemic racial injustice in capital punishment and precipitated a constitutional challenge to the purportedly remediated death penalty scheme of Georgia. The evidence from this data-driven research was at the center of the landmark case, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Powell, J.) (5-4). *McCleskey* concerned evidence from a study conducted under the leadership of Professor David Baldus and based on a 230-variable model that differentiated murder cases in Georgia during the 1970s into eight different ranges based on levels of aggravation of the crime.⁸⁴

Shortly after his retirement and just four years after his opinion, Justice Powell intimated to his biographer that his vote in McCleskey was the one he wished he could have changed.

Writing for the Court, Justice Lewis Powell deemed the peer-reviewed and adversarially tested Baldus study (and thereby empirical, statistical studies like it) irrelevant, in effect, for questions concerning Equal Protection Clause violations. The decision has been decried as "the Dred Scott decision of our time" and its correctness questioned by many, including its author.⁸⁵

Shortly after his retirement and just four years after his opinion, Justice Powell intimated to his biographer that his vote in *McCleskey* was

the one he wished he could have changed.⁸⁶ It remains to be seen whether the Court's hostility toward data-driven inquiries and the rhetorical dressing of its opinion will remain tenable more than a quarter-century after McCleskey, in a world where data saturates decision-making large and small.⁸⁷

In this regard, there are signs that the Supreme Court, or at least certain of its members, are revisiting the evidentiary value of empirical research on capital punishment schemes. In *Glossip v. Gross*,^{135 S.Ct. 2726 (2015)},⁸⁸ Justice Breyer's dissenting opinion, which Justice Ginsberg joined, called for the Court to reconsider whether the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishments.⁸⁹ The dissent examined, in a range of ways, the actual experience in the modern death penalty era.⁹⁰ It relied significantly upon empirical studies concerning the practice of certain death penalty states in concluding that "40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily."⁹¹ Further, Justice Breyer pointed to the Connecticut legislature's abolition of the death penalty—prospectively—effective April 25, 2012,⁹² and the weight upon that decision-making from the long-standing empirical research by Professor John J. Donohue of the Stanford Law School (formerly of Yale Law School), examining Connecticut's scheme between 1973 and 2007.⁹³ The Donohue study determined that county-by-county disparities within the state necessitated the conclusion that its death penalty was untenable.⁹⁴ Less than two months after the June 29, 2015 entry of the *Glossip* opinion, the Connecticut Supreme Court ruled in its approximately 231-page opinion of its 4-3 decision in *State v. Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), that, following the legislature's prospective abolition of the death penalty effective in 2012 and in review of the death penalty "as currently imposed in Connecticut, 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."⁹⁵

Other empirical studies have revealed the influence of unconstitutional factors such as race,⁹⁶ gender,⁹⁷ and in Missouri, limited studies have examined geography (e.g., rural v. urban intrajurisdictional differences), as well

as differences due to individual prosecutorial discretion.⁹⁸ Previous studies have also demonstrated disproportionality in death sentences, relative to the crime, the strength of the evidence, and the demographics and traits of the defendant.⁹⁹ Despite Missouri's prominent profile in American capital punishment,¹⁰⁰ no comprehensive and exhaustive analysis of capital charging and trials in Missouri has been completed.

Analysis of this kind, in this well-established tradition of empirical research, is key to understanding what factors determine whether a defendant has been or will be charged, prosecuted,¹⁰¹ and sentenced capitally. Further, such analysis is essential to determining whether the key decision makers responsible for Missouri's statutory scheme for the adjudication and punishment of homicides — from sheriffs and prosecutors to the Missouri Supreme Court and Missouri's legislative assembly—have delivered a capital punishment system that is accurate in assigning culpability and indeed functions to narrow the application of the death penalty to the small subset of the "worst of the worst" homicides, as the Eighth Amendment's prohibition against cruel and unusual punishment requires.¹⁰²

V. Built Upon Data-Capture Inherent in Missouri's Modern Death Penalty Scheme, Research Plan Encompasses Intentional Homicide Cases

Under Missouri's post-*Gregg* capital-sentencing statute, capital trial courts have been required to report to the Clerk of the Supreme Court particular case-specific data for each death-prosecuted case.¹⁰³ The Clerk is responsible for maintaining those files and over the years Missouri's high court has sustained this responsibility with considerable diligence. The files include those capital trials that culminated in a sentence as well as those in which death was waived after an initial notice by the state that it would seek death. They contain nearly 19,000 pages of materials detailing circumstances surrounding the crime, defendant, victim, and trial.¹⁰⁴ According to Professor Raymond Paternoster, a preeminent criminologist at the University of Maryland and the lead researcher of the current Missouri study,¹⁰⁵ these files comprise the richest data

set of this kind in the history of the American death penalty.¹⁰⁶

The Missouri Capital-Sentencing Research Program (the “Program”) based at the Saint Louis University School of Law and conducted in conjunction with the Capital Sentencing Institute, an independent research organization, has partnered with volunteers from the London-based charity, Amicus,¹⁰⁷ to gather the evidence for the comprehensive analysis in the research’s design.¹⁰⁸ Since March 2015, Amicus volunteers have been on the ground in Missouri collecting intentional homicide files from courthouses in Missouri’s 115 counties in order to augment the Program’s core data set in the pursuit of amassing homicide case information,¹⁰⁹ unprecedented in depth and breadth in the annals of American capital punishment.

The Program is designed to assess empirically the basic narrowing role of “aggravating factors” in Missouri’s capital-sentencing framework. The scheme must meaningfully differentiate between the levels of aggravation in homicides in order to give effect to the federal constitution.¹¹⁰ The research is to determine whether the statutory scheme adequately differentiates between voluntary manslaughter,¹¹¹ second degree murder,¹¹² and first degree murder¹¹³ — wherein only a subset of the most aggravated crimes may be eligible for the state to pursue a death sentence.¹¹⁴ The research may also enable assessment, under the Eighth Amendment, of intrajurisdictional disproportionality as a matter of actual practice among the state’s 115 counties.¹¹⁵ During this modern period after *Gregg*, the State of Missouri has relied upon the presumption that its system guarantees reliable differentiation and ensures proportionate outcomes. Perennially, Missouri has prevailed upon state and federal courts that its death penalty scheme passes constitutional muster. In so doing, the courts have upheld the constitutionality of hundreds of death sentences and permitted scores of executions. However, existing inquiries¹¹⁶ and extensive, appalling anecdotal evidence (as

suggested herein, *supra*), call this premise into question.

**Since March 2015,
Amicus volunteers
have been on the
ground in Missouri
collecting intentional
homicide files**

The Program’s research may point to other flaws in the system, including patterns of misconduct and negligence and the persistence of wrongful convictions stemming from law enforcement and prosecutorial abuses,¹¹⁷ unchecked by the state’s courts—or appointed defense counsel through the state’s notoriously underfunded public defender system¹¹⁸ and *ad hoc* federal appointment process.¹¹⁹

The Missouri capital punishment research is anticipated to yield data and analysis of a degree perhaps not witnessed since the seminal work of Professor Baldus’s team in Georgia in the 1970s and ‘80s.¹²⁰ The results of the leading research on Missouri to date, which studied four of the state’s 115 counties,¹²¹ reinforce the concern emanating from the foregoing executions wave. Missouri’s modern use of the death penalty may suffer from constitutionally impermissible influences throughout the legal process.

VI. CONCLUSION

Empirical review and analysis of the operation of Missouri’s capital-sentencing statute is key to determining whether, as has long been feared among the capital defense bar, the death penalty has been conducted in an unconstitutional manner. Though historically courts have often spoken to the narrowing operation of capital statutes and treated proportionality review as perfunctory, in Missouri, statutorily mandated proportionality review is responsible for the creation and preservation of valuable case-related information that now may inform an exhaustive empirical examination of one of the few states, at this point, responsible for more than three-quarters of the entire country’s executions annually.¹²² To date, Missouri’s scheme has remained unexplored. Evidence exists to evaluate the actual operation of Missouri’s capital-sentencing statute since *Gregg v. Georgia*, 428 U.S. 153 (1976).

- 1 This article reflects available information, including web addresses, and the law as of February 1, 2016.
- 2 See n.5, n.6, n.7 and related text for the five men who each obtained a temporary stay of his execution.
- 3 See Ken Armstrong, *The Burnout: Missouri Keeps Killing Jennifer Herndon's Clients. So She Invented an Alternate Life*, THE MARSHALL PROJECT, (June 9, 2015) available at <https://www.themarshallproject.org/2015/06/04/the-burnout> ("Although Texas executed just as many inmates last year, Texas has been executing a comparatively large number of inmates for decades. . . . [T]hrough the years, Texas has spawned more organizations such as [Texas Defender Services] to share in the work of capital defense, which helps disburse the impact.").
- 4 Missouri executed Mr. Dennis Skillicorn on May 20, 2009 and Mr. Martin Link on February 9, 2011.
- 5 The United States Supreme Court granted Mr. Johnson a stay on the night of his execution and remanded, ordering that the Eighth Circuit was "required to decide whether petitioner's complaint was properly dismissed for failure to state a claim or whether the case should have been permitted to progress to the summary judgment stage." *Johnson v. Lombardi*, _ U.S. __, 136 S.Ct. 443 (2015). Mr. Johnson had filed in the district court an affidavit from a doctor providing that "[a]s a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as result of a violent seizure that may be induced by" Missouri's execution procedures. *Id.* Despite the proffered evidence, the district court dismissed his complaint for failure to state a claim, without requiring the state "to submit any evidence refuting this allegation." *Id.* Mr. Johnson unsuccessfully sought a stay in the Eighth Circuit, pending an appeal from the lower court's dismissal, before ultimately obtaining relief in the Supreme Court. *Id.*
- 6 On May 21, 2014, nineteen hours after he was to be executed, the U.S. Supreme Court stayed the execution of Mr. Russell "Rusty" Bucklew. *Bucklew v. Lombardi*, _ U.S. __, 134 S.Ct. 2333 (2014). On the day before his scheduled execution, the district court had dismissed a complaint by Mr. Bucklew arguing that Missouri's execution procedures would cause him unreasonable pain and torture because he "suffers a medical condition known as cavernous hemangioma involving large vascular deformities and tumors in his face and neck that cause pressure, pain, and frequent bleeding." *Bucklew v. Lombardi*, 565 Fed. Appx. 562, 564 (8th Cir. 2014), vacated on reh' en banc (May 20, 2014). Mr. Bucklew sought a stay in the Eighth Circuit pending appeal. Initially, a panel of the Eighth Circuit granted the stay, finding that Bucklew's "unrebutted medical evidence [including an affidavit from an anesthesiologist and a radiologist] demonstrates the requisite sufficient likelihood of unnecessary pain and suffering beyond the constitutionally permissible amount inherent in all executions." *Bucklew v. Lombardi*, 565 Fed. Appx. at 564. A short while later, the Eighth Circuit en banc reversed, vacating the stay, and the Supreme Court reversed. On October 28, 2014, two hours before he was to be executed, the U.S. Supreme Court granted a stay for Mark Christeson due to the persisting denial of his federal statutory right to conflict-free counsel. Mr. Christeson's federally appointed counsel had missed his federal statute of limitations by 117 days, waiving his federal appeals, and mislead their client, who, according to the Supreme Court "appears to have severe cognitive disabilities that lead him to rely entirely on his attorneys." See *Christeson v. Roper*, _ U.S. __, 135 S. Ct. 891, 892 (2015). The case came to the attention of outside pro-bono counsel, who attempted to intervene, alleging that Mr. Christeson's federally appointed counsel suffered from an inherent conflict of interest and arguing that Mr. Christeson had a right to new, conflict-free counsel. *Id.* at 893. After the Western District of Missouri denied a Motion for Substitution of Counsel, and while an appeal was pending in the Eighth Circuit, the Missouri Supreme Court attempted to moot the issue by issuing an execution warrant for Mr. Christeson. *Id.* See also *State v. Christeson*, Mo. S.Ct. SC82082. The Eighth Circuit summarily affirmed the district court's denial. The Supreme Court stayed the execution and, three months later, summarily reversed and remanded, holding that Mr. Christeson "should have the opportunity . . . to show that he was entitled to the equitable tolling of AEDPA's statute of limitations. . . and is entitled to the assistance of substitute counsel in doing so." *Christeson*, _ U.S. __, 135 S. Ct. at 896.
- 7 On October 2, 2015, Governor Nixon commuted Kimber Edwards' sentence to life without parole, Statement by Governor Nixon, available at: <https://governor.mo.gov/news/archive/gov-nixon-commutes-sentence-kimber-edwards-life-prison-without-parole>.
- 8 On January 22, 2015, the Missouri Supreme Court vacated Marcellus Williams's execution date and, on May 26, 2015 appointed a Special Master "to ensure DNA testing of appropriate items at issue in this case and to report to this Court the results of such testing." *State ex rel. Williams v. Steele*, No. SC94720, Order and Commission to Take Testimony.
- 9 <http://www.missourinet.com/2016/01/21/execution-date-set-for-missouri-killer-of-deputy-two-others/>
- 10 Pub. L. No. 104-132, § 106(b)(3)(E), 110 Stat. 1214, 1221 (1996).
- 11 AEDPA's strict limitations and procedural hurdles apply to all individuals imprisoned pursuant to a state court judgment. For those who are under sentence of death from those judgments, 18 U.S.C. 3599 guarantees a statutory right to counsel in the habeas corpus proceedings and thereafter, including state clemency proceedings. See *Harbison v. Bell*, 556 U.S. 180 (2009).

12 For example, second or "successor" applications for habeas relief are strictly limited by 28 USC 2244(b).

13 In 1940, Missouri adopted a non-partisan plan by which to elect judges, in order to "minimize . . . politics in judicial selection." Laura Denver Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 Mo. L. Rev. 711, 725 (2009). "First, a judicial commission solicits and considers applications for a judicial vacancy and, from the applicant pool, nominates three highly qualified individuals . . . Then the governor has the responsibility to select which of the three nominees will" take the bench. Missouri voters determine whether a judge will be retained. *Id.* The Missouri Supreme Court's Chief Justice serves as the head of the judicial commission. *Id.* at 730. "By tradition, the chief justice typically is elected on a rotating basis by a vote of all seven Supreme Court judges to a two-year term." Office of State Court Administrator, <https://www.courts.mo.gov/page.jsp?id=133>.

14 This lawsuit brought by dozens of Missouri death sentenced prisoners originated in state court in mid-2012 but the Missouri Attorney General removed it to the federal courts.

15 On March 26, 2015, the Missouri Supreme Court issued an execution warrant for Kimber Edwards, scheduling his execution for May 12, 2015. *State v. Edwards*, SC8648. The defense moved to vacate and urged the court to adopt the change to Rule 30.30 proposed by the ABA's Death Penalty Assessment Team advocating that this Court modify its current rule of setting executions from thirty to sixty days in the future to a minimum of one hundred eighty days. Counsel for Mr. Edwards argued that he "practice is just now recovering from the fact that had to drop everything to devote six weeks of his time from mid-December until the end of January to successfully obtain a stay of execution for Marcellus Williams. Less than sixty days after Mr. Williams was scheduled for execution, this Court set Mr. Edwards' execution date." *Id.* (Reply In Support Of His Motion For A Stay Of Execution)(April 1, 2015). On April 8, the court granted the motion, staying the execution date. Two weeks later, on April 23, the court entered another order directing counsel for Mr. Edwards to show cause why an execution date should not be set. On August 10, 2015, the court issued another execution warrant, this time scheduling Mr. Edwards' execution for October 6, 2015.

16 On February 5, 2013, Ms. Herndon's bar license was suspended pursuant to Missouri Supreme Court Rule 5.245. She was ultimately suspended for four months of the year 2013 and was reinstated on June 7, 2013. See also *supra* at n.2.

17 According to the Missouri Supreme Court's rules governing disciplinary proceedings, which dictate that an attorney suspended pursuant to Rule 5.245 "is prohibited from the practice of law and circuit courts throughout the State may be notified of the attorney's suspended status. It also means that if the attorney appears in

court after being automatically suspended by the Missouri Supreme Court, the attorney is engaging in the unauthorized practice of law and may be subject to additional discipline. Further, the attorney in question must make appropriate provisions for the protection of the client so as to avoid any collateral consequences." Shannon Briesacher, *OCDC Article: You're Suspended: Do Not Pass "Go", Do Not Collect \$200*, May 16, 2009 (internal citations omitted). Available at: <http://www.mochiefcounsel.org/newsP.htm?id=13>; see also Mo S.Ct. Rule 6.06. Though, for four months of the year leading up to the executions Franklin and Nicklasson, Herndon was barred from practicing law, it does not appear that she made any "appropriate provisions for the protection of" her clients. *Id.* Nor did the Missouri Supreme Court require that she do so.

18 Mr. Franklin "believed that Jews were the cause of all evil in the world, yet he observed Jewish holidays" and "testified that he still believed he was Jewish, because the New Testament says that all spiritual believers are spiritual Jews." *Franklin v. Roper*, Mo. E.D., 4:00-cv-01465, Doc. 92 at 25 (June 15, 2004)(Memorandum and Order). "He believed that his mother had satanic powers that caused her to beat him and that he killed her with his thoughts. Finally, he attached great importance to his dreams and other messages he received from spirit guides. His failure to obey the messages from such sources could result in his death." *Id.* Mr. Nicklasson had spent the majority of his life institutionalized in mental health facilities, trauma centers, and delinquency homes before he was prosecuted for his capital case. He was prohibited at trial from introducing evidence about his long history of hospitalizations as well as evidence that his mother's mental illness and bizarre and destructive behaviors, including telling her young son (falsely) that she had murdered his father, walking him to the school bus stop while she was naked, and, finally, that she had been forcibly sterilized "because she was incapable of raising any more children." *Nicklasson v. Roper*, W.D. Mo, 4:03-cv-08001, Doc. 15, (Sept. 30, 2004)(Petition for Writ of Habeas Corpus).

19 *Armstrong, supra* at n.3.

20 As noted in *Armstrong, supra* at n.3, Ms. Herndon "would like to be rid of [her j-o-b]. But in those 150,000-plus words, she never says what the other job is." To get a clearer picture of the interactions between the two j-o-b's, *Armstrong* charts the timeline Herndon's warrants and executions, against the timeline of her facebook page and blog post. The day after Joseph Franklin's execution, *Armstrong* notes, "Herndon went on Facebook and wrote: 'Superexcited to be making the long drive to Atlanta to meet some online friends in real life!'" *Id.* at 8. According to *Armstrong*, Herndon was at a "three-day event for online entrepreneurs." *Id.* "The next day, in Facebook's comments section, she wrote: '[W]e finally made it! The event has really been awesome so far. I am in the middle [of] rebranding and this

- has helped me tremendously!" Herndon had another client scheduled to be executed in less than three weeks." *Id.* at 9.
- 21 In March 2015, members of the American Bar Association's Missouri Death Penalty Assessment Team requested that the Missouri Supreme Court amend its rules to limit the number of clients under death warrant that any one attorney could be required to represent in a six-month timeframe. The proponents urged the rule change since Missouri's "capital defense bar is in crisis because of its recent workload" because only a handful of attorneys represented the men facing execution. The proposal letter from the ABA assessment team members recommended that for attorneys handling capital appeals to perform competently, the execution dates for their clients should be spaced at least six months apart.
- 22 On August 29, 2013 DOJ Special Counsel wrote to counsel for Mr. Ferguson to indicate that FBI agent Michael Malone had testified falsely in Mr. Ferguson's case, offering "statements that exceeded the limits of science, and were, therefore, invalid." *Ferguson v. Steele*, SC 93873, Petition For A Writ Of Habeas Corpus, Exhibit 1(December 24, 2013). Over fifteen years earlier, in 1997, Malone had been discredited after his false pseudoscientific methodology was exposed by fellow FBI agent Frederick Whitehurst. *Id.* at 10-11. In 2009, Donald Gates, convicted of a rape-murder he did not commit based upon the false testimony of Malone, was exonerated after spending twenty-eight years in prison. *Id.* In December 2013, four months after receiving the FBI letter, prior state post-conviction counsel for Mr. Ferguson—not his then current counsel of record, Ms. Herndon—introduced this letter from DOJ Special Counsel into Mr. Ferguson's record in the Missouri Supreme Court, in support of a simultaneous petition for relief. *In Re Jeffrey Ferguson v. Troy Steele*, No. SC93873. The Missouri Supreme Court denied relief summarily on February 21, 2014 and on the same day issued an execution warrant for Mr. Ferguson. *Missouri v. Ferguson*, SC7809. Two weeks later, on March 4, counsel filed a writ of habeas corpus in federal court. *Ferguson v. Luebbers*, 4:00-cv-01882. The district court denied the petition on March 10, 2014 and declined to grant a certificate of appealability. *Id.*
- 23 *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo. 2006).
24 *Id.*
- 25 On December 5, counsel initiated a *Ford* action in the Missouri Supreme Court, arguing that Mr. Goodwin was incompetent for execution by virtue of his low IQ, relying on data from the prior. Three days later, on December 8, she supplemented the pleading with a report from a new expert. On the same day, the Missouri Supreme Court denied the action. *See Goodwin v. Steele*, Mo. S.Ct. SC94637 (2015).
- 26 *Id.*
- 27 In *Hall v. Florida*, the Supreme Court struck down Florida's rigid requirement of an IQ score of 70 and explained that "established medical practice" and prevailing methods of "scientific measurement" must determine whether a capital defendant is, or is not, intellectually disabled and thus exempt from a death sentence. *Hall v. Florida*, 134 S.Ct. 1986, 1995 (2014).
- 28 *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735 (Mo. banc 2015). As to the majority's finding of delay, the dissent responded as follows: "Ms. Carlyle, lead counsel for Mr. Clayton, has been lead counsel for three executed defendants in the last year alone — Michael Taylor, executed February 26, 2014; John C. Middleton, executed July 16, 2014; and Leon Taylor, executed just four months ago on November 19, 2014. Two of her other clients have received orders to show cause why execution dates should not be set. To suggest in these circumstances that these dedicated counsel are at fault for not filing papers a few weeks earlier is just plain unreasonable. It is also unreasonable to expect counsel to anticipate and have the ability to file pleadings and conduct needed medical and mitigation research and investigation simultaneously in the face of Missouri's sudden rush of executions." *State ex rel. Clayton*, 457 S.W.3d at 754 (Stith, J., dissenting).
- 29 *State ex rel. Clayton*, 457 S.W.3d at 754.
- 30 *Clayton v. Luebbers*, 2015 U.S. Dist. LEXIS 32519 at *5.
- 31 *Id.* at *10;
- 32 When defense counsel were able to obtain discovery about the execution team, it revealed shocking details about the credentials and caliber of the team members. Litigation in 2006 exposed the execution doctor, known only as John Doe, as a dyslexic who frequently transposed numbers and made mistakes in his mixing of the execution chemicals. *See, e.g., Taylor v. Crawford*, No. 02-4173, 12 (W.D. Mo. June 26, 2006) (order); *see also* http://www.nytimes.com/2006/07/15/us/15lethal.html?_r=3D1. Litigation in 2009 revealed that an unidentified execution team nurse had a felony stalking conviction. *See Clemons v. Crawford*, No. 08-2895, Eighth Circuit.
- 33 Chris McDaniel, *Missouri Swore It Wouldn't Use a Controversial Execution Drug, It Did*, ST. LOUIS PUBLIC RADIO, (Sept. 2, 2014) available at news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did.
- 34 *Id.*
- 35 *See* Jim Salter, *Earl Ringo Executed in Missouri for Killing 2 People During Restaurant Robbery*, ASSOCIATED PRESS, (Sept. 10, 2014). Similar litigation challenging Missouri's lethal injection procedures were pending before the United States Supreme Court. *See Zink v. Lombardi*, Eighth Circuit, No. 14-9223. However, the pendency of the case did not provide any protection from execution; most of the petitioners in that lawsuit have been executed, despite receiving four Supreme Court Justices' votes for a stay of execution. *See* Eric Freedman, *Idea: No Execution If Four Justices Object*, 34 *HOFSTRA L. REV.* 639, 644 (2015) (providing procedural history of lethal injection challenges).

- 36 See *Ringo v. Roper*, Eighth Circuit, No.14-3061 (Docket entry stating "Earl Ringo was executed by the State of Missouri on September 10, 2014. The Clerk is directed to enter a judgment in this case, administratively closing the appeal. The court's mandate shall issue forthwith.")
- 37 See generally Sep. 9, 2014 *Joint Statement from Bend the Arc: A Jewish Partnership for Justice, Charles Hamilton Houston Institute for Race and Justice, Hip Hop Caucus, Lawyers Committee for Civil Rights Under Law, Rev. Michael McBride, Director of Urban Strategies and LIVE FREE Campaign at PICO National Network, NAACP, National Action Network, The National Coalition to Abolish the Death Penalty and Dr. Virgil A. Wood.*
- 38 See generally *Traditionalist American Knights of the Ku Klux Klan v. City of Cape Girardeau, Missouri*, No. 1:12-cv-0151, verified complaint in civil rights action seeking injunctive relief to permit KKK leafleting despite local littering ordinance prohibiting (Sep. 6, 2012)
- 39 *Smulls v. Roper*, E.D. Mo., 4:02-cv-00618 (Doc. 64, Memorandum and Order, at 13). Prosecutor Waldemer also dissembled that the venire member was "silent" during questioning and "glared" at him with "attitude." Further, the state tried to rely on her attire as a race-neutral basis for striking her, pointing to her choice in sequined baseball cap or beret. *Id.*
- 40 In the case of Andre Cole, counsel obtained information from a former St. Louis County prosecutor, Dan Diemer, who revealed the racist practice by that office. See *Cole v. Steele*, Mo. S.Ct., SC 94604, Rule 91 at 18-20. Petition. [According to sworn affidavits filed by counsel for Cole and Smulls, Diemer refused to submit a written statement because he feared that the St. Louis County prosecutor's office would "ruin" him. *Id.*
- 41 *Cole v. Steele*, SC 94604, Rule 91 at 10.
- 42 See *Winfield v. Roper*, Mo. S.Ct. SC88942.
- 43 Affidavit of Juror Kimberly Turner, filed in support of clemency, available at <http://johnwinfieldclemency.drupalgardens.com/sites/g/files/g1607741/fi/201405/Declaration%20of%20Kimberly%20Turner.pdf>.
- 44 *Id.*
- 45 *Id.*
- 46 *Id.*
- 47 See *State v. Taylor*, 929 S.W.2d 209 (Mo. 1996); *State v. Nunley*, 923 S.W.2d 911 (Mo. 1996).
- 48 *Taylor*, 929 S.W.2d at 215.
- 49 *Taylor*, 929 S.W.2d 209; *Nunley*, 923 S.W.2d 911.
- 50 See also *infra* at n.61 and related text concerning case of Mr. Richardson.
- 51 Hebert Smulls, Andre Cole, Earl Ringo and Leon Taylor.
- 52 John Winfield, Earl Ringo, Andre Cole, Leon Taylor, Roderick Nunley, and Michael Taylor. Statistical regression analysis studies in the tradition of Profs. Wolfgang and Baldus (*infra* at Part IV), have consistently "indicate[d] that the cases that are most likely to be pursued capitally and to end with death sentences are ones in which Black defendants are accused and subsequently convicted of killing White victims." Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 575 (2011), citing Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases Charging*, 19 Temp. Pol. & Civ. Rts. L. Rev. 389 (2010).
- 53 Joseph Franklin, Herbert Smulls, Jeff Ferguson, John Winfield, Paul Goodwin and Richard Strong.
- 54 See DOJ Report, *Investigation of Ferguson Police Department*, Mar. 4, 2015, at 2 ("Ferguson's police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes. Ferguson's own data establish clear racial disparities that adversely impact African Americans. The evidence shows that discriminatory intent is part of the reason for these disparities.")
- 55 See *State v. McFadden*, 191 S.W.3d 648, 658 (Mo. 2006) (reversing and remanding for new trial based on violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. McFadden*, 216 S.W.3d 673, 676-77 (Mo. 2007) (same); *State v. McFadden*, 369 S.W.3d 727, 739-40 (Mo. 2012) (holding that despite trial court's ruling that the prosecution did use race as the basis for striking several jurors, reversal was not required because those jurors ultimately served and the remaining strikes were not racially motivated).
- 56 *Clemons v. Larkins*, No. SC909197 (Mo. banc slip op. Nov. 24, 2015).
- 57 *Clemons*, slip op. at 1-2.
- 58 *Id.* at 2.
- 59 *Id.*
- 60 KMOV.com Staff, St. Louis Circuit Attorney Will Re-try Reginald Clemons, Jan. 25, 2016: <http://www.kmov.com/story/31051237/st-louis-circuit-attorney-will-retry-reginald-clemons>.
- 61 Mr. Richardson's capital sentence was summarily set aside by Missouri Suprem Court in *State v. Richardson*, No. SC76059, because of a constitutional violation arising from the trial judge's sentencing following a jury deadlock. See *State v. Whitfield*, 107 S.W.3d 253, 257-58 (Mo. banc 2003) (applying the rule articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that only the jury may determine the aggravating factors for sentencing in capital cases).
- 62 Mo. Rev. Stat. § 565.014.3-565.014.6 (1977), subsequently codified at Mo. Rev. Stat. § 565.035 (1984), re-established Missouri's capital-sentencing statute under Mo. Rev. Stat. § 565.020.
- 63 Alternatives to such a defender system include, for instance, a scheme of regional post-conviction counsel recommended by the judiciary for appointment by the governor. Florida's scheme divides the state into three regions. Fla. Stat. Ann. § 27.701. Each collateral counsel serves a three-year term, and his office is responsible for "represent[ing] each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed" in capital cases. Fla. Stat. Ann. § 27.702(1).

- In principle, this could be a robust framework. In practice, Florida has had more than its share of problems in capital post-conviction representation. See generally, *Lugo v. Sec'y Florida Dep't Corr.*, 750 F.3d 1198, 1222-26 (11th Cir. 2014) (Martin, J., concurring).
- 64 Prof. Marvin Wolfgang of the University of Pennsylvania was a pioneering scholar in the field of criminology, contributing to its ascent in the second half of the Twentieth Century with leading works such as *Patterns in Criminal Homicide* (1957), and *The Measurement of Delinquency* (1962). In 1965, at the behest of the Legal Defense Fund, Prof. Wolfgang applied empirical methods in the capital punishment context. Marvin E. Wolfgang, *The Social Scientist in Court*, 65 J. Crim. L. & Crim'logy 239, (1974).
- 65 See generally, Michael Meltner, *Cruel and Unusual, the Supreme Court and Capital Punishment* (1973); see also Barrett J. Foerster (ed. M. Meltner), *Race, Rape, and Injustice* (2012) (memoir of one of the 28 first-year students chronicling the summer 1965 research). Prof. Wolfgang distilled the detailed extractions from these cases into a multiple regression statistical analysis. His work exposed stark problems in the use of the death penalty in rape cases. The study found that prosecutions of black defendants for crimes against a white woman were eighteen times more likely to result in a death sentence than any other combination of defendant and victim. Wolfgang, 65 J. Crim. L. & Crim'logy at 242.
- 66 *Maxwell v. Bishop*, 270 F.Supp. 710, 711 (E.D. Ark. 1966).
- 67 *Maxwell v. Bishop*, 398 F.2d 138, 144 (8th Cir. 1968). Prior to *Coker v. Georgia*, 433 U.S. 584 (1977), the death penalty was constitutional for the crime of rape of an adult. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), capital punishment for a rape of a child was also rendered unconstitutional.
- 68 *Maxwell*, 398 F.2d at 144.
- 69 See generally, Foerster, *Race, Rape, and Injustice*, at 83-96. Compare reliance on social science in *Brown v. Board of Ed.*, 347 U.S. 483, 495 n.11 (1954).
- 70 Wolfgang, 65 J. Crim. L. & Crim'logy at 242.
- 71 *Maxwell*, 270 F.Supp at 717.
- 72 Meltner, *Cruel and Unusual, the Supreme Court and Capital Punishment*, 100-01, quoted in Wolfgang, 65 J. Crim. L. & Crim'logy at 242.
- 73 "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that anything can be proved by them." *Maxwell*, 257 F.Supp. at 720.
- 74 Circuit Judge Harry Blackmun (as he was then known) wrote for the panel, upholding the district court's findings that, while "the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore," *Maxwell*, 398 F.2d at 145, it is not "sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women . . . The study does not indicate that Negro men convicted of raping white women invariably or even in a majority of cases receive the death penalty." *Id.* Unfortunately, the findings—and there are more in this vein—utterly evaded the point of the research. With the benefit of a half-century of hindsight and immersion in a data-saturated world, courts today should be better equipped to evaluate information of this kind.
- 75 *Bishop v. Maxwell*, 398 U.S. 262 (1970). Though ultimately, the Court remanded the case for a separate issue involving the improper disqualification of a juror, these questions were prophetic, as the procedures would be at the heart of the modern framework for capital punishment. The first question was whether Arkansas's capital trial procedure violated Maxwell's right to be free from self-incrimination when it called on his jury to determine guilt/innocence and life/death in a single proceeding. *Bishop*, 398 U.S. at 264. The second question was whether the Arkansas jury instructions' failure to supply any "standards or directions" of any kind on "whether to impose a sentence of life imprisonment or death" violated Maxwell's right to be free from the imposition of cruel and unusual punishments. *Id.*
- 76 Six years later, the Gregg Court would speak to these matters again, and definitively for the procedures in death penalty states for the four decades that followed:
- In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.
- Gregg*, 428 U.S. at 195.
- 77 For an excellent survey of this research, see Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 *Cardozo L. Rev.* 1227 (2012-13).
- 78 See, e.g., Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murders: A California Study*, 59 *Fla. L. Rev.* 719 (2007); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 *Fla. L. Rev.* 1 (1991); .
- 79 Justice Marshall mobilized and cited extensive statistical analysis and empirical research literature in taking his position. *Furman*, 408 U.S. at 364 n. 152, 365 n. 154 (Marshall, J., concurring).

- 80 *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976)).
- 81 Mo. Rev. Stat. 565.014.3-6 (1977), *subsequently codified* at Mo. Rev. Stat. 565.035 (1984). Proportionality review involves identifying other cases within the jurisdiction that are similar in one or more material ways to the case under review and then determining whether the death sentence in question is proportionate in light of the sentences imposed in the similar cases. Proportionality is a basic safeguard against the concern, articulated by the United States Supreme Court in *Furman*, that America's various statutory schemes had distributed death sentences to a "capriciously selected random handful" of defendants and thereby violated the Eighth Amendment's prohibition of cruel and unusual punishment. In 2010, the Missouri Supreme Court strengthened its proportionality review in a series of four opinions published in a six-month span, beginning with *State v. Deck*, 303 S.W.3d 527, 555-61 (Mo. banc 2010) (J. Stith concurring, joined by J. Wolff), and culminating in *State v. Dorsey*, 318 S.W.3d 648 (Mo. banc 2010). The *Deck* line restored life cases—i.e., those cases in which a jury chose to sentence the defendant to life without the possibility of parole rather than to death—to the universe comprising the court's pool for comparison. It ended a sixteen-year discontinuity during which the court's proportionality review had examined only death cases. See also *State v. Anderson*, 306 S.W.3d 529, 544 (Mo. banc 2010) (J. Breckenridge concurring, joined in part by J. Wolff), 306 S.W.3d at 551 (J. Wolff dissenting, joined by J. Teitelman, and J. Stith).
- 82 Mo. Rev. Stat. 565.035.
- 83 *Infra* at Part V.
- 84 See David Baldus, Charles Pulaski and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 672 (1983) (evaluating racial discrimination in death sentencing, finding defendants accused of killing white victims were 4.3 times more likely to receive death than those accused of killing black victims).
- 85 Anthony Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 47 (2007).
- 86 John C. Jeffries Jr., *Justice Lewis F. Powell Jr.* 451 (1994).
- 87 Compare approach of Eighth Circuit in *Maxwell*, *supra* at n.74.
- 88 *Glossip* concerned the constitutionality of Oklahoma's lethal injection law. The majority ruled that the lower federal courts were within their purview in upholding the state's execution protocol. Several months before that decision, Oklahoma had resumed executions after a hiatus induced by the botched execution of Mr. Clayton Lockett in April 2014. Mr. Lockett died of a massive heart attack approximately 43 minutes into his failed lethal injection procedure. In January 2015, after an investigation into Mr. Lockett's death and assurances that the state had implemented safeguards sufficient to permit the resumption of executions, Oklahoma executed Mr. Charles Warner. Purportedly, Mr. Warner had been executed under the lethal injection protocol the Supreme Court ultimately upheld in *Glossip* in June 2015. However in October, an autopsy of Mr. Warner showed that Oklahoma had used potassium acetate as the lethal drug in its three-drug procedure. Potassium acetate was not the lethal drug specified in Oklahoma's protocol—the one presented to the U.S. Supreme Court. The Oklahoma protocol called for potassium chloride and in no way involved the use of potassium acetate, a chemical typically used to euthanize dogs. As a result, executions in Oklahoma have been suspended once again, despite Oklahoma's Supreme Court victory in *Glossip*.
- 89 135 S. Ct. at 2750-51 (see Thomas, J., concurring).
- 90 Justice Breyer sets forth three chief threads of the analysis: the penalty's lack of reliability, *Glossip*, 135 S.Ct. at 2756, the arbitrariness in its imposition, *id.* at 2759, and the excessive delays in its ultimate imposition, *id.* at 2764.
- 91 *Id.* at 2760.
- 92 Conn. Public Act 12-5, codified C.G.S.A. Const. Art. 1, §8, 9, *prospectively* abolishing capital punishment in prosecutions from the enactment date of April 25, 2012.
- 93 *Id.* citing John J. Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637 (2014) (hereafter, Empirical Evaluation of the Connecticut Death Penalty System). Donohue's work follows in the long line of highly influential studies since Prof. Wolfgang's pioneering research in the mid-1960s concerning capital rape statutes in eleven Southern states.
- 94 Donohue, *Empirical Evaluation of the Connecticut Death Penalty System*, 11 J. Empirical Legal Studies at 680, cited in *Glossip*, 135 S. Ct. at 2761.
- 95 *Santiago*, 318 Conn. at 31, 122 A.3d at 46. In *State v. Peeler*, S.C. 18125, the Connecticut Supreme Court granted the State's motion for supplemental briefing to address the decision in *Santiago*, which had been rendered after the parties in *Peeler* had briefed the direct appeal but before the high court had ruled on *Peeler*'s argument, which advanced a point *decided* by *Santiago*, *viz.*, that it is unconstitutional to repeal the death penalty prospectively only. In the interim between the Aug. 25, 2015 decision in *Santiago*, and the January 6, 2016 argument on the supplemental briefing in *Peeler*, the composition of the Connecticut Supreme Court has changed. Justice Flemming Norcott Jr. (who had joined the *Santiago* majority with Justices Palmer, Eveleigh, and McDonald), retired after the *Santiago* decision and Gov. Dannel P. Malloy (D) has since replaced him by the elevation of Justice Richard A. Robinson from the Connecticut Appellate Court. It has been noted that the Connecticut Supreme Court has never reversed itself on a constitutional question.

- Christine Stuart, *Connecticut high court asked to reverse itself on death penalty*, New Haven Register, Jan. 7, 2016.
- 96 Virtually every study, including the U.S. government's General Accounting Office review of twenty-eight studies, has concluded that the race of the victim plays a significant role in whether a defendant receives a death sentence. See *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*: Hearing on GAO Report Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 101 Cong. 1 (1990) (statement of Lowell Dodge, Director, Administration of Justice Issues) (finding racial disparities in capital sentencing); see also Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 762, 783-85 (1983) (reporting and analyzing the charging decisions made by local prosecutors in South Carolina).
- 97 See, e.g., Caisa Royer, et al., *Victim Gender and the Death Penalty*, 82 UMKC L. REV. 429, 446-47 (2014) (finding effect of gender in Delaware death penalty is strongest where defendant is a black male and the victim is a white female).
- 98 See, e.g., Katherine Barnes, David Sloss, and Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death Eligible Cases*, 51 ARIZ. L. REV. 305, 305 (2009) (concluding that in Missouri, death sentences are much more rarely applied in urban areas).
- 99 As a general proposition, proportionality or comparative sentencing review evaluates "whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases or, instead, is comparatively excessive." David Baldus, Charles Pulaski, and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 663 (1983) (hereafter *Comparative Review of Death Sentences*).
- 100 In the death penalty era since *Gregg v. Georgia*, 428 U.S. 153 (1976), Missouri has executed 86 people, placing it fifth behind only Texas, Oklahoma, Virginia, and Florida. Source: *Death Penalty Information Center*, www.deathpenaltyinfo.org. In the prior American epoch, Missouri executions have been tabulated at 285. M. Watt Espy Papers, State Univ. of New York at Albany Library, <http://library.albany.edu/speccoll/findaids/eresources/findaids/apap301.html> [last accessed as of n.1].
- 101 The arbitrary exercise of the Missouri Attorney General's uncommon special prosecutor role may further distinguish the state from other capital jurisdictions. The conventional purpose of a special prosecutor appointment is to manage a conflict that a local prosecuting authority may have in a given case. See generally, Mo. Rev. Stat. § 56.110. However, under the aegis of *State v. Naylor*, 40 S.W.2d 1079 (1931), the Missouri Attorney General has the uncommon "right to assist the circuit attorney, when so requested by the latter, without an order from the Governor." *State v. Steffen*, 647 S.W.2d 146, 153 (Mo.App. 1982). During the tenure of Attorney General Jeremiah "Jay" Nixon (now Governor Nixon) from 1993 to 2006, the office deployed numerous special prosecutors to circuit courts throughout the state in order to prosecute cases capitally. See, e.g., the capital trials of Mark Christeson (Vernon County, No. 01CV673904); John Middleton (Callaway Circuit, No. 13R059700001), Derrick Roper (Phelps County, No. 25R03970239F-01); and *Walter Storey*, St. Charles County, 11R019000174.
- While it is typical for the office of the attorney general to have broad responsibilities on behalf of the state in capital appeals and collateral review, see, e.g., Fla. R. Crim. P. Rule 3.851(j), it is perhaps unique to Missouri that the statewide office has routinely participated in capital trials even without a conflict for the circuit attorney. An August 23, 2013 press release from the current Attorney General, Mr. Christopher Koster, highlights this zealous tradition with which the Missouri Attorney General's Office prosecutes capital cases: "AG Koster assists in obtaining death sentence for Laclede County double homicide—Jury recommends death for Jesse Driskill in 2010 murder of Johnnie and Coleen Wilson. The release stated: "Koster examined witnesses, introduced evidence, and provided closing statements to jurors, including arguments that Driskill should receive the death penalty." See <https://ago.mo.gov/home/news-archives/2013-news-archives/ag-koster-assists-in-obtaining-death-sentence-for-laclede-county-double-homicide>
- 102 See *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting), quoting *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).
- 103 Mo. Rev. Stat. § 565.035 (1984).
- 104 Digitized complete volume of trial-court reports are on file with authors.
- 105 Prof. Paternoster's research on the death penalty spans more than thirty years. See Raymond Paternoster and R. Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 CRIMINOLOGY 971-1008 (2008); Raymond Paternoster, R. Brame, and S. Bacon, *The Death Penalty: America's Experience with Capital Punishment*, Oxford University Press (2007); *Capital Punishment*, George Ritzer (ed.), *The Blackwell Encyclopedia of Sociology*, London: Blackwell Publishing (2007); *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, with R. Brame, S. Bacon and A. Ditchfield, *Margins: Maryland's Law Journal on Race, Religion, Gender and Class* (2004); *An Examination of Comparatively Excessive Death Sentences in South Carolina 1979-1987*, with M. Kazayaka, 17 N.Y.U. REV. L. & SOC. CHANGE 101 (1991); *Prosecutorial Discretion and Capital Sentencing in North and South Carolina*, pp. 39-53 in Robert M. Bohm (ed.), *The Death*

- Penalty in America: Current Research*, Sage Publications (1990); *Racial Discrimination and Arbitrariness in Capital Sentencing: A Review of the Evidence*, pp. 59-69 in George W. Woodworth (ed.), *Proceedings of the Third Workshop on Law and Justice Statistics* (1988); *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, with M. Kazzaya, 39 S.C. L. REV. 245 (1988); *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); and *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 701 (1983).
- 106 See Alan Scher Zagier, *SLU to Study Missouri Death Penalty*, ASSOCIATED PRESS, (Mar. 26, 2014) available at stlouis.cbslocal.com/2014/03/26/slu-to-study-missouri-death-penalty/.
- 107 Amicus is the trading name of the Andrew Lee Jones Fund Ltd., a British charitable organization. www.amicus-alj.org.
- 108 Research design documentation on file with the authors.
- 109 The Missouri Supreme Court's trial-court reports include information about the race of the defendant and victim, the types of forensic evidence presented at trial, the racial makeup of the jury and the types of mental health evidence presented. They also capture detailed information about the crime, aggravators and mitigators presented, and the jury's findings. They include the names of the judge, prosecutors, and defense attorneys and identify the geographic location of the crime and trial. The Program will provide a basis for more thoroughgoing review in Missouri at every stage of capital litigation.
- 110 *Gregg*, 428 U.S. at 196-97.
- 111 Mo. Rev. Stat. § 565.023 (2000).
- 112 Mo. Rev. Stat. § 565.021 (2000).
- 113 Mo. Rev. Stat. § 565.020 (2000).
- 114 As addressed over thirty years ago with respect to Georgia's statute in *Zant v. Stephens*, 462 U.S. 862 (1983), the adequacy of the state's capital framework is predicated upon the purported role of aggravating circumstances to narrow the class of death-eligible homicides to the worst-of-the-worst cases. Since *Furman v. Georgia*, 408 U.S. 238 (1972), the constitutional jurisprudence has been premised upon the conclusion that statutes avoid arbitrariness defects by narrowing the class of death-eligible cases to a small segment of homicides. The theoretical operation of these schemes envisions that the narrowed class filtered by aggravators obtains a high proportion of death sentences because the statute has worked—via the narrowing function—to isolate the small cross-section of homicides worthy of the ultimate punishment. This narrowing role explained in *Stephens* in relation to Georgia's scheme, established that statutes overcame the arbitrariness problem found in statutes addressed in *Furman* a decade earlier. The jurisprudence is dormant—the issue is not seriously considered lately—and, in reality, practitioners understand it to be unmoored from the actual workings of state systems in the past decades.
- 115 As noted in *Graham v. Florida*, “an ‘intra-jurisdictional’ comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction and an ‘inter-jurisdictional’ comparison with sentences imposed for the same crime in other jurisdictions” follows after the threshold determination of gross disproportionality. 560 U.S. 48, 88 (2010) (Roberts, C.J., concurring), quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991), citing *Solem v. Helm*, 463 U.S. 277, 291-92 (1983).
- 116 See, e.g., Barnes et al., *Place Matters (Most)*, 51 Ariz. L. Rev. 305; see also Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 Behav. Sci. & L. 61, 64-66, 78 (1995) (examining capital cases between 1977 and 1991, finding victim race and defendant race discrimination at pre-trial stage and presentencing (in determination to proceed to penalty phase)).
- 117 See, e.g., Alan Zagier, *Missouri Death Row Inmate: New Evidence Shows Innocence*, ASSOCIATED PRESS, (Mar. 19, 2014); Michal Barajas, *Mark Woodworth's Two Murder Convictions Were Overturned, But Missouri Wants to Try Him a Third Time*, THE PITCH, (Jan. 7, 2014).
- 118 See generally Remarks of Stephen F. Hanlon, 2013 Kentucky Bar Association Annual Convention: *The Gideon Decision: Constitutional Mandate or Empty Promise*: http://texaswcl.tamu.edu/reports/2013_Hanlon_A_Fifty-Year_Deal_Under_Fire.pdf
- 119 See *Christeson v. Roper*, 135 S. Ct. 891 (2015) (holding federally appointed counsel had conflict of interest in investigating whether their own failure to timely file federal challenge to death sentence constituted abandonment of their client); Ken Armstrong, *Lethal Mix: Lawyers' Mistakes, Unforgiving Law*, WASHINGTON POST, (Nov. 15, 2014) (describing “patchwork system by which indigent death-row prisoners are provided with counsel” in federal proceedings).
- 120 See Baldus et al., *Comparative Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY at 663; McCleskey, 481 U.S. at 286.
- 121 Barnes et al., *Place Matters (Most)*, 51 Ariz. L. Rev. at 348 (“the study finds significant disparities in capital prosecution across regions”).
- 122 *Glossip*, 135 S. Ct. at 273 (Breyer, J., dissenting, noting that in 2014, Texas, Florida, and Missouri accounted for 80% of the nation's executions that year); Death Penalty Information Center, *The Death Penalty in 2015: Year End Report*, at 4 (<http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>) (noting that 86% of the nation's executions in 2015 were carried out by just three states: Texas, Missouri, and Georgia, and Texas, Missouri, Florida, and Georgia were responsible for 89% of executions in 2014 through 2015).