DEAD RIGHT: A CAUTIONARY CAPITAL PUNISHMENT TALE

Joseph Margulies*

John Blume**

Sheri Johnson***

ABSTRACT

At least 228 people executed in the modern era—or more than one in every seven—were right too soon. That is, they had claims in their case that today would render their execution unconstitutional, but were killed because of a legal regime that arrived too late. Roughly 30% of our total include the children and persons with intellectual disability who were executed prior to *Roper v. Simmons* and *Atkins v. Virginia*, respectively. But the great majority of the people identified in our study raised claims based on doctrine that had already been clearly established by the Supreme Court. If the lower courts had applied Supreme Court caselaw correctly, these people would have gotten relief. Yet the lower courts resisted the doctrine and for years the Supreme Court did nothing to correct them. This resistance was particularly egregious in Texas and Florida. In Texas, at least 108 people were executed after the Supreme Court had already established the relevant basis for relief, and in Florida, the total is at least 36. At least when it comes to the death penalty, the lower courts seem especially unwilling to follow Supreme Court doctrine that would save a person from execution. The result is a system that routinely kills people even when they are right.

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* Professor of the Practice of Law and Government, Cornell University

** Samuel F. Leibowitz Professor of Trial Techniques and Director, Cornell Death Penalty Project, Cornell Law School

*** James and Mark Flanagan Professor of Law, Cornell Law School

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INTRODUCTION[1]

In 2002, the Supreme Court held in *Atkins v. Virginia* that persons with intellectual disability could not be executed.[2] Three years later, the Court held in *Roper v. Simmons* that the juvenile death penalty violated the Eighth Amendment.[3] By the time of the Court's decisions in *Atkins* and *Roper*, forty-two people with an intellectual disability and twenty-two juveniles (including our former clients Sylvester Adams and Christopher Burger) had already been put to death.[4]

In *Hitchcock v. Dugger*, a unanimous opinion authored by Justice Scalia, the Court held that the Florida death penalty statute was unconstitutional because it confined the jury and judge's consideration of mitigating evidence to those factors listed as statutory mitigating circumstances.[5] In the Court's view, the constitutional violation "could not be clearer."[6] The judicial recognition of the constitutional defect in Florida's statute came as little consolation to the fifteen Florida death row inmates who had raised the identical issue but previously died sitting in "Old Sparky."[7]

In this study, we set out to answer a deceptively simple question: How many people on death row have been executed in the modern era of capital punishment despite claims that would render their execution unconstitutional today? The Supreme Court launched the modern era of capital punishment in 1976 when it approved the death penalty statutes of several states.[8] We examined the cases of 1,534 people executed in the United States since 1976, using the database maintained by the Death

1. We accumulated a great many debts as we prepared this article. Rosalind Major, Emily Baca Loaiza, Zellnor Myrie, and Robert Lynch provided excellent research assistance, Kathleen Weng at the *Columbia Human Rights Law Review* proved herself an exceptional editor and Merel Pontier and Rindy Fox helped us track down pleadings and unpublished orders in the Texas Court of Criminal Appeals. Our thanks in particular to Robert Owen and Jordan Steiker for their review of the material related to *Penry v. Lynaugh*.

2. 536 U.S. 304 (2002).

3. 543 U.S. 551 (2005).

4. *See infra* Appendices I, II. Four executed juveniles were also intellectually disabled: James Roach, Dalton Prejean, Robert Carter and Dwayne Wright. *Id.*

5. 481 U.S. 393 (1987).

6. *Id.* at 398.

7. *See infra* Appendix VI.

8. Gregg v. Georgia, 428 U.S. 153 (1976).

Penalty Information Center.[9] Drawing from the database, we then reviewed the available judicial decisions underlying the executions. In a limited number of cases, we tracked down unpublished decisions and orders that are not online to fill in gaps. Where possible, we also cross-referenced our research against the lists compiled by other researchers who have examined subsets of this universe.[10]

By our count, at least 228 people executed since 1976—more than one of every seven—were right too soon.[11] And as we will describe, we have been exceedingly conservative in our calculations; there is every reason to believe that the actual number of persons who were "dead right" is significantly higher. Though some scholars have examined various parts of the story, this is the first study to calculate the total number of incarcerated persons on death row who were right too soon in the modern era.[12]

Our study makes two important contributions to the literature about the administration of the ultimate punishment in the United States. First, until now, we had no sense of the sheer number of people who had claims in their case that could have saved them, but for a legal regime that arrived too late. At least one of every seven people killed at the hands of the state since 1976 had claims that would today render their execution constitutionally impermissible. Second, and perhaps even more importantly, most of these

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9. *Execution Database,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database [https://perma.cc/855F-2VYF] (data on file with the *Columbia Human Rights Law Review*) [hereinafter *DPIC Execution Database*]. We examined executions through June 30, 2021.

10. *See*, *e.g.*, RANDY A. HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §38.2, at 2227–28 (7th ed., 2015) (exemplifying why determining the probability that a lower court's decision in a capital case will be reversed is a "speculative process" and should be abandoned); Joseph Margulies, *The Bottoson Effect*, VERDICT (Jan. 25, 2016) (discussing the people who were right too soon in Florida prior to *Hurst v. Florida*, 577 U.S. 92 (2016)), https://verdict.justia.com/2016/01/25/the-bottoson-effect [https://perma.cc/MUK5-8G6C].

11. The Appendices to this Article provide a list of every case we have identified as right too soon, along with a record citation where available. The one exception to this is the list of juveniles executed in the modern era. For that, we provide a citation to the list of juveniles maintained by the Death Penalty Information Center, whose calculations accord with our own. *Executions of Juveniles in the U.S. 1976–2005*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/juveniles/executions-of-juvenilessince-1976 [https://perma.cc/XPV2-GGTQ]. Some people were right too soon in multiple categories. Four people, for instance, were both juveniles at the time of their crime and a person with intellectual disability. Similarly, four persons with intellectual disability also raised a claim under Penry v. Lynaugh, 492 U.S. 302 (1989) that would prevail if decided today. We note these overlaps in the appendices but count each person only once, producing a total of 228 distinct individuals who were right too soon.

12. *See*, *e.g.*, HERTZ & LIEBMAN, *supra* note 10; Margulies, *The Bottoson Effect*, *supra* note 10.

people were executed after the Supreme Court had established the legal basis for their claim. Yet the lower courts turned a blind eye to their claims and for years the Supreme Court did nothing to correct them. Our study, therefore, reveals something invidious about the willingness of the lower courts to follow the law, at least when it comes to the death penalty. The study thus joins others that critique systemic flaws in the U.S. death penalty and reveals another species of injustice occluded by the myth that death can be administered in a just and equitable way.[13]

Our thoughts unfurl in the customary way. In Part I, we present our findings, which we have organized by category of error. We begin with those who would now be categorically ineligible for the death penalty—juveniles and the intellectually disabled—followed by those who were executed while the lower courts contrived ways to resist clearly established Supreme Court precedent. Part I accounts for nearly all of the people who were right too soon.

As noted, we think our total substantially undercounts the number of condemned incarcerated persons who were right too soon. We discuss several reasons why we suspect this is so, but the most important can be traced to the changes in the law of criminal procedure that enhanced constitutional protections for defendants in recent years, which we describe in Part II. The Supreme Court has improved the lot of the accused—sometimes in ways that dramatically reshaped the legal landscape—in areas as doctrinally diverse as the law of confessions, jury selection, and the right to effective assistance of counsel.[14] Given the extent to which these cases upended prior practice, we are confident that a number of incarcerated persons on death row presented claims that would win today but that lost at the time.[15] With only two exceptions, however, the records at our disposal do

13. *See generally*, James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, (Columbia L. Sch. Pub. L. Working Paper, Paper No. 15, 2000), https://scholarship.law.columbia.edu/faculty_scholarship/1219 [https://perma.cc/JKG8-D6U5] (outlining that between 1973 and 1995, courts found prejudicial error in nearly seven in ten capital cases); Jeffrey L. Kirchmeier *et al.*, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327 (2009) (examining common types of prosecutor misconduct in capital cases); NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT, (Samuel R. Gross et al. eds., 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/4BBC-8962] (describing misconduct in the first 2,400 cases listed in the National Registry of Exonerations).

14. *See Infra* Part II.

15. *Id.*

not allow us to identify these cases and count them in our study.[16] We flag the issue both to illustrate the magnitude of the problem discussed in this Article, and to spur other researchers who might get access to records beyond our reach.

In Part III, we respond to potential objections to our study, and in Part IV, we offer concluding reflections on the significance of our findings. For us, the implication is clear enough: at least when it comes to capital punishment, history teaches that the lower courts cannot be trusted to enforce the law. If the Supreme Court cannot or will not move more quickly to corral them, then it should abandon the fiction that it can create a legally and morally legitimate death penalty.

I. But First, Let's Do the Numbers

A. Part of a Group Categorically Excluded from the Death Penalty

The cases we have identified fall into two broad sets. The first set, and the most straightforward, includes people whose execution would now be categorically barred by the "cruel and unusual punishments" clause of the Eighth Amendment,[17] but who were executed before the bar existed. That clause, of course, is the primary constitutional vehicle through which the Supreme Court "tinker[s] with the machinery of death."[18] This set includes the children and persons with intellectual disability who were executed prior to *Simmons* and *Atkins*, respectively. Some of these individuals raised the claim that eventually became law after they had been executed, and some did not (and we note those who did).

Some might counter that the executions in this first set are merely the lethal but unintended consequence of a gradually unfolding legal regime. We do not take that view, and even if we did, the rate of error is still disturbingly high. But even on that view, the same argument cannot be made with respect to most of the executions in the second, and far larger, set. With only three exceptions, the people in the second set were executed *after* the Supreme Court had established the relevant doctrine. They were killed

16. The exceptions are *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997) (en banc) and *Garcia v. Stephens*, 757 F.3d 220 (5th Cir. 2014); *see infra* notes 260–80 and Appendix XI.

17. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

18. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari)

because the lower courts did not follow that doctrine and the Supreme Court allowed the resistance to persist. By the time the Court finally ended the resistance, the people in our second set had already been put to death. That is, all of the people in the second set—173 in total—were right too soon, and 170 of them were killed after the law establishing their claim for relief had been clearly established by the Supreme Court.[19]

The phenomenon we describe in this study, in other words, is not merely the innocuous, if regrettable, result of an unavoidably complex and lengthy adjudicatory process. Quite the contrary, it is evidence of a failed system. If the lower courts had faithfully discharged their constitutional obligations, or if the Supreme Court had ended their obstruction sooner, most of the executions we have identified would not have taken place.

1. Juveniles Before *Roper v. Simmons*

The first category is the most straightforward to tally. In 2005, the Supreme Court held that the Eighth Amendment barred the execution of offenders who committed their crime before they were eighteen years old.[20] Years earlier, in *Stanford v. Kentucky*, the Court found no such categorical exclusion, and sanctioned the execution of sixteen and seventeen-year-old offenders.[21] Twenty-two people were executed in the modern era for crimes committed while they were children.[22] Of these, eight raised the exact claim that would eventually prevail in *Simmons*.[23] The presence of such a claim, however, would have had no bearing on whether they would have gotten

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19. *See infra* Appendices III (13), IV (95), VI (15), VII (23), VIII (21), IX (3). For this purpose, we exclude the person identified in Appendix X, Pedro Medina, and the two people identified in Appendix XI, Ronnie Howard and Juan Garcia. They raised claims that eventually prevailed, and were therefore right too soon, but the claims they raised had not been previously clearly established by the Court.

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

21. 492 U.S. 361, 380 (1989). In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court had held that individuals who were fifteen years old or younger at the time of their crime were not eligible for the ultimate punishment.

22. *See infra* Appendix I. Unlike the other categories discussed in this Article, we are confident that this total does not understate (or overstate) the number of juveniles executed.

23. The eight were: Dalton Prejean, Prejean v. Blackburn, 743 F.2d 1091, 1098 (5th Cir. 1984); Gary Graham (aka Shaka Sankofa), Graham v. Lynaugh, 854 F.2d 715, 717 (5th Cir. 1988); Chris Burger, Burger v. Zant, 984 F.2d 1129, 1131–32 (11th Cir. 1993); Sean Sellers, Sellers v. State, 809 P. 2d 676, 687–88 (Okla. Crim. App. 1991); Napolean Beazley, Beazley v. Johnson, 242 F.3d 248, 268 (5th Cir. 2001); Scott Hain, Hain v. State, 852 P..2d 744, 748–49 (Okla. Cri. App. 1993); Dwayne Wright, Wright v. Commonwealth, 427 S.E.2d 379, 383 (Va. 1993); and James Terry Roach, Roach v. Aiken, 474 U.S. 1039, 1039–40 (1986) (Brennan, J., dissenting from denial of certiorari).

relief under a constitutional statute. After *Simmons*, all juveniles then under sentence of death were removed from death row, without regard to whether they had a pending challenge to their sentence based on their youth.[24]

2. Persons with Intellectual Disability Before *Atkins v. Virginia*

In *Atkins v. Virginia*,[25] the Supreme Court held that executing a person with intellectual disability constituted cruel and unusual punishment, reversing the position it had taken thirteen years earlier in *Penry v. Lynaugh*.[26] Prior to *Atkins*, however, at least forty-two people with intellectual disability were sentenced to death and executed in various jurisdictions. In most of these cases, the state either conceded or did not contest the person's intellectual disability.[27] These forty-two, however, almost certainly do not account for all executions of persons with intellectual disability, for several reasons. For one, at least some attorneys were likely

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24. *See, e.g.*, State v. Morgan, 626 S.E.2d 888, 889 (S.C. 2006) (vacating defendant's death sentence without regard to whether he had previously preserved or raised the claim that execution of seventeen-year-olds was unconstitutional); Duncan v. State, 925 So. 2d 245, 281 (Ala. Crim. App. 2005) (remanding after *Roper* with instructions to resentence defendant to imprisonment for life without the possibility of parole); *see also* Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 21 (2008) (asserting that *Roper* "spared the lives of more than seventy young offenders on death row"). The juveniles executed in the modern era are listed in Appendix I, along with a notation that indicates whether they raised the claim eventually recognized in *Simmons*. *See also DPIC Execution Database*, *supra* note 9, filtered by "Juvenile" on Sept. 6, 2021, https://deathpenaltyinfo.org/executions/execution-database?filters%5Bjuvenile%5D=Yes [https://perma.cc/7LB6-ERDL] (listing executions of juveniles).

25. 536 U.S. 304, 305 (2002).

26. 492 U.S. 302, 302–06 (1989).

27. Our list of persons with intellectual disability executed prior to *Atkins* differs somewhat from that of other researchers. Some researchers, for instance, count Ricky Ray Rector as a person with intellectual disability who was executed. *See*, *e.g.*, Denis Keyes, et al., *People with Mental Retardation are Dying, Legally,* 35 MENTAL RETARDATION 59–63 (1997). But Rector's cognitive impairment, though profound, was caused by a self-inflicted gunshot wound to the head when Rector was 31. It did not begin prior to age 18, which is one of the diagnostic criteria for intellectual disability. *See*, *e.g.*, George J. Annas, *Moral Progress, Mental Retardation and the Death Penalty*, 347 NEW ENGLAND J. MED. 1814, 1814 (2002) ("Rector did not fit the medical definitions of mental retardation (since his condition did not manifest itself by 18 years of age). . . ."). For that reason, we do not include Rector. Likewise, many lists include people who suffered from a serious mental illness but for whom we could not find reliable evidence that they were also people with an intellectual disability. *See*, *e.g.*, Keyes, *supra*. In the absence of this evidence, we elected not to include them. Three people on our list raised the claim that would eventually prevail in *Atkins*. For a list of the cases, including a notation of whether they raised the claim, see *infra* Appendix II.

deterred post-*Penry* from raising the issue. And since life or death did not turn on parsing the line between borderline intellectual functioning and intellectual disability before the Court's creation of the categorical bar, many evaluating experts (and capital defense teams) did not make the effort to do so. In addition, since *Atkins*, the bench and bar have learned that it is no small challenge to distinguish between a person who is intellectually disabled and one whose cognitive deficits place them on just the other side of the line.[28] Given the number of persons with intellectual disability on death row,[29] we think it is a virtual certainty that some number of capital defendants with intellectual disability were never so diagnosed.

B. Victims of Lower Court Resistance

1. Resistance to *Atkins v. Virginia*: Unconstitutional Impediments to Determining Intellectual Disability

A major theme of our research is that lower courts, especially in Texas and Florida, have actively resisted Supreme Court decisions that extended protections to incarcerated persons on death row. In the *Atkins* context, the resistance in Texas took a particularly insidious form. Since *Atkins*, most states and the medical community have used a definition of intellectual disability that rests on three factors for diagnosis: (1) subaverage intellectual functioning; (2) deficits in adaptive functioning in social and practical skill areas; and (3) onset during development (before age

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28. See, e.g., Sheri Lynn Johnson, John H. Blume, Emily Paavola & Lindsey Vann, *Protecting People with Intellectual disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev. 1107 (2018). This difficulty is why we count cases in which a judge "found" the defendant was not intellectually disabled in the course of a hearing undertaken for some other purpose. *See*, *e.g.*, Fairchild v. Lockhart, 744 F. Supp. 1429, 1435 (E.D. Ark. 1989), *aff'd* 900 F.2d 1292 (8th Cir. 1990), *cert. denied* 497 U.S. 1052 (1990) (finding Fairchild not intellectually disabled pre-*Atkins* in the course of hearing on adequacy of *Miranda* waiver). More recent jurisprudence makes clear that these hearings do not reflect best practices for ascertaining intellectual disability. *See*, *e.g.*, Wiley v. Epps, 625 F.3d 199, 207–22 (5th Cir. 2010) (rejecting state court hearing because state court followed pre-*Atkins* standards).

29. *Cf.* John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill of Rights J. 393, 396–97 (2014) (roughly 7% of death row inmates sought relief based on *Atkins*, approximately half of whom prevailed).

eighteen).[30] After the Supreme Court decision, some states—relying on language that left enforcement of the new rule to them[31]—severely limited the class of persons who could be classified as intellectually disabled.

Although the general definition of intellectual disability embraced in the Texas Health and Safety Code was in line with the clinical consensus, in the first post-*Atkins* case to come before it, the Texas Court of Criminal Appeals created out of whole cloth a gloss on the second prong—deficits in adaptive functioning—that was clearly contrary to clinical consensus.[32] After noting that—in its view—the court was required to determine "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty,"[33] the lower court questioned whether every capital defendant in Texas who met the clinical definition of intellectual disability should be spared from the executioner.[34] To make the "exceedingly subjective" judgment about adaptive functioning, the state court directed fact-finders to focus on a list of "other evidentiary factors" that were, in the court's estimation, "indicative of mental retardation,"[35] including:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

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30. *See* Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002) (citing the American Psychiatric Association for the three factors to define mental disability); *see also* Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 232 (2008) (explaining the clinical definitions of mental disability and pointing out that "there is little disagreement among psychiatric professionals today" on the three factors).

31. *Atkins*, 536 U.S. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

32. *Ex parte* Briseño, 135 S.W.3d 1, 2 (Tex. Crim. App. 2004).

33. *Id.* at 6.

34. *Id.*

35. *Id.* at 8.

- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[36]

Even a casual review of these factors, otherwise known as the *Briseño* factors, for the case that spawned them—reveals that they were steeped in stereotype and had no grounding in the clinical definition of intellectual disability, as the Supreme Court has recognized.[37] For instance, the first *Briseño* factor asks whether those who knew the person "best" thought he was "mentally retarded."[38] This assumes that persons with intellectual disability look and act in a way that laypeople can easily recognize, an assumption not borne out by the clinical literature.[39] Other *Briseño* factors assume that persons with intellectual disability are "impulsive" and "wander" in conversation from topic to topic, but that too is not supported by the clinical literature. The overwhelming majority of persons with an intellectual disability "can usually acquire the vocational and social skills necessary for independent living."[40] Yet, relying upon these factors, the Texas courts rejected many very strong claims of intellectual disability, including some where no expert challenged the defense expert's diagnosis.[41] Nonetheless, the Supreme Court refused to hear numerous

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36. *Id.* at 8–9.

37. Moore v. Texas, 137 S. Ct. 1039, 1053 (2017) (criticizing the *Briseño* factors as "wholly nonclinical"). A more detailed critique of the *Briseño* factors can be found in John H. Blume, Sheri L. Johnson & Christopher Seeds, *Of Atkins & Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 710–14 (2009).

38. *Ex parte Briseño*, 135 S.W.3d at 8.

39. Blume et al., *supra* note 37, at 707–14.

40. Blume et al., *supra* note 37, at 709. Indeed, persons with intellectual disability "can drive, hold jobs, make money, and operate heavy machinery." *Id.*

41. *See, e.g.*, Petetan v. State, No. AP-77,038, 2017 WL 915530, at *76 (Tex. Crim. App. Mar. 8, 2017) (upholding a finding of no intellectual disability even though "[n]o psychological expert testified definitively . . . that appellant was *not* mentally retarded" and three psychological experts diagnosed that appellant *was*); Lizcano v. Texas, No. AP-75,879, 2010 WL 1817772, at *35 (Tex. Crim. App. May 5, 2010) (noting, in relation to a jury's finding that the defendant had no intellectual disability, that the State did not introduce its own expert witness, but citing *Ex parte Briseno* to reject the contention that the "State had a burden . . . to introduce expert witnesses" to disprove intellectual disability); *cf. id.* at *101 (Price, J., dissenting) (arguing that it is not for the jury to decide "what the Eighth Amendment standard for determining mental retardation is in the first place").

challenges to the legitimacy of the *Briseño* factors, including many where the factors were outcome-determinative.[42]

The Court finally got around to cleaning up the *Briseño* mess in *Moore v. Texas*.[43] In this case, eight Justices agreed that, "by design and in operation," the *Briseño* factors created a constitutionally intolerable risk that persons with intellectual disability would be wrongfully executed.[44] The Court also noted that the evidentiary factors were an outlier in two respects: first, only one other state had adopted them; and second, even in Texas they were only used in death penalty cases and not in any other intellectual disability context.[45]

Unfortunately, for a number of incarcerated people on Texas's death row, there was more than a risk of wrongful execution: there was the reality. Bobby Moore's case itself is a cameo of Texas's recalcitrance. On remand from the Supreme Court's decision in *Moore,* the Texas Court of Criminal Appeals, despite the State's concession that Moore was a person with intellectual disability, again found that Moore's claim failed.[46] Although the Texas court refrained from using the phrase "*Briseño* factors," its analysis repeated *Briseño*'s deviations from clinical standards.[47] This drew the Supreme Court's ire and it (again) reversed the state court.[48] At this point, the Texas Court of Criminal Appeals finally relented and modified Moore's

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42. *See, e.g.*, Lizcano v. Texas, 2010 WL 1817772 (denying petition for writ of certiorari); Hernandez v. Stephens, 572 U.S. 1036 (2014) (denying petition for writ of certiorari on the state court decision that the incarcerated person did not have an intellectually disability).

43. Moore v. Texas, 137 S. Ct. 1039, 1060–62 (2017).

44. *Id.* at 1051. While Moore prevailed 5-3, the three dissenters, in an opinion authored by Chief Justice Roberts, agreed that the *Briseño* factors ran afoul of the Eighth Amendment. *Id.* at 1053 (Roberts, C.J., dissenting).

45. *Id.* at 1052.

46. *See Ex parte* Moore, 548 S.W.3d 555, 573 (Tex. Crim. App. 2018) (dissenting opinion) (remarking that "[t]he State's prosecutor has agreed" that the applicant met his burden to show intellectual disability, and arguing that the majority was once again employing *Briseño*–type factors).

47. *Compare id.* at 556–57 (setting forth the *Briseño* evidentiary factors), *with id.* at 564–72 (applying an allegedly separate standard to assess intellectual disability); Moore v. Texas, 139 S. Ct. 666, 670–72 (2019) ("*Moore II*") (comparing the *Briseño* factors with the Texas court's analysis, and concluding that "despite the court of appeal's statement that it would 'abandon reliance on the Briseño evidentiary factors,' it seems to have used many of those factors in reaching its conclusion" and relied on "analysis too much of which too closely resembles what we previously found improper").

48. *Moore*, 139 S. Ct. at 672.

sentence to life imprisonment.[49] Between the Supreme Court decision in *Atkins* and *Moore II*, Texas executed three hundred people.[50] Of those, the *Atkins* claims of at least thirteen were judged by a standard held to be unconstitutional in *Moore*.[51] Because the wording of some denials is so cryptic, these numbers almost certainly undercount the wrongful executions in Texas prior to *Moore II*.[52]

In all, we have identified fifty-five people whose execution ran afoul of *Atkins* (forty-two) or *Moore* (thirteen).[53] To put this in context, only seven states in the modern era have executed this many people.[54] Of these fifty-five people, twenty-two were executed in Texas,[55] which means that, in this category alone, Texas has wrongfully executed more people than twenty-one states and the federal government.[56]

2. Unconstitutional Limits to the Jury's Consideration of Mitigating Evidence

In *Lockett v. Ohio*, the Supreme Court held that the jury in a capital case must be permitted to consider and give effect to "*any* aspect of a defendant's character or record and *any* of the circumstances of the offense

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49. *Ex parte* Moore, 587 S.W.3d 787, 789 (Tex. Crim. App. 2019). In a recent decision, the Texas Court of Criminal Appeals finally appeared to, if not exactly embrace, at least accept, that the Supreme Court meant what it said. *See* Brownlow v. State, No. AP-77,068, 2020 WL 718026, at *2 (Tex. Crim. App. Feb. 12, 2020) ("We conclude that appellant was harmed by the pervasive influence of the *Briseño* standard at his trial and, thus, he is entitled to a new punishment hearing.").

50. *DPIC Execution Database*, *supra* note 9, filtered by State Texas and Years of Execution 2002–2019 on Sept. 5, 2021, https://deathpenaltyinfo.org/executions/execution-database?q=Blue&filters%5Bstate%5D=Texas [https://perma.cc/LDF3-KVKT].

51. *See infra* Appendix III.

52. *Compare*, *e.g.*, *Ex parte* Johnny Ray Johnson, No. 57,854-02 (Tex. Crim. App. Feb. 11, 2009) (dismissing application for writ of habeas corpus for failure to state "a *prima facie* case of mental retardation," with no discussion of facts), *with Ex parte* Johnny Ray Johnson, No. 57,854-02, Application for Post-Conviction Writ of Habeas Corpus and Motion for Stay of Execution at 5–20 (Feb. 10, 2009) (recounting facts demonstrating Mr. Johnson's intellectual disability).

53. *See infra* Appendices II, III.

54. Those states are Alabama, Florida, Georgia, Missouri, Oklahoma, Texas, and Virginia. *See DPIC Execution Database*, *supra* note 9, filtered by States Alabama, Florida, Georgia, Missouri, Oklahoma, Texas, and Virginia on Sept. 5, 2021, https://deathpenaltyinfo.org/executions/executiondatabase?q=Blue&filters%5Bstate%5D=Texas [https://perma.cc/LDF3-KVKT].

55. *See infra* Appendices II, III.

56. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (Sept. 1, 2021), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf [https://perma.cc/9SZ8-QTUA] (listing total executions by state and the federal government in the modern era).

that the defendant proffers as a basis for a sentence less than death."[57] This principle derives from the self-evident fact that death is different from all other sentences, unique in its severity and finality, and therefore cannot be imposed unless the jury gives individualized consideration to the moral culpability of the accused,[58] taking into account the "uniqueness"[59] of each individual, including the many challenges he endured, the frailty of his character, and the particulars of his role in the offense.

Texas and Florida are two states that have long resisted this foundational principle of capital jurisprudence. For years, the capital statutes in these states prevented juries from considering and giving effect to a wide range of mitigating evidence. For years, incarcerated persons on death row challenged these statutes.[60] For years, they were rebuffed by the lower state and federal courts.[61] Eventually, the Supreme Court brought the lower courts to heel, but not before Texas and Florida had killed more than one hundred men and women, all of whom had raised a challenge that would eventually have prevailed if they had not been put to death because they were right too soon.

a. A Texas-Sized Problem: *Penry v. Lynaugh* and Its Progeny

i. Resistance by the Texas Court of Criminal Appeals

In *Furman v. Georgia*, the Supreme Court concluded that all then-existing capital statutes failed to sufficiently guide the jury's discretion and thus produced an intolerable risk that the ultimate penalty would be imposed in an arbitrary and capricious manner.[62] After *Furman*, the Texas legislature redrafted its capital statute.[63] Unlike many states, Texas tried to meet the challenge of *Furman* by directing the jury in a capital case to answer "special issues."[64] The first asked whether the defendant committed the crime "deliberately" and the second asked whether he would be a danger in

57. 438 U.S. 586, 604–05 (1978) (emphasis added).
58. *See id.* (explaining that individualized decisions are required because the "imposition of death . . . is so profoundly different from all other penalties").
59. *Id.* at 605.
60. *Infra* Part I, Section B, 2a and 2b.
61. *Id.*
62. 408 U.S. 238, 239–40 (1972); *id.* at 304–305 (Douglas, J., concurring).
63. *Infra* note 114.
64. TEX. CODE CRIM. PROC. Art. 37.071, § 2.

the future.[65] One question looked forward, the other backward. None of the terms in the new sentencing scheme were defined, and the Texas Court of Criminal Appeals quickly held that no definitions were needed.[66] If the jury answered the "special issues" in the affirmative, the death sentence was mandatory. The Supreme Court upheld the new statute in *Jurek v. Texas.*[67] Thereafter, the Texas Court of Criminal Appeals and the Fifth Circuit rebuffed every challenge to the Texas statute with an increasingly ritualistic citation to *Jurek*.[68]

The earliest challenges to the Texas statute included the claim, articulated in various ways, that the statute did not allow the jury to give effect to mitigating evidence.[69] Defendants on direct appeal and petitioners in post-conviction proceedings, in both state and federal court, pointed out that an accused may have acted deliberately, as that term is commonly understood, and may even pose a threat of future dangerousness, but nonetheless may have deserved a sentence less than death based on the mitigating evidence.[70] This claim, in all its forms, invariably failed; the lower courts simply rejected the argument by citing either *Jurek*, or their own growing body of adverse decisions.[71] Even after *Lockett v. Ohio*,[72] where the Supreme Court clarified and reaffirmed that the jury must be allowed to give

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65. *Id.* § 2(b). Under certain factual circumstances, the jury was directed to answer a third question: "whether the conduct of the defendant in killing the deceased was reasonable in response to the provocation, if any, by the deceased?" *Id.*

66. King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978).

67. 428 U.S. 262, 268 (1976). For a detailed account of this aspect of *Penry* and the surrounding litigation see Jordan M. Steiker, Penry v. Lynaugh*: The Hazards of Predicting the Future, in* DEATH PENALTY STORIES 277, 288–97 (Blume & Steiker eds., 2009).

68. *See, e.g.*, Quinones v. State, 592 S.W.2d 933, 947 (Tex. Crim. App. 1980), *cert. denied*, 449 U.S. 893 (1980) (holding that an explanation of the special issues is not necessary for the protection of "a right to consideration of mitigating circumstances by the jury deciding whether or not to impose the death penalty")

69. *See, e.g.*, *Ex parte* Granviel, 561 S.W.2d 503, 516 (Tex. Crim. App. 1978) (considering the claim that the jury was prevented from considering the defendant's mental condition as a mitigating factor in relation to the statutory special issues); Adams v. State, 577 S.W.2d 717, 729 (Tex. Crim. App. 1979), *rev'd on other grounds sub nom*. Adams v. Texas, 448 U.S. 38 (1980).

70. *Id.*

71. *See, e.g.*, Johnson v. State, 691 S.W.2d 619, 626 (Tex. Crim. App. 1984) ("The special issues adequately guide the jurors in weighing the mitigating and aggravating circumstances presented by [the] evidence.") (citing Jurek v. Texas, 428 U.S. 262 (1976)); O'Bryan v. State, 591 S.W.2d 464, 475–76 (Tex Crim. App. 1979) (rejecting succinctly the contention that the statute is unconstitutional by pointing to *Jurek*). For more adverse decisions, see *Blansett v. State*, 556 S.W.2d 322, 329 (Tex. Crim. App. 1977); *Granviel v. Estelle*, 655 F.2d 673, 675–77 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982).

72. 438 U.S. 586, 604 (1978).

effect to mitigating evidence, the lower state and federal courts continued to reject the claim that the Texas capital statute precluded a jury from giving effect to certain types of mitigating evidence.[73]

There matters stood until 1989, when the Supreme Court decided *Penry v. Lynaugh*.[74] In *Penry*, the Court recognized that some evidence is "two-edged," meaning it can be simultaneously aggravating and mitigating.[75] Penry presented evidence that he was severely intellectually disabled (then referred to as "mentally retarded").[76] At trial, the prosecutor did not challenge the evidence of Penry's cognitive deficits. Instead, he argued that Penry's disability sealed his fate: while it did not prevent him from acting deliberately (and the evidence showed that Penry deliberately killed his victim), the severity and irreversibility of his condition all but guaranteed that he would be dangerous in the future, at least according to the prosecutor.[77] To the state, therefore, the evidence of Penry's intellectual disability compelled affirmative answers to the special issues, and therefore a mandatory sentence of death.[78] Penry argued that his sentence violated the Eighth Amendment because his jury could not give mitigating effect to his evidence, but the Texas Court of Criminal Appeals and lower federal courts rejected his challenge.[79]

The Supreme Court reversed.[80] To the Court, the prosecutor's use of the evidence perfectly illustrated the constitutional flaw in the Texas statute. Penry's disability was undoubtedly mitigating, as the Court had previously defined the term, since it reduced his moral culpability and it could provide

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73. *See, e.g.*, Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984) (insisting that the questions prescribed under the Texas capital sentencing statute sufficiently allow the jury to "grasp the logical relevance of mitigating evidence").

74. Penry v. Lynaugh, 492 U.S. 302, 339 (1989).

75. *Id.* at 324.

76. *Id.* at 307–310 (summarizing the evidence presented at trial and pointing out that "both psychiatrists for the State acknowledged that Penry was a person of extremely limited mental ability"); *see also id.* at 320 (summarizing the mitigating evidence).

77. *Id.* at 322–26.

78. *Id.*

79. Penry v. State, 691 S.W.2d 636, 657 (Tex. Crim. App. 1985), *cert. denied sub nom.,* Penry v. Texas, 474 U.S. 1073 (1986); Penry v. Lynaugh, 832 F.2d 915, 920–26 (5th Cir. 1987), *rev'd*, 492 U.S. 302, 339 (1989). Though the Fifth Circuit denied relief, the panel broke with prior circuit practice when it expressed considerable doubt about the constitutionality of the Texas statute in Penry's case. *Penry*, 832 F.2d at 925 ("We recognize that *Jurek* specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty . . . . Perhaps, it is time to reconsider *Jurek* in light of that developing law.") (footnotes omitted).

80. Penry v. Lynaugh, 492 U.S. 302, 322–28 (1989).

a reasonable juror with a reason to spare his life.[81] Yet, under the constraints imposed by the Texas statute, the jury could give effect only to the aggravating "edge" of this evidence.[82] The Court struck down Penry's sentence.[83]

The Texas Court of Criminal Appeals could have used the decision in *Penry* to revisit its entire sentencing scheme. It could have, but it did not. Rather than accepting *Penry* as an indication that the Texas capital statute was constitutionally flawed, the state court embarked on a protracted campaign to avoid the implications of *Penry* by limiting the case to its facts. After *Penry*, the Court of Criminal Appeals heard case after case from scores of people in prison who presented evidence that was either functionally identical to the evidence Penry presented or was otherwise outside the scope of the special issues. Virtually without exception, the state court rejected these claims.[84]

Kenneth Granviel's case presents a particularly striking illustration of the lower court's resistance to *Penry*. Like Penry, Granviel was charged with murder in the course of a sexual assault.[85] Like Penry, he confessed.[86] Like Penry's, Granviel's lawyers presented an insanity defense.[87] Where Penry's lawyers had presented expert testimony of his intellectual disability,

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81. *Id.* at 324.

82. *Id.* at 323 (noting that the evidence of Penry's intellectual disability was relevant to the second questions "only as an aggravating circumstance because it suggests a 'yes' answer to the question of future dangerousness"). Penry also presented mitigating evidence that he had been abused as a child. The Court held that this evidence was likewise beyond the scope of the special issues because they simply failed to "provide a vehicle for the jury to give [it] mitigating effect." *Id.* at 322–24.

83. *Id.* at 340.

84. *See, e.g.*, Gosch v. State, 829 S.W.2d 775, 786–87 (Tex. Crim. App. 1991) (mitigating evidence that defendant had been abandoned and abused by his mother was "not of the same quality and character" as the evidence in *Penry*); Garcia v. State, 919 S.W.2d 370, 398–99 (Tex. Crim. App. 1994) (holding that drug use, alcoholism and family background were not beyond the special issues); Cantu v. State, 842 S.W.2d 667, 693 (Tex. Crim. App. 1992) (finding evidence that defendant had been raised by alcoholic father, had a long history of substance abuse and addiction, and was intoxicated at the time of the offense "was not of such caliber as to warrant" relief under *Penry*); Mines v. State, 888 S.W.2d 816, 818 (Tex. Crim. App. 1994) (finding that the evidence the defendant suffered from bipolar disorder was "well within the effective reach of the jury"); Zimmerman v. State, 881 S.W.2d 360, 362 (Tex. Crim. App. 1994) (finding the defendant's mitigating evidence of low IQ, past substance abuse, chaotic family environment, and expert diagnosis of paranoid personality disorder was not beyond the special issues).

85. *See* Granviel v. State, 552 S.W.2d 107, 110–12 (Tex. Crim. App. 1976).

86. *See* Granviel v. State, 723 S.W.2d 141, 144 (Tex. Crim. App. 1986) (presenting details regarding Granviel's confession).

87. Applicant's Brief on Remand at 3, *Ex parte* Granviel, No. 6,620–04 (Tex. Crim. App. Oct. 9, 1993) (on file with the *Columbia Human Rights Law Review*).

Granviel's lawyers presented expert testimony that he had suffered from paranoid schizophrenia for years.[88] As with Penry, therefore, Granviel labored under the influence of a debilitating condition for which he bore no responsibility. Like Penry's intellectual disability, Granviel's mental illness took root early in his life—his first commitment to a mental hospital happened when he was sixteen years old.[89] Like Penry, Granviel had been raised in an abusive environment marked by violence and cruelty at the hands of his stepfather.[90] As in *Penry*, the prosecutor in *Granviel* made short work of Granviel's mitigating evidence, arguing that it did not prevent Granviel from acting deliberately but certainly made him more likely to be dangerous in the future.[91] That is, just as in *Penry*, the prosecutor argued that only the aggravating edge of Granviel's two-edged evidence could be given effect under the Texas statute.[92] Despite these parallels, the Texas Court of Criminal Appeals rejected Granviel's *Penry* claim in a terse, unpublished order.[93]

The Supreme Court gave the state court yet a second chance to get it right in Granviel's case, and again the lower court whiffed. After the state court denied relief, the Supreme Court granted certiorari, vacated the judgment, and remanded for reconsideration in light of *Johnson v. Texas*.[94] In *Johnson*, the Supreme Court held that youth, as a purely transitory condition, could be given mitigating effect under the "future danger" special issue.[95] But having held that youth was not beyond the special issues, the Court obviously did not grant, vacate, and remand Granviel's case merely for the state court to inquire about his age. That is, if Granviel's age were the only issue, and if it could be considered under the special issues, the Court would have simply denied Granviel's petition. The Court's action, therefore, plainly signaled that it intended for the state court to examine whether the evidence of Granviel's mental illness and child abuse, which were so similar to Penry's evidence, could be given mitigating effect. The state court, however, ignored the message and again denied relief in an unpublished decision, this time with

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88. *Id.*

89. *Id.* at 4, 7–8.

90. *Id.* at 6.

91. *Id.* at 13.

92. The mitigating evidence is recounted in detail in Suggestion for Reconsideration and Motion for Stay of Execution at 2–24, *Ex parte Granviel*, No. 6, 620-05, (Tex. Crim. App. May 26, 1992) (on file with the *Columbia Human Rights Law Review*).

93. Order on Remand from the Supreme Court of the United States, *Ex parte* Granviel, No. C-213-1747-0193760-C, (Tex. Crim. App. Oct. 19, 1994), No. 6,620-04 (on file with the *Columbia Human Rights Law Review*).

94. 509 U.S. 350, 352–53 (1993).

95. *Id.*

the irrelevant observation that Granviel had been twenty-four years old at the time of the offense.[96] Granviel was executed in 1996.[97]

Nor was the error in *Granviel* unique. In addition to Granviel, the Supreme Court granted, vacated, and remanded the cases of six other death row inmates for reconsideration in light of *Johnson*: Henry Lee Lucas[98], Kevin Zimmerman[99], James Earhart[100], Samuel Hawkins[101], Miguel Richardson[102], and Charles Mines.[103] In all of them, the accused had presented mitigating evidence of a troubled family background, mental illness, or intellectual limitations. The state court denied relief to all seven. Zimmerman, Earhart, Hawkins and Richardson, like Granviel, were eventually executed.[104]

ii. Resistance by the Fifth Circuit

Alongside the Texas courts, the Fifth Circuit took an equally ill-fitting view of *Penry*. Shortly after the decision, the lower federal court held that no mitigating evidence was outside the scope of the special issues unless it established a "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own," *and* that "the criminal act was attributable to this severe permanent condition." [105] In short, mitigating evidence was outside the scope of the special issues only if it was

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96. *Ex parte* Granviel, Writ No. 6,620-04 (Tex. Crim. App. Oct. 19, 1994). The lead author of this article represented Granviel in state post-conviction proceedings.

97. *Kenneth Granviel*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database/323/ 78 obert 78 -granviel [https://perma.cc/B9MN-LE9M].

98. *Ex parte* Lucas, 877 S.W.2d 315, 316 (Tex. Crim. App. June 8, 1994).

99. Zimmerman v. State, 881 S.W.2d 360, 361 (Tex. Crim. App. May 31, 1994).

100. Earhart v. State, 877 S.W.2d 759, 761 (Tex. Crim. App. Apr. 6, 1994).

101. *Ex parte* Hawkins, No. 7, 369–07 (Tex. Crim. App. Oct. 12, 1994). The lead author of this Article also represented Hawkins in post-conviction proceedings.

102. Richardson v. State, 901 S.W.2d 941, 941–42 (Tex. Crim. App. June 1, 1994).

103. Mines v. State, 888 S.W.2d 816, 817 (Tex. Crim. App. Nov. 30, 1994). *See also id.* at 818 (Baird, J., concurring) (listing the seven cases, and citing the orders vacating and remanding).

104. *See Death Row Information: Executed Inmates*, TEX. DEP'T CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html [https://perma.cc/9X6X-RRDC].

105. Tennard v. Cockrell, 284 F.3d 591, 595 (5th Cir. 2002) (quoting Davis v. Scott, 51 F.3d 457, 460–61 (5th Cir. 1995)).

"uniquely severe" and established a "nexus" to the crime.[106] Anything less, the circuit court held, was simply not "constitutionally relevant."[107]

Applying this standard, the lower federal courts issued decisions that revealed a badly flawed understanding of black letter Eighth Amendment doctrine. In Jeffrey Motley's case, for instance, the jury heard that, as a child, Motley was subjected to his father's horrific physical, psychological, and sexual abuse, including anal and oral rape, until he was about thirteen years old.[108] Neighbors and experts testified to the severity of the abuse and the effect it had on Motley.[109] Rather than conclude that this evidence, like the comparable evidence of child abuse in *Penry*, was outside the scope of the special issues, the federal district court saw fit to lecture Motley on personal responsibility:

> Motley's argument is simple and wrong. [He argues that] [h]is circumstances were pitiful as a child; therefore, he is not responsible for his acts.[110] Freedom necessarily implies responsibility; Motley abused his freedom. He must bear the consequences the state of Texas has prescribed for this particular abuse, after he has been afforded every protection the procedures of a humane, reasonable people can offer. Child abuse is tragic for anyone, but its ability to break the causal connection between the free will of the defendant and the fate of his victim has never been suggested . . . . Motley's position is an insult to people everywhere who have overcome their injuries and deprivations to become successful contributing members of our community.[111]

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106. *Id.* at 597.

107. *Id.* at 595. The Fifth Circuit first articulated this test in 1992. *See* Graham v. Collins, 950 F.2d 1009, 1029, 1032–33 (5th Cir. 1992) (en banc), *aff'd on other grounds*, 506 U.S. 461, 463 (1993). The court then relied on it to deny virtually every *Penry* claim that came before it prior to the Supreme Court decision in *Tennard*. Decisions explicitly relying on the test include, *inter alia*: Madden v. Collins, 18 F.3d 304, 306–07 (5th Cir. 1994), *cert. denied sub nom.* Madden v. Scott, 513 U.S. 1156 (1995); Davis v. Scott, 51 F.3d 457, 460–61 (5th Cir. 1995); Bigby v. Cockrell, 340 F.3d 259, 273 (5th Cir. 2003); Robertson v. Cockrell, 325 F.3d 243, 251 (5th Cir. 2003) (en banc); Smith v. Cockrell, 311 F.3d 661, 680 (5th Cir. 2002).

108. Motley v. Collins, 18 F.3d 1223, 1229 (5th Cir. 1994), *cert. denied sub nom.* Motley v. Scott, 513 U.S. 960 (1994).

109. *Id.*

110. This of course was not Motley's argument. He argued that the jury could not give mitigating effect to the evidence of his "pitiful" childhood. *Motley*, 18 F.3d at 1228. To suggest that mitigating evidence is an argument to escape "responsibility" is not and has never been the law.

111. *Id.* at 1228 (quoting the district court's consideration of Motley's *Penry* claim) (first alteration in original).

Lockett and its progeny make plain that evidence of the sort presented by Motley diminishes a defendant's moral blameworthiness and is therefore a proper basis for mercy, without regard to whether it "break[s] the causal connection between the free will of the defendant and the fate of the victim."[112] Yet the Fifth Circuit, applying its "nexus" test, affirmed the district court and rejected the claim.[113] The Supreme Court denied certiorari,[114] and one hundred days later, Jeffrey Motley was executed by the State of Texas.[115]

iii. The Supreme Court (Finally) Steps In

It was not until 2004, fifteen years after *Penry*, that the Supreme Court finally began to correct the lower courts.[116] At the punishment phase

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112. *Id.*

113. *Id.*

114. Motley v. Scott, 513 U.S. 960, 960 (1994).

115. *See Jeffrey Motley*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database/264/80obert80-motley [https://perma.cc/8VMQ-XBLP]. The Fifth Circuit routinely dismissed evidence of child abuse and neglect as irrelevant to *Penry*. *See, e.g.*, Russell v. Collins, 998 F. 2d 1287, 1291–92 (5th Cir. 1993) (rejecting the "attempt[ ] to characterize" the occurrence of a "severe beating in the face" and subsequent "attempt[ ] to shoot" the defendant as "'child abuse' similar to the type introduced by the capital defendant in *Penry*"). Meanwhile, as the lower state and federal courts were eviscerating *Penry*, prosecutors had decided to retry the defendant at the center of it all. Unfortunately, the Texas legislature did not craft a legislative solution to the problem identified by the Supreme Court until 1991, which meant that for two years, trial judges had to solve the problem on their own. Texas courts could have used this opportunity to write instructions that provided jurors with a meaningful opportunity to give effect to mitigating evidence. They could have, but they did not. In Penry's retrial, the trial court instructed the jury to answer the special issues, unchanged from the last trial, but also to consider whether Penry's mitigating evidence justified a sentence less than death. Penry v. State, 903 S.W.2d 715, 764–65 (Tex. Crim. App. Feb. 22, 1995). If the jury decided it wanted Penry to live, the trial court instructed it to answer "no" to one of the special issues, even if it still believed Penry acted deliberately and would be dangerous in the future. *See* Penry v. Johnson, 532 U.S. 782, 797–98 (2001) (quoting the State's explanation of the "simply answer . . . 'no'" instruction). Unsurprisingly, this jury-rigged solution became known as a nullification instruction, since jurors were asked to nullify one view of the evidence to make room for another. *Id.* at 798; *Penry*, 903 S.W.2d at 765 (contending that a "nullification instruction such as this one" complies with *Penry*). In the absence of legislative direction, scores of trial judges across the state quickly adopted some variant of this "just say no" instruction. *See, e.g.*, *Ex parte* Smith, 132 S.W.3d 407, 409 (Tex. Crim. App, 2004) (issuing a supplemental instruction). The Supreme Court struck down the constitutionality of the instruction in 2001. Penry v. Johnson, 532 U.S. 782, 797–804 (2001) (*Penry II*).

116. In *Graham v. Collins*, the Court held that evidence of the defendant's youth and good character could be provided as mitigating factors under the special issues and were

of Robert Tennard's capital trial, defense counsel presented evidence that Tennard had an IQ of sixty-seven, significantly below average.[117] In his argument at the penalty phase, counsel relied on the IQ score to urge the jury to spare Tennard's life in part because of his extremely limited intelligence.[118] The prosecutor, however, encouraged the jury to disregard the evidence because it was simply irrelevant to the special issues.[119] The jury answered the special issues in the affirmative and the trial court sentenced Tennard to die.[120]

In the Texas Court of Criminal Appeals, Tennard relied on *Penry* and argued that his jury could not give effect to his mitigating evidence because it was beyond the scope of the special issues.[121] The state court disagreed, holding that the mere fact of a low IQ score did not establish that Tennard was intellectually disabled, and that his evidence was not otherwise of the kind and quality presented by Penry.[122] The Fifth Circuit also denied relief.[123] Indeed, it held that Tennard's claim was not even debatable among reasonable jurists, since by that time the circuit's "uniquely severe" and "nexus" requirements had completely emasculated *Penry*.[124] To the lower courts, *Tennard* was not even a close case.

The Supreme Court reversed, holding that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court."[125] Contrary to the view of the lower court, the Supreme Court had never suggested that mitigating evidence must cross some severity hurdle before it can be mitigating. The Court had also repeatedly rejected any requirement that the evidence have a nexus to the crime.[126] Turning to the mitigating evidence, the Court held that Tennard's low IQ "has the same essential features as the relationship" between the special issues and evidence of Penry's intellectual condition.[127]

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therefore not "beyond the effective reach of the sentencer." 506 U.S. 461, 475 (1993). And as noted in *Johnson v. Texas*, 509 U.S. 350, 352–53 (1993), the Court held that the Texas capital statute did not preclude the jury from giving mitigating effect to a defendant's youth.

117. *See* Tennard v. Dretke, 542 U.S. 274, 277 (2004) (summarizing the arguments at the penalty phase of the trial).

118. *Id.*

119. *Id.* at 278.

120. *Id.* at 277–78.

121. *See id.* at 278–79 (summarizing Tennard's argument when he sought postconviction relief).

122. *Id.* at 279–80.

123. Tennard v. Cockrell, 284 F.3d 591, 595–97 (5th Cir. 2002), *rev'd sub nom.* Tennard v. Dretke, 542 U.S. 274 (2004).

124. *Id.* at 597.

125. Tennard v. Dretke, 542 U.S. 274, 284 (2004).

126. *Id.* at 286–87.

127. *Id.* at 288.

The Court remanded the case to the Fifth Circuit, which granted sentencing phase relief.[128] In 2009, Tennard was resentenced to life in prison.[129]

And just to make sure the lower courts got the message, the Court also granted certiorari and reversed a case from the Texas Court of Criminal Appeals. In *Smith v. Texas*, the defendant had presented mitigating evidence that he suffered from possible organic brain damage, that he had an extremely low IQ score and had mostly been in special education classes, and that his father had been a drug addict who stole money from family members to support his addiction.[130] The state court had parroted the "uniquely severe" and "nexus" tests to deny relief,[131] but the Supreme Court reversed in a per curiam opinion, noting—as it did in *Tennard*—that the lower court tests had no basis in law and that the mitigating evidence, no less than the evidence in *Penry*, could not be given effect under the special issues.[132]

Despite the rebukes in *Tennard* and *Smith*, the lower state and federal courts continued to contrive ways to avoid *Penry*. In the Fifth Circuit, for instance, the court read *Tennard* as nothing more than a narrow critique about the appellate court's "methodology for determining what mitigating evidence is constitutionally relevant."[133] After *Tennard*, the Fifth Circuit continued to insist that mitigating evidence of, *inter alia*, mental illness, substance abuse, child abuse and neglect, and susceptibility to the influence of another could be given effect under the special issues.[134] But at least the Fifth Circuit granted relief in *Tennard*. In the state system, the Texas Court of Criminal Appeals did not even grant relief to Smith. Notwithstanding the decision in *Smith v. Texas*, the lower court held the constitutional error was not sufficiently "egregious" to warrant relief.[135]

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128. Tennard v. Dretke, 442 F.3d 240, 256 (5th Cir. 2006).

129. *Inmates No Longer on Death Row*, TEX. DEP'T CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_no_longer_on_dr.html [https://perma.cc/EYN2-WQSH].

130. *Ex parte* Smith, 132 S.W.3d 407, 411–16 (Tex. Crim. App. 2004), *rev'd sub nom.* Smith v. Texas, 543 U.S. 37 (2004) (per curiam).

131. *Id.* at 413–14.

132. Smith v. Texas, 543 U.S. 37, 37 (2004) (per curiam).

133. Brewer v. Dretke, 410 F.3d 773, 778 (5th Cir. 2005), *withdrawn and superseded on denial of reh'g*, 442 F.3d 273, 275 (5th Cir. 2006), *rev'd sub nom.* Brewer v. Quarterman, 550 U.S. 286 (2007).

134. *See, e.g.*, *Brewer*, 442 F.3d at 277–82 (discussing special issues jurisprudence); Cole v. Dretke, 418 F.3d 494, 498–508 (5th Cir. 2005) (noting that Cole's family background constituted relevant mitigating evidence), *rev'd sub nom.* Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007); *In re* Kunkle, 398 F.3d 683, 685 (5th Cir. 2005) (noting that mitigating evidence could be given effect under the special issues).

135. *Ex parte* Smith, 185 S.W.3d 455, 468–72 (Tex. Crim. App. 2006).

In 2007, the Supreme Court tried yet again to end this obstructionism. In Ted Cole's capital trial, the defense presented lay and expert testimony that Cole had endured what a federal district judge would later describe as a "destructive family background,"[136] an upbringing that had left him with apparent neurological damage and badly impaired impulse control.[137] The Texas Court of Criminal Appeals concluded the jury could give mitigating effect to this evidence in its response to the special issues, and the Fifth Circuit held that the state court ruling was neither contrary to, nor an unreasonable application of, clearly established law.[138] In *Abdul-Kabir v. Quarterman*, the Supreme Court disagreed and reversed. It stated that "even though Cole's mitigating evidence may not have been as persuasive as Penry's, it was relevant to the question of Cole's moral culpability for precisely the same reason as Penry's."[139] Yet, just as in *Penry*, the special issues allowed Cole's jury to give effect only to the aggravating edge of the evidence.[140]

Likewise, in *Brewer v. Quarterman*, the Supreme Court held that Brewer's mitigating evidence—that he had been hospitalized for depression three months before the murder, that he was dominated and controlled by his co-defendant, that he had been abused by his father, that he had seen his father abuse his mother, and that he had a history of drug abuse—was outside the scope of the special issues.[141] And in *Smith v. Texas* (*Smith II*), the Court held that it meant what it had said in *Smith I* and added for good measure, "The Court of Criminal Appeals is, of course, required to defer to our finding of *Penry* error [in *Smith I*], which is to say our finding that Smith has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence."[142]

We would like to say that the trio of Supreme Court decisions in *Abdul-Kabir*, *Brewer*, and *Smith II* finally broke the lower courts' resistance to *Penry*. Yet even this is probably too strong an assertion, as the state court *still* continued to misapply *Penry*. At his capital trial, Shelton Jones presented expert testimony from a psychologist who opined that Jones suffered from an "empty vessel personality," which left him particularly susceptible to

136. Abdul-Kabir v. Quarterman, 550 U.S. 233, 244 (2007) (quoting the federal district court's opinion denying relief).
137. *Id.* at 239–41.
138. *Id.* at 242–46 (summarizing the procedural history).
139. *Id.* at 259.
140. *Id.* at 260.
141. 550 U.S. 286, 296 (2007).
142. Smith v. Texas, 550 U.S. 297, 316 (2007).

domination by others.[143] According to the expert, Jones was not a violent person by nature. Instead, his behavior was shaped by the strongest influences around him: "[Y]ou don't find this individual instigating things of a criminal nature . . . . You find him following or being with a group or with at least one other person who is more anti-social, consistently anti-social and more aggressive."[144]

The Texas Court of Criminal Appeals rejected Jones' *Penry* claim.[145] On the fifth page of its unpublished decision, the court listed the wide range of mitigating evidence that the Supreme Court had held was outside the scope of the special issues, including "a troubled childhood, learning disabilities, low IQ/special education status, neglect, abandonment, neurological damage, substance abuse, family violence in childhood, mental illness, and domination by another."[146] Yet, two pages later, the court denied relief to Jones because his case for life was "a far-cry from the sort of psychological mitigating evidence that has been determined to be *Penry* evidence."[147] In short, it contended that the evidence was not mitigating *enough*, though this reasoning had been repeatedly rejected by the Supreme Court.[148] At least in this case, the federal courts prevented Jones from becoming yet another right too soon person on our list. The District Court held that the state court ruling was contrary to clearly established law, and the Fifth Circuit affirmed.[149]

Fortunately, *Jones* would prove to be an outlier, and the Texas Court of Criminal Appeals has finally ended its resistance to *Penry*, granting relief in a host of *Penry* cases that once would have been rejected out of hand.[150] And in 2010, the state court admitted it had "completely misunderstood the scope and applicability of *Penry* for almost twenty years" and had been

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143. *See* Jones v. Stephens, 541 F. App'x 399, 402 (5th Cir. 2013) (quoting the expert testimony at trial).

144. *Id.*

145. *Id.*

146. *Ex parte* Jones, No. AP-75,896, 2009 WL 1636511, at *5 (Tex. Crim. App. June 10, 2009) (internal citations omitted).

147. *Id.* at *7

148. *Id.*; *see also* Tennard v. Dretke, 542 U.S. 274, 284–87 (2004) (collecting cases).

149. Jones v. Thaler, No. H-09-1825, 2011 WL 1044469, at *18 (S.D. Tex. Mar. 3, 2011), *aff'd* in relevant part, Jones v. Stephens, 541 F. App'x 399, 400 (5th Cir. 2013) (per curiam).

150. *See, e.g.*, *Ex parte* Martinez, 233 S.W.3d 319, 323 (Tex. Crim. App. 2007) (granting relief); *Ex parte* Moreno, 245 S.W.3d 419, 426 (Tex. Crim. App. 2008) (same); *Ex parte* Hathorn, 296 S.W.3d 570, 572–73 (Tex. Crim. App. 2009) (same); *Ex parte* Smith, 309 S.W.3d 53, 58–64 (Tex. Crim. App. 2010) (same). The state court continues to grant relief on *Penry* cases. *See also Ex parte* Riles, Nos. WR-11,312-01 & WR-11312-04, 2021 WL 1397906, at *2 (Tex. Crim. App. Apr. 14, 2021) (granting relief).

wrong "in virtually all of our *Penry* cases."[151] The Fifth Circuit has likewise received the memo, and has gone even further than the Texas Court of Criminal Appeals. In *Pierce v. Thaler*, the federal court of appeals held that evidence of an incarcerated person's good character both before and after the crime could not be given mitigating effect under the special issues, a position the state court has not yet taken.[152] As of this writing, the *only* evidence that can be given mitigating effect within the special issues—at least according to the lower courts—is good behavior in jail or prison and proof of an entirely transient condition, such as youth or voluntary intoxication at the time of the crime.[153]

It is all well and good that the lower state and federal courts have finally begun to follow *Penry* and its progeny. But recent decisions do not make up for the 95 people who were right too soon.[154] These are the men and women who were executed despite having presented what would today be a successful *Penry* claim—that is, their claim is indistinguishable from claims that have gotten relief in the state or federal courts. To put this total in perspective, only three other states in the country have executed more than ninety-five people *in the entire modern era of capital punishment*.[155] In fact, in this category alone, Texas has wrongfully executed more people than the combined modern-era total of every execution in eighteen states.[156]

Still, we are confident that even this number substantially undercounts the lethal impact of the flaw in the Texas statute. For one thing,

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151. *Ex parte* Hood, 304 S.W.3d 397, 407 (Tex. Crim. App. 2010).

152. 604 F.3d 197, 202–12 (5th Cir. 2010).

153. *See*, *e.g.*, *Ex parte* Jones, No. AP–75,896, 2009 WL 1636511, at *5 (Tex. Crim. App. June 10, 2009) (describing the sorts of evidence that are outside the scope of the special issues, and concluding that evidence within the scope "include youth and redeeming qualities").

154. *See infra* Appendix IV. To be included in our list of right too soon *Penry* defendants, the incarcerated person had to raise a claim that would ultimately be successful in state or federal court. Because the Texas Court of Criminal Appeals eventually waived its procedural default and abuse of the writ doctrines, under the law as it finally came to rest in Texas, incarcerated people who raised a *Penry* claim at any stage of the litigation would have received a merits ruling. *See*, *e.g.*, Selvage v. Collins, 816 S.W.2d 390, 392 (Tex. Crim. App. 1991) (concluding that prior to *Penry*, litigants were not required to make a contemporaneous objection to preserve the claim); Black v. State, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991) (Campbell, J., concurring) (same); *Ex parte* Hood, 304 S.W.3d 397, 405–09 (Tex. Crim. App. 2010) (waiving state abuse of the writ doctrine for *Penry* claims).We therefore count all incarcerated individuals who raised a *Penry* claim at any stage.

155. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (Sept. 1 2021) https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1591881221.pdf. [https://perma.cc/W5KJ-8GHM]. The three states are Florida, Oklahoma, and Virginia.

156. *See id.* (listing the totals of modern-era executions by state).

many decisions are simply unavailable online, and we were not able to track down the paper records in many cases. We cannot count what we cannot find. In addition, prior to the decision in *Penry*, the lower courts were often spectacularly dismissive of the claim. In *Penry* itself, for instance, the state court rejected Penry's claims in less than a page with no discussion of the issue that would eventually transform the constitutional landscape.[157] This sometimes made it impossible to determine precisely what the incarcerated person had alleged. Unless we could track down the appellate briefs in those cases, we did not count them. In the end, we counted only those instances where we could say with confidence that the incarcerated person had argued that the jury could not give effect to the mitigating evidence, *and* the mitigating evidence was materially indistinguishable from that presented by people who got relief.

Furthermore, our list does not take full account of the defect in the Texas statute. The problem in Texas was that most mitigating evidence could not be given mitigating effect under the special issues. At best, the evidence was deemed irrelevant; at worst, it was used to support an affirmative answer to the special issues. Under these constraints, many defense lawyers sensibly concluded that investigating and presenting most types of mitigating evidence was simply not worth it. For them, *Penry* provided a measure of vindication, since it confirmed what they had long maintained. In the wake of *Penry*, many incarcerated persons on death row went back to court and recounted the mitigating evidence that they would have presented but for the constitutional flaw in the Texas statute. We have identified thirteen such cases.[158] In all of them, the available mitigating evidence was either functionally indistinguishable from that presented in *Penry*, or indistinguishable from the evidence presented by persons on death row who eventually prevailed. Though several judges on the state and federal courts recognized and would have granted relief to defendants who presented this variant of *Penry*, [159] the argument that the former Texas statute

157. Penry v. State, 691 S.W.2d 636, 653–54 (Tex. Crim. App. 1995), *cert. denied*, 474 U.S. 1073 (1986).

158. *See infra* Appendix V.

159. In *May v. Collins*, for instance, the evidence presented in post-conviction proceedings established that May had endured horrific child abuse and neglect and suffered from organic brain damage, which in combination left him with badly impaired impulse control. 904 F.2d 228, 231–32 (5th Cir. 1990). Unlike counsel for Johnny Penry, however, defense counsel for May opted not to present the evidence at trial since it would only have hastened his client's death sentence. *Id.* at 232. Judges Reavley and King drafted a special concurrence which described counsel's dilemma perfectly:

> [E]ither . . . present the mitigating evidence, which would . . . bolster[ ] the state's case with regard to future dangerousness, and . . . pursue a losing

unconstitutionally chilled the presentation of mitigating evidence never commanded a majority in either the Texas Court of Criminal Appeals or the Fifth Circuit. As a result, we do not count these people as right too soon, even though they undoubtedly were.

Yet even this does not capture the full impact of the constitutional flaw in the Texas statute. The capital sentencing scheme trained an entire generation of lawyers to shun mitigating evidence. Otherwise competent defense lawyers became conditioned to ignore the evidence that, in a lawful scheme, would have saved their client's life. In trial after trial, the statute schooled defense counsel that presenting a complete picture of a capital defendant as a flawed, fragile, and damaged human being—as a person who stumbled and fell under the crushing weight of organic brain damage or an untreated mental illness, or who lived with the scars of unspeakable abuse inflicted on him as a defenseless child—was the kiss of death.[160] We will never know the number of men and women executed in Texas who would have lived were it not for a statute that made mitigation part of the case for death.

b. (More) Resistance in the Sunshine State: *Hitchcock v. Dugger*

While the Texas statute presents the most egregious example of a sentencing scheme that perverted the consideration of mitigating evidence, it is not alone. The Florida statute barred the advisory jury from considering non-statutory mitigating evidence.[161] The Supreme Court made clear both in

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> constitutional argument; or . . . withhold that evidence and hope that other arguments would persuade the jury to impose a life sentence. *Any capable defense attorney would pursue the latter course*[.]

Id. at 234 (Reavley & King, JJ., specially concurring) (emphasis added). As the concurring judges explained, the jury was "prevented from hearing extremely probative evidence on [the defendant's] moral culpability and on the appropriateness of a death sentence." *Id.* The tactical decision resulted from a "web spun of words and logic that, in the end, deprived . . . constitutional rights, a deprivation that may cost [the defendant] his life." *Id.*; *see also, e.g.*, *Ex parte* Garrett, 831 S.W.2d 304, 309–10 (Tex. Crim. App. 1991) (Baird, J., dissenting) ("If, in pre-*Penry* cases, counsel is excused from making a *Penry* objection, it is an anomaly to require counsel to have presented *Penry* type evidence at trial, either by way of a proffer or as evidence before the jury.").

160. *See, e.g.*, *Ex parte Garrett*, 831 S.W.2d at 305 (Clinton, J., dissenting) ("Because evidence [Garrett] now proffers as to his history of family violence and drug and alcohol abuse, and of his limited intelligence and possible brain damage could only . . . have operated to his detriment, he was prevented as a practical matter from producing that evidence at trial").

161. FLA. STAT. ANN. § 921.141 (Supp. 1976–77).

the 1976 re-instatement cases,[162] and in subsequent cases decided soon thereafter,[163] that a jury must be permitted to consider a wide range of mitigating evidence in deciding whether a capital defendant should be sentenced to die, and that states could not cabin that consideration to a statutory list of factors.[164] Unfortunately, the Florida courts were slow to get the message. In James Hitchcock's trial (as in many other Florida capital trials), the trial judge instructed the advisory jury that it could only consider the mitigating circumstances "enumerated" in the statute.[165] The prosecutor argued in his penalty summation that the jury could only consider those circumstances and, in accepting the jury's majority (but not unanimous) death sentence recommendation, the trial judge specifically stated that there were "insufficient mitigating circumstances *as enumerated* . . .to outweigh the aggravating circumstances."[166]

After the Florida Supreme Court affirmed Hitchcock's death sentence, the Supreme Court granted certiorari to determine whether the Florida statute violated the requirement that the "sentencer" not "be precluded from considering any relevant mitigating evidence." [167] After considering the mitigating evidence presented in Hitchcock's case (which included evidence that he "huffed" gas as a child, that he was one of seven children from a poor, itinerant farming family, that his father died when he was a young child, and that he had been a good uncle to his siblings' children)—as well as the jury instructions, the summations, and the judge's sentencing order—the Court had no difficulty finding that "the proceedings . . . did not comport with the requirements" of the Eighth Amendment.[168] The Court was unanimous, and its language unambiguous: "[w]e think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-

162. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (explaining that a death penalty scheme must allow for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind" to meet the Eighth Amendment).

163. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (jury must be permitted to consider "a defendant's character or record and any circumstances of the offense proffered that the defendant proffers as a basis for a sentence less than death").

164. Eddings v. Oklahoma, 455 U.S 104, 113–14 (1982).

165. *See* Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) (describing the trial judge's instruction to the advisory jury). This instruction had the blessing of the Florida Supreme Court. *See* Cooper v. State, 336 So. 2d 1133, 1139 (Fla. 1976) ("The sole issue in a sentencing hearing . . . is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding[.]").

166. *Hitchcock*, 481 U.S. at 398.

167. *Id.* at 394 (internal citations omitted).

168. *Id.* at 399.

statutory mitigating circumstances, and the proceedings therefore did not comport with the requirements of [our precedent]."[169]

Post-*Hitchcock*, the Florida state courts, and the federal courts reviewing Florida capital cases, granted new sentencing hearings to all incarcerated persons on death row whose jury was given the "as enumerated" instruction and whose attorneys had presented non-statutory mitigating evidence. This resulted in dozens of people receiving new sentencing proceedings, many of whom received life sentences.[170] *Hitchock* and various subsequent appellate reversals, however, did nothing for the many people on Florida's death row who had unsuccessfully raised the same "clear" constitutional error and had been executed. Many of these people had also presented significant non-statutory mitigating evidence to juries and judges who were instructed, in no uncertain terms, to disregard it. James Raulerson, for example, presented evidence of his "troubled childhood, excellent work record, devotion to family, religious beliefs, and prospects for rehabilitation."[171] The sentencing judge, however, found that he had not demonstrated the existence of *any* mitigating circumstances.[172] Raulerson raised the same argument as Hitchcock, had that claim summarily denied by the state and federal courts, and was executed on January 30, 1985, two years before the Supreme Court's unanimous decision finding the Florida scheme unconstitutional.[173] Our review of the cases of the people who had already been executed in Florida at the time of the Supreme Court's identification of the "clear" constitutional error reveals that 15 were right too soon.[174]

c. Resistance to the Right to Trial by Jury: Judge v. Jury Sentencing

Several states enacted post-*Furman* capital sentencing statutes that gave the trial judge, as opposed to the jury, the ultimate sentencing authority. For many years, the Supreme Court, as well as the lower federal and state

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169. *Id.* The Supreme Court cited *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978).

170. *See* O'Callaghan v. State, 542 So. 2d 1324, 1326 (Fla. 1989) (collecting cases in which people received new sentencing schemes post-*Hitchcock*).

171. Raulerson v. Wainwright, 732 F.2d 803, 806 (11th Cir. 1984).

172. *See* Raulerson v. State, 358 So. 2d 826, 832–33 (Fla. 1978) (presenting court's findings on mitigation).

173. Raulerson v. Wainwright, 732 F.2d 803, 813 (11th Cir. 1984); *see also* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 575–77 (1988) (describing the procedural history leading up to Raulerson's execution).

174. *See infra* Appendix VI. We did not double count any inmates who also fell in the *Hurst* category discussed below.

courts, saw no issue with this practice. In 1984, 1989, and again in 1990, the Court found no problem with statutes in Florida and Arizona where a judge, rather than a jury, decided whether the prosecution had proven the existence of aggravating circumstances which rendered a defendant "death eligible," and in turn made the ultimate life or death sentencing decision.[175] Attorneys for condemned incarcerated persons raised a variety of constitutional challenges to these statutes, including arguments that the practice violated the Sixth Amendment right to jury trial, the Eighth Amendment right to heightened reliability in capital sentencing proceedings, and the Fourteenth Amendment right not to be deprived of life without due process. All these challenges failed.

In 2000, however, the legal landscape changed when the Court decided *Apprendi v. New Jersey*, a non-capital case.[176] In *Apprendi*, the Court held that any fact which enhanced a defendant's sentence above the maximum sentence authorized for the crime by the legislature had to be found unanimously and beyond a reasonable doubt by a jury rather than a judge.[177] Charles Apprendi entered a guilty plea to several counts that he had illegally possessed a weapon.[178] Following his sentencing hearing, the trial judge found, by a preponderance of the evidence, that Apprendi's racial animus motivated his conduct.[179] Relying on a state law "hate-crime" enhancement provision, the judge imposed a sentence of twelve years, two years more than the ten-year maximum authorized by statute for unlawful possession of a weapon.[180] The Supreme Court concluded that Apprendi's sentence violated the Sixth Amendment right to jury trial.

The relevance of *Apprendi* was not lost on lawyers who represented people on death row in Arizona and Florida, the two main judge-sentencing jurisdictions. Two years after *Apprendi*, in *Ring v. Arizona*,[181] the Court agreed that the Arizona sentencing scheme violated the Sixth Amendment right to jury trial. Of the twenty-two people executed in Arizona prior to *Ring*,[182] at least twelve had challenged the practice of allowing judges to

175. Spaziano v. Florida, 468 U.S. 447, 449 (1984); Hildwin v. Florida, 496 U.S. 633, 636 (1989); Walton v. Arizona, 497 U.S. 639, 642 (1990).
176. 530 U.S. 466, 468 (2000).
177. *Id.* at 490.
178. *Id.* at 469–70.
179. *Id.* at 471.
180. *Id.*
181. 536 U.S. 584, 589 (2002).
182. *See infra* Appendix VII.

make the death-eligibility determination.[183] Others likely would have but were deterred by the Supreme Court's 1990 decision in *Walton v. Arizona*,[184] which rejected the contention of a person on death row that Arizona's use of judges, not juries, was unconstitutional.

We also include in the "dead right" category another ten people executed in Arizona after the Supreme Court's 2002 decision in *Ring*.[185] These ten were right, both too soon and too late. They had challenged Arizona's judge-sentencing scheme prior to *Ring*, only to be told the issue was meritless. After *Ring*, they tried again, relying on the new decision, only to be rejected once more. This time, they were told that, consistent with the subsequent Supreme Court decision in *Schriro v. Summerlin*,[186] *Ring* did not apply retroactively to cases that were final on direct review when the Court's decision was handed down.[187] This number will continue to rise, as there are still people on death row in Arizona who were tried, convicted, and sentenced to death under the pre-*Ring* judge-sentencing scheme.[188] Finally, we have identified one incarcerated person in Idaho, another judge-sentencing state, who challenged the Idaho scheme prior to *Ring* and, like those in Arizona, was killed because he was right too soon. This brings the total in this category to twenty-three.

After *Apprendi*, and certainly after *Ring*, the Florida Supreme Court must have seen the writing on the wall. Arizona's scheme and Florida's

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183. We say "at least" because in several of the cases involving people executed in Arizona before the Supreme Court's decision in *Ring*, the pleadings and opinions filed in state post-conviction proceedings are not available. It is almost a certainty that some, potentially all, of the ten other executed individuals raised the issue in one form or another, but since we cannot confirm it, we do not count them.

184. 497 U.S. 639, 639 (1990).

185. *See infra* Appendix VII.

186. 542 U.S. 348, 348 (2004).

187. Towery v. Schriro, No. CV-03-826-PHX-MHM, 2008 WL 4447043, at *61 (D. Ariz. Sept. 30, 2008); *see also, e.g.*, State v. Towery, 64 P.3d 828, 833 (Ariz. 2003) (en banc) (holding that *Ring* announced a new procedural rule that did not apply retroactively to convictions that are final). Towery, who had raised the issue six years prior to *Ring* during his direct appeal, State v. Towery, 920 P.2d 290, 312 (Ariz. 1996) (en banc), was executed on March 8, 2012. *Robert Towery*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database/1285/ 91 obert-towery [https://perma.cc/E7MW-5U87]. A case is final on direct review after the trial, initial appeal, and resolution of a petition for certiorari by the Supreme Court (if no petition is filed, the date on which a timely petition could have been filed). In broad strokes, most new legal developments in criminal procedure are not available to defendants whose cases are already final on direct review. This non-retroactivity framework was created by the Supreme Court in *Teague v. Lane*, 489 U.S. 288, 295–96. (1980).

188. *See Death Row*, ARIZ. DEP'T OF CORR., https://corrections.az.gov/public-resources/death-row [https://perma.cc/D7D4-A3DU] (showing sentence dates of inmates on death row).

scheme were identical in all material respects: the judge, not the jury, determined the existence *vel non* of statutory aggravating circumstances, which was precisely the reason the Supreme Court invalidated Arizona's capital sentencing statute. Florida's statute used the jury in an advisory capacity only and gave the judge the authority to decide on the existence of aggravating circumstances that make a defendant eligible for the death penalty and to sentence a defendant to die.[189] But just as it resisted *Atkins* and the prohibition against the execution of persons with intellectual disability, and just as it resisted the rule in *Lockett* that the jury must be allowed to consider and give effect to all mitigating evidence, the Florida Supreme Court petulantly resisted *Ring* and *Apprendi*.

Within months of *Ring*, the Florida Supreme Court held that the U.S. Supreme Court's decision did nothing to upset the status quo in Florida.[190] The state supreme court's failing rationale was that because the U.S. Supreme Court did not expressly say in *Ring* that the Florida system was unconstitutional, and did not specifically direct them to "reconsider" the constitutionality of the system, it had implicitly found that Florida could—and arguably even should—continue using its death sentencing laws.[191] There were other equally flimsy, and frankly disingenuous, attempts to distinguish *Ring*. Perhaps most strikingly, the state court maintained that a non-unanimous death recommendation by an advisory jury with no burden of proof (what the statute provided), was functionally equivalent to a unanimous finding, beyond a reasonable doubt, of a statutory aggravating circumstance (what the Sixth Amendment requires).[192]

Florida death row inmates sought review in one case after another. Nonetheless, for more than a decade, the Supreme Court refused to step in, and Florida continued to execute people on death row, the overwhelming majority of whom argued that Florida's use of judges, not juries, to make the death eligibility determination violated the Sixth Amendment right to a jury

189. *See* Hurst v. Florida, 577 U.S. 92, 95–96 (2016) (summarizing Florida's judge-sentencing provision). In *Profitt v. Florida*, the Supreme Court had found no constitutional defect in Florida's scheme. 428 U.S. 242 (1976). It again dismissed a constitutional challenge to the judge-sentencing aspect of the Florida system in *Hildwin v. Florida*. 480 U.S. 638 (1989).

190. King v. Moore, 831 So. 2d 143, 144 (Fla. 2002).

191. *Id.*

192. *See Hurst*, 577 U.S. at 98–100 (2016) (assessing Florida's contention that an advisory jury that does not make specific factual findings on mitigating or aggravating circumstances saves the sentencing scheme from violating *Ring*).

trial.[193] In 2015, the Court finally granted certiorari in *Hurst v. Florida* and, in an 8-1 decision, held that the rationale of *Ring* compelled the conclusion that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is . . . unconstitutional."[194] Forty years after upholding the scheme,[195] the Court concluded that "[t]ime and subsequent cases have washed away the logic" of prior precedent "allow[ing] a sentencing judge to find an aggravating circumstance . . . that is necessary for imposition of the death penalty."[196]

We would like to say that *Hurst* settled the matter, but the Florida Supreme Court has continued to resist *Hurst*. On remand, the Florida Supreme Court initially accepted that *Hurst* had a significant impact on capital sentencing in the state. It held that a trial judge could no longer impose a death sentence unless the jury "unanimously and expressly" found (1) "all the aggravating factors . . . beyond a reasonable doubt," (2) that "the aggravating factors were sufficient to impose death," (3) that "the aggravating factors outweigh[ed] the mitigating circumstances," and the jury (4) unanimously recommended a sentence of death.[197] The state court also ordered new sentencing trials for persons who were sentenced to death without a unanimous jury recommendation.[198] The decision to provide *Hurst* relief to those people whose death sentences were final after *Ring* has led most of them to receive new sentencing hearings and be taken off death row.[199]

Yet, in practically the same judicial breath, the state court began its well-practiced resistance to Supreme Court jurisprudence. In *Asay v. State*, the Florida Supreme Court held that death row inmates whose death

193. *See, e.g.*, Bottoson v. Moore, 833 So. 2d 693, 694–95 (Fla. 2002) (denying habeas petition based on *Ring*); Tompkins v. Crosby, 895 So. 2d 1068 (Fla. 2004) (denying habeas petition based in part on *Ring*); Valle v. Crosby, 859 So. 2d 516 (Fla. 2003) (same); *cf. also Bottoson*, 833 So. 2d at 703 (Anstead, C.J., concurring) (remarking that the *Ring* holding on judge-sentencing in capital cases "conflicts with our previous denial of relief to Bottoson").

194. Hurst v. Florida, 577 U.S. 92, 103 (2016).

195. Profitt v. Florida, 428 U.S. 242 (1976).

196. *Hurst*, 577 U.S. at 102.

197. Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016).

198. *Id.*; *see also Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring [https://perma.cc/PVF9-K3FY] (tracking people on death row who are eligible for resentencing through *Hurst*).

199. Hannah L. Gorman & Margaret Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 COLUM. HUM. RTS. L. REV. 935, 972 (2020).

sentences were "final on direct review" before the Supreme Court issued its decision in *Ring*, could not take advantage of the Supreme Court's ruling.[200] Given the size of Florida's death row, the non-retroactivity ruling means that more people will be executed in the future who raised Sixth Amendment challenges to Florida's death penalty law prior to the Supreme Court's decision in *Hurst*.[201]

Based upon our review of the Florida cases, eighteen people were executed in Florida prior to *Hurst* whose advisory juries did not unanimously recommend a death sentence and who specifically challenged the practice of allowing the advisory jury to make the findings necessary to support a death sentence.[202] Again, this number would likely have been higher but for the fact that many lawyers representing people on Florida's death row were chilled from attacking the advisory jury's role in capital sentencing by the series of cases rejecting the claim.

Three more people have been executed since *Hurst*, who also were both right too soon and too late.[203] Fourteen years before the Supreme Court's decision, Mark James Asay filed a post-conviction petition raising the identical Sixth Amendment issue that prevailed in *Hurst*.[204] The state court denied the claim summarily.[205] Then, after the Supreme Court's decision finding that Florida's capital sentencing system was unconstitutional, Asay

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200. Asay v. State, 210 So. 3d 1, 21–22 (Fla. 2016); *see also* Mosley v. State, 209 So. 3d 1248, 1274 (Fla. 2016) (citing *Asay* and once again using its logic to deny retroactive consideration). This type of line drawing, while common in retroactivity analysis, injects its own brand of arbitrariness into the death penalty machinery. For example, Florida death row inmate James Ford's case became final on direct review on May 28, 2002, see Ford v. Florida, 535 U.S. 1103 (2002) (denying certiorari), a few weeks before the Supreme Court's June 24, 2002 decision in *Ring*. Under *Asay*, he was denied *Hurst*'s guarantee of the *Ring* protections. Jason Looney's case, on the other hand, became final four days after *Ring*. *See* Looney v. Florida, 536 U.S. 966 (2002) (denying certiorari on June 28, 2002). He received a new sentencing hearing. *Florida Death-Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR. (Jan. 23, 2020), https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst [https://perma.cc/36JW-565X].

201. *See, e.g.*, Bottoson v. Moore, 833 So. 2d 693, 698–99 (Fla. 2002) (Wells, J., concurring) (observing that, at the time of the court's decision, "Florida ha[d] 369 individuals confined in special confinement on death row" and "[e]xtending *Ring*" to them would lead "all of the individuals on Florida's death row [to] have a new basis for challenging the validity of their sentences").

202. *See infra* Appendix VIII.

203. *Id.*

204. Asay filed a Motion to Vacate Judgment and Sentence with Request for Leave to Amend in 2002, raising the issue that was decided in *Ring v. Arizona*. *See* Appellant Mark James Asay's Initial Brief at 1, Asay v. State, 892 So. 2d 1011 (2004) (No. SC04–433) (summarizing the case at the trial court); *see also* Asay v. State, 210 So. 3d 1, 9 (Fla. 2016) (explaining the procedural history).

205. *Asay*, 892 So. 2d at 1011.

returned to the state courts requesting a new sentencing proceeding. This time, the Florida Supreme Court rejected the claim on non-retroactivity grounds.[206] Asay was executed August 24, 2017.[207] Eric Scott Branch, executed in 2018, was also both too early and too late, as was Cary Michael Lambrix.[208]

This brings the total number of persons in the *Hurst* "dead right" column for now at twenty-one.[209] It is important to bear in mind that ninety-two people executed in Florida,[210] and twenty-two executed in Arizona,[211] were sentenced to death utilizing a scheme now recognized to be constitutionally defective. Nonetheless, we count only a total of forty-four because that is how many challenged the practice that we have been able to identify in the three states: twenty-two in Arizona, twenty-one in Florida, and one in Idaho.[212] To put this in perspective, only eight states in the modern era have executed more than forty-four people.[213]

Yet this is not the end of the post-*Hurst* saga. As has been true in other states following an important Supreme Court development, most

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206. *Asay*, 210 So. 3d at 11.

207. *Mark Asay*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database/1459/mark-asay [https://perma.cc/LHX7-FR5N].

208. *See* Branch v. State, 952 So. 2d 470, 470 n.1. (Fla. 2007); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018); Lambrix v. State, 217 So. 3d 977, 980–81 (Fla. 2017). Lambrix was executed in 2017. *Cary Lambrix*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database/1461/michael-lambrix [https://perma.cc/YQN9-CPK2].

209. *See infra* Appendix VIII.

210. DPIC, *Execution Database*, Filters: Florida, Ending Date Jan. 12, 2016, https://deathpenaltyinfo.org/executions/executiondatabase?filters%5BendDate%5D=01%2F12%2F2016&filters%5Bstate%5D=Florida [https://perma.cc/7J4A-MZC5].

211. *Id.*; Filters: Arizona, Ending Date Jun. 24, 2002, https://deathpenaltyinfo.org/executions/executiondatabase?filters%5BendDate%5D=06%2F24%2F2002&filters%5Bstate%5D=Arizona [https://perma.cc/39RM-RBCH].

212. *See infra* Appendices VI, VII.

213. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (Sept. 1, 2021), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf [https://perma.cc/9SZ8-QTUA]. The number in this category could also grow if the Supreme Court decides to resolve the related challenges to Alabama's judge-sentencing scheme. *See* Patrick Mulvaney & Katherine Chamblee, *Innocence & Override*, 126 YALE L.J. F. 118, 118 (2016) (explaining that Alabama is the only state that still permits the practice of judge override in capital case). Alabama has executed 67 people since 1976, but for now, we are not counting them. *DPIC Execution Database*, *supra* note 9, filtered by State Alabama on Sept. 13, 2021, https://deathpenaltyinfo.org/executions/executiondatabase?filters%5Bstate%5D=Alabama [https://perma.cc/9SZ8-QTUA]; *cf.* EQUAL JUST. INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 22 (2011) (finding as of 2011 that 93 people were sentenced to death by judicial override in Alabama, though "37% left death row after their convictions or sentences were reversed").

notably Texas, the Florida response to *Hurst* is a story of resistance. In *State v. Poole*, the Florida Supreme Court quickly jettisoned the relatively broad reading it initially gave to *Hurst* and embraced a much narrower view of the decision, concluding that *Hurst* required only that the jury find one or more aggravating circumstances.[214] This is almost certainly a mistaken reading of *Hurst* (and *Ring*), but for now, it is the law in Florida.[215] This reinterpretation of *Hurst* led the court to vacate some of the new sentencing hearings it had previously ordered.[216] In fact, emboldened by the Florida Supreme Court's decision in *Poole*, the Florida Attorney General asked that the death penalty be reinstated in cases that had been overturned years earlier in the first wave of post-*Hurst* cases.[217] But that was a bridge too far, even for the very conservative Florida Supreme Court, which denied the State's petition on the basis that those judgments were final.[218]

d. Resistance to Guided Discretion: Unconstitutionally Vague Aggravating Circumstances

Early in the modern era, the Supreme Court held that in order to limit the arbitrary and capricious imposition of the death penalty, statutory aggravating circumstances had to genuinely narrow the universe of homicides that could expose a defendant to a risk of execution.[219] In 1980, the Court held that the Georgia aggravator that purported to limit eligibility for execution to those whose crimes were "outrageously or wantonly vile, horrible or inhuman" was too vague to narrow the pool.[220] But other states had equally vague statutory aggravating circumstances, the most common of which was the "especially heinous, atrocious and cruel" (HAC) factor used in Oklahoma, Mississippi, and a few other jurisdictions.[221] In *Maynard v.*

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214. State v. Poole, 297 So. 3d 487, 508 (Fla. 2020).

215. For a more detailed critique of the *Poole* decision's "departure from the *Hurst* precedent," and its consequences for the stability of the capital punishment system, see Gorman & Ravenscroft, *supra* note 199, at 954–57.

216. *See id.* at 956–57 (describing the aftermath of *Poole v. State*, including motions to reinstate death sentences that had been vacated, and the actual reinstatement of two death sentences: Thomas McCoy's and James Belcher's).

217. State v. Okafor, 306 So. 3d 930, 932 (Fla. 2020).

218. *Id.* at 933–34.

219. Godfrey v. Georgia, 446 U.S. 420, 427–28 (1980).

220. *Id.* at 432.

221. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 701.12(4) (aggravating circumstance when the "murder was especially heinous, atrocious, or cruel"); MISS. CODE ANN. § 99–19–101(5)(h) (aggravating circumstance when "capital offense was especially heinous, atrocious, or cruel"); ALA. CODE § 13A–5–49(8) (aggravating circumstance when "capital offense was especially heinous, atrocious, or cruel compared to other capital offenses");

Cartwright,[222] the Court held that this language in the Oklahoma statute, standing alone, did not satisfy constitutional requirements. Mississippi had an identical instruction.[223] Prior to *Maynard*, the Mississippi Supreme Court had rejected a number of challenges to its own HAC aggravator,[224] and post-*Maynard* had held that there was no prejudice from the jury's reliance on the invalid aggravating circumstance as long as the jury found at least one other valid aggravating circumstance.[225] In *Clemons v. Mississippi*,[226] the Supreme Court rejected this particular form of appellate "reweighing," and the Mississippi Supreme Court subsequently determined that in cases where the jury relied upon the unconstitutionally vague HAC aggravator in fixing the punishment at death, the remedy was a new sentencing trial.[227] This came too late, however, for three men in the state who were executed after they had unsuccessfully maintained that the vagueness of the HAC circumstance required that they be afforded a new sentencing hearing.[228]

e. Uncategorized

Our research uncovered one case of a right too soon execution that does not fit in a broader category.[229] Fittingly, it comes from Florida. In *Stewart v. Martinez-Villareal*, the Supreme Court held by a 7-2 majority that a claim alleging that an incarcerated person was incompetent to be executed was an exception to the statutory prohibition of second federal petitions.[230] However, this 1998 decision came too late for Pedro Medina, a person incarceration on Florida's death row whose lawyers had argued in a second petition that he was incompetent to be executed. The Eleventh Circuit had

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MODEL PENAL CODE § 210.6(3)(h) (aggravating circumstance when "murder was especially heinous, atrocious or cruel, manifesting exceptional depravity").

222. Maynard v. Cartwright, 486 U.S. 356 (1988).

223. *See supra* note 221.

224. *See, e.g.*, Washington v. State, 361 So. 2d 61, 65–66 (Miss. 1978) (holding that "especially heinous, atrocious or cruel" is not unconstitutionally vague").

225. *See* Clemons v. State, 535 So. 2d 1354, 1362 (Miss. 1988) (collecting Mississippi Supreme Court cases establishing that another valid aggravating circumstance will support a death penalty verdict, in order to differentiate Mississippi's cases from *Maynard*).

226. 494 U.S. 738 (1990).

227. *See* Clemons v. State, 593 So. 2d 1004, 1007 (Miss. 1992) (remanding for new sentencing hearing); *see also* Lockett v. State, 614 So. 2d 898, 904 (Miss. 1992) ("This Court has determined that the remedy on remand for such a violation is to vacate the sentence and remand for new sentencing trials.").

228. *See infra* Appendix IX.

229. *See infra* Appendix X.

230. 523 U.S. 637, 637 (1998).

found his claim barred by the statute.[231] He was executed by the state of Florida on March 25, 1997.[232]

II. What Is Not as Easily Counted

What matters to us is how many people were unconstitutionally executed in the modern death penalty era. The numbers we have presented significantly undercount that total because of the cases we did not count: those implicated by expansions of general criminal procedure rights, changes in the application of the ineffective assistance of counsel standard, and changes in the cognizability of some ineffective assistance of counsel claims. There are likely larger numbers in these areas, but because we can reliably count only a fraction of them, they are not reflected here.

A. Expansions of Criminal Procedure Rights

It may surprise the casual reader to learn that the Supreme Court has expanded general criminal procedure rights since 1976,[233] but four criminal procedure decisions since 1976 have significantly expanded constitutional rights for every criminal defendant, including those charged with capital crimes: *Missouri v. Seibert*,[234] *Crawford v. Washington*,[235] *Peña-Rodriguez v. Colorado*,[236] and *Batson v. Kentucky*.[237]

1. *Missouri v. Seibert*

In *Oregon v. Elstad*, [238] the Supreme Court considered the admissibility of a Mirandized confession taken after a confession that had not been preceded by *Miranda* warnings. It is well-established that the first

231. *In re* Medina, 109 F.3d 1566, 1566 (11th Cir. 1997).

232. To make matters worse, his execution was "botched": "[F]lames up to a foot-long shot from the right side of Mr. Medina's head . . . filling the execution chamber with smoke," because of a problem in the conduction of electricity. *Condemned Man's Mask Bursts into Flame During Execution*, N.Y. TIMES (Mar. 26, 1997), https://www.nytimes.com/1997/03/26/us/condemned-man-s-mask-bursts-into-flame-during-execution.html (on file with *Columbia Human Rights Law Review*); AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 83 (2014).

233. By then, the "Warren Court"—both hailed and castigated for its expansion of the rights of the accused—had long since disappeared. At least in our view, none of the Chief Justices since then—Burger, Rehnquist, or Roberts—can be counted as friends of criminal defendants.

234. 542 U.S. 600, 613–14 (2004).

235. 541 U.S. 36, 36–38 (2004).

236. 137 S. Ct. 855, 857–859 (2017).

237. 476 U.S. 79, 79–81 (1986).

238. 470 U.S. 298 (1985).

confession is inadmissible; the question was whether the first affected the admissibility of the second.[239] Elstad argued that he should have been told that the first confession was inadmissible before being asked to give a second.[240] Otherwise, he would have sensibly concluded "the cat was out of the bag" and that he may as well confess again after the *Miranda* warnings.[241] The Court disagreed and held that the police did not need to advise a suspect that an un-Mirandized statement was inadmissible before obtaining a second, properly Mirandized confession.[242]

The police conduct in *Elstad* had been, at worst, negligent; the officers mistakenly thought the first questioning was not custodial.[243] But what happens if the police *deliberately* use a two-step interrogation process, first securing a confession without warnings, then providing a set of warnings and getting the suspect to repeat the same confession they just gave? The Court took up this question in *Missouri v. Seibert*.[244] Officers had intentionally questioned Seibert without *Miranda* warnings, obtained a confession, then after a twenty-minute break, provided her with *Miranda* warnings, obtained a waiver, and resumed questioning that included confronting her with her pre-warning confession.[245] Justice Souter's plurality opinion reasoned that a second confession would be admissible only if the intervening *Miranda* warnings provided a reasonable person in the suspect's shoes with the opportunity to make an informed choice about whether to waive *Miranda*.[246] The plurality found that the compressed time frame, combined with the fact that the same officers conducted both interrogations, deprived Seibert of that opportunity.[247] Justice Kennedy, providing the crucial fifth vote, concluded that the second confession should be inadmissible if "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," as it was in *Seibert*.[248]

In the nineteen years between *Elstad* and *Seibert*—or for that matter, in the twenty-eight years between *Gregg* and *Seibert*—did police deliberately circumvent *Miranda* in a capital case by a ploy like the one used in *Seibert*? We cannot tell—and add none to our count—in part because *Elstad* likely deterred defense counsel from making such claims, and in part

239. *Id.* at 300.
240. *Id.* at 303.
241. *Id.*
242. *Id.* at 318.
243. *Id.* at 315.
244. 542 U.S. 600 (2004).
245. *Id.* at 604.
246. *Id.* at 615–17.
247. *Id.* at 611.
248. *Id.* at 622 (Kennedy, J., concurring).

because reported cases both before and after *Elstad* generally do not provide enough factual detail to determine whether the two-step confession sequence was intentional or accidental. But we suspect the number is significant. The police in *Seibert* had been trained to subvert *Miranda* by employing this two-step process, and the Court found that it was a "practice of some popularity."[249] Unlike the violation in *Elstad*, in other words, the violation in *Seibert* was neither inadvertent nor unintentional; the officers did precisely what they were trained to do.[250] This suggests that the practice was widespread.

2. *Crawford v. Washington*

Before *Crawford v. Washington* became the law,[251] the Supreme Court in *Ohio v. Roberts* had held that the Confrontation Clause did not bar the admission of statements of an unavailable declarant so long as the statements bear sufficient indicia of reliability—indicia that may be supplied either by a "firmly rooted hearsay exception" or, where there is no applicable exception, by "particularized guarantees of trustworthiness."[252] Almost a quarter century later, *Crawford* overruled *Roberts*.[253] Relying on the history of the Confrontation Clause, the Court held that when "testimonial" evidence was at stake, the Sixth Amendment demanded either cross-examination or both unavailability and a prior opportunity for cross-examination.[254] The Court postponed defining "testimonial" evidence, but noted that at a minimum, it included, among other things, police interrogation.[255] The following year, the Court in *Davis v. Washington* added that any product of interrogation aimed at establishing the facts of a past crime was testimonial for Sixth Amendment purposes, regardless of whether it was reduced to writing signed by the declarant or embedded in the memory of the interrogating officer.[256]

As is true with *Seibert* violations, it is difficult to determine how many pre-*Crawford* capital cases contain what would later become *Crawford* violations. We again suspect the number is significant. Given the ruling in *Roberts*, defense lawyers were unlikely to raise a Confrontation Clause

249. *Id.* at 609–11, 611 n. 3.
250. *Id.*
251. 541 U.S. 36, 69 (2004).
252. 448 U.S. 56, 82 (1980).
253. *Crawford*, 541 U.S. at 60–69.
254. *Id.* at 53–54.
255. *Id.* at 52.
256. 547 U.S. 813, 827 (2006).

objection to the admission of testimonial evidence of an unavailable declarant where a hearsay exception was applicable.

3. *Peña-Rodriguez v. Colorado*

Under the common law, jurors were not allowed to testify about their deliberations to impeach their verdict. The strong version of that common law "no-impeachment" rule, codified in Federal Rule of Evidence 606(b), generally prohibited any testimony relating to jury deliberations, permitting only three narrow exceptions: extraneous prejudicial information improperly brought to the jury's attention; outside influences improperly brought to bear on a juror; and mistakes made in entering the verdict on the verdict form.[257] A weaker version, often referred to as the "Iowa rule," forbade jurors from testifying regarding their own mental processes but permitted testimony recounting events that had occurred and comments that had been made during deliberations.[258]

In *Peña-Rodriguez*,[259] the Supreme Court held that the Sixth Amendment permits a juror to impeach the verdict whenever "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant."[260] The Court was quick to note, however, that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[261] Rather, the constitutionally-compelled exception exists only when the statement "tend[s] to show that racial animus was a significant motivating factor in the juror's vote to convict."[262] Moreover, *Peña-Rodriguez* explicitly commits the question of whether the threshold showing has been satisfied "to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence."[263]

For several reasons, the number of *Peña-Rodriguez* right too soon cases is impossible to assess. First, the standard is phrased in terms of the effect on *conviction*, and there is at least a question about whether and how it applies to sentencing phase deliberations. Perhaps that is a function of the fact that *Peña-Rodriguez* is a non-capital case. Assuming that the decision

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257. FED. R. EVID. 606(b)(2).

258. *See* Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195, 210–13 (1866) (announcing the "Iowa rule").

259. 137 S. Ct. 855 (2017).

260. *Id.* at 869.

261. *Id.*

262. *Id.*

263. *Id.*

applies to deliberations on sentencing, given everything we know about racial animus, we are confident that there are a *large* number of death sentences in which racial animus was a significant motivating factor.[264] However, in how many of those cases was animus expressed to other jurors? And in how many of those cases could the comment be discounted as an "offhand comment indicating racial bias or hostility,"[265] or the preliminary showing be dismissed as insufficient based on the reliability of the proffered evidence? And even if we could overcome these evidentiary obstacles, how do we identify the cases where the animus surfaced? Lawyers may not have raised these claims in jurisdictions with Rule 606(b) formulations, which is the majority rule. And judges, relying on the same rules, may have refused to permit the testimony (or admit the affidavits or subpoena the witnesses) that would have formed the basis for those claims. In short, we give up.

4. *Batson v. Kentucky* and Its Progeny

In 1965, *Swain v. Alabama* affirmatively sanctioned racially motivated peremptory challenges except where the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of" Black people "who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause," such that no Black people "ever serve on petit juries."[266] *Batson v. Kentucky*, decided twenty years after *Swain* and ten years after *Gregg*, holds that a prosecutor violates the Equal Protection Clause when he or she exercises even one peremptory challenge based upon the race of the juror.[267] *Batson* also prescribes a procedure to determine whether a violation has occurred. First, defense counsel must allege that the prosecutor struck jurors of the defendant's race for racially motivated reasons. If the trial court determines that a prima facie case of discrimination has been established, the burden of production shifts to the prosecution to supply race-neutral reasons for those strikes. Finally, considering all the circumstances, the trial court determines if the defendant has carried the burden of proof that at least one of the challenged strikes was racially motivated.[268]

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264. *See* Sheri L. Johnson et al., *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755, 765-67 (2011) (surveying criminal cases where there was evidence of racial epithets).

265. Peña, 137 S. Ct. at 869.

266. 380 U.S. 202, 223 (1965).

267. Batson v. Kentucky, 476 U.S. 79 (1986).

268. *Id.* at 80, 93–98.

At the time the Court decided *Batson*, only one death penalty state, California, had restricted the racially motivated exercise of the peremptory challenge. Its restriction was very weak.[269] Thus, in almost all the capital cases prosecuted in the decade between *Gregg* and *Batson*, the prosecutor would have been free to consider race in the exercise of his or her peremptory challenges. Moreover, *Batson* was held to not be retroactive,[270] so for all the cases with trials preceding it, there was no remedy for the discrimination it forbade.

How many prosecutors during that time period had struck African American jurors in capital cases with Black defendants? Lots. Some district attorney offices, such as those in Dallas County and Philadelphia, had official policies authorizing, or trainings encouraging, the practice.[271] In offices that had not publicized such a policy, it was both difficult to collect data showing the extent of the practice, and generally pointless to do so, given the nearly impossible evidentiary standard set out in *Swain*. But as Justice Marshall pointed out in his concurrence in *Batson*, evidence from cases where such data had been collected revealed that "[m]isuse of the peremptory challenge to exclude black jurors ha[d] become both common and flagrant."[272]

Moreover, it was not solely bias that would have driven such decisions. Practical considerations would have also motivated prosecutors who wanted the jury to get to a death sentence to excuse Black jurors. Black people have always been substantially less likely to support the death penalty than white people,[273] which means that prosecutors who suspected that white jurors would be more likely to impose the death penalty than Black jurors would have been correct. Without reason to believe racially motivated strikes were constitutionally forbidden, it would have been a rare

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269. People v. Wheeler, 22 Cal. 3d 258, 276, 278 (1978) (forbidding exercise of peremptory challenges solely based on group membership but establishing rebuttable presumption that strikes were not so based).

270. Allen v. Hardy, 478 U.S. 255, 256 (1986).

271. *See Batson*, 476 U.S. at 104 (1986) (Marshall, J., concurring) (presenting evidence that prosecutors "routinely strike black jurors" and further noting that from 1983 to 1984, Dallas County prosecutors peremptorily struck 405 out of 467 black jurors); "Former Philadelphia Prosecutor Accused of Racial Bias," *New York Times*, Apr. 3, 1997, https://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html (on file with the *Columbia Human Rights Law Review*) (describing training offered by former prosecutor).

272. *Id.* at 103.

273. *See, e.g.*, James D. Unnever et al., *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45, 50 (2008) ("African Americans and whites have quite divergent sensibilities about capital punishment, with Blacks decidedly less likely to support it."); Sishi Wu, *The Effect of Wrongful Conviction Rate on Death Penalty Support and How It Closes the Racial Gap*, AM. J. CRIM. JUST. 3–4 (2021) (presenting evidence from decades of polling that whites were more supportive of the death penalty than African Americans from 1933 through 2018).

prosecutor who would not have considered race in deciding which jurors to strike in such a case.

And there are likely yet more *Batson* right too soon cases. Many prosecutors would have struck African American jurors even in cases with white defendants. For four years after *Batson*, such prosecutors would have been free to do so. It was not until 1991, in *Powers v. Ohio*, that the Supreme Court broadened *Batson* to include any racially motivated exercise of the peremptory challenge, regardless of whether the challenged juror was the same race as the defendant.[274] Striking African American jurors based on their race in cases with white defendants was probably less common than striking them in cases with Black defendants, but it would not have been rare. The Court heard two such cases with white defendants in 1990.[275] We suspect that striking Black jurors in cases with white defendants was more common in capital cases simply because the relative African American opposition to the death penalty[276] would have provided additional motivation in capital cases.

Even more significant than the *Powers* addition to the *Batson* right too soon cases are those that followed from the Supreme Court decision in *Miller-El v. Dretke*, which again examined racial discrimination in jury selection.[277] In the nearly two decades between *Batson* and *Miller-El*, commentators agreed that *Batson* was widely unenforced and perhaps unenforceable.[278] The Supreme Court seemed unconcerned, and its decisions in the interim increased rather than decreased the burden of proving purposeful discrimination.[279] Then, in 2005, for the first time, the Supreme Court reversed a lower court's finding of no discriminatory motive.[280] In the course of doing so, it acknowledged the problem that commentators had long since identified:

> Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast

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274. Powers v. Ohio, 499 U.S. 400, 402 (1991).

275. *Id.* at 402–03; *Holland v. Illinois*, 493 U.S. 474, 476, 486–87 (1990) (rejecting white defendant's challenge to the removal of Black jurors on fair cross-section grounds).

276. *See supra* note 273.

277. Miller-El v. Dretke, 545 U.S. 231, 235 (2005).

278. Sheri Lynn Johnson, *Race and Recalcitrance: The* Miller-El *Remands*, 5 OHIO ST. J. CRIM. L. 131, 157–58 (2007).

279. *Hernandez v. New York* held that the prosecutor offered a race-neutral explanation for striking two Spanish-speaking Latinx prospective jurors by stating that he doubted their ability to defer to official translation of anticipated Spanish-language testimony. 500 U.S. 352, 369–70 (1991). *Purkett v. Elem* held that a race-neutral explanation tendered by the proponent of a peremptory challenge need not be persuasive, or even plausible. 514 U.S. 765, 767–68 (1995).

280. *Miller-El*, 545 U.S. at 265.

> *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*.[281]

Following this acknowledgement, the Supreme Court set forth evidence that lower courts had to consider in evaluating whether a facially neutral reason was pretextual. Among the indicia of discrimination that the Supreme Court identified were: the strength of the prima facie showing of racial discrimination, disparate questioning of Black and white jurors, any history of discrimination by the prosecutors, mischaracterizations of the record, and a comparison of the treatment of struck Black jurors with that of unchallenged white jurors.[282]

This last factor, often referred to as "comparative juror analysis,"[283] is enormously important. Although some state courts had already embarked upon comparative juror analysis, others had explicitly rejected it.[284] Many other courts were silent on the question, making it impossible to tell from their opinions whether a comparative juror analysis had been proffered, or whether a proffered analysis had been rejected. How many post-*Gregg* capital cases would have been altered had the Court set forth the *Miller-El* criteria when it decided *Batson*? We cannot say, though we know that in one capital case from the Fourth Circuit, the court explicitly rejected the comparative juror analysis later endorsed in *Miller-El*—and we only know that case because one of us was counsel.[285] We suspect there were many others.

B. Changes in the Application of the Sixth Amendment

In 1984, the Supreme Court first established the standard for judging whether counsel had provided constitutionally ineffective assistance. In *Strickland v. Washington*, the Court held that counsel was

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281. *Id.* at 239–40.

282. *Id.* at 241–66.

283. *Id.* at 241.

284. *See* Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201, 216–21 (2021) (assessing courts' application of comparative juror analysis); NAT'L JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES app. 4B (Elisabeth Semel ed., 2020) (assessing inconsistent application of the analysis by trial and state courts); *see also, e.g.*, Howard v. Moore, 131 F.3d 399, 408 (4th Cir. 1997) (en banc) (rejecting the suggestion that *Batson* requires such analysis); McDaniels v. Kirkland, 813 F.3d 770, 776 (9th Cir. 2015) (same).

285. *Howard*, 131 F.3d at 403 (listing Sheri Lynn Johnson as counsel for the appellant).

ineffective if they provided deficient performance that produced a reasonable probability of a different outcome.[286] Because of the multiplicity of standards prior to *Strickland*, it is impossible to calculate how many people were represented by ineffective counsel within the meaning of *Strickland* and later executed prior to that decision. The *Strickland* standard has not changed since 1984, but its application has changed in two important ways.

1. Scrutiny of Mitigation Investigations.

Not until the turn of the century did the Supreme Court find counsel to be ineffective in a modern-era capital case. Starting with *Williams v. Taylor*, [287] a line of cases found counsels' sentencing investigations prejudicially inadequate.[288] Those cases emphasized that counsels' strategic decisions are entitled to deference only when supported by adequate investigation and found the investigations in those cases inadequate. The Court also added an important gloss to *Strickland*'s prejudice prong, asking whether there was a reasonable likelihood that *even one of the twelve jurors* would have voted for life had they been aware of the unpresented mitigation.[289]

Would the enhanced scrutiny of counsels' sentencing phase investigations and the focus on the possible response of a single juror have made a difference in the death penalty cases adjudicated before *Williams*? Given the remarkable laxity of direct and habeas review of ineffective assistance of counsel claims in the "death belt," the answer must be yes. Commentators and several lower courts have viewed the post-*Williams*

286. 466 U.S. 668, 687–88 (1984). The standard assesses whether counsel's ineffectiveness rendered a conviction or death sentence a violation of the Sixth Amendment. *Id.* It defers to legitimate strategic choices by counsel, and considers the reasonable probability of a different outcome absent deficient performance. *Id.*

287. 529 U.S. 362 (2000).

288. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 534 (2003) ("The mitigating evidence counsel failed to discover and present in this case is powerful."); Rompilla v. Beard, 545 U.S. 374, 383 (2005) ("[T]he failure to examine Rompilla's prior conviction file fell below the level of reasonable performance."); Porter v. McCollum, 558 U.S. 30, 42 (2009) ("The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable.").

289. *Wiggins*, 539 U.S. at 537 (stating that had the sentencing jury been able to consider more on the "mitigating side of the scale," there was "a reasonable probability that at least one juror would have struck a different balance").

decisions as calling for both a more rigorous scrutiny of counsels' performance and a more relaxed measure of prejudice.[290]

The Fourth Circuit did not find counsel ineffective in a single capital case for more than two decades,[291] but it is hard to imagine that there were no worthy cases. Indeed, every death penalty lawyer we know from the Fourth Circuit can tell you about an ineffectiveness case they lost during that period that was at least as meritorious as *Williams* (or *Wiggins, Rompilla*, or *Porter*).[292] There are, however, at least two problems that make it difficult to count such cases as right too soon. The first is finding them, because the courts often rejected the claims without sufficient recounting of the facts to determine how they compared to the decided cases. The second is the comparison itself; because no precedent was overturned, it is impossible to say which cases were decided under the wrong standard. In addition, because the facts are so varied—both as to what the lawyer failed to do, and as to what was later uncovered—it is a judgment call whether possibly right too soon ineffective assistance cases are more or less meritorious than the decided cases.

Indeed, we are compelled to say that ineffectiveness claims as good or better than the claims in *Williams* and its progeny are still denied today, not idiosyncratically but systematically. The Fifth Circuit continues to adhere to the view that the brutality of a crime trumps any mitigation that might have been offered, despite several clear Supreme Court decisions rejecting this mode of analysis.[293] The Eleventh Circuit (among others) routinely

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290. *See generally* John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126 (2013); John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again":* Williams v. Taylor*,* Wiggins v. Smith*,* Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 129 (2007).

291. John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1498 (1999) (pointing to the Fourth Circuit as "the only circuit that has never found counsel to be ineffective in a capital case" since the Supreme Court set the standard for assessing ineffective assistance of counsel in *Strickland v. Washington*); *see also* John H. Blume, *The Dance of Death or (Almost) "No One Here Gets out Alive": The Fourth Circuit's Capital Punishment Jurisprudence*, 61 S.C. L. REV. 465, 473–75, 476–79 (2010) (explaining potential reasons why the Fourth Circuit had found ineffective assistance of counsel in only three cases over the previous thirty-three years, particularly the circuit's "very deferential approach").

292. *See, e.g.*, Drayton v. Moore, 168 F.3d. 481, No. 98–18, 1999 WL 10073, *2–3 (4th Cir. Jan. 12, 1999) (per curiam) (denying Drayton's claim of ineffective counsel, despite counsel's myriad failures to investigate and present mitigating evidence).

293. *See, e.g.*, Smith v. Quarterman, 471 F.3d 565, 576 (5th Cir. 2006) (holding that "in the light of brutal and senseless nature of the crime," it was unlikely that mitigating evidence counsel "should have discovered and presented would have made any difference").

rejects ineffective assistance of counsel if the evidence has any "double-edged" aspect,[294] again despite Supreme Court cases finding the failure to present clearly double-edged mitigation to be prejudicial.[295]

But one ineffective assistance of counsel right too soon case that we *can* count is that of Juan Garcia.[296] In 2017, the Supreme Court reversed Duane Buck's conviction based on the ineffectiveness of his counsel.[297] Buck's counsel had introduced an expert who concluded that Buck was unlikely to be dangerous in the future, but also opined that because he was African American, he was more likely to be dangerous than a white man.[298] The majority deemed the decision to call this expert deficient.[299] Given both the centrality of future dangerousness to the jury's sentencing phase inquiry and the pervasiveness of racial stereotypes concerning propensity to engage in violent behavior, it found the introduction of his testimony was reasonably likely to have altered the jury's sentence.[300] Yet the *same* expert that testified in *Buck* was called by defense counsel in Garcia's case, where he both testified that Garcia was unlikely to be dangerous in the future, and that Garcia's Latino ethnicity made him more likely to commit acts of violence in the future.[301] Garcia's postconviction claim of ineffective assistance (unlike Buck's) timely raised the same error, but it was denied,[302] and Garcia was executed.

2. Post-Conviction Counsel's Failure to Raise Trial Counsel's Ineffectiveness.

Under ordinary procedural default law, when a state court denies a claim relying on a well-established procedural rule, a federal court may not reach the merits of that claim.[303] Although cause may excuse such a default, *Coleman v. Thompson* decided that the errors of post-conviction counsel in failing to raise a claim do not constitute cause.[304] If state post-conviction

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294. *See, e.g.*, Evans v. Sec'y, Dept. of Corr., 703 F.3d. 1316, 1327 (11th Cir. 2013) (holding that it was not unreasonable for the state court to find that the failure to present double-edged mitigation evidence does not establish prejudice); Ponticelli v. Sec'y, Dept. of Corr., 690 F.3d 1271, 1296 (11th Cir. 2012) (same).
295. Williams v. Taylor, 529 U.S. 362, 396 (2000).
296. *See infra* Appendix XI.
297. Buck v. Davis, 137 S. Ct. 759, 780 (2017).
298. *Id.* at 767.
299. *Id.* at 775.
300. *Id.* at 776–77.
301. Garcia v. Stephens, 757 F.3d 220, 226–27 (5th Cir. 2014).
302. *Id.* at 226–29, *cert. denied*, 574 U.S. 1193 (2015).
303. Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977).
304. 501 U.S. 722, 752 (1991).

counsel fails to raise a claim, therefore, it is defaulted and lost forever. In *Martinez v. Ryan*,[305] the Supreme Court carved a very limited exception to *Coleman*. In those states where state law requires that claims alleging ineffective assistance of trial counsel be raised in state post-conviction proceedings, if state post-conviction counsel was himself ineffective in failing to raise the claim, the failure will be excused and the claim can be raised in federal habeas proceedings.[306]

There were many cases prior to *Martinez* where merits review of an ineffective assistance claim in federal habeas proceedings was precluded by procedural default. We could probably count how many such cases there were, but we would not be quite sure what we were counting. In contrast to the other right too soon cases we have identified, these too-soon-for-*Martinez* cases are not claims, the merits of which were recognized too late, but lost opportunities to litigate claims in another forum.[307] So in the end, we count none of these cases, though here too, there are likely a very large number of executed men who would not have been executed had *Martinez* been decided earlier.[308]

III. Responding to Potential Objections

A. Wrongfully Executed You Say?

Some might be skeptical and push back against our claim that the individuals we have identified as "dead right" were, in fact, wrongfully executed. When we presented our study, prior to publication, some argued that, for many of the people in our study, the death penalty remained at least a theoretical possibility. Those who presented evidence of intellectual disability, for instance, would have won no more than a hearing at which they

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305. Martinez v. Ryan, 566 U.S. 1, 2 (2012).

306. *Id.*

307. For an example of a claim that was "right too soon" for *Martinez*, *see* Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997). Tony Mackall was executed by the Commonwealth of Virginia in 1998. DPIC Execution Database.

308. *See, e.g.*, Trevino v. Thaler, 569 U.S. 413, 413 (2013) (holding that the *Martinez* exception to *Coleman* applies in Texas, where in theory, a claim of ineffective assistance of trial counsel could be raised on direct appeal, but the structure of the Texas system makes it virtually impossible to do so). Law professor David Dow has identified sixty Texas death penalty cases between *Coleman* and *Trevino* where the State of Texas invoked *Coleman* to bar merits consideration of an ineffective assistance claim. According to Professor Dow's calculations, forty-seven of these incarcerated persons were executed. The remaining thirteen are currently on death row. Professor Dow has provided us with his spreadsheet, which we have not independently verified. *See* email from David Dow, Professor of Law, Univ. Houston L. Ctr., to authors (Apr. 6, 2021) (on file with authors).

could prove the claim. Likewise, those who presented *Penry*, *Hitchcock*, *Ring*, and *Hurst* claims would have won no more than a new sentencing hearing. We reject this criticism.

Let us start with the easiest cases. The criticism is certainly not true of the right too soon juveniles; the Supreme Court created a categorical bar to execution that applied retroactively.[309] All persons who were under the age of eighteen at the time of their offense and who were on death row at the time of the Court's decision in *Roper v. Simmons* were removed without any additional proceedings, regardless of whether the incarcerated person had a pending challenge to their execution based on their youth.[310] It is also not true for the overwhelming majority of those we identified as being put to death in violation of *Atkins v. Virginia*. In most of those cases, the fact of intellectual disability was not disputed (and in many it was conceded). After *Atkins*, many people with strong claims of intellectual disability were removed from death row by agreement, and the success rate in cases where intellectual disability has been raised as a bar to execution was and remains high.[311]

As for the other individuals and categories of cases we have identified, we acknowledge that the constitutional rules created by the Supreme Court did not absolutely preclude the death penalty. Indeed, for those who eventually prevailed under *Penry*, *Hitchcock*, *Ring*, and *Hurst*, the relief was a new sentencing hearing. But the empirical evidence all but compels the conclusion that if the same relief had been extended to those who were right too soon, the vast majority of them would have been permanently removed from death row. We have hard numbers from a few states with very different death penalty pedigrees, but they tell the tale that needs telling. In Pennsylvania, 97% of the incarcerated persons sentenced to death who prevailed on appeal did not return to death row.[312] In South

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

310. *See supra* note 23 and accompanying text.

311. *See generally* John Blume, Sheri L. Johnson & Christopher Seeds, *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009); John H. Blume Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393 (2014). According to the Death Penalty Information Center, 135 people on death row have obtained relief under *Atkins* and been resentenced to life in prison. *Reversals Under Atkins*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/intellectual-disability/reversals-under-atkins [https://perma.cc/QZZ4-748C].

312. ROBERT BRETT DUNHAM, DEATH PENALTY INFO. CTR., PENNSYLVANIA POST-CONVICTION REVERSALS AND SUBSEQUENT DISPOSITIONS 48 (Apr. 23, 2018), https://files.deathpenaltyinfo.org/legacy/files/pdf/Pennsylvania_Subsequent%20Dispositions_2018_04-23.pdf [https://perma.cc/73UU-434X].

Carolina, 84.5% of the previously condemned people who prevailed at some point in the appellate process did not return to death row.[313] Most were resentenced to life, but others were sentenced to a term of years or acquitted.[314] Thus, in the overwhelming majority of cases, a new sentencing hearing means removal from death row.

B. Isn't This Just How the Common Law Works?

We have also heard the view that our observation is simply an unavoidable feature of the common law. Especially in a federal system, lower courts routinely reach diverse views on particular issues. Conflict comes with the territory, and until the Supreme Court steps in, it is unfair to say the lower courts were "wrong." For several reasons, we do not consider this a serious objection to the phenomenon we have described.[315]

First, the critique misses the point. The takeaway from our research is not that the common law works differently in capital cases than it does in other areas of the law. On the contrary, we think it works pretty much the same way in every area of the law. Yet because death is different, the fact that the common law works the same way exposes death row incarcerated persons to uniquely severe risks that other criminal defendants or civil plaintiffs do not face. The routine operation of the common law, in other words, cuts in favor of our position, not against it. In capital cases, the willingness of the Supreme Court to tolerate conflict among the lower courts

313. This total is based on calculations conducted by John H. Blume of every post-Furman death sentence in South Carolina (on file with authors).

314. John H. Blume & Lindsey Vann, *Forty Years of Death: The Past, Present and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 40 DUKE J. CONST. L. 183, 194–200 (2017).

315. We put aside that some jurists would maintain that the critique itself is nonsensical, since it assumes that the meaning of the Constitution changes over time. To them, the law of the Constitution is fixed and merely reveals itself in particular cases. Once the Supreme Court decides the meaning of a constitutional provision, contrary judgments by the lower courts (and by the Supreme Court itself) do not suddenly become mistaken; they have always been mistaken. From this perspective, the lower courts that upheld death sentences based on reasoning later rejected by the Court were indeed "wrong," regardless of the nature of the common law process in non-constitutional cases. However, such jurists almost certainly would reject the Eighth Amendment doctrine of "evolving standards of decency" that underlies many of the decisions we have reviewed, and given usual left-right allegiances, probably would disagree with most of the other doctrinal changes we have tracked.

is reason both for the Court to amend its practice, and for the public to withdraw its support.[316]

Second, if the critique maintains that petitioners never get the benefit of the constitutional rules that are announced after their cases become final, it is simply mistaken. The routine operation of the common law, at least in criminal cases, requires that courts give retroactive application to new substantive constitutional rules, precisely in order to vindicate the liberty interests of those imprisoned pursuant to rules later determined to be unconstitutional. In *Montgomery v. Louisiana*,[317] for instance, the Court held that its prior decision in *Miller v. Alabama*[318] was retroactive, and that Montgomery deserved the benefit of the rule even though his conviction had been final for more than four decades.[319]

Finally, and perhaps most importantly, the critique misapprehends the nature of our findings, particularly the persistent, willful refusal of some state and federal courts to follow clear Supreme Court precedent. As we have described above, the flaw in the Florida statute identified in *Hitchcock v. Dugger*[320] had been obvious at least since the Supreme Court decision in *Lockett v. Ohio*,[321] which held that a capital jury must be allowed to consider and give mitigating effect to non-statutory mitigating evidence. Over the next decade, the Court issued several decisions that reaffirmed *Lockett* and applied it to a widening set of circumstances.[322] Throughout this period, people incarcerated on death row in Florida repeatedly raised the increasingly obvious *Lockett* error in the lower state and federal courts.[323] Yet it was not until *Hitchcock* that the Supreme Court finally brought the

316. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long . . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

317. 136 S. Ct. 718, 723 (2016).

318. 567 U.S. 460 (2012).

319. *Montgomery*, 136 S. Ct. at 736; *see also* Teague v. Lane, 489 U.S. 288, 315 ("[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of *administration of justice with an even hand*.'") (emphasis added) (citations omitted).

320. 481 U.S. 393, 393 (1987).

321. 438 U.S. 586, 604 (1978).

322. *See* Eddings v. Oklahoma, 455 U.S. 104, 105 (1988) (explicitly applying the rule in *Lockett*); Skipper v. South Carolina, 476 U.S. 1, 1 (1986) (same).

323. *See supra* notes 163–168 and accompanying text; *see also* Songer v. State, 365 So. 2d 696, 700 (Fla. 1978) (England, C.J. and Adkins, Boyd, Overton, Sundberg, & Hatchet, JJ., concurring) (rejecting request for rehearing in view of *Lockett*); Peek v. State, 395 So. 2d 492, 496–97 (Fla. 1980) (rejecting the assertion that the death penalty statute limits consideration of mitigating circumstances in violation of *Lockett*).

lower courts to heel. By that time, Florida had killed more than a dozen people through a constitutional error that Justice Scalia, for a unanimous Court, believed "could not be clearer."[324] The Florida Supreme Court's fourteen-year resistance to *Ring v. Arizona* is even more striking, but not as mysterious as why the Supreme Court let the resistance go on so long.

The post-*Penry* experience in Texas is similar, though even more egregious. As we have described, the lower state and federal courts in Texas refused to apply the 1989 decision in *Penry v. Lynaugh* in good faith[325] until at least 2007, when the Supreme Court finally issued the trilogy of *Abdul-Kabir v. Quarterman,*[326] *Brewer v. Quarterman*,[327] and *Smith v. Texas*.[328] For years, the lower courts had resisted *Penry* either by limiting the case to its facts, or by appending additional requirements onto the rule, insisting for instance that the mitigating evidence be of a particular severity or duration. These restrictions had no basis in the law, as the Court eventually held in *Tennard v. Dretke*.[329] Yet the lower courts persisted, sending scores of incarcerated persons in Texas to their death though they had claims either indistinguishable from that of Johnny Penry, or indistinguishable from that of incarcerated persons who obtained relief after 2007.

In short, capital litigation—at least in Texas and Florida—is not like the typical common law process, which presupposes that lower courts will apply Supreme Court precedent in good faith. Had the Florida courts applied *Lockett* and the Texas courts applied *Penry* in good faith, rather than repeatedly ignoring or evading the constitutional rule, one hundred ten people would not have been executed, ninety-five in Texas and fifteen in Florida.[330] Nor do these illustrations exhaust the recalcitrance of the Florida and Texas courts. After *Hitchcock* there was *Hurst*; after *Penry* there was *Moore,* and then *Moore II.* The suggestion that this is just the way the common law works simply ignores this history and misses its significance.

IV. Implications

We have not paused to calculate the number of right too soon executions prior to *Furman*; that would be *all* of them. *Furman,* however, was supposed to be an overhaul of arbitrariness, racial bias, and caprice. Our estimate of the post-*Furman* "dead right" executions is at least 228. As we

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324. *Hitchcock*, 481 U.S at 398.
325. *See supra* Part I.B.2.
326. 550 U.S. 233, 233 (2007).
327. 550 U.S. 286, 286 (2007).
328. 550 U.S. 297, 297 (2007).
329. 542 U.S. 274, 284 (2004).
330. *See infra* Appendices IV, VI.

have explained, even that number likely excludes a legion of *Batson* errors as well as handfuls of other criminal procedure errors. What should we conclude from these numbers? What do we make of the fact that more than one in seven post-*Furman* executions would, by contemporary standards, be judged unconstitutional?

A. Can the "Laboratory of the States" Be Justified in Death Penalty Cases?

No, it cannot. A majority of the Court generalized in *Smith v. Robbins* that "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."[331] The Court takes this to mean that it should "evaluate state procedures one at a time, as they come before us . . . while leaving 'the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance.'" [332] Perhaps this is fine as a general rule (though we are not convinced even when it is "only" imprisonment that is at stake), but the costs are simply too high when an earlier decision would avoid the unconstitutional taking of a life by the State. These stakes call for consideration, at least grants of certiorari, sooner rather than later.

Moreover, absent *much* more vigilant enforcement from the federal courts, especially the Supreme Court, judicial resistance leaves a lot of defendants who have *already* been determined right, nonetheless, dead. This is especially so in Texas and Florida, where courts have persisted in defying one Supreme Court decision after another. And, unfortunately, though probably not coincidentally, most recalcitrance arises in states that execute the largest number of people, making the price of failure to vigorously enforce declared rights very high.

We acknowledge that there are other areas where the cost of Supreme Court delay in granting certiorari and laxness in enforcing new rules has terrible consequences. For instance, immigration cases, particularly asylum cases, have life and death consequences, and therefore would fall within our reasoning. Doubtless there are many other areas where the stakes are high, cases in which the mantra "death is different" also applies. We would welcome extending our protest to such cases.

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331. 528 U.S. 259, 275 (2000).
332. *Id.* (internal citations omitted).

B. But Does Any of This Matter?

Yes, Justice Kennedy retired, and yes, any observer would predict that Justice Kavanagh will vote against most additional procedural protections for the condemned that Justice Kennedy might have considered. Yes, Justice Ginsburg is no longer on the Court, and yes, an observer would think Justice Barrett would be much more resistant to the potential expansion of criminal procedural rights. So, it is fair to say there will not be many expansions, either death penalty-specific or generic criminal procedure, in the short run.

But we cannot be confident there will be none. Indeed, in all probability there will be some, albeit not as many as there were when Justices Kennedy and Ginsburg were still on the Court. It was Justice Scalia who authored *Crawford*, and his opinion commanded seven votes. He also wrote *Hitchcock* for a unanimous Court. More recently, Chief Justice Roberts authored *Buck*, which garnered six votes, and most recently, Justice Kavanaugh wrote the opinion in *Flowers v. Mississippi*,[333] where he was joined by all but Justices Thomas and Gorsuch. That is, even in the short run, there are likely to be some expansions. And in the longer run, there will be more liberal Justices, and more tinkering with the machinery of death.

C. W(h)ither the Death Penalty?

The death penalty is, in all but Texas, in one fashion or another, withering away. States that have not used the death penalty are abolishing it (Virginia!) or issuing moratoria, and states that have retained the death penalty are both executing fewer people and sentencing fewer to death. Given the "evolving standards of decency" that govern the Eighth Amendment, eventually, though likely still far down the road, the death penalty will be declared unconstitutional. At that point, all of the post-*Furman* executed, like all of the pre-*Furman* executed, will have been right too soon, "dead right".

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333. 139 S. Ct. 2228, 2232 (2019).

THE DEAD RIGHT DATABASE

APPENDIX I[334]

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

	Name
1.	Charles Rumbaugh
2.	James Roach[τλ]
3.	Jay Pinkerton
4.	Dalton Prejean[τλ]
5.	Johnny Garrett
6.	Curtis Paul Harris[*]
7.	Frederick Lashley
8.	Ruben Cantu
9.	Christopher Burger[λ]
10.	Joseph Cannon
11.	Robert Carter[τ]
12.	Dwayne Wright[τλ]
13.	Sean Sellers[λ]
14.	Douglas Thomas
15.	Steven Roach
16.	Glen McGinnis
17.	Shaka Sankofa[λ]
18.	Gerald Mitchell
19.	Napoleon Beazley[λ]
20.	T. J. Jones
21.	Toronto Patterson
22.	Scott Hain[λ]

334. DPIC Execution Database, death penalty info. ctr., filtered by "Juvenile" on Sept. 6, 2021, https://deathpenaltyinfo.org/executions/executiondatabase?filters%5Bjuvenile%5D=Yes [https://perma.cc/7LB6-ERDL].

τ Also a person with intellectual disability

λ These individuals raised the claim that eventually prevailed in Roper v. Simmons. See Prejean v. Blackburn, 743 F.2d 1091, 1098 (5th Cir. 1984); Burger v. Zant, 984 F. 2d 1129, 1131-32 (11th Cir. 1993) Graham (Shaka Sankofa) v. Lynaugh, 854 F. 2d 715, 717 (5th Cir. 1988); Sellers v. State, 809 P.2d 676 (Okla. Crim. App. 1991); Beazley v. Collins, 242 F. 3d 248, 268 (5th Cir. 2001); Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993); Wright v. Commonwealth, 427 S.E.2d 379 (Va. 1993); Roach v. Aiken, 474 U.S. 1039, 1039–40 (1986) (Brennan, J., dissenting from denial of certiorari).

∗ Also a Penry claim.

APPENDIX II

Atkins v. Virginia, 536 U.S. 304 (2002)

	Name	Citation
1.	Arthur Goode	Philip L. Fetzer, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S. C. L. REV. 419, 432 (1989).
2.	Ivon Ray Stanley	MICHAEL MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT 50–52 (Univ. Wisc. 1997).
3.	Morris Odell Mason	Philip L. Fetzer, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S. C. L. REV. 419, 432 (1989); HUMAN RTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION (2001).
4.	James Roach$^{\phi}$	Roach v. Martin, 757 F.2d 1463, 1475 (4th Cir. 1985).
5.	Jerome Bowden	Bowden v. State, 296 S.E.2d 576, 577 (Ga. 1982); Philip L. Fetzer, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S. C. L. REV. 419, 432 (1989).
6.	Willie Celestine	Celestine v. Blackburn, 750 F.2d 353, 357 (5th Cir. 1984).
7.	John Brogdon	State v. Brogdon, 426 So. 2d 158, 166 (La. 1983).
8.	Horace Dunkins$^{\approx}$	Dunkins v. Thigpen, 854 F.2d 394, 399-400 (11th Cir. 1988); CHARLES EDWARD ANDERSON, LOW-IQ MURDERERS, 75 A.B.A. 26 J. 26 (1989).
9.	Alton Waye	Waye v. Commonwealth, 251 S.E.2d 202, 210 (Va. 1979).
10.	Johnny Ray Anderson	Associated Press, *Killers Are Put to Death in Texas and Missouri*, N.Y. TIMES, May 17, 1990.
11.	Dalton Prejean$^{\phi\approx}$	Prejean v. Smith, 889 F.2d 1391, 1401–02 (5th Cir. 1989); Prejean v. Blackburn, 743 F.2d 1091, 1105–06, n. 5 (5th Cir. 1984).
12.	Billy White	HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 10 (2001).
13.	Nollie Lee Martin	HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 17 (2001).
14.	Ricky Lee Grubbs	AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH PENALTY DEVELOPMENTS IN 1992, at 19 (1993).

ϕ Also a juvenile

$\approx$ These individuals raised the claim that eventually prevailed in Atkins v. Virginia. See Charles Edward Anderson, Low-IQ Murderers, ABA J., Oct. 1989, at 26 (describing claim raised on behalf of Horace Dunkins); Prejean v. Smith, 889 F.2d 1391, 1401-02 (5th Cir. 1989); Middleton v. Evatt, 77 F.3d 469, 1996 WL 63038 (4th Cir. Feb. 14, 1996); State v. Middleton, 368 S.E.2d 457, 461 (1988).

15.	Cornelius Singleton	Singleton v. Thigpen, 806 F. Supp. 936, 938 (S. D. Ala. 1992); ACLU, BROKEN JUSTICE: THE DEATH PENALTY IN ALABAMA 10–11 (2005).
16.	Robert Wayne Sawyer	Brief for Petitioner at 7–8, 45–47, Sawyer v. Whitley, 945 F.2d 812 (1991) (No. 91-3658), 1991 WL 530829.
17.	William Henry Hance	Hance v. Zant, 114 S. Ct. 1392, 1392 (Blackmun, J., dissenting from den'l of cert and den'l of application for stay of execution)
18.	Mario Marquez	Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, (Marquez "had an IQ of 60 and the skills of a 7-year-old.").
19.	Girvies Davis	Davis v. Greer, 13 F.3d 1134, 1139 (7th Cir. 1994); Jill Smolowe, *Untrue Confessions*, TIME (May 22, 1995).
20.	Sylvester Adams	Brief for Petitioner 21–24, Adams v. Aiken, 965 F.2d 1306 (4th 1992) (No. 91-4000), 1991 WL 11686055.
21.	Walter Correll	Correll v. Commonwealth, 352 S.E.2d 352, 359 (Va. 1987); Correll v. Thompson, 63 F.3d 1279, 1291 (4th Cir. 1995).
22.	Luis Mata	State v. Mata, 916 P.2d 1035, 1049 (Az. 1996); HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 41–42 (2001).
23.	Frank Middleton[≈]	Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); State v. Middleton, 368 S.E.2d 457, 461 (1988).
24.	Terry Washington	Joan Thompson, *Retarded Man Who Killed Restaurant Manager Executed in Texas*, ASSOCIATED PRESS, May 6, 1997 ("Prosecutors, however, described Washington as only borderline or mildly retarded."); Dina R. Hellerstein, *What Do We Gain By Taking These Childlike Lives?*, N.Y. TIMES (Dec, 1 2000).
25.	Tony Mackall	Mackall v. Commonwealth, 372 S.E.2d 759, 768 (Va. 1988).
26.	Reginald Powell	Powell v. Bowersox, 112 F.3d 966, 970 (8th Cir. 1997); State v. Powell, 798 S.W.2d 709, 713 (Mo. 1990).
27.	RobertCarter[ϕ]	Carter v. Johnson, 131 F.3d 452, 461–62 (5th Cir. 1997).
28.	Dwayne Wright[ϕ]	Wright v. Angelone, 151 F.3d 151, 161 (4th Cir. 1998); Application for Executive Clemency for Dwayne Allen Wright at 1, Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998).
29.	Ronald Yeatts	Yeatts v. Commonwealth, 410 S.E.2d 254, 259–60 (Va. 1991).
30.	Raymond James Jones[*]	Jones v. Johnson, 171 F.3d 270, 275–76 (5th Cir. 1999).

∗ Also a Penry claim

31.	Charles Anthony Boyd*	Boyd v. Johnson, 167 F.3d 907, 909–11 (5th Cir. 1999).
32.	Willie Sullivan	Sullivan v. State, 636 A.2d 931, 946–47 (Del. 1994).
33.	Oliver Cruz	HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 33–34 (2001); Cruz v. Johnson, 228 F.3d 409 (5th Cir. 2000); Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000 (defense psychologist testified Cruz was intellectually disabled, which the state did not dispute).
34.	Wanda Jean Allen	Allen v. State, 871 P.2d 79, 99 (Okla. 1994); Allen v. Massie, 202 F.3d 281 (10th Cir. 2000).
35.	Robert Clayton	Clayton v. State, 892 P.2d 646, 655–56 (Ok. Crim. App. 1995).
36.	Carl Kelly*	Ex parte Kelly, No. 71,008-02, Application for Post-Conviction Writ of Habeas Corpus (Tex. Crim. App. 1993), 2-7.
37.	Ignacio Cuevas*	Petitioner's Brief Opposing the Trial Court's Recommendation Regarding His Petition for Writ of Habeas Corpus at 6, n.4, *Ex parte* Cuevas, No. 19, 807-02 (Tex. Crim. App. 1991).
38.	Barry Fairchild	Fairchild v. Lockhart, 744 F. Supp. 1429, 1435–86 (E.D. Ark. 1989).
39.	Alvaro Calambro	Calambro v. Second Judicial Dist. Ct., 964 P.2d 794, 803–05 (Nev. 1998) (Springer, C.J., dissenting).
40.	Charles Foster	Foster v. Ward, 182 F.3d 1177, 1188–89 (10th Cir. 1999).
41.	George Gilmore	Gilmore v. Delo, 908 F.2d 385, 387–88 (8th Cir. 1990).
42.	Ronald Fitzgerald	Fitzgerald v. Greene, 150 F.3d 357, 368 (4th Cir. 1998).

APPENDIX III

Atkins v. Virginia, 536 U.S. 304 (2002) &
Ex parte Briseño, 135 S.W.3d 1 (Tex. Crim. App. 2004)
Before Moore v. Texas, 137 S. Ct. 1039 (2017)

	Name	Citations
1.	Kia Johnson	*In re* Johnson, 343 F. 3d 403 (5th Cir. 2003).
2.	Jaime Elizalde	*Ex parte* Elizalde, No. WR-48,957-02, 2006 WL 235036 (Tex. Crim App. Jan. 30, 2006).
3.	Curtis Moore	*Ex parte* Moore, No. WR-42,810-03, 2007 WL 283113 (Tex. Crim. App. Jan. 31, 2007).
4.	Michael Rosales	Rosales v. Quarterman, 291 F. App'x. 558 (5th Cir. 2008).
5.	Robert Ladd	*Ex parte* Ladd, No. WR-42,639-03, 2015 WL 9594730 (Tex. Crim. App. Jan. 27, 2015).
6.	Michael Riley	*Ex parte* Riley, No. WR-39,238-02, 2007 WL 2660319 (Tex. Crim. App. Sept. 12, 2007).
7.	Elroy Chester	Chester v. Thaler, 666 F.3d 340 (5th Cir. 2011).
8.	Jamie McCoskey	McCoskey v. Thaler, No. CIV.A.H-10-0123, 2011 WL 2162176 (S.D. Tex. May 31, 2011) aff'd, 478 F. App'x 143 (5th Cir. 2012).
9.	Marvin Wilson	Wilson v. Thaler, 450 F. App'x. 369 (5th Cir. 2011).
10.	Ramiro Hernandez-Llanas	Hernandez v. Stephens, 537 F. App'x. 531 (5th Cir. 2013).
11.	Jeffrey Williams	Williams v. Quarterman, 293 F. App'x. 298 (5th Cir. 2013).
12.	James Clark	Clark v. Quarterman, 457 F. 3d 441 (5th Cir. 2006).
13.	Elkie Taylor	Taylor v. Quarterman, 498 F.3d 306 (5th Cir. 2007).

APPENDIX IV

Penry v. Lynaugh, 492 U.S. 302 (1989)

	Name	Citations
1.	Ignacio Cuevas[#]	Cuevas v. Collins, 754 F. Supp. 1127, 1134–35 (S.D. Tex. 1990), *aff'd sub nom.* 922 F.2d 242 (5th Cir. 1991).
2.	G. W. Green	G.W. Green v. State, 682 S.W. 2d 271, 289–90 (Tex. Ct. Crim. App. 1984); *Ex parte* Green, 820 S.W.2d 796 (Tex. Crim. App. 1991); Green v. Collins, 947 F.2d 1230 (5th Cir. 1991).
3.	Eddie Ellis	*Ex parte* Eddie Ellis, 810 S.W.2d 208, 211 (Tex. Crim. App. 1991).
4.	Justin Lee May	May v. Collins, 904 F.2d 228, 232 (5th Cir. 1990).
5.	Jesus Romero	Romero v. Lynaugh, 884 F.2d 871, 873 (5th Cir. 1989); Romero v. Collins, 961 F.2d. 1181 (5th Cir. 1992).
6.	Robert Black	Black v. State, 816 S.W.2d 350, 364 (Tex. Ct. Crim. App. 1991).
7.	James Demouchette	Demouchette v. Collins, 972 F.2d 651, 654 (5th Cir. 1992).
8.	Kavin Wayne Lincecum	Lincecum v. Collins, 958 F.2d 1271, 1282 (5th Cir. 1992).
9.	Darryl Elroy Stewart	Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984); Stewart v. Collins, 978 F.2d 199 (5th Cir. 1992).
10.	Leonel Torres Herrera	*Ex parte* Herrera, 819 S.W.2d. 528, 533 (Tex. Crim. App. 1991).
11.	Curtis Paul Harris[ɜ]	Harris v. Tex. Dep't. Crim. Just., 806 F. Supp. 627, 635 (S.D. Tex. 1992).
12.	Joseph Paul Jernigan	Jernigan v. Collins, 980 F.2d 292, 295 (5th Cir. 1992); Brief for Petitioner at 12–13, Jernigan v. Collins, 980 F.2d 292 (5th Cir. 1992) (No. 92-1415), 1992 WL 12127494.
13.	David Lee Holland	Holland v. Collins, 962 F.2d 417, 419 (5th Cir. 1992).
14.	Carl Eugene Kelly[#]	Kelly v. Collins, 862 F. 2d 1126, 1133, n. 12 (5th Cir. 1988); *Ex parte* Kelly, 832 S.W.2d 44, 46 (Tex. Crim. App. 1992).
15.	David Lee Holland	Wilkerson v. Collins, 950 F.2d 1054, 1061 (5th Cir. 1992).
16.	Johnny James	James v. Collins, 987 F.2d 1116, 1122 (5th Cir. 1993).
17.	Harold Amos Barnard	Barnard v. Collins, 958 F.2d 634, 635 (5th Cir. 1992).
18.	Richard Lee Beavers	Beavers v. State, 856 S.W.2d 429, 431 (Tex. Crim. App. 1993).
19.	Larry Norman Anderson	Anderson v. Collins, 18 F.3d 1208, 1223, n. 3 (5th Cir. 1994).
20.	Warren Euene Bridge	Bridge v. Collins, 963 F.2d 767, 770 (5th Cir. 1992).
21.	Jesse Dewayne Jacobs	Jacobs v. Scott, 31 F.3d 1319, 1327–28 (5th Cir. 1994).

Also a person with intellectual disability
ɜ Also a juvenile

22.	Clifton Charles Russell	Russell v. Collins, 998 F.2d 1287, 1291–92 (5th Cir. 1993).
23.	Jeffrey Dean Motley	Motley v. Collins, 18 F.3d 1223 (5th Cir. 1994).
24.	Billy Conn Gardner	Gardner v. Collins, 20 F.3d 1171 (5th Cir. 1994) (per curiam); Gardner v. State, 730 S.W.2d 675, 680. 703, n. 4 (Tex. Crim. App. 1987).
25.	Samuel Hawkins	Hawkins v. Collins, 980 F.2d 975 (5th Cir. 1992).
26.	Ronald Keith Allridge	Allridge v. Collins, 41 F.3d 213 (5th Cir. 1994).
27.	John Fearance	Fearance v. Scott, No.94-10686, 1995 WL 152759 (5th Cir. 1995).
28.	Harold Joe Lane	Lane v. Texas, 822 S.W.2d 35 (Tex. Crim. App. 1991).
29.	Esequel Banda	Banda v. State, 890 S.W.2d 42, 62 (Tex. Crim. App. 1994).
30.	Kenneth Granviel	*Ex parte* Granviel, 561 S.W.2d 503, 516 (Tex. Crim. App. 1978).
31.	Earnest Orville Baldree	*Ex parte* Baldree, 810 S.W.2d 213, 216 (Tex. Crim. App. 1991).
32.	Clifford Belyeu	Belyeu v. Scott, 791 S.W.2d 66, 72–78 (Tex. Crim. App. 1989).
33.	Clarence Allen Lackey	Lackey v. State, 638 S.W.2d 439, 455 (Tex. Crim. App. 1982); *Ex parte* Lackey, 819 S.W.2d 111, 129–136 (Tex. Crim. App. 1991) (May 29, 1991).
34.	Robert Madden	Madden v. State, 799 S.W.2d 683, 694 (Tex. Crim. App. 1990).
35.	Patrick F. Rogers	Petitioner's Brief Supporting Application for Certificate of Probable Cause to Appeal at 6–7, Rogers v. Scott, 70 F.3d 340 (5th Cir. 1995) (No. 94-41161); *Ex parte* Rogers, 819 S.W.2d 533, 534–37 (Tex. Crim. App. 1991) (Clinton, J., dissenting); Rogers v. Director, 864 F. Supp. 584 (E.D. Tex. 1994).
36.	Robert Nelson Drew	Drew v. Collins, 964 F.2d 411, 420 (5th Cir. 1992).
37.	Kenneth Bernard Harris	Harris v. Johnson, 81 F.3d 535, 538–39 (5th Cir. 1996).
38.	Irineo Montoya	Montoya v. Scott, 65 F.3d 405, 415–416 (5th Cir. 1995).
39.	James Carl Lee Davis	Davis v. Scott, 51 F.3d 457, 460–62 (5th Cir. 1995).
40.	Ricky Lee Green	Green v. Johnson, 116 F.3d 1115, 1126 n. 8 (5th Cir. 1997).
41.	Aaron Fuller	Fuller v. State, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992).
42.	Karla Faye Tucker	Tucker v. Johnson, 115 F.3d 276, 281–82 (5th Cir. 1997).
43.	Lesley Lee Gosch	Gosch v. Collins, No. SA-93-CA-731, 1993 WL 484624 (W.D. Tex. Sept. 15, 1993).
44.	Pedro Cruz Muniz	Muniz v. State, 851 S.W. 2d 238, 256 (Tex. Crim. App. 1993).
45.	Jonathan Nobles	Nobles v. State, 843 S.W.2d 503, 506–07 (Tex. Crim. App. 1992).
46.	Jeff Emery	Emery v. Johnson, 139 F.3d 191, 199–200 (5th Cir. 1997).

47.	John Glenn Moody	Moody v. State, 827 S.W.2d 875, 896–97 (Tex. Crim. App. 1992).
48.	Clifford Boggess	Boggess v. State, 855 S.W. 2d 645, 646–47 (Tex. Crim. App. 1991); Brief of Appellant at 4–7, Boggess v. State, 855 S.W. 2d 645 (Tex. Crim. App. 1991).
49.	George Cordova	Cordova v. Johnson, 993 F. Supp. 473, 500–505 (W. D. Tex. 1998).
50.	Clydell Coleman	Coleman v. State, 881 S.W.2d 344, 350–52 (Tex. Crim. App. 1994).
51.	Tyrone Fuller	Fuller v. State, 827 S.W.2d 919, 936–37 (Tex. Crim. App. 1992).
52.	Charles Anthony Boyd[#]	Boyd v. Johnson, 167 F.3d 907, 911 (5th Cir. 1999).
53.	James Otto Earhart	Earhart v. State, 823 S.W.2d 607, 632–33 (Tex. Crim. App. 1991).
54.	Raymond James Jones[#]	Jones v. Johnson, 171 F.3d 270, 275–76 (5th Cir. 1999).
55.	Domingo Cantu	Cantu v. State, 842 S.W.2d 667, 693 (Tex. Crim. App. 1992).
56.	David Martin Long	Long v. Johnson, 189 F.3d 469, 1999 WL 548729 (5th Cir. 1999), slip op. at 8–10; Reply Brief of Petitioner at 9–12, Long v. Johnson, (No. 98-10994), 1999 WL 33620629.
57.	Sammie Felder	Felder v. State, 848 S.W.2d 85, 100 (Tex. Crim. App. 1992).
58.	Earl Heiselbetz	Heiselbetz v. State, 906 S.W.2d 500, 508, 512–13 (Tex. Crim. App. 1995).
59.	Larry Keith Robison	Robison v. Johnson, 151 F.3d 256, 265–66 (5th Cir. 1998).
60.	Billy Hughes	Hughes v. Johnson, 191 F.3d 607, 626 (5th Cir. 1999).
61.	Cornelius Alan Goss	Goss v. State, 826 S.W.2d 162, 166–67 (Tex. Crim. App. 1992).
62.	John Albert Burks	Burks v. State, 876 S.W.2d 877, 910 (Tex. Crim. App. 1994).
63.	Orien Cecil Joiner	Joiner v. State, 825 S.W.2d 701, 706–07 (Tex. Crim. App. 1992).
64.	Oliver David Cruz	Cruz v. Johnson, 228 F. 3d 409, 2000 WL 1056141 (5th Cir. 2000).
65.	John T. Satterwhite	Satterwhite v. State, 858 S.W.2d 412, 425–26 (Tex. Crim. App. 1993).
66.	Tony Chambers	Chambers v. State, 866 S.W.2d 9, 27–28 (Tex. Crim. App. 1993).
67.	Garry Dean Miller	Miller v. Johnson, 200 F.3d 274, 289 (5th Cir. 2000).
68.	Jack Wade Clark	Clark v. State, 881 S.W. 2d 682, 700 (Tex. Crim. App. 1994).
69.	Miguel A. Richardson	Richardson v. State, 901 S.W.2d 941, 942 (Tex. Crim. App. 1994).
70.	Gerald Lee Mitchell	Mitchell v. Johnson, 252 F.3d 434 (5th Cir. 2001).

71.	Monty Allen Delk	Delk v. State, 855 S.W.2d 700, 709 (Tex. Crim. App. 1993).
72.	Rodolfo Baiza Hernandez	Rodolfo Hernandez, 248 F.3d 344, 349–50 (5th Cir. 2001).
73.	Jessie Joe Patrick	Patrick v. State, 906 S.W.2d 481, 493 (Tex. Crim. App. 1995).
74.	Craig Neil Ogan	Ogan v. Cockrell, 297 F.3d 349, 358–61 (5th Cir. 2002).
75.	Kevin Lee Zimmerman	Zimmerman v. State, 860 S.W.2d 89, 101–03 (Tex. Crim. App. 1993).
76.	David Ray Harris	*Ex parte* Harris, 825 S.W.2d 120, 121–23 (Tex. Crim. App. 1991); *id.* at 123–24 (Maloney, Clinton & Baird JJ., dissenting).
77.	John William Elliott	Elliott v. State, 858 S.W.2d 478, 487 (Tex. Crim. App. 1993).
78.	Bruce Charles Jacobs	Jacobs v. Cockrell, 54 F. App'x. 406 (5th Cir. 2002).
79.	Ivan Ray Murphy Jr.	Murphy v. Cockrell, 330 F.3d 353, 354 (5th Cir. 2003).
80.	Peter J. Miniel	Miniel v. Cockrell, 339 F.3d 331, 337–38 (5th Cir. 2003).
81.	Francis Elaine Newton	Newton v. State, 1992 WL 175742, *19 (Tex. Crim. App. Jun. 17, 1992).
82.	Preston Hughes III	*Ex parte* Hughes, 2012 WL 3848404 (Tex. Crim. App. Aug. 29, 2012); Hughes v. Quarterman, 530 F.3d 336, 339–345 (5th Cir. 2008).
83.	Troy Kunkle	*In re* Kunkle, 398 F.3d 683, 685 (5th Cir. 2005).
84.	Gregory Lynn Summers	Summers v. Dretke, 431 F.3d 861, 881–82 (5th Cir. 2005).
85.	Gary Johnson	Johnson v. Quarterman, 2007 WL 2891978 (S.D. Tex. 2007).
86.	Alvin Wayne Crane	*Ex parte* Crane, No. 21,094-C, Supplemental Brief in light of Graham v. Collins at 3–6 (Tex. Crim. App. Jan. 22, 1992).
87.	James Beathard	Petition for Writ of Habeas Corpus at 8–4, *Ex parte* Beathard, No. 22,106-01 (Tex. Crim. App. Nov. 6, 1990).
88.	Herbert James Boyle	Supplement to Application for Writ of Habeas Corpus at 14–16, *Ex parte* Boyle, No. 25,097-1, (Potter Cnty. Dist, Ct. Jul. 31, 1992).
89.	Joseph Cannon	Applicant's Motion for Rehearing at 3, Cannon v. Texas, No. 16-656-02 (Tex. Crim. App. Jan. 31, 1991).
90.	David Lee Herman	Herman v. Texas, No. 71-290, slip op. at 14–16 (Tex. Crim. App. Feb. 9, 1994); Appellant's Brief at 69-72, Herman v. Texas (No. 71-290) (Tex. Crim. App. May 1, 1992).
91.	David Spence	Petition for Post-Conviction Writ of Habeas Corpus at 35–41, Spence v. Texas, (No. 83-559), (Tex. Crim. App. Oct. 16, 1991).
92.	Kenneth Ray Ransom	Appellant's Brief at 140–145, Ransom v. Texas, (No. 69-339) (Tex. Crim. App. Jun. 13, 1986).
93.	David Stoker	Petition for Post-Conviction Writ of Habeas Corpus at 10–17, *Ex parte* Stoker, No. B9, 679, (242nd Dist. Ct., Hale County, Tex. May 17, 1991).

94.	James Allridge	Application for Post-Conviction Writ of Habeas Corpus at 54–66, *Ex parte* Allridge, (No. 23, 164-03), (Tex. Crim. App. Aug. 20, 2004).
95.	Vernon Sattiewhite	Sattiewhite v. Scott, 53 F.3d 1281, 1995 WL 295892 (5th Cir. 1995).

APPENDIX V

The Chilling Effect of Penry v. Lynaugh, 492 U.S. 302 (1989)

	Name	Citations
1.	Carlos DeLuna	DeLuna v. Lynaugh, 890 F.2d 720, 722–23 (5th Cir. 1989).
2.	Lawrence Lee Buxton	Buxton v. Collins, 925 F.2d 816, 822 (5th Cir. 1991).
3.	Johnny Frank Garrett	*Ex parte* Garrett, 831 S.W.2d 304, 305 (Tex. Ct. Crim. App. 1991).
4.	Freddie Lee Webb	Webb v. Collins, 2 F.3d 93, 95 (5th Cir. 1993).
5.	James A. Collins	Crank v. Collins, 19 F.3d 172, 176 (5th Cir. 1994).
6.	Mario Marquez	Marquez v. Collins, 11 F.3d 1241, 1248 (5th Cir. 1994).
7.	Fletcher Thomas Mann	Mann v. Scott, 41 F.3d 968 (5th Cir. 1994).
8.	Carl Johnson	Johnson v. Scott, 68 F.3d 470 (5th Cir. 1995).
9.	Billy Joe Woods	Woods v. Johnson, 75 F.3d 1017, 1033 (5th Cir. 1996).
10.	Bruce Edwin Callins	Callins v. Collins, 998 F.2d 269, 275 (5th Cir. 1993).
11.	Richard Wayne Jones	Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992).
12.	Gary Wayne Etheridge	Etheridge v. Johnson, 49 F. Supp. 2d 963, 985–87 (S. D. Tex. 1999).
13.	Robert Excell White	White v. Texas, No. F99-101R-74, Pet. for Post-Conviction Relief at 164-166 (199th Dist. Ct. of Collin County, Tex. Jun. 23, 1994).

APPENDIX VI

Hitchcock v. Dugger, 481 U.S. 393 (1987)

	Name	Citations
1.	John Spenkelink	Spinkellink v. Wainwright, 578 F.2d 582, 609–12 (5th Cir. 1978).
2.	Robert Sullivan	Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983).
3.	Anthony Antone	Antone v. Strickland, 706 F.2d 1534, 1537–38 (11th Cir. 1983).
4.	Arthur Goode	Goode v. Wainwright, 704 F.2d 593, 601–02 (11th Cir. 1983).
5.	James Adams	Adams v. Wainwright, 709 F.2d 1443, 1448–49 (11th Cir. 1983).
6.	Carl Shriner	Shriner v. Wainwright, 715 F.2d 1452, 1457 (11th Cir. 1983).
7.	David Washington	Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982); 10 F.R. Evid. Serv. 338–907.
8.	Ernest Dobbert	Dobbert v. Strickland, 718 F.2d 1518, 1523–24 (11th Cir. 1983).
9.	James Henry	Henry v. Wainwright, 721 F.2d 990, 994 (11th Cir. 1983).
10.	Timothy Palmes	Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984).
11.	James Raulerson	Raulerson v. Wainwright, 732 F.2d 803, 806–08 (11th Cir. 1984).
12.	Marvin Francois	Francois v. State, 423 So. 2d 357, 361 (11th Cir. 1982).
13.	Daniel Thomas	Thomas v. Wainwright, 767 F.2d 738,744–47 (11th Cir. 1985).
14.	David Funchess	Funchess v. Wainwright, 772 F.2d 683, 690–91 (11th Cir. 1985).
15.	Ronald Straight	Straight v. Wainwright, 772 F.2d 674, 677 (11th Cir. 1985).

APPENDIX VII

Ring v. Arizona, 536 U.S. 584 (2002)

	Name	Citations
1.	Donald Eugene Harding	State v. Harding, 670 P.2d 383, 398 (Ariz. 1983).
2.	John George Brewer	State v. Brewer, 826 P.2d 783, 794 (Ariz. 1992).
3.	James Dean Clark	State v. Clark, 616 P.2d 888, 895 (Ariz. 1980).
4.	Jimmie Wayne Jeffers	Jeffers v. Lewis, 38 F.3d 411, 419 (Ariz. 1994).
5.	Luis Morine Mata	State v. Mata, 609 P.2d 48, 56 (Ariz. 1980).
6.	Jose Jesus Ceja	State v. Ceja, 565 P.2d 1274, 1276 (Ariz. 1977), 612 P.2d 491, 497 (Ariz. 1980).
7.	Douglas Edward Gretzler	State v. Gretzler, 659 P.2d 1, 15 (Ariz. 1983).
8.	Robert Wayne Vickers	State v. Vickers, 768 P.2d 1177, 1188 (Ariz. 1989).
9.	Michael Kent Poland	State v. Poland, 698 P.2d 207 (Ariz. 1985).
10.	Anthony Lee Chaney	State v. Chaney, 686 P.2d 1265 (Ariz. 1984).
11.	Patrick Gene Poland	State v. Poland, 698 P.2d 183 (Ariz. 1985), aff'd, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986).
12.	Donald Jay Miller	State v. Miller, 921 P.2d 1151 (Ariz. 1996).
13.	Robert Charles Comer	State v. Comer, 799 P.2d 333 (Ariz. 1990).
14.	Jeffrey Timothy Landrigan	State v. Landrigan, 859 P.2d 111 (Ariz. 1993).
15.	Eric John King	State v. King, 883 P.2d 1024 (Ariz. 1994).
16.	Donald Edward Beaty	State v. Beaty, 762 P.2d 519 (Ariz. 1988).
17.	Richard Lynn Bible	State v. Bible, 858 P.2d 1152 (Ariz. 1993).
18.	Thomas Paul West	State v. West, 862 P.2d 192 (Ariz. 1993).
19.	Robert Charles Towery	State v. Towery, 920 P.2d 290 (Ariz. 1996).
20.	Samuel Villegas Lopez	State v. Lopez, 857 P.2d 1261 (Ariz. 1993).
21.	Richard Dale Stokley	State v. Stokley, 898 P.2d 454 (Ariz. 1995).
22.	Edward Harold Schad, Jr.	State v. Schad, 788 P.2d 1162 (Ariz. 1989), aff'd, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).
23.	Paul Ezra Rhoades	State v. Rhoades, 822 P.2d 960, 976 (Idaho 1991).

APPENDIX VIII

Hurst v. Florida, 577 U.S. 92 (2016)

	Name	Citations
1.	Thomas Provenzano	Provenzano v. State, 497 So. 2d 1177 (Fla. 1986).
2.	Linroy Bottoson	Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002).
3.	Johnny Robinson	Robinson v. State, 865 So. 2d 1259 (Fla. 2004).
4.	Clarence Hill	Hill v. State, 921 So. 2d 579 (Fla. 2006).
5.	Arthur Rutherford	Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2004).

6.	Ángel Díaz	Diaz v. State, 945 So. 2d 1136 (Fla. 2006).
7.	Wayne Tompkins	Tompkins v. Crosby, 895 So. 2d 1068 (Fla. 2004).
8.	Martin Grossman	Grossman v. Crosby, 359 F. Supp. 2d 1233 (M.D. Fla. 2005).
9.	Manuel Valle	Valle v. State, 70 So. 3d 530 (Fla. 2011).
10.	Manuel Pardo	Pardo v. State, 941 So. 2d 1057 (Fla. 2006).
11.	Larry Mann	Mann v. Moore, 794 So. 2d 595 (Fla. 2001).
12.	William Van Poyck	Van Poyck v. State, 116 So. 3d 347 (Fla. 2013).
13.	Darius Kimbrough	Kimbrough v. State, 886 So. 2d 965 (Fla. 2004).
14.	Paul Howell	Howell v. State, 133 So. 3d 511 (Fla. 2014).
15.	Robert Henry	Henry v. State, 937 So. 2d 563 (Fla. 2006).
16.	Chadwick Banks	Banks v. State, 842 So. 2d 788 (Fla. 2003).
17.	Johnny Kormondy	Kormondy v. State, 845 So. 2d 41 (Fla. 2003).
18.	Jerry Correll	Correll v. State, 184 So. 3d 478 (Fla. 2015).
19.	Mark Asay	Asay v. State, 210 So. 3d 1 (Fla. 2016).
20.	Michael Lambrix	Lambrix v. State, 217 So. 3d 977 (Fla. 2017).
21.	Eric Branch	Branch v. State, 952 So. 2d 470 (Fla. 2006).

APPENDIX IX
Clemons v. Mississippi, 494 U.S. 738 (1990)

	Name	Citations
1.	Jimmy Gray	Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982).
2.	Edward Johnson	Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986).
3.	Connie Evans	Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987).

APPENDIX X
Uncategorized

	Name	Citations
1.	Pedro Medina [ω]	*In re* Medina, 109 F.3d 1556 (11th Cir. 1997).

APPENDIX XI
Other Criminal Procedure Errors

	Name	Citations
1.	Ronnie Howard [λ]	Howard v. Moore, 131 F.3d 399 (4th Cir. 1997).
2.	Juan Garcia[γ]	Garcia v. Stephens, 757 F.3d 220 (5th Cir. 2014).

ω Disapproved in Stewart v. Martinez-Villareal
λ Abrogated by Miller El v. Dretke
γ Disapproved by Buck v. Thaler