

THE DEATH PENALTY: ETHICS AND ECONOMICS IN MISSISSIPPI

*Valena Elizabeth Beety**

INTRODUCTION	1437
I. THE DEATH PENALTY IN MISSISSIPPI	1441
II. OPPOSITION TO THE DEATH PENALTY FROM THE BENCH.....	1442
III. POLITICAL CONTROVERSY AND THE DEATH PENALTY.....	1445
IV. ECONOMICS: BUDGET PROBLEMS	1450
<i>A. Funding the Death Penalty</i>	1452
V. STATES ABOLISHING THE DEATH PENALTY BECAUSE OF THE COST.....	1455
VI. TWO CASES HIGHLIGHTING PROBLEMS WITH THE DEATH PENALTY IN MISSISSIPPI: <i>WOODWARD V. STATE AND BREWER V. STATE</i>	1459
<i>A. Woodward v. State: Ineffective Assistance of Counsel</i>	1461
<i>B. Brewer v. State: Newly Discovered DNA Evidence of Innocence</i>	1465
CONCLUSION	1470

INTRODUCTION

Five of the original nine Supreme Court Justices who reinstated the death penalty in the United States after it had been abolished four years prior—a majority—vocally opposed the death

* Adjunct Professor of Law, The University of Mississippi School of Law; Senior Staff Attorney, Mississippi Innocence Project. Associate Professor Designate, West Virginia University College of Law. J.D., University of Chicago, B.A., University of Chicago. I would like to thank Nora Niedzielski-Eichner and Andrew Colom for their helpful comments on prior drafts. I would also like to thank Jack Williams and Nina Rifkind for their heartfelt representation of Paul Woodward, for discussing his case with me, and for allowing me access to his trial transcripts. Thank you finally to Will Berry for his insights on the death penalty.

penalty in all circumstances by the time they left the bench.¹ Two of the three Justices who wrote the primary opinion in *Gregg v. Georgia*—the pivotal case reinstating the death penalty—came to the conclusion later in their careers that the decision was wrong.² One should note that in both instances the Justices' change in perspective happened as they were in the twilight of their careers, although whether the change was occasioned by the wisdom of decades of experience or the removal of political pressure is impossible to say.

Now, legislative policies surrounding the death penalty may be on the verge of a similar shift due to an essential political reality: the economy. At the beginning of the financial crisis in 2007, New Jersey had spent \$253 million over a twenty-five-year period on costs associated with the death penalty—a time period during which the State executed not a single prisoner.³ That same year, New Jersey became the first state in forty years to legislatively repeal the death penalty.⁴ In March 2009, New Mexico Governor Bill Richardson, a proponent of the death

¹ See generally Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783 (2010). Of the Justices who took part in the *Gregg v. Georgia*, 428 U.S. 153 (1976), decision, the following supported the reinstatement of the death penalty: Justices Stewart, Powell, and Stevens (judgment of the Court); Justices White and Rehnquist, and Chief Justice Burger (concurrence); Justice Blackmun (concurrence). Justices Brennan and Marshall dissented. Of these Justices, Justices Brennan, Marshall, Powell, Stevens, and Blackmun all opposed the death penalty by the end of their lives.

² See *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring))); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994) ("I have come to think that capital punishment should be abolished. . . . [because it] serves no useful purpose." (quoting Justice Lewis F. Powell, Jr.)).

³ Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on our Nation's "Evolving Standards of Decency"*, 15 MICH. J. RACE & L. 223, 249 n.19 (2009).

⁴ *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Apr. 11, 2012).

penalty, signed a bill to eliminate the death penalty in his state.⁵ Governor Pat Quinn of Illinois signed into law a bill abolishing the death penalty in March 2011, making Illinois the sixteenth state without the death penalty.⁶ A central concern for these politicians and legislatures was the large, and largely unjustifiable, cost of the death penalty in the face of massive statewide budget cuts.⁷

Those costs are likewise apparent in Mississippi, a state that houses fifty-three people on death row, and has executed eighteen people since the death penalty was reinstated in 1977.⁸ Between 1989 and 2002, no individuals were executed in Mississippi, although the State continued to provide high-security separate housing for the death row inmates, incurring additional costs.⁹ More recently, three men were executed in Mississippi in 2010; two men were executed in 2011—with a third scheduled and deferred; and three men were executed in the spring of 2012.¹⁰

Even in Mississippi, the death penalty is finding new opponents in the midst of a difficult economy. In 2011, House Bill 127 was introduced in the Mississippi legislature to place a

⁵ Elaine de Leon, *Money, Morality, and Repealing the Death Penalty*, RELIGION & ETHICS NEWSWEEKLY (Apr. 24, 2009), <http://www.pbs.org/wnet/religionandethics/episodes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/>.

⁶ Ray Long, *Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life*, CHI. TRIB. (Mar. 9, 2011, 11:59 AM), http://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html.

⁷ See, e.g., Tom Kacich, *Death Penalty in Quinn's Hands*, NEWS-GAZETTE (Jan. 12, 2011, 9:00 AM), <http://www.news-gazette.com/news/courts-police-and-fire/2011-01-12/death-penalty-quinn-hands.html> (quoting Sen. Dan Duffy, R-Lake Barrington: "We have spent over \$100 million of taxpayer money defending and prosecuting death row cases. The death penalty does not make our society safer, I believe. It has been an ineffective and expensive use of our scarce resources."); Mary Massingale, *House Narrowly Approves Abolition of Death Penalty*, ILL. STATEHOUSE NEWS (Jan. 6, 2011), <http://illinois.statehousenewsonline.com/4846/house-narrowly-approves-abolition-of-death-penalty> (quoting Rep. Pat Verschoore, D-Milan: "I was on both sides of this issue. But then you think of the potential cost savings of this bill, and the state needs all of the savings we can get . . .").

⁸ *Death Row General Facts*, MISS. DEP'T OF CORR., http://www.mdoc.state.ms.us/death_row.htm (last visited Apr. 11, 2012).

⁹ *Mississippi and the Death Penalty*, MISS. DEP'T OF CORR., http://www.mdoc.state.ms.us/mississippi_and_the_death_penalt.htm (last visited Apr. 11, 2012).

¹⁰ *Id.*

moratorium on the death penalty.¹¹ Judicially, in a similar vein to Justice Stevens, Mississippi Supreme Court Justice Oliver Diaz voiced an eloquent opposition to the death penalty in all cases before leaving the bench in 2008.¹² One can see why cost is becoming more and more of a consideration; facing revenue shortfalls even more dire than much of the country, Mississippi made major budget cuts in 2010 and 2011 and remains the state with the lowest income per capita in the nation.¹³ As budget cuts for the state ranged from twelve percent to seventeen percent across the board, the massive cost of the correctional bureaucracy in the state had popular Governor Haley Barbour on the defensive over his last years in office.¹⁴

When Barbour was directly challenged about using discretionary funds for the Mississippi Department of Corrections (MDOC) instead of other areas, Barbour retorted: “Why am I doing that? So some convict doesn’t move next door to your momma.”¹⁵ While this type of public safety rhetoric is often used to justify prison spending, the substantial savings the state would receive from eliminating the death penalty would not release a single convict.

The exception, of course, is the recent freeing of an innocent man sentenced to death in Mississippi, which has started a different kind of momentum against the death penalty in the state.¹⁶

¹¹ H.R. 127, 2011 Reg. Sess. (Miss. 2011), available at <http://billstatus.ls.state.ms.us/documents/2011/pdf/HB/0100-0199/HB0127IN.pdf> (introduced by Rep. John Mayo).

¹² *Doss v. State*, No. 2007-CA-00429-SCT, 2008 Miss. LEXIS 608, at *38 (Miss. Dec. 11, 2008) (Diaz, P.J., dissenting) (opinion withdrawn on grant of rehearing Oct. 22, 2009).

¹³ *Per Capita Personal Income by State, 1990 to 2011*, U.N.M., BUREAU OF BUS. & ECON. RES., <http://bber.unm.edu/econ/us-pci.htm> (last visited Apr. 11, 2012); *News Release: GDP by State*, U.S. BUREAU OF ECON. ANALYSIS (June 7, 2011, 8:30 AM), http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm.

¹⁴ Molly Parker, *Early Paroles Possible in Miss. Budget Crunch*, CLARION-LEDGER, Mar. 1, 2010, at A1.

¹⁵ Valena Beety, *The Cost of Death*, JACKSON FREE PRESS (July 14, 2010), http://www.jacksonfreepress.com/index.php/print_view/39077.

¹⁶ Press Release, Innocence Project, Two Innocent Men Cleared Today in Separate Murder Cases in Mississippi, 15 Years After Wrongful Convictions (Feb. 15, 2008), http://www.innocenceproject.org/Content/Two_Innocent_Men_Cleared_Today_in_Separate_Murder_Cases_in_Mississippi_15_Years_after_Wrongful_Convictions.php.

This Article posits that Mississippi's growing willingness to rethink the death penalty in its current financial and penal situation is indicative of changes in the death penalty dialogue nationally, changes that have revived debate about the death penalty on both economic and ethical grounds. Part I reviews the history of the death penalty in Mississippi to provide a basis for comparison with its current status in the state. Part II examines the actions of court justices in ultimately opposing the death penalty, whether these decisions were economically or ethically influenced. Part III examines the political climate surrounding the death penalty and prison growth in general in Mississippi, and how that climate is changing under economic pressures. Part IV addresses the cost of the death penalty, particularly in the face of budgetary constraints. Part V compares Mississippi to other states in similar circumstances.

Lastly, Part VI examines the cases of Paul Woodward and Kennedy Brewer, two men sentenced to death in Mississippi. Paul Woodward was executed in 2010, while Kennedy Brewer was proven innocent and exonerated in 2008. These two cases highlight the indispensability of post-conviction counsel, and the necessary costs of the extensive appeals process in death penalty cases. These Mississippi cases reveal the economic necessity of fully funding counsel and evidence preservation and analysis for capital cases, underscoring how the cost of the death penalty will always intersect with the ethics of the institution.

I. THE DEATH PENALTY IN MISSISSIPPI

Like the rest of the country in the wake of the *Furman v. Georgia* decision, Mississippi suspended the death penalty in 1972.¹⁷ Four years later, the Mississippi Supreme Court held that if capital trials have a bifurcated sentencing proceeding, and incorporate aggravating and mitigating circumstances into the jury's decision as to how the defendant shall be sentenced, then capital cases, and the death penalty, could proceed in Mississippi.¹⁸ The court's opinion was in response to *Gregg v. Georgia*, a Supreme Court case confirming that capital trials could

¹⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁸ *Jackson v. State*, 337 So. 2d 1242, 1256 (Miss. 1976).

follow the bifurcated trial standard with guided discretion, creating one trial to determine guilt or innocence and one trial to determine whether to implement the death penalty, such that the trials were fair and constitutional.¹⁹ The Mississippi legislature acted promptly to pass legislation comporting with the court decisions, thus reinstating the death penalty in Mississippi with statutes that remain in effect and fairly unchanged today.²⁰

Changes in the death penalty in Mississippi have been primarily due to U.S. Supreme Court cases that require compliance with further protections. For example, after the Court decided that the execution of a mentally handicapped prisoner violates the Eighth Amendment and constitutes cruel and unusual punishment, Mississippi followed by amending its own standards.²¹ Mississippi likewise followed suit when the Court banned the death penalty for juvenile offenders in 2005, at a time when Mississippi had five men on death row who had been sentenced as juveniles.²² Otherwise, the standard of review for death sentences is largely the same now as it was in 1976: “heightened scrutiny,” where “all doubts are to be resolved in favor of the accused because what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.”²³ The death penalty itself has not been found to be cruel and unusual punishment, nor has the method implemented in Mississippi, death by lethal injection.²⁴

II. OPPOSITION TO THE DEATH PENALTY FROM THE BENCH

In 2008, at the age of eighty-eight, Justice John Paul Stevens publicly stated that his decision in *Gregg* had been wrong. In

¹⁹ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976); *see also Jackson*, 337 So. 2d at 1256.

²⁰ *Jackson*, 337 So. 2d at 1256.

²¹ *Mitchell v. State*, 886 So. 2d 704, 712 (Miss. 2004).

²² *Juvenile Offenders Who Were on Death Row*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/juvenile-offenders-who-were-death-row> (last visited Apr. 11, 2012). Ronald Chris Foster’s execution was suspended two days before it was scheduled to take place by Governor Ronnie Musgrove who anticipated the U.S. Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005). *See Foster v. State*, 848 So. 2d 172, 173 (Miss. 2003) (en banc).

²³ *Bennett v. State*, 990 So. 2d 155, 158 (Miss. 2008) (internal quotations omitted); *Chamberlin v. State*, 989 So. 2d 320, 330 (Miss. 2008); *Havard v. State*, 988 So. 2d 322, 346 (Miss. 2008).

²⁴ *Bennett*, 990 So. 2d at 161; *Branch v. State*, 882 So. 2d 36, 80 (Miss. 2004).

simple words, he wrote the death penalty is “[a] penalty with such negligible returns to the State” that it necessarily is “patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”²⁵

The three Justices who crafted the plurality opinion supporting the death penalty statute in *Gregg v. Georgia* were Potter Stewart, Lewis E. Powell, and John Paul Stevens.²⁶ Both Powell and Stevens eventually turned away from the death penalty, in all its forms.²⁷ Justice Blackmun’s later change led to what has been described as a powerful “cumulative effect of Powell, Stevens, and Blackmun’s conversions,” where “three Justices together formed half of *Furman*’s dissenting block and two-thirds of *Gregg*’s plurality reviving the modern American death penalty as we now know it.”²⁸ Stevens’s colleagues on the bench for the *Gregg* decision included Justices Brennan, Marshall, and Blackmun, all of whom renounced the power of the State to execute individuals.²⁹ Once openly opposed to the death penalty, Justices Brennan, Marshall, and Blackmun³⁰ then proceeded to dissent from every affirmance, every denial of certiorari, and every denial of a stay of execution in the capital cases brought before them.³¹

²⁵ *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

²⁶ 428 U.S. 153, 154 (1976).

²⁷ See generally Semel, *supra* note 1.

²⁸ Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 552 (2009).

²⁹ See generally Semel, *supra* note 1.

³⁰ Justice Blackmun’s rejection of the death penalty came in 1994, much later than Brennan and Marshall’s, when he famously stated, “From this day forward, I no longer shall tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Blackmun’s reasoning rested on the lack of meaningful federal oversight, and the inconsistency of the application of the death penalty. *Id.* at 1158-59.

³¹ Semel, *supra* note 1, at 792 n.31 (“Justice Marshall began each of his post-*Gregg* capital punishment opinions with the following phrase: ‘Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments’” (quoting Steiker, *supra* note 28, at 526)); see also *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Brennan, J., concurring) (“Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments”). In almost every death penalty decision following *Callins*, Justice Blackmun included the phrase: “Adhering to my view that the death penalty cannot be imposed fairly within the

Yet each of these Justices renounced the death penalty individually, not as a unit, nor as a common voice from the Court. Their voices came at different times, with different motivations, arguably diminishing their force and impact. In the intervening time, *Gregg* served as “the beginning of a long line of capital cases in which a majority of Justices made it increasingly clear that they simply were not interested in the social realities of capital punishment.”³² The Justices who have sat on the bench since *Gregg* have, with some exceptions, been disinclined to engage with the alleged problems of racism and innocence in capital punishment.³³

Stevens, however, who in 1976 turned the tide in favor of the death penalty by joining the plurality decision in *Gregg*, may have turned the tide again by his recently vocalized opposition to the death penalty.³⁴ Judge Boyce Martin of the Sixth Circuit Court of Appeals, in a 2009 death penalty case, wrote that he was “join[ing] Justice Stevens in calling for ‘a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces.’”³⁵

On the state level, in Mississippi, Stevens inspired Justice Diaz to openly oppose the death penalty in one of his last written opinions.³⁶ Noting in *Doss v. Mississippi* that the Eighth

constraints of our Constitution, see my dissent in *Callins v. Collins . . .*” LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 179 (2005).

³² CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 12 (2005).

³³ *In re Davis*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting) (“This court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.”).

³⁴ *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

³⁵ *Wiles v. Bagley*, 561 F.3d 636, 642 (6th Cir. 2009) (Martin, J., concurring); see also *In re Noling*, 651 F.3d 573, 576 (6th Cir. 2011) (Martin, J.) (“As Justice Stevens said simply, “[t]he risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive. As long as our justice system depends on men and women to make decisions, it will invariably make mistakes.”).

³⁶ *Doss v. State*, No. 2007-CA-00429-SCT, 2008 Miss. LEXIS 608, at *38 (Miss. Dec. 11, 2008) (Diaz, P.J., dissenting) (opinion withdrawn on grant of rehearing Oct. 22, 2009).

Amendment requires “capital punishment be imposed fairly, and with reasonable consistency, or not at all,”³⁷ Diaz turned to social science to question the fairness and consistency of Mississippi’s death penalty decisions. Diaz pointed out that one-third of the citizens in Mississippi are African American, while half of death row inmates are African American.³⁸ Ultimately, Diaz eloquently argued: “Just as a cockroach scurrying across a kitchen floor at night invariably proves the presence of thousands unseen, these cases leave little room for doubt that innocent men, at unknown and terrible moments in our history, have gone unexonerated and been sent baselessly to their deaths.”³⁹

After penning this provoking dissent, Diaz left the bench; *Doss v. Mississippi* was slated for rehearing in 2009, after which the Mississippi Supreme Court found the defendant had received ineffective assistance of counsel.⁴⁰ The death sentence was reversed.

III. POLITICAL CONTROVERSY AND THE DEATH PENALTY

On the state level, the death penalty has potent power as a political tool; however, despite the oft-made claims that politicians are merely reflecting constituent demands in their support for the death penalty, studies show that punitive policies, bolstered by politician-driven rhetoric and media campaigns, have preceded public opinion shifts in support of more punitive policies.⁴¹ It is the “tough on crime” language that precipitates constituent support for harsher penalties. The impact of political rhetoric on the death penalty, therefore, is palpable.

The political fear of being viewed as “soft on crime,”⁴² as well as the political benefit of support from a constituency that believes in capital punishment, bolsters political affirmation of the death penalty in Mississippi across the political spectrum. As one

³⁷ *Id.* at *42-43. (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

³⁸ *Id.* at *48.

³⁹ *Id.* at *49.

⁴⁰ *Doss v. State*, 19 So. 3d 690, 693 (Miss. 2009).

⁴¹ KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 14-27 (1997).

⁴² JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 34-35 (2007).

example, Mississippi Attorney General Jim Hood, a democrat in a conservative state, has overseen and supported the executions of twelve men—more than any other Mississippi attorney general since the death penalty was re-instated in 1981.⁴³ Weeks after Hood announced he would run for re-election in 2011,⁴⁴ his office announced it would seek the execution of three men in one week in April 2010: Gerald James Holland, Paul Everette Woodward, and Joseph Daniel Burns.⁴⁵ The unusual request of the triple execution brought attention to Hood especially as the last execution was held two years earlier, and at the time only ten people in total had been executed in Mississippi since the re-instatement of the death penalty.⁴⁶ This request was particularly unique—the spokeswoman for Hood commented that the last time back-to-back executions were requested was in 1961.⁴⁷ Hood’s office failed to note that one of the men, Joseph Burns, had a remaining constitutional appeal to the Supreme Court, and could not be executed at that time.⁴⁸

In May 2011, the attorney general’s office again scheduled three executions, before the impending statewide elections of November 2011. Two men were executed, but on the day of Robert

⁴³ Indeed, there have been more executions under Attorney General Jim Hood than in the entire twenty-two years preceding his ascension to office. This number is as of March 26, 2012. See *Mississippi and the Death Penalty*, MISS. DEP’T OF CORR., http://www.mdoc.state.ms.us/mississippi_and_the_death_penalt.htm (last visited Mar. 26, 2012) (As of March 26, 2012, eighteen people had been executed in Mississippi since the re-instatement of the death penalty.).

⁴⁴ John O’Brien, *AG Hood Will Seek Re-election*, LEGALNEWSLINE.COM (Mar. 23, 2010, 1:34 AM), <http://www.legalnewsline.com/news/226297-ag-hood-will-seek-re-election>.

⁴⁵ *Hood Requests Execution Dates*, JACKSON FREE PRESS (April 21, 2010), http://www.jacksonfreepress.com/index.php/print_view/37054.

⁴⁶ See *Mississippi and the Death Penalty*, *supra* note 43. In 2010, Hood faced a difficult year of fund-raising, especially as two of his biggest benefactors, plaintiff’s lawyers Joey Langston and Richard “Dickie” Scruggs, were both in prison for pleading guilty to attempting to bribe judges. The last execution in Mississippi had been that of Dale Leo Bishop, executed on July 23, 2008; this timing coincided with intense criticism of Attorney General Hood specifically for his high profile relationship with Scruggs, and the open written criticism of Hood by a judge.

⁴⁷ Jimmie E. Gates, *AG Seeking 3 Executions*, CLARION-LEDGER, Apr. 21, 2010, at 1A.

⁴⁸ *Defense Attorneys Say Federal Appeal Pending*, DJOURNAL.COM, http://nems360.com/pages/full_story/push?article-Defense+attorneys+say+federal+appeal+pending%20&id=7184546 (last visited Apr. 11, 2012). Joseph Burns was later executed in July 2010. See *Mississippi and the Death Penalty*, *supra* note 43.

Simon's execution, the U.S. Court of Appeals for the Fifth Circuit granted a stay, ordering a competency hearing for Simon in the Quitman County Circuit Court.⁴⁹ Simon suffered a head injury in January 2011 when he fell—or jumped—off his top-level bunk bed.⁵⁰ Simon must be competent and able to understand the proceedings in order to be executed; the costs of the additional hearing and experts will be borne by the State.⁵¹

The cost of Simon's death penalty case was already controversial—it had sparked a lawsuit by Quitman County against the State of Mississippi in 2003.⁵² Quitman County challenged the indigent defense system by which the county pays part-time public defenders, rather than a statewide public defender system financed by the State.⁵³ The cost of prosecuting Robert Simon and his co-defendant Anthony Carr was simply too much. As T.H. Scipper, the Quitman County Chancery Clerk, said at the time: "Let's put it this way . . . Quitman County had a flood in 1989, the Parker trials in 1990-91, and another flood in 1992. All three events were about equal economic catastrophes."⁵⁴ According to the 2010 census data, Quitman remains one of the poorest counties in the nation and is still paying for part-time public defenders.⁵⁵

As the new decade continues, the attorney general, the governor, and the district attorneys will face further criticism of

⁴⁹ Sid Salter, *Stay of Execution Granted for Death Row Inmate Robert Simon at the 5th U.S. Circuit for His Role in the Most Heinous Crime This Writer Ever Covered*, MISS. ST. U. LIBR. (May 24, 2011, 11:28 PM), <http://blogs.library.msstate.edu/sidsalter/?p=371>.

⁵⁰ Monica Land, *Lawyers for Death Row Inmate Issued Stay of Execution to File Today*, MISS. LINK (June 6, 2011, 7:45 AM), http://www.mississippilink.com/news/article_c4d26d86-8fee-11e0-8378-001cc4c03286.html.

⁵¹ *Id.* This case is similar to that of Ricky Ray Rector, executed in Arkansas in 1992, but whom some believe was unable to understand his execution. Rector saved the dessert from his final meal to eat before going to bed. Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

⁵² *Quitman Cnty. v. State*, 910 So. 2d 1032 (Miss. 2005) (en banc) (affirming the trial court judgment that the county had failed to prove financial injury, and ruling for the State).

⁵³ *Id.*

⁵⁴ Salter, *supra* note 49.

⁵⁵ See *Selected Economic Characteristics: 2006-2010 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03&prodType=table (last visited Apr. 11, 2012); Salter, *supra* note 49.

the penal system from the financial hardship it imposes on Mississippi citizens.⁵⁶ The economic crisis has brought to public view the intertwined ethical and economic concerns created by the state's current criminal justice system. MDOC Commissioner Chris Epps has been among the first to respond to the linked questions of constitutional and ethical treatment of detainees and the financial reality of imprisonment, but he certainly may not be the last.

In 2008, Epps worked with State Senator Willie Simmons to introduce and pass legislation to amend Mississippi's Truth in Sentencing Law.⁵⁷ Originally passed in 1995, the Truth in Sentencing Law required inmates to serve at least eighty-five percent of their prison sentences, instead of serving reduced time based on good behavior in prison.⁵⁸ The financial fallout from the Truth in Sentencing Law was dramatic—from 1990 to 2007, the MDOC budget rose from \$109.6 million per year to \$327 million per year.⁵⁹ The 2009 amended law, however, allowed for non-violent offenders to be eligible for parole after serving twenty-five percent of their sentences.⁶⁰ Immediately upon enactment, nearly

⁵⁶ See Charlie Mitchell, *Death Penalty Getting Costly in Mississippi*, CLARION-LEDGER (Nov. 6, 2005), <http://www.cuadp.org/news/CL-20051108.htm> (stating poor counties cannot easily afford the increase in taxes necessary to prosecute and defend death penalty cases).

⁵⁷ John Buntin, *Mississippi's Corrections Reform*, GOVERNING (Aug. 2010), <http://www.governing.com/topics/public-justice-safety/courts-corrections/mississippi-correction-reform.html>.

⁵⁸ *Id.*

⁵⁹ *Id.* The incarceration rate also more than doubled between 1994 and 2008. Ward Schaefer, *Behind Barbour's Prison Rhetoric*, JACKSON FREE PRESS (Feb. 17, 2010), http://www.jacksonfreepress.com/index.php/site/comments/behind_barbours_prison_rhetoric_021710/ (Finding, in reference to recidivism of released inmates, that "[t]hrough August 2009, the state had released almost 3,100 prisoners under the new guidelines. Of those, only 121 returned to prison, and only 5 were arrested for new crimes; the others had their parole revoked for technical violations. That rate of 5 per 3,100, or 0.2 percent, is far below the national recidivism rate of 10.4 percent for the first year after release.").

⁶⁰ Buntin, *supra* note 57. Senate Bill (SB) 2136 was signed into law in April 2009. The law was also retroactive, which made twelve percent of the prison population eligible for parole upon its enactment in 2009. See American Bar Association: Criminal Justice Section, *Texas & Mississippi: Reducing Prison Populations, Saving Money, and Reducing Recidivism*, AM. BAR ASS'N, http://www2.americanbar.org/sections/criminal_justice/CR203800/PublicDocuments/paroleandprobationsuccess.pdf (last visited Apr. 11, 2012) (discussing the impact of SB 2136, as well as other legislative measures passed in Mississippi to "award[] additional meritorious earned time (MET) and

3000 inmates were eligible for parole, offering the possibility of substantial savings for the state.⁶¹

Furthermore, the drop in the economy may have been a contributing factor to the 2010 closing of Unit 32, the former maximum security unit that housed death row inmates. Following a lawsuit that challenged the living conditions at Unit 32 as cruel and inhumane, Epps established his own committee to investigate the living situation, and ultimately decided to shut down the unit completely.⁶²

Perhaps these changes have financially helped MDOC. On September 20, 2011, Commissioner Epps announced at the Joint Legislative Budget Committee hearings that he was requesting zero increase in budget allocations for prisons for fiscal year (FY) 2013.⁶³ This was welcome news, as the state budget general fund was down 0.6 percent from anticipated revenues for FY 2013, while \$1 billion in additional funding requests were anticipated statewide.⁶⁴

These actions by Commissioner Epps and Senator Simmons may provide some insight into how politicians in Mississippi will respond when other issues related to the death penalty and criminal punishment—previously shaped primarily by moral opinions and controversy—become influenced by economic concerns. The dependence of public support for the death penalty on massive doses of political rhetoric creates an opportunity for another shift in public opinion in the coming years. Perhaps, as journalists pull back the veil on the cost of the death penalty, and of funding for the Mississippi Department of Corrections in general, politicians will modify their rhetoric to align with the rising economic concerns of constituents.

expand[] the authority to sentence convicted drug offenders to house arrest with electronic monitoring”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *State Budget: Pressure is Building*, CLARION-LEDGER, Sept. 22, 2011, at 6A, available at <http://www.statebudgetsolutions.org/publications/detail/state-budget-pressure-is-building>.

⁶⁴ *Id.*; see also Elizabeth Crisp, *Lawmakers: Cuts Inevitable: State's Economic Growth 'Near Standstill,'* CLARION-LEDGER, Nov. 16, 2011, at 1A, available at <http://www.statebudgetsolutions.org/publications/detail/mississippi-economist-growth-appears-to-be-near-a-standstill>.

IV. ECONOMICS: BUDGET PROBLEMS

Mississippi, like much of the United States, faces drastic budget cuts, and the difficulty of balancing government services with dwindling financial resources. Moreover, these cuts must occur in the context of Mississippi being statistically the poorest state in the nation,⁶⁵ with the largest percentage of people living below the poverty line in the country.⁶⁶

The state's recent fiscal history has been one of severe cuts. In 2009, legislators remained in session until June 30, the final day of the fiscal year, attempting to balance the budget.⁶⁷ The result was a 9.4% funding cut across the board for FY 2010.⁶⁸ The FY 2011 budget was agreed upon only after across the board cuts of twelve to seventeen percent, and after Governor Haley Barbour had already successively slashed the 2011 budget five times.⁶⁹ Politicians seeking re-election in 2011 faced constituents wanting fewer taxes, and the reality was that state revenue shortfalls for FY 2012 were estimated at more than a \$1.2 billion drop from FY 2010 revenue levels, which were already low.⁷⁰ Some legislators predicted that the state budget would not return to 2008 levels until 2016.⁷¹ As one Mississippi reporter noted in the spring of 2010, something would have to give.⁷²

In the midst of the budget balancing in 2010, Governor Barbour was specifically criticized for his use of discretionary funds to support the MDOC rather than to meet other pressing needs for state services.⁷³ MDOC has consistently had a strong pipeline of funds from the state, as the system has grown to not only house more inmates in state facilities, but also to contract

⁶⁵ *Personal Income Per Capita in Current Dollars, 2007*, U.S. CENSUS BUREAU, <http://www.census.gov/statab/ranks/rank29.html> (last visited Apr. 11, 2012).

⁶⁶ *Persons Below Poverty Level, 2007*, U.S. CENSUS BUREAU, <http://www.census.gov/statab/ranks/rank34.html> (last visited Apr. 11, 2012).

⁶⁷ Sid Salter, Editorial, *Lengthy Legislative Session Likely Even in Tough Times*, CLARION-LEDGER, Jan 6, 2010, at 6A.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Wade Phillips, *Snowden on Mississippi Budget Recovery*, WTOK CHANNEL 11 (June 13, 2011, 7:16 PM), http://www.wtok.com/home/headlines/Snowden_on_Mississippi_Budget_Recovery_123777584.html.

⁷² Crisp, *supra* note 64.

⁷³ See Schaefer, *supra* note 59.

with more private prisons.⁷⁴ The juvenile inmate population has increased, and in 2011 Mississippi was subject to a class action lawsuit charging juvenile detention centers with cruel and unusual treatment.⁷⁵ The pleading charged: “These violations reflect a disorganized, understaffed facility that houses children in brutal, abusive conditions.”⁷⁶ The case settled in February 2012, after the State agreed to make substantial changes to detention policies, and look for more cost-effective alternatives to juvenile detention centers, such as day treatment and mentoring programs.⁷⁷

With a growing prison population and declining funds for hiring corrections officers, the conditions of detention facilities will continue to be a costly problem. In 2010, as discussed above, the supermax facility at Mississippi State Penitentiary was closed due to a lawsuit alleging inhumane living conditions, and potentially also as a cost cutting measure.⁷⁸ Currently, Mississippi has three State prisons, five private prisons, and numerous detention centers.⁷⁹ As fiscal realities begin to challenge MDOC’s formerly uncontroverted status as a primary funding priority, the

⁷⁴ *Private Prisons*, MISS. DEP’T OF CORR., <http://www.mdoc.state.ms.us/Five%20Private%20Prisons.htm> (last visited Apr. 11, 2012).

⁷⁵ *J.H. ex rel. Gray v. Hinds Cnty.*, 3:11-cv-327-DPJ-FKB, 2011 WL 3047667 (S.D. Miss. June 1, 2011).

⁷⁶ Complaint at 2, *J.H. ex rel. Gray v. Hinds Cnty.*, 3:11-cv-327-DPJ-FKB, 2011 WL 3047667 (S.D. Miss. June 1, 2011); see also Andy Jones, *Juvenile Jail Under Fire*, DISABILITYRIGHTSGALAXY.COM (June 13, 2011), <http://disabilityrightsgalaxy.com/2011/06/13/juvenile-jail-under-fire/>.

⁷⁷ Valerie Wells, *Reforms Coming to Henley-Young*, JACKSON FREE PRESS (Mar. 7, 2012), http://www.jacksonfreepress.com/index.php/site/comments/reforms_coming_to_henley-young_030712/ (detailing a settlement in which the Henley-Young Juvenile Justice Center will focus more on education and suicide prevention, as well as look at alternatives to detention centers).

⁷⁸ See *supra* notes 73-76 and accompanying text.

⁷⁹ CCA runs four private prisons in Mississippi, which include Delta Correctional Facility in Greenwood, Adams County Correctional Facility in Natchez, Tallahatchie Correctional Facility in Tutwiler, and Wilkinson County Correctional Facility in Woodville. *CCA Facility Locations*, CCA.COM, <http://www.cca.com/facilities/?state=MS> (last visited Apr. 11, 2012). Operation of Delta Correctional Facility in Greenwood has been suspended as of January 15, 2012. See *Private Prisons*, *supra* note 74; see also WJTV Staff, *Mississippi Correctional Facility Closing Down*, WJTV.COM (Nov. 10, 2011), <http://www2.wjtv.com/news/2011/nov/10/mississippi-correctional-facility-closing-down-ar-2684565/>.

government will next need to examine one of the main financial investments of the state: the death penalty.

A. *Funding the Death Penalty*

The economic crisis has increased calls to redirect prison resources because funding is scarce—in direct contrast to the strong rise in correctional expenses over the past twenty years.⁸⁰ Between 1988 and 2008, the amount spent on corrections across the nation increased 303%.⁸¹ In the years since, as detailed in a Vera Institute of Justice report, twenty-six states have cut funding for corrections during the economic crisis.⁸² The public perception of criminal justice is now being shaped through a view of budget cuts, limited resources, and the high cost of incarceration.⁸³ As one scholar noted, the financial crisis has impacted the visibility of the correctional system, “exposing policymakers and the public to the financial realities of the correctional apparatus . . . presented as a burden on citizens’ wallets, as well as a budget slice at the expense of other important public services.”⁸⁴ This visibility, and heightened criticism of the cost of the correctional system, lends itself to a move away from the current system.

Cases such as that of Darnell Wilson, who received three life sentences for stealing bras from Kohl’s in DeSoto County, cast a stark light on the tremendous costs being borne by taxpayers for questionable gain.⁸⁵ Since the beginning of the financial crisis

⁸⁰ In the 2008 fiscal year, states spent approximately \$47 billion of general funds on corrections. One in every fifteen state general fund dollars is now spent on corrections. CHRISTINE S. SCOTT-HAYWARD, *THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES* 3 (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

⁸¹ *Id.*

⁸² *Id.*

⁸³ This view is not new in academia; Gary Becker first introduced a cost-benefit approach to analyzing the criminal justice system. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 174 (1968).

⁸⁴ Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1, 16 (2010). Aviram coins the term, “humonetarianism,” focusing on changes in the criminal justice system that may appear largely humanitarian but arise from economic motives, especially apparent during fiscally difficult times. *Id.*

⁸⁵ *Repeat Offender Gets Life in Jail After Mississippi Bra Theft*, FOX NEWS (June 25, 2010), <http://www.foxnews.com/us/2010/06/25/mississippi-judge-orders-bra-thief->

there has been a nationwide increase in early releases of non-violent inmates, prison closures, increased use of probationary sentences, and decriminalization of marijuana.⁸⁶ These changes have been embraced and promoted by individuals across the political spectrum, most notably by Newt Gingrich and the conservative Right on Crime Campaign.⁸⁷ These changes are not necessarily a move away from punitivism, but rather a reaction to financial realities that demand change—and perhaps a change in the ethics of punishment to comply with these realities.

Although the current prison system is successful in its primary goal—incarceration and incapacitation—the system as it functions now becomes only more entrenched and more demanding of resources each passing year, with no foreseeable end. As Mississippi has sentenced more people to prison, the recidivism rate has likewise increased. State funds pay to chart and control inmates after they leave prison; this observation system has revealed the stigma of a prison sentence. A felony record leads to heightened difficulty in finding lawful work after being released. This cycle of rotating individuals consistently and continuously through the criminal justice system is demanding more resources than our society can give when financially floundering. U.S. Attorney Kenyen Brown, for the Southern District of Alabama, recently supported a job fair at Bishop State Community College specifically for ex-offenders,⁸⁸ and has met with businesses to discuss benefits of hiring former inmates. Because of the expanding population of inmates over the past

bars/. Wilson was sentenced under Mississippi's three strikes law because he had prior convictions in Tennessee. *Id.*

⁸⁶ Several states, including Michigan and New York have closed penal institutions in order to save costs. SCOTT-HAYWARD, *supra* note 80, at 6. Other states are increasing early release programs for completion of education or vocational rehabilitation programs. *Id.* at 9.

⁸⁷ Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>; see also *The Conservative Case for Reform*, RIGHTONCRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/> (last visited Apr. 11, 2012) (The face of the Right on Crime Campaign stating “The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers.”).

⁸⁸ Renee Busby, *Bishop State, U.S. Attorney's Office Help Ex-Offenders Learn Job Skills*, AL.COM (Apr. 15, 2011, 10:23 AM), http://blog.al.com/live/2011/04/bishop_state_us_attorney_south.html.

thirty years, there is also an expanding population of ex-felons. Without work, these individuals will become even more costly to the state. This is yet another consideration in the growing ethics of viewing the fiscal consequences of punishment.

At the highest end of these cost drivers is the death penalty. Excess expenditures for the death penalty are close to \$10 million annually per state.⁸⁹ For a single death penalty trial, it is estimated a “state may pay \$1 million more than for a non-death penalty trial.”⁹⁰ And yet, only one in every three capital trials even results in a death sentence, leading some to argue that “the true cost of [a] death sentence is \$3 million.”⁹¹

The evident conclusion is that pursuing a death sentence is more costly to the state than a sentence of death in prison—otherwise known as life without parole.⁹² Maintaining the death penalty is costly because at every stage a capital case is more complex and time-consuming than a non-capital case.⁹³ Neighboring state Tennessee reports that death sentences cost forty-eight percent more for the state to pursue, rather than life without parole.⁹⁴

The execution itself may ultimately be the least costly part of pursuing a capital case. In Mississippi, the average cost of an execution using lethal injection is \$11,400; this figure includes the

⁸⁹ RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 13 (2009), available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

⁹⁰ *Id.* at 14.

⁹¹ *Id.*

⁹² Memorandum in Support of Expert Testimony Re: Costs of Execution vs. Life Imprisonment Without Release, Connecticut v. Hayes, No. CR07-0241859, 2010 WL 5068356 (Conn. Super. Ct. Oct. 12, 2010) (further stating, “on average, every phase of a capital case is more expensive than (*sic*) in a non-capital case, and the lifetime cost of a capital case is substantially more than the cost of incarcerating an inmate for life without parole. Surprising as that may seem, the reason for it is simple: ‘lawyers are more expensive than prison guards.’”).

⁹³ MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 64 (1997) (“Capital appeals generally cost more than noncapital appeals because of the complexity of the legal issues involved, the number of different issues that can be raised, and the availability of multiple avenues for appeal. Because a high proportion of appeals in capital cases are successful, and because the defendant’s life is at stake, there is ample incentive for pursuing every avenue of appeal.”).

⁹⁴ *Death Penalty Cost*, AMNESTYINTERNATIONAL.ORG, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-cost> (last visited Apr. 11, 2012).

injected drugs, use of facilities, security, overtime, and psychiatric counseling for guards.⁹⁵ This is less than the cost of experts alone in a federal capital case, which average \$83,029, in contrast to non-capital federal case expert costs of \$5,275.⁹⁶

V. STATES ABOLISHING THE DEATH PENALTY BECAUSE OF THE COST

It is perhaps unsurprising that the death penalty—a punishment that looms large in the imagination and consciousness of Americans, but in reality is used proportionally little⁹⁷—is the first to topple when faced with financial realities. Despite the historic and visceral importance of this most extreme punishment, which has caused many to turn a blind eye to past criticisms, the fiscal crisis has created an opportunity to rethink the place of the death penalty in the American criminal justice system. Perhaps because financial considerations can provide an ostensibly apolitical analysis of the death penalty, they will be effective at raising questions about the death penalty's value in a capitalist society and market. Therefore, budget-conscious legislators—not the courts—may finally end the death penalty.

According to the Death Penalty Information Center (DPIC), sixteen states currently do not impose the death penalty.⁹⁸ Of those that do, the question becomes how often the death penalty is implemented. Kansas and New Hampshire have not held an execution since 1976.⁹⁹ The national average of time spent on

⁹⁵ E-mail from Tara Booth, Office of Commc'ns, Miss. Dep't of Corrs., to author (Feb. 1, 2012) (on file with author).

⁹⁶ JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 31 (Sept. 2010) *available at* <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf#page=48>.

⁹⁷ RICHARD C. DIETER, DEATH PENALTY INFO. CTR., A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY 6 (2007), *available at* <http://www.deathpenaltyinfo.org/CoC.pdf>.

⁹⁸ DEATH PENALTY INFO. CTR., *supra* note 4, at 1.

⁹⁹ *Executions per Death Sentence*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited Apr. 11, 2012).

death row, between sentencing and execution, was 153 months in 2007.¹⁰⁰

In 2009, eleven states that currently impose the death penalty introduced bills to repeal it.¹⁰¹ The New Hampshire House voted to repeal the death penalty in 2009, but the bill died in the senate.¹⁰² Connecticut passed a bill to repeal the death penalty, but Governor Jodi Rell vetoed it.¹⁰³ The Colorado House passed a bill to repeal the death penalty, but the bill lost by one vote in the senate.¹⁰⁴ Maryland, while not abolishing the death penalty, passed a bill that significantly limited the classes of death-eligible crimes. In 2010, seven states introduced bills to place a moratorium on the death penalty or abolish it completely.¹⁰⁵ In 2011, nineteen states introduced bills to either establish a moratorium on the death penalty, urge prosecutors to limit capital cases, or abolish the death penalty entirely.¹⁰⁶ Nearly one-third of the thirty-five states that impose the death penalty have questioned its continued imposition and value since the financial crisis.

In 2012, Connecticut, Maryland, and Oregon all seriously challenged—or changed—the death penalty in their respective states. The Connecticut legislature passed Senate Bill 280 on

¹⁰⁰ TRACY L. SNELL, BUREAU OF JUST. STATS., CAPITAL PUNISHMENT, 2007 – STATISTICAL TABLES tbl.11 (2007), available at <http://www.bjs.gov/content/pub/html/cp/2007/tables/cp07st11.cfm>; *Time on Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/time-death-row> (last visited Apr. 11, 2012); see also NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW USA (2009), available at http://naacpldf.org/files/publications/DRUSA_Winter_2009.pdf.

¹⁰¹ See DIETER, *supra* note 97, at 14. The states are Colorado, Connecticut, Illinois, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, Texas, and Washington. *Id.*

¹⁰² Lauren R. Dorgan, *House Votes to Repeal Death Penalty*, CONCORD MONITOR (Mar. 26, 2009), <http://www.concordmonitor.com/article/house-votes-to-repeal-death-penalty>.

¹⁰³ Christopher Keating, *Rell Vetoes Bill to Abolish Capital Punishment*, HARTFORD COURANT, June 6, 2009, at A3.

¹⁰⁴ Jessica Fender, *Colorado Death Penalty Survives*, DENVER POST (May 7, 2009, 12:30 AM), http://www.denverpost.com/news/ci_12312533.

¹⁰⁵ 2010 – Proposed or Passed Legislation, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/2010-proposed-or-passed-legislation> (last visited Apr. 11, 2012).

¹⁰⁶ *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited Apr. 11, 2012).

April 11, 2012, abolishing the death penalty in Connecticut.¹⁰⁷ Although a proposed bill to end the death penalty in Maryland was slated to fail,¹⁰⁸ over three dozen Maryland attorneys, including former Governor Harry Hughes and former Attorneys General Stephen Sachs and Joseph Curran, joined an extensive report analyzing the rising costs and challenges of the death penalty in Maryland.¹⁰⁹ Finally, on November 22, 2011, Oregon Governor John Kitzhaber announced a moratorium on the death penalty for the remainder of his term in office.¹¹⁰ Governor Kitzhaber oversaw the only two executions in Oregon in 49 years while he was previously in office.¹¹¹

While most of the bills introduced from 2007 to 2012 failed,¹¹² New Jersey, New Mexico, Illinois, and Connecticut abolished the death penalty in 2007, 2009, 2011, and 2012 respectively. At the beginning of the financial crisis, in December 2007, New Jersey became the first state in four decades to abolish the death penalty through the legislative process.¹¹³ The New Jersey Death Penalty Study Commission ultimately concluded the re-victimization of victims' families, the high financial costs, and the risk of executing innocent people were sufficient reasons to repeal the death

¹⁰⁷ See generally CONN. NETWORK TO ABOLISH THE DEATH PENALTY, <http://www.cnadp.org> (last visited Apr. 17, 2012); Daniela Altimari, *House Votes to Repeal the Death Penalty: Measure Awaits Malloy's Signature*, HARTFORD COURANT (April 12, 2012), http://articles.courant.com/2012-04-12/news/hc-death-penalty-house-vote-0412-20120411_1_death-penalty-capital-punishment-repeal-bill.

¹⁰⁸ David Nyczepir, *Maryland Death Penalty Repeal Bill Likely to Die in Committee*, CAPITAL NEWS SERV. (Mar. 7, 2012), <http://www.cnsmaryland.org/2012/03/07/maryland-death-penalty-repeal-bill-likely-to-die-in-committee>.

¹⁰⁹ See generally MARYLAND'S DEATH PENALTY: STILL HERE, STILL UNFAIR. MORE ARBITRARY AND COSTLY (2012), available at http://mdcase.org/files/DP_Report.pdf.

¹¹⁰ Helen Jung, *Gov. John Kitzhaber: Oregon death penalty fails 'basic standards of justice'*, OREGONIAN (Nov. 22, 2011, 7:13 PM), www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_oregon_deat.html.

¹¹¹ GOV. KITZHABER STATEMENT ON CAPITAL PUNISHMENT (Nov. 22, 2011), <http://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf>.

¹¹² *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited Apr. 11, 2012).

¹¹³ Act of Dec. 17, 2007, ch. 204, § 1, 2007 N.J. Laws 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)). For a more extensive discussion of the repeal of the death penalty in New Jersey, see Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's "Evolving Standards of Decency"*, 15 MICH. J. RACE & L. 223 (2009).

penalty and impose life without parole.¹¹⁴ In New Mexico, Governor Bill Richardson, a proponent of the death penalty, specifically stated in signing his state's bill repealing the death penalty that the financial cost of imposing the death penalty was a consideration.¹¹⁵ Illinois Governor Pat Quinn signed into law a bill abolishing the death penalty due to a central concern over the cost of the death penalty in the face of massive statewide budget cuts.¹¹⁶

As a comparison, California could save, by current estimates, as much as \$1 billion in five years if the state eliminated the death penalty.¹¹⁷ In an op-ed for the *Los Angeles Times*, Los Angeles District Attorney John Van de Kamp made clear, "it costs \$125 million a year more to prosecute and defend death penalty cases and to keep inmates on death row than it would simply to put all those people in prison for life without parole."¹¹⁸ On November 6, 2012, citizens of California are set to decide for themselves on the value of the death penalty by their vote on the "Savings, Accountability, and Full Enforcement for California Act."¹¹⁹ California has spent \$4 billion on the death penalty since 1978, during which time thirteen individuals were executed.¹²⁰ The bill proposes to transfer the money set aside for death penalty

¹¹⁴ N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 1 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

¹¹⁵ See de Leon, *supra* note 5. Like Mississippi Supreme Court Justice Oliver Diaz, Richardson's other main concern was the conviction of innocent men after four men were exonerated from New Mexico's death row. Press Release, State of N.M., Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009), available at <http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf>.

¹¹⁶ See, e.g., Tom Kacich, *supra* note 7; Massingale, *supra* note 7.

¹¹⁷ Natasha Minsker, *Save \$1 Billion in Five Years—End the Death Penalty in California*, ACLU (May 21, 2009, 4:52 PM), <http://www.aclu.org/2009/05/21/save-1-billion-in-five-years-end-the-death-penalty-in-california>. This would include eliminating the need to create a new death row facility. *Id.*

¹¹⁸ John Van de Kamp, Editorial, *We Can't Afford the Death Penalty*, L.A. TIMES, June 10, 2009, at A23.

¹¹⁹ Bob Egelko, *Bid to End Death Penalty Headed to the Ballot*, S.F. CHRON., Mar. 2, 2012, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/03/01/MNO21NEQAR.DTL>.

¹²⁰ Ravali Reddy, *Battle Shaping Up for November Death Penalty Vote*, PENINSULA PRESS (Mar. 28 2012), <http://peninsulapress.com/2012/03/28/battle-shaping-up-for-november-death-penalty-vote/>.

related costs to a fund for assisting state law enforcement.¹²¹ Fiscal challenges and calculation-based conversations about the cost of the death penalty are occurring nationwide.

VI. TWO CASES HIGHLIGHTING PROBLEMS WITH THE DEATH PENALTY IN MISSISSIPPI: *WOODWARD V. STATE* AND *BREWER V. STATE*

When one challenges the death penalty on economic grounds, the first response is often to query whether something within the death penalty system can be cut, rather than the system itself. A brief review of two recent Mississippi death-penalty cases reveals that, despite its massive expense, the current system frequently fails to adequately protect defendants' rights in the initial trial phase. This failure makes the expensive post-conviction phase utterly necessary. Any cuts to the death penalty system that do not end the death penalty itself will create constitutional violations—not to mention affronts to Americans' sense of fair play.

The common factors in the cases of Kennedy Brewer and Paul Woodward—shared with many other death penalty cases in Mississippi and across the country—are the lack of adequate representation at the trial level, and the almost inevitable reversals, post-conviction motions, and re-trials that follow on the basis of biases to the detriment of the defendant. For Woodward, his initial death sentence was reversed and his case remanded for a new trial on the sentencing phase.¹²² For Brewer, his conviction

¹²¹ *See id.*

¹²² *Woodward v. State*, 635 So. 2d 805, 812 (Miss. 1993). This alone has been controversial, whether a jury can determine the sentence when it does not know the evidence put forward in the guilt phase, and whether the defendant can properly rebut what the state puts forward as fact. It is not unusual for a person on Mississippi's death row to have had multiple trials. *See Flowers v. State*, 947 So. 2d 910 (Miss. 2007); *Flowers v. State*, 842 So. 2d 531 (Miss. 2003); *Howard v. State*, 853 So. 2d 781 (Miss. 2003); *Flowers v. State*, 773 So. 2d 309 (Miss. 2000); *Howard v. State*, 701 So. 2d 274 (Miss. 1997). Eddie Lee Howard is currently on death row after having his first conviction reversed, resulting in two full trials. He has challenged his most recent conviction yet again, claiming he is innocent. *Howard v. State*, 49 So. 3d 79 (Miss. 2010). Curtis Flowers, who has also proclaimed his innocence, is on death row after six separate full trials, each either resulting in a hung jury or a reversal on appeal. *See Flowers*, 947 So. 2d at 910 (Miss. 2007).

was affirmed on direct appeal,¹²³ his motion for post-conviction relief was denied,¹²⁴ and it was only when presented with DNA evidence excluding Brewer that he was granted an evidentiary hearing.¹²⁵ Execution dates were set for both men; however, Woodward was executed on May 19, 2010, while Brewer was exonerated on February 15, 2008.

Both of these men might never have been placed on death row if a number of circumstances common in other states existed here—if Mississippi funded statewide public defender offices to handle criminal cases,¹²⁶ if the defendants had dedicated trial counsel, or if they lived in a state that simply held death penalty sentences to strict scrutiny on appeal.¹²⁷ Both were convicted before the Mississippi legislature passed the Capital Defense Litigation Act in 2000, creating the Office of Capital Defense Counsel to ensure representation for individuals on death row.¹²⁸ Death is supposed to be “different,”¹²⁹ and yet these cases illustrate how death penalty representation, and the process through which these cases proceed, face the same problems as criminal cases in general. Although the permanency of the death penalty is what should make it “different,” all too often the case treatment is no different than any other.

¹²³ Brewer v. State, 725 So. 2d 106, 112, 136 (Miss. 1998).

¹²⁴ Brewer v. State, 819 So. 2d 1165, 1166, 1169 (Miss. 2000).

¹²⁵ *Id.* at 1174.

¹²⁶ The state legislature did create the Office of State Public Defender in 2011, in part to provide recommendations for a future unified statewide trial-level system. See generally OFFICE OF STATE PUB. DEFENDER, <http://www.ospd.ms.gov/index.htm>; Press Release, GovernorBarbour.com, Gov. Barbour Appoints Lee as First State Public Defender (June 9, 2011), available at <http://www.governorbarbour.com/news/2011/jun/6.9barbourappointsleepublicdefender.html>.

¹²⁷ As of July 1, 2010, 121 death cases affirmed, forty-two cases reversed for guilt and sentencing (*Flowers* accounts for three of these cases), seven remanded and commuted to life sentences, and thirty cases reversed and remanded for a trial on sentencing only. *Gillett v. State*, 56 So. 3d 469 app. at 535-40 (Miss. 2010).

¹²⁸ MISS. CODE ANN. §§ 99-18-1, -3 (West, Westlaw through 2011 Reg. Sess.).

¹²⁹ “This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); see also *Griffin v. State*, 557 So. 2d 542, 552 (Miss. 1990) (“In capital murder cases this Court has applied a heightened standard of review . . .”).

A. Woodward v. State: Ineffective Assistance of Counsel

Woodward v. State demonstrates the necessity of post-conviction representation and sufficient appeals as safeguards in capital cases.¹³⁰ Paul Everette Woodward was convicted of capital murder, kidnapping, and sexual battery in 1988.¹³¹ On direct appeal Woodward's claims were rejected and the verdict and sentence of death upheld.¹³² During the post-conviction phase, a strong and established office through research, investigation, and legal writing alerted the Mississippi Supreme Court of the extensive faults at trial. In the face of the severe problems at Woodward's trial, the court granted post-conviction relief and reversed the death sentence, remanding the case for re-sentencing by a new jury.¹³³

As in many death penalty cases reviewed on post-conviction, Woodward's post-conviction counsel claimed ineffective assistance of counsel at trial under *Strickland v. Washington*.¹³⁴ Indeed, the behavior of Woodward's trial counsel was egregious and prejudicial to his case: first, Woodward's counsel made no opening statement;¹³⁵ second, they intentionally "sat with their backs to [their client] during the course of the trial," later stating that they thought that behaving otherwise might incite the audience to physically act out against them;¹³⁶ third, they failed to cross-examine all ten State witnesses;¹³⁷ and fourth, defense counsel not only complimented the district attorney, but also assisted a State witness in identifying Woodward.¹³⁸ Defense attorneys have the same obligation to zealously advocate for their clients in Mississippi as in the rest of the country.¹³⁹ And yet, in closing,

¹³⁰ 533 So. 2d 418 (Miss. 1988).

¹³¹ *Id.* at 421.

¹³² *Id.* at 435.

¹³³ *Woodward v. State*, 635 So. 2d 805, 812 (Miss. 1993).

¹³⁴ *Id.* at 808-09; *see also* *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³⁵ *Id.* at 808

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007); MISS. RULES OF PROF'L CONDUCT R. 1.3 (1987) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

defense counsel stated to the jury that Woodward was guilty¹⁴⁰ of kidnapping and murder.¹⁴¹ In his own words, Woodward's defense counsel stated, "Rhonda Crane obviously in her lifetime was a fine Christian lady . . . I've never lied to Juries and I'm not going to start now, I think Paul Woodward is guilty of kidnapping Rhonda Crane, and I think Paul Woodward is guilty of the murder of Rhonda Crane."¹⁴² The district attorney's request for a mistrial was denied, and the jury was dismissed to deliberate. The jury returned with a guilty verdict after only an hour and fifteen minutes.¹⁴³

In the sentencing phase of the trial, defense counsel relied on a mental illness defense to spare their client from the death penalty. The defense's psychological expert was the only witness presented at the entire trial, through both the guilt and sentencing stages of the case. Woodward's counsel, however, failed to speak with their witness until five minutes before the witness testified.¹⁴⁴ In their brief conversation, Woodward's counsel incorrectly told the witness he could not speak of psychological exams performed on Woodward.¹⁴⁵ The expert witness did testify to Woodward's lack of self-confidence¹⁴⁶ and repeated suicide

¹⁴⁰ *Woodward*, 635 So. 2d at 808. Of multiple claims of ineffective assistance of counsel, the Mississippi Supreme Court addressed one in particular—whether Woodward's attorney admitted Woodward's guilt of the crime. *Id.* The court, however, found under *Strickland* that this action was not necessarily prejudicial, reasoning that defense counsel's behavior could have been tactical. *Id.* at 808-09. Furthermore, the court felt that the action did not "undermine confidence in the outcome" because of the other evidence against Woodward. *Id.* at 809 (quoting *Strickland*, 466 U.S. at 694).

¹⁴¹ *Id.* at 808.

¹⁴² Transcript of Record at 1416, *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

¹⁴³ *Id.* at 1430.

¹⁴⁴ *Woodward*, 635 So. 2d at 809. As became clear in post-conviction when Woodward claimed ineffective assistance of counsel under *Strickland*, one of the ways that Woodward's trial counsel failed him was in not interviewing the State's rebuttal psychological expert witness before he took the stand. *Id.*

¹⁴⁵ *Id.* at 810. Defense counsel incorrectly told the witness he could not speak of psychological exams performed on Woodward because that would open the door to prior bad acts. *Id.* This admonition was incorrect and castrated the expert's testimony, depriving it of its full usefulness as mitigating evidence. *Id.* at 812 (Smith, J., concurring in part and dissenting in part).

¹⁴⁶ Other findings by the clinical psychologist for the defense included:

His father abused him as a child . . . His school history was one of not being happy at school. He did not seem to fit in; he didn't have friends . . . He felt like nobody liked him as a child . . . By the time he was fourteen, he was so

attempts;¹⁴⁷ however, Woodward's counsel failed to ask the witness about Woodward's detailed psychological history, and the witness did not present documentation that Woodward suffered from severe mental disturbance at the time of the crime.¹⁴⁸ The witness testified only that his evaluation showed that "Woodward was able to distinguish between right and wrong at the time of the crime."¹⁴⁹ As the court stated, "[counsel] incorrectly instructed [the expert witness] and unnecessarily limited his testimony apparently based on a misunderstanding of evidentiary rules. . . . They simply did not do their homework."¹⁵⁰

With little mitigation evidence of mental illness, defense counsel was forced to argue that the jury should spare their client's life because of "redeeming love." Defense counsel, now giving his second closing argument, told the jury that "he could not ask the jury to spare the defendant's life on the facts of the case."¹⁵¹ In sum, defense counsel argued that the crime was unforgiveable and deserving of the death penalty.¹⁵² The jury was

dissatisfied with life that he attempted suicide. He has made perhaps at least three suicide attempts up to the present time. He feels very inferior, very unloved, very unwanted . . . his whole history from the time he can remember up to the present time has been one of rejection, disapproval, feeling alienated from his family, from his friends, from his schoolmates, from the community in general, and so it's been a very unhappy life that he's lead up to this point.

Transcript of Record at 1474-76, *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

¹⁴⁷ *Id.* at 1486-87.

¹⁴⁸ *Woodward*, 635 So. 2d at 810. Despite the paucity of this testimony, the defense counsel relied solely on a mental illness defense as a mitigating factor for the jury to consider against sentencing Woodward to death. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 812 (Smith, J., concurring in part and dissenting in part).

¹⁵¹ *Id.* at 809. Specifically, the defense attorney stated:

And that's what's called redeeming love. In this case, I realize that will probably never happen. I don't know. You say, how could you ask me to spare Paul Woodward's life? How could any lawyer come and ask you to do it? I can't ask you to do it on the facts. No, I can't. They're terrible. I'm going to be honest with you. I can't ask you to do it on the facts. There's only one way that I can ask you to spare his life, and that's on redeeming love. That's the only way. I know whatever your decision will be, it will be fair and just.

Id. at 810 (emphasis in original).

¹⁵² *Id.*

left with one alternative: to allow “redeeming love” to guide them in their sentencing decision.¹⁵³

As the Mississippi Supreme Court pointed out, “redeeming love” is not a statutory mitigating circumstance that the jury can consider when sentencing. The court cogently noted, “[t]he counsel’s statement above to the jury severely prejudiced any chance Woodward had to receive a life sentence from this jury. . . . [D]efense counsel’s argument to the jury told them that they could not spare Woodward’s life.”¹⁵⁴

The Mississippi Supreme Court, in reversing the case both because defense counsel did not effectively pursue a mental health mitigation strategy and because defense counsel condemned the client, noted “[d]efense counsel had to argue redeeming love because he and his co-counsel failed to present much of a case in mitigation.”¹⁵⁵ Defense counsel failed to call any personal witnesses during the mitigation stage, despite the fact that Woodward’s mother was present and available to testify.¹⁵⁶ As one concurrence stated, “[t]he failure to call any witness who could humanize the defendant cannot be justified as an effective strategy.”¹⁵⁷ Indeed, defense counsel failed to develop or implement any valid strategy. Relying on a mental illness defense, while having only one witness to that defense, and then curtailing that witness’ testimony, undermined Woodward’s only defense.¹⁵⁸

Without post-conviction counsel, which is mandated for all individuals on death row in Mississippi, these issues would have gone unaddressed.¹⁵⁹ The counsel on direct appeal, one of the same individuals who represented Woodward at trial, failed to

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 813 (Smith, J., concurring in part and dissenting in part).

¹⁵⁷ *Id.*

¹⁵⁸ The case was also reversed and remanded for re-sentencing because the jury was incorrectly instructed regarding “the especially heinous, atrocious or cruel” aggravating circumstance. *Id.* at 811-12.

¹⁵⁹ Although Woodward’s post-conviction attorneys were only able to make limited claims, one of those claims was ineffective assistance of trial counsel—a claim not procedurally barred because the same counsel represented Woodward on direct appeal—thus allowing the issue to be raised by separate counsel in a post-conviction appeal. *Id.* at 807-08.

raise the majority of these issues.¹⁶⁰ Despite the costs, post-conviction appeals and new trials are necessary for the death penalty in Mississippi to remain constitutional and consistent with American beliefs in justice.¹⁶¹

B. Brewer v. State: Newly Discovered DNA Evidence of Innocence

While partially analogous to the *Woodward* case in emphasizing the importance of the appellate and post-conviction process, the *Brewer* case is also an example of the importance of safeguards to test, store, and allow newly discovered evidence before the court. Mississippi's first DNA Task Force, charged with recommending statewide procedures for preserving, cataloguing, and testing biological evidence, was created by statute in May 2008.¹⁶² The Task Force was formed partly in response to the exonerations of Levon Brooks and Kennedy Brewer in Noxubee

¹⁶⁰ *Woodward v. State*, 533 So. 2d 418, 420 (Miss. 1988).

¹⁶¹ Other constitutional concerns were present at Woodward's trial. Woodward's case directly implicated the Fourth Amendment. Police searched Woodward's truck for evidence twice, yet only asked for consent to search the first time. *Id.* at 426. The Mississippi Supreme Court, lacking notable precedent on the issue, looked to the Tennessee Supreme Court, which in a similar situation ruled that the second search was "merely a continuation of the first." *Id.* at 427. The Mississippi Supreme Court thus stated the second search in Woodward's case was "authorized and reasonable, and that therefore the evidence was the result of a lawful search." *Id.* Without any further deliberation on the issue or attention to authority or case law, the court moved to deny relief to Woodward. *Id.* In Woodward's case on remand, every African American juror on his panel was struck by the prosecution, including an alternate, using peremptory challenges. *Woodward v. State*, 726 So. 2d 524, 529-30 (Miss. 1998). This left an all white jury that sentenced Woodward to death. *Id.* at 530. The Mississippi Supreme Court noted that Woodward was white, which seemed to imply that this fact nullified any racism in the district attorney's decision and made the decision to strike every single black juror less race-based. *Id.* at 529-30. *But see* EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), available at <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>. The Mississippi Supreme Court ruled "the reasons for the strikes were race-neutral" and not for the intentional purpose of excluding African Americans from the jury. *Woodward*, 726 So. 2d at 534. The court finally found that because no alternate jurors were called to serve on the panel, the State's peremptory strike of an African American alternate juror and the fact the trial judge made no ruling on that strike did not prejudice Woodward. *Id.*

¹⁶² STATE OF MISS., 2008 DNA TASK FORCE REPORT 1 (2008), available at <http://www.clarionledger.com/assets/pdf/D0124061129.pdf>.

County in February of that year.¹⁶³ Brewer was the first person exonerated in Mississippi through post-conviction DNA testing.¹⁶⁴ The Task Force, composed of prosecutors, defense attorneys, legislators, and judges, suggested amendments to the Mississippi Uniform Post-Conviction Collateral Relief Act.¹⁶⁵ These amendments provided for preservation of DNA as well as accessibility to the courts for post-conviction relief motions based on newly discovered evidence.¹⁶⁶ The proposal was presented to and accepted by the legislature, which ultimately adopted the recommendations of the Task Force and amended the Post-Conviction Collateral Relief Act in 2009.¹⁶⁷

Surprisingly, the bill faced opposition from the attorney general's office, which in subsequent years encouraged failed legislation to weaken the statute's provisions.¹⁶⁸ While there are fiscal arguments against the evidence-preservation and court-access components of the statute, Brewer's case is an example of the necessity of preserving evidence and allowing for post-conviction relief motions and hearings to safeguard against wrongful convictions and executions.

In May 1995, Kennedy Brewer was convicted of capital murder while committing sexual battery and was sentenced to death.¹⁶⁹ The allegations were that he raped and killed his girlfriend's three-year-old daughter and then deposited her body in a nearby creek where it was found days later.¹⁷⁰ A semen sample was found on the victim's body but was deemed insufficient for DNA testing.¹⁷¹ The primary evidence that

¹⁶³ *Id.*

¹⁶⁴ Press Release, Innocence Project, *supra* note 16.

¹⁶⁵ STATE OF MISS., *supra* note 162, at 10.

¹⁶⁶ MISS. CODE ANN. § 99-39-5 (West, Westlaw through 2011 Reg. Sess.).

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g.*, H.B. 1361, 127th Leg., Reg. Sess. (Miss. 2012) (limiting post-conviction DNA testing to sexual assault cases); S. 2448, 127th Leg., Reg. Sess. (Miss. 2012) (imposing additional requirements for exonerees to receive compensation for wrongful conviction; if exoneree gave a false confession, regardless of coercion the exoneree cannot receive compensation for wrongful conviction); S. 2891, 125th Leg., Reg. Sess. (Miss. 2010) (allowing the attorney general's office to be custodian of the biological evidence instead of the Mississippi Crime Lab and allowing the custodian to dispose of the biological evidence, provided a petition to do so has been served to defense counsel).

¹⁶⁹ *Brewer v. State*, 725 So. 2d 106, 117 (Miss. 1998).

¹⁷⁰ *Id.* at 112-14.

¹⁷¹ *Id.* at 133-34.

convicted Kennedy Brewer was forensic evidence and the testimony of two medical experts, Dr. Stephen Hayne and Dr. Michael West.¹⁷² Dr. West concluded that he found nineteen marks on the victim's body that were inflicted by Brewer using only his top two teeth.¹⁷³ Brewer's direct appeal was denied in 1998, and after his petition for writ of certiorari was denied by the U.S. Supreme Court,¹⁷⁴ the State moved to set an execution date.¹⁷⁵

Brewer immediately responded by asking for counsel to be appointed for a post-conviction petition, and he filed a pro se petition for post-conviction relief four days later.¹⁷⁶ The Mississippi Supreme Court dismissed the State's motion for an execution date and remanded the case to the trial court for counsel to be appointed.¹⁷⁷ Newly appointed counsel filed a motion for post-conviction relief based on the possibility of exculpatory DNA evidence; this motion was denied by the court in 2000. The court did, however, order the evidence be accessible for DNA testing by Brewer.¹⁷⁸

In 2001, the New York based Innocence Project became involved in the case and had advanced DNA testing performed on the semen recovered in 1992 from the victim's body.¹⁷⁹ The test results excluded Brewer as the perpetrator.¹⁸⁰ The following year, the Mississippi Supreme Court, in an opinion authored by Justice Graves, granted Brewer's motion for post-conviction relief for an evidentiary hearing to consider the newly-discovered DNA evidence.¹⁸¹ The trial court vacated Brewer's conviction later that year.

Despite the vacating of Brewer's conviction in 2002, Brewer remained in detention—albeit not on death row—for the next five years.¹⁸² Prosecutor Forrest Allgood intended to retry Brewer for

¹⁷² *Id.* at 115, 134.

¹⁷³ *Id.* at 116.

¹⁷⁴ *Brewer v. Mississippi*, 526 U.S. 1027 (1999).

¹⁷⁵ *Brewer v. State*, 819 So. 2d 1169, 1171 (Miss. 2002).

¹⁷⁶ *Id.* at 1171.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; *see also id.* at 1168.

¹⁷⁹ Press Release, Innocence Project, *supra* note 16.

¹⁸⁰ *Id.*

¹⁸¹ *Brewer*, 819 So. 2d at 1176.

¹⁸² Press Release, Innocence Project, *supra* note 16.

capital murder, thus Brewer could not be released on bond.¹⁸³ In 2007, Ben Creekmore, then District Attorney of Oxford, Mississippi, was appointed as Special Prosecutor in the Brewer case and decided not to seek the death penalty or oppose bail.¹⁸⁴ Brewer was released in August 2007 while a new trial was pending.¹⁸⁵ Later that year, the attorney general's office intervened and investigated the case, ultimately discovering that the unidentified DNA profile from the semen sample matched Justin Albert Johnson, one of the original suspects.¹⁸⁶ Johnson confessed to the murder as well as to an almost identical crime—the murder of three-year-old Courtney Smith in Noxubee County, Mississippi in September 2000—for which another man, Levon Brooks, had been wrongfully convicted and sentenced to life in prison.¹⁸⁷ Furthermore, Johnson stated that he committed the crimes alone.¹⁸⁸

On February 15, 2008, charges were dropped against Kennedy Brewer and he was exonerated; in March 2008, Levon Brooks was also exonerated.¹⁸⁹ On February 9, 2012, Justin Albert Johnson pled guilty to the murders of Courtney Smith and Christine Jackson.¹⁹⁰ Due in part to the compelling request by Levon Brooks and Kennedy Brewer that the State not pursue the death penalty, Johnson received a plea agreement for two consecutive life sentences.¹⁹¹

¹⁸³ See MISS. CONST. art. III, § 29(1) (“Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.”).

¹⁸⁴ Ronni Mott, *You're Free to Go*, JACKSON FREE PRESS (Feb. 20, 2008), available at http://www.jacksonfreepress.com/index.php/site/comments/youre_free_to_go/.

¹⁸⁵ Press Release, Innocence Project, *supra* note 16.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Ronni Mott, *The Nightmare is Over: Levon Brooks Finally Free*, JACKSON FREE PRESS (Mar. 13, 2008), http://www.jacksonfreepress.com/index.php/site/comments/the_nightmare_is_over_levon_brooks_finally_free/.

¹⁹⁰ Carmen K. Sisson, *Noxubee Man Gets Life Sentence for Rape, Murder*, COLUMBUS DISPATCH (Feb. 10, 2012, 10:19 PM), <http://www.cdispatch.com/news/article.asp?aid=15589>.

¹⁹¹ Interview with Levon Brooks, in Kansas City, Mo. (Mar. 30, 2012). The victims' families also requested that the State not seek the death penalty against Justin Albert Johnson. See Sisson, *supra* note 190.

The markings on the victim's body that Dr. West identified as bite marks made by Kennedy Brewer were determined to be bug bites and the result of the victim's body remaining in the creek for numerous days.¹⁹² The same result was found for the alleged bite marks on the child victim in Levon Brooks's case. Dr. West had been suspended from the American Board of Forensic Odontology and, by 2009, was no longer assisting in criminal investigations for the State.¹⁹³

Dr. West did, however, leave behind a swath of cases where the convictions turned on his testimony. In a statement to the press in August, 2011, Attorney General Jim Hood stated that his office was personally investigating twenty cases in which Dr. West had testified.¹⁹⁴ Then, on October 25, the attorney general's office conceded in court that they had simply conducted a Westlaw search for cases involving Dr. West.¹⁹⁵ Following the Fall 2011 elections and the re-election of Attorney General Jim Hood, all investigation of cases that included West's testimony apparently ceased. This, despite the deposed statement of Dr. West on February 11, 2012, that "I thought [a bite mark] was as unique as

¹⁹² *Id.*

¹⁹³ *See id.*; see also Radley Balko, *Leigh Stubbs, Mississippi Woman, Serving 44-Year Sentence Despite Discredited Testimony*, HUFFINGTON POST (Aug. 9, 2011, 5:36 PM), http://www.huffingtonpost.com/2011/08/09/leigh-stubbs-michael-west-forensics-discredited-testimony_n_922219.html.

¹⁹⁴ Sheri Falk, *Part Three: The Innocence Project Takes on Collins Woman's Case*, WDAM (Aug. 19, 2011, 7:08 PM), <http://www.wdam.com/story/15300146/part-two-the-innocence-project-takes-on-collins-womans-case> (describing the case of Leigh Stubbs, whose conviction was based largely on Dr. West's varied testimony of expert video analysis, gynecological injuries, and bite marks); see also Balko, *supra* note 193.

¹⁹⁵ *Stubbs v. Mississippi*, No. 2011-288-LS-LT, slip op. at 91 (Lincoln Cnty. Cir. Ct. Oct. 25, 2011). At the discovery hearing for Leigh Stubbs on October 25, 2011, Marvin Sanders of the Attorney General's office informed the court that he had been charged with the investigation of Dr. West's cases. He further stated:

BY MR. SANDERS: Your Honor, if I may. You did order us to provide information about our investigation into Dr. West. I was tasked by the attorney general to do an investigation. To be honest with you, I have not conducted any formal investigation. I pulled all of his cases just via Westlaw search and just have not had time to review them for any . . .

BY THE COURT: Okay.

BY MR. SANDERS: . . . forensics or whatever.

Id.

a fingerprint . . . I no longer hold that opinion . . . my opinion of the uniqueness of bite marks was in error.”¹⁹⁶

These actions and statements bring home the point that forensic fraud has tainted an enormous number of cases over the past two decades in Mississippi, including death penalty cases.¹⁹⁷ In order for the cases of innocent individuals to be uncovered, criminal appeals, the preservation of evidence, and accessibility to the courts based on new evidence all play crucial roles.

Kennedy Brewer was an innocent man weeks away from being executed. The possibility of executing an innocent individual should give one serious pause when considering reducing the cost of the death penalty by limiting access to courts and the preservation of evidence.

CONCLUSION

As the execution of Paul Woodward and the exoneration of Kennedy Brewer make clear, the death penalty is a punishment unevenly distributed, often revoked due to trial errors, and ultimately imposing lengthy, exhausting, and costly responsibilities on the state. Unfortunately, these responsibilities require an ample amount of both time and money. Moreover, the only benefits of the death penalty appear to have largely gone to politicians using fear to manipulate voters, rather than to citizens seeking justice.¹⁹⁸ During the current economic crisis, the state is forced to make budget cuts to continue funding the death penalty. As other states, and constituents across the nation, have become more aware of these sacrifices, they have become less willing to take such a punitive stance and maintain their commitment to the death penalty. Indeed, if Mississippi turns away from the death penalty, it will be due to the stark financial crisis that impacts all Mississippi citizens. Just as the view of the death penalty is changing nationwide, the dialogue is changing in Mississippi.

¹⁹⁶ Videotaped Deposition of Dr. Michael West, *Stubbs v. Mississippi*, No. 2011-288-LS-LT, slip op. at 81-82 (Lincoln Cnty. Cir. Ct. Feb. 11, 2012).

¹⁹⁷ See, e.g., Balko, *supra* note 193.

¹⁹⁸ See, e.g., Sid Salter, *Renewing the Death Penalty Debate in Mississippi No Simple Matter*, PICAYUNE ITEM (Apr. 23, 2011), <http://picayuneitem.com/opinion/x1812412311/Renewing-the-death-penalty-debate-in-Mississippi-no-simple-matter/print>.

Ultimately, Mississippi may see an end to the death penalty sooner than an end to the financial recession, but it is possible the two will leave jointly.

