

Guest Editor's Note: A Personal Journey into the Morass of Ohio's Death Penalty

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When I started teaching Criminal Law in 1959, I was not opposed to the death penalty. By August 1960 I was an abolitionist. I testified at legislative hearings, participated in debates, drafted proposed statutes, and wrote an article. When I retired from teaching in 2014, I was still an abolitionist, but disheartened. Ohio still had a death penalty and I was tired. Then I read two books, "Just Mercy" by Bryan Stevenson and "Blind Justice" by Mark Godsey. Both books revealed how and why innocent persons were convicted and how motivated lawyers could help them. The two books energized me and I suggested to my colleague, Douglas Berman, who was one of the Faculty Managing Editors of Ohio State's Journal of Criminal Law, that the Journal do a symposium on the abolition of the death penalty. Professor Berman was very enthusiastic. So was our colleague Ric Simmons, another Faculty Managing Editor. The result is the symposium that you are now reading today.

I. FROM STATEHOOD TO THE 1960S¹

As will be demonstrated by this brief history, the most enduring and controversial issue of Ohio's criminal law is whether Ohio's death penalty should be abolished. Shortly after Ohio became a state in 1803 the legislature enacted a death penalty statute that covered five offenses. By 1824, all but first-degree murder had been removed.² In 1835, a legislative study committee recommended abolition of the death penalty, but the proposed bill was postponed indefinitely.³ In 1837, Governor Joseph Vance recommended abolition, but the Senate did not act and the House postponed consideration by a 33–29 vote.⁴ Vance tried again in 1838, but

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¹ The history of Ohio's death penalty is based in large part on OHIO LEGIS. SERV. COMM'N, STAFF RESEARCH REPORT NO. 46 (1961). The document was prepared for a legislative study committee. Hereafter it will be referred to as "Ohio Report."

² *Id.* at 8.

³ *Id.* at 8.

⁴ *Id.* at 8–9.

again failed.⁵ In 1850, a new bill to abolish was presented.⁶ The Senate voted yes 18–12 but the House postponed consideration indefinitely 31–23.⁷ In 1912, a constitutional convention voted 69–35 to abolish the death penalty and sent the issue to Ohio’s voters.⁸ The voters voted for retention 303,246 to 258,706.⁹ In 1922, Governor Harry Davis strongly urged abolition and collected rudimentary statistical information from governors of other states, but he failed to persuade the legislature.¹⁰

Between 1923 and 1960 various legislators introduced bills to abolish the death penalty, but all of the bills were defeated.¹¹ In the early 1960s, however, Governor Michael DiSalle strongly opposed the death penalty. It may have cost him a second term. In 1965, former Governor DiSalle continued his opposition by writing a book, “The Power of Life and Death” in which he said that the one characteristic that death-row persons had in common was that they were poor.¹²

⁵ *Id.* at 9.

⁶ *Id.* at 9.

⁷ *Id.* at 9.

⁸ *Id.* at 9.

⁹ *Id.* at 10.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 11.

¹² More recently Ohio governors Celeste, Taft, and Strickland have said that they wish that they had spared more people from execution. Darrel Rowland, *Ohio’s former governors Celeste, Taft, Strickland found executions the most difficult part of job*, COLUMBUS DISPATCH (Nov. 28, 2018) <https://www.dispatch.com/news/20181128/ohios-former-governors-celeste-taft-strickland-found-executions-most-difficult-part-of-job>.

As I write this article there are developments in Ohio and other states regarding the death penalty. Ohio Governor DeWine has imposed a moratorium on the death penalty until the lethal injection drugs that Ohio uses will pass constitutional muster. See Thomas Suddes, *DeWine takes on gas tax; is death penalty next*, COLUMBUS DISPATCH (Feb. 24, 2019) <https://www.dispatch.com/opinion/20190224/column-dewine-takes-on-gas-tax-is-death-penalty-next>. Six Ohio Episcopalian Bishops have urged Governor DeWine to abolish the death penalty. See *Bishops reaffirm call for end of death penalty in Ohio*, CONNECTIONS (Jan. 16, 2019), <http://www.dsconnections.org/2019/01/16/bishops-reaffirm-call-for-end-of-death-penalty-in-ohio/>. In California, which is the state with America’s largest death row, Governor Newsom has announced a moratorium. See *California Governor Announces Moratorium on Executions*, DEATH PENALTY INFO. CTR. (Mar. 13, 2019), <https://deathpenaltyinfo.org/news/california-governor-announces-moratorium-on-executions>. In Colorado and Nevada two prosecutors “have added their voices to support efforts to repeal the death penalty in their states. See *Prosecutors in Colorado and Nevada Call for Death-Penalty Repeal*, DEATH PENALTY INFO. CTR. (Mar. 15, 2019), <https://deathpenaltyinfo.org/news/new-voices-prosecutors-in-colorado-and-nevada-call-for-death-penalty-repeal>. In the State of Washington, the Supreme Court unanimously held the death penalty unconstitutional on the ground that “Washington juries were 4.5 times more likely to impose a death sentence on a black defendant than on a white defendant in a similar case.” See *The Race Study that Convinced the Court to Declare Washington’s Death Penalty Unconstitutional*, DEATH PENALTY INFO. CTR. (Mar. 14, 2019), <https://deathpenaltyinfo.org/news/new-podcast-the-race-study-that-convinced-the-court-to-declare-washingtons-death-penalty-unconstitutional>. Washington has become the 20th state, plus the District of Columbia, to abolish the death penalty. See John Gramlich, *California is one of 11 states that have the death penalty but haven’t used it in more than a decade*,

Although Governor DiSalle's opposition to the death penalty may have cost him a second term, it may also have persuaded some Ohioans that the death penalty should be abolished. A state poll in 1960 showed a plurality against the death penalty.¹³ As a result, the legislature created a Special Legislative Committee to hold hearings around the state.¹⁴ One of the hearings was held in Cleveland where I was in my first year of teaching Criminal Law at Case Western Reserve Law School. I was invited to participate in the hearing, and I accepted.

Before I became a teacher, I was in the U.S. Army JAG and had been involved in two capital cases, one as a co-prosecutor, the other as a co-defense lawyer. I was not opposed to the death penalty then. My uninformed thinking was that if criminal punishments deterred crimes, then the most severe punishment should deter the worst crimes. Because my thinking was uninformed, however, I began to do research on the death penalty. I learned three important things. The first was that the question was not whether the death penalty deterred crime, but whether the death penalty deterred crime better than some other severe punishment such as life imprisonment. The second was whether abolition of the death penalty would result in an increase of serious crime. The third was whether juries were competent to determine unerringly who was guilty of a capital offense and who was not. To answer these questions I turned to the Model Penal Code's Tentative Draft No. 9 which contained an article on the death penalty written for the American Law Institute by Professor Thorsten Sellin of the University of Pennsylvania, a well-regarded sociologist and penologist¹⁵.

To answer the first and second questions, Professor Sellin divided neighboring states with similar economic conditions and population components into groups of three, two of which had the death penalty and one of which did not. One of the trios consisted of Ohio and Indiana (death penalty) and Michigan (no death penalty). When he compared the statistics for all three, the statistics were so similar that he could not identify the states from their statistics. The same was true for other trios.

PEW RES. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/>. California is one of eleven states that have the death penalty but have not used it in more than a decade. *Id.* On May 30, 2019, New Hampshire became the 21st state to abolish its death penalty. See Bill Chappell, *New Hampshire Abolishes Death Penalty As Lawmakers Override Governor's Veto*, NPR (May 30, 2019), <https://www.npr.org/2019/05/30/728288240/new-hampshire-abolishes-death-penalty-as-lawmakers-override-governors-veto>.

On the other hand, on July 25, 2019, US Attorney General William Barr announced that the federal government, which had only executed three inmates since 1988, would execute five men in December 2019. See Katie Benner, *U.S. to Resume Capital Punishment for Federal Inmates on Death Row*, NEW YORK TIMES (Jul. 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/federal-executions-death-penalty.html>

¹³ OHIO LEGIS. SERV. COMM'N, *Supra* note 1.

¹⁴ OHIO LEGIS. SERV. COMM'N, *Supra* note 1.

¹⁵ Thorsten Sellin, *The death penalty*, MODEL PENAL CODE DRAFTING RECORDS (AM. LAW INST., Tentative Draft 1959).

To answer the third question, Professor Sellin relied on a book written by Professor Edwin Borchard of Yale Law School, "Convicting the Innocent—Sixty-Five Errors of Criminal Justice"¹⁶. The book, published in 1932, contained sixty-five cases, two of which were from Ohio, in which juries convicted innocent defendants. Some of the cases involved death sentences. Others, including the two from Ohio, did not.

Armed with the work of Professors Sellin and Borchard, I participated in the hearing of the Special Legislative Committee on August 9 and 10, 1960. I was now an abolitionist and my major concern was that innocents were being convicted and might be executed. I told the Committee, "I am scared to death that one day we are going to execute someone who is innocent, and when we do it will blow the top off capital punishment in Ohio." Other abolitionists who testified were Professor Richard Schermerhorn, a sociologist at Western Reserve University, and Ronald Benjamin, President of the Cuyahoga (Cleveland) County Bar Association, both of whom argued that the death penalty was not a deterrent. All of the retentionists were high-ranking police officers who said that they believed that the death penalty was a deterrent that protected the police, but who offered no evidence that it was a better deterrent than life imprisonment.¹⁷

The end result of all the special legislative hearings throughout Ohio was that the legislature did nothing about the death penalty. I, on the other hand, became vice-president of a state-wide abolition organization and began to collect a small library of death-penalty material with emphasis on Ohio. The material eventually turned into an article that was published in 1964.¹⁸

The article discussed: (1) deterrence; (2) the death penalty as an investigative device (e.g., a wedge to induce a murderous co-felon to implicate others, whether the implication was true or false); (3) the recidivism rate of paroled capital felons (it turned out to be very low in Ohio and other states)¹⁹; (4) whether first-degree murderers who are serving life sentences are likely to murder someone in the prison (the answer was no)²⁰; (5) whether the death penalty was consonant with a fair administration of justice (there were serious issues of inequality with reference to race, the county in which the proceedings took place, the quality of representation by appointed counsel versus hired counsel); and (6) whether the innocent defendants

¹⁶ EDWIN BORCHARD, *CONVICTING THE INNOCENT—SIXTY-FIVE ERRORS OF CRIMINAL JUSTICE* (Yale Univ. Press 1932).

¹⁷ The retentionists were apparently unaware that Professor Sellin found no significant difference in police protection between retention and abolition states. See Sellin *supra* note 15, cmt. at 55 for Professor Sellin's analysis. Cleveland's Chief of Police did concede that in the "average murder" the murderer does not consider the punishment before he acts.

¹⁸ Lawrence Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 W. RES. L. REV. 512 (1964).

¹⁹ OHIO LEGIS. SERV. COMM'N, *supra* note 1 at 81–82.

²⁰ OHIO LEGIS. SERV. COMM'N, *supra* note 1 at 79.

who were wrongly convicted were sentenced to a term of years or to death (both happened).²¹

On June 23, 1965, the Ohio House of Representatives adopted House Resolution 81 which asked the Legislative Service Commission (LSC) to make a comprehensive study of Ohio's criminal code as well as Ohio's criminal procedures.²² The Resolution gave the LSC authority to appoint a Committee consisting of legislators and other learned people. The committee was a so-called "Technical Committee," assisted by the professional staff of the LSC, and composed of members of the legislature, bench, bar, and law academia. I was one of the three academics and I was prepared to vote against any death penalty.

According to the minutes, the death penalty was not discussed until the 14th meeting of the Technical Committee, April 25, 1967.²³ Only three members attended that meeting.²⁴ One member asked whether we should go on record as being opposed to the death penalty.²⁵ A second member said that it would have no effect on the legislature and would create animosity to our entire project.²⁶ I then piped up with "I vote to oppose the death penalty." However, because only three of us attended the meeting, no binding vote was taken.

At a primary election in May 1968, Ohio voters approved a so-called "Modern Courts Amendment" to Ohio's Constitution.²⁷ Article 4, Section 5 gave the Ohio Supreme Court the sole authority to promulgate rules of procedure for courts. That had the effect of taking the authority from the Technical Committee, leaving only substantive criminal law as the Committee's focus. There was also a second effect. Within a month or so of the enactment of the Modern Courts Amendment, I received a telephone call from C. William O'Neill, the Chief Justice of the Ohio Supreme Court. He asked me to be a member of the committee that would re-write Ohio's rules of criminal procedure. Having taught Criminal Procedure for many years and having enjoyed the subject even more than I enjoyed Criminal Law, I accepted Chief Justice O'Neill's invitation.

²¹ *Id.*

²² H.R. 81, 106th Gen. Assemb., Reg. Sess. (Ohio 1965)

²³ Minutes of the Criminal Law Technical Committee meeting, April 27, 1967 (in the possession of Professor Lawrence Herman of The Ohio State University College of Law).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Harry J. Lehman & Alan E. Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEVE. ST. L. REV. 8, 9 (1974). Both authors were legislative Representatives. Representative Norris was also a member of the Technical Committee.

The 1970s

Although I intended to continue my work with the Technical Committee, eventually I had to miss some meetings. While I was absent, the Committee included the death penalty in its revision. The Committee completed its work in late 1970, and the legislative Service Commission produced a book entitled “Proposed Ohio Criminal Code” in March 1971. The proposed code was then given to the legislature.

The existing criminal code defined nine separate offenses as first degree murder punishable by death. The proposed code defined only three. The existing code defined premeditated murder; however, case law regarded murder as premeditated even if conceived and executed on the spur of the moment. The proposed code substituted for “premeditated” the words “prior calculation and design” to signal “studied care in planning.”²⁸

The proposed code’s second capital offense was “purposely causing the death of another by means of a firearm or dangerous ordnance carried in violation of section 2923.12 of the revised code.”²⁹ This capital offense was not in the existing code. The proposed code’s third capital offense expanded the existing code’s definition of felony murder by adding the word “escape” to the list of felonies and by substituting the mens rea “recklessly” for the existing code’s “purposely,” thus significantly expanding felony murder.

When the proposed code reached the legislature, it was given first to the House Judiciary Committee. Representative Harry Lehman offered an amendment abolishing the death penalty. It was rejected by a vote of 8 to 7.³⁰ When the proposed code reached the floor debate, Representative Lehman sought to substitute life imprisonment for death.³¹ The proposed amendment was tabled. A third amendment to abolish was offered by Representative Marcus Roberto. It was defeated by a vote of 57 to 38.³² The proposed code passed the House and was pending before the Senate Judiciary.

And then the United States Supreme Court decided *Furman v. Georgia*³³ and thereby completely upset the work of the legislature. *Furman* was actually three separate cases in one. William Furman, of Georgia, was convicted of murder and sentenced to death. Lucious Jackson, also of Georgia, was convicted of rape and sentenced to death. Elmer Branch, of Texas, was convicted of rape and sentenced to death. All three defendants were African American. The issue in each case was

²⁸ DAVID A. JOHNSTON, OHIO LEGIS. SERV. COMM’N, PROPOSED OHIO CRIMINAL CODE: FINAL REPORT OF THE TECHNICAL COMMITTEE TO STUDY OHIO CRIMINAL LAWS AND PROCEDURE 71 (1971).

²⁹ *Id.*, at 70.

³⁰ *See* OHIO LEGIS. SERV. COMM’N, *supra* note 1, at 17.

³¹ *See id.* at 18.

³² *Id.*

³³ *Furman v. Georgia*, 408 U.S. 238 (1972).

whether the death penalty was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.³⁴ In a 5 to 4 decision, the Court set aside all three death penalties. Each of the nine Justices wrote an opinion. Justices Brennan and Marshall were the only justices to conclude that all death penalties violated the Eighth Amendment.³⁵ Justices Douglas, Stewart, and White took a narrower path. Each held that the three death sentences before them violated the Eighth Amendment.³⁶

Justice Douglas was concerned that judges and juries had the uncontrolled discretion to discriminate against the poor, ignorant, powerless, mentally impaired, and members of unpopular groups.³⁷ He was particularly concerned that there was discrimination against African Americans.³⁸

Justice Stewart gave a positive nod in the direction of Justices Brennan and Marshall (“Their case is a strong one”), but said that it was “unnecessary to reach the ultimate question they would decide.”³⁹ His concern was that in a universe of people who had committed the same crimes the defendants had committed, it was the defendants who had been selected for death “capriciously” and “wantonly and freakishly.”⁴⁰ Justice White seconded Justice Stewart’s concern.⁴¹ The dissenters were Chief Justice Burger and Justices Blackmun (who later became an abolitionist), Powell, and Rehnquist.⁴²

Less than one month after *Furman* was decided, the Ohio Supreme Court followed suit in *State v. Leigh*.⁴³ Ohio’s death penalty was gone. So was the death penalty of all other states. When *Furman* and *Leigh* were decided, Ohio’s Senate Judiciary Committee was in the middle of considering the Technical Committee’s proposed criminal code which contained a provision for the death penalty. Not wishing to make a big mistake, the Judiciary Committee asked the Legislative Service Commission to analyze and interpret *Furman*. A few months later the LSC sent the legislators a report entitled “Capital Punishment; Legislative Implications of Supreme Court Decision in *Furman v. Georgia*.” The report alerted the legislature to the possibility that one or more of the three majority justices who did not vote to abolish the death penalty *per se* might join the four dissenters if certain changes were

³⁴ *Id.* at 239 (per curiam).

³⁵ *Id.* at 257–306 (Brennan, J., concurring); *Id.* at 314–71 (Marshall, J., concurring).

³⁶ *Id.* at 240–57 (Douglas, J., concurring); *Id.* at 306–10 (Stewart, J., concurring); *Id.* at 310–14 (White, J., concurring).

³⁷ *Id.* at 249–53 (Douglas, J., concurring).

³⁸ *Id.*

³⁹ *Id.* at 306 (Stewart, J., concurring).

⁴⁰ *Id.* at 310 (Stewart, J., concurring).

⁴¹ *Id.* at 313 (White, J., concurring).

⁴² *Id.* at 375–405 (Burger, C.J., dissenting); *Id.* at 405–14 (Blackmun, J., dissenting); *Id.* at 415–65 (Powell, J., dissenting); *Id.* at 465–70 (Rehnquist, J., dissenting).

⁴³ *Ohio v. Leigh*, 31 Ohio St.2d 97, 285 N.E.2d 333 (1972).

made in the death penalty⁴⁴. Three alternatives were suggested: (1) limiting sentencing discretion; (2) eliminating sentencing discretion, which might involve mandating the death penalty; and (3) narrowing the scope of capital crimes. The Senate Judiciary Committee saw four alternatives: (1) abolish the death penalty; (2) retain the death penalty, but make its imposition mandatory in specified cases; (3) retain the death penalty, but provide the judge and jury with criteria for determining whether to impose the death penalty; and (4) retain the death penalty, but remove from judge and jury as much discretion as possible.⁴⁵ “Mindful of the action taken by the House of Representatives in retaining capital punishment and sensing a similar attitude by the members of the Senate, the Senate Judiciary Committee opted for the last described alternative.”⁴⁶

The death-penalty statute that the Senate Judiciary crafted had three parts: (1) capital offenses were limited to murder and felony murder; (2) in addition to proving a capital offense beyond a reasonable doubt, the prosecutor had to prove at least one of nine “aggravating circumstances,” also beyond a reasonable doubt, in order to justify the death penalty; and (3) if the defendant could prove by a preponderance one or more of three mitigating factors, the sentence would be life imprisonment instead of death.⁴⁷ The three mitigating factors were that (1) the victim of the offense induced or facilitated it; or (2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or (3) the crime was primarily the product of the offender’s psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.⁴⁸

Before the Senate voted on the death penalty statute, a senator offered an amendment that would have abolished the death penalty. It was defeated by a vote of twenty-two to six.⁴⁹

Having voted in favor of the death penalty statute, the Senate sent the proposed statute to the House of Representative. Because the House refused to concur, the bill was sent to a Committee on Conference. The Committee made a few minor changes and one major change. At the request of the Ohio Prosecutors Association the Committee added felony murder as an aggravating factor.⁵⁰ Since felony murder was already a crime, adding it as an aggravating factor had the effect of mandating

⁴⁴ OHIO LEGIS. SERV. COMM’N, Capital punishment; legislative implications of U.S. Supreme Court Decision *Furman v. Georgia*, STAFF RESEARCH REPORT NO. 107 (1972).

⁴⁵ See OHIO LEGIS. SERV. COMM’N, *supra* note 1, at 19–20.

⁴⁶ See *id.* at 20.

⁴⁷ See *id.* at 20–21.

⁴⁸ See *id.* at 21. The three mitigation factors were eventually codified as OHIO REV. CODE § 2929.04(B).

⁴⁹ *Id.*

⁵⁰ See *id.* at 23.

the death penalty unless the defendant could prove one of the three mitigating factors by a preponderance.

Having dealt with the substance, the Committee recommended that the effective date be deferred until January 1, 1974, the date when the new criminal code was to become effective⁵¹

In 1976, the Supreme Court upheld the death penalty in three cases. The most significant of the cases was *Gregg v. Georgia*.⁵² Georgia's death penalty statute defined the forms of murder and a few other crimes that would qualify for the death penalty if coupled with any one of ten forms of aggravation.⁵³ Although the statute did not set out forms of mitigation, it left no doubt that mitigation was an important part of the equation: "[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation The defendant is accorded substantial latitude as to the types of evidence he may introduce [T]he judge is also required to consider or to include in his instructions to the jury any mitigating circumstances" ⁵⁴

Given what the Court said in *Gregg*, one might well ask whether Ohio could get away with just three forms of mitigation. The answer was found in 1978, in *Lockett v. Ohio*⁵⁵ and *Bell v. Ohio*.⁵⁶ Both cases involved the criminal liability of accomplices.

Sandra Lockett, 21 years old, was the accomplice of Al Parker.⁵⁷ When Dew, one of Parker's friends, needed money, Sandra suggested a robbery.⁵⁸ Sandra's brother, James Lockett, suggested robbing a pawn shop where they could ask to see a gun, put cartridges, which Parker had, into the gun, and then rob the owner of the pawn shop.⁵⁹ Sandra offered to lead the group to the pawn shop but said she would not enter the pawn shop because the owner, Sydney Cohen, knew her.⁶⁰ When they arrived at the pawn shop, Parker told Sandra to stay in the car, wait two minutes, then start the engine.⁶¹ James, Dew, and Parker entered the pawn shop.⁶² Dew asked to see a gun.⁶³ When Cohen gave the gun to Dew, Dew gave it to Parker, then Parker

⁵¹ *Id.*

⁵² *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵³ *Id.* at 164–65, n.9.

⁵⁴ *Id.* at 164.

⁵⁵ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁵⁶ *Bell v. Ohio*, 438 U.S. 637 (1978). Warning: I wrote a brief *amicus curiae* for the Supreme Court in the *Bell* case on behalf of The American Civil Liberties Union of Ohio Foundation, Inc.

⁵⁷ *Lockett*, 438 U.S. at 590.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

put two cartridges in it and then told Cohen, "This is a stickup."⁶⁴ When Cohen grabbed for the pistol, Parker had his finger on the trigger and the gun went off, fatally shooting Cohen.⁶⁵

Police eventually arrested Parker and Sandra and both were charged with murder.⁶⁶ Parker pleaded guilty for a life sentence and was the prosecution's key witness. Sandra, who was given various offers by the prosecutor, insisted on going to trial, was convicted, and was sentenced to death.⁶⁷ The Ohio Supreme Court upheld the conviction and sentence in a 4 to 3 decision, the dissenters saying, with reference to homicide, that Sandra was guilty of no more than involuntary manslaughter.⁶⁸ Sandra's lawyers then took her case to the U.S. Supreme Court.

On October 16, 1974, Willie Lee Bell, 16 years old, met a friend, Samuel Hall, 18 years old, at a youth center in Cincinnati.⁶⁹ They went to Hall's home, borrowed a car, and drove away.⁷⁰ They followed another car that was being driven into a parking garage.⁷¹ That car was driven by Julius Graber, 64 years old. Hall, armed with a shotgun, forced Graber into the trunk of Graber's car.⁷² Then Hall got into Graber's car, Bell got into Hall's car and, both drove to Hall's home. Once there, Bell got into Graber's car with Hall and, following Hall's directions, Bell drove to a cemetery and parked the car on a service road.⁷³ The resident of a nearby apartment house saw the car, heard what appeared to be two doors close, and then heard a voice twice screaming, "Don't shoot me," followed by two shots.⁷⁴ He saw someone return to the car and slide from the passenger's seat to the driver's seat.⁷⁵ Then he saw the car being driven away with its lights off and he called the police.⁷⁶

The police arrived, found Graber with massive head wounds, and took him to the hospital. There Graber died.⁷⁷ Bell later told the police that Hall returned to the car and drove himself and Bell to Dayton, where they spent the night.⁷⁸ Hall later

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 591.

⁶⁷ *Id.*

⁶⁸ *Ohio v. Lockett*, 358 N.E.2d 1062, 1076 (1976) (Stern, J., dissenting).

⁶⁹ *Bell v. Ohio*, 438 U.S. 637, 639 (1978).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 639-40.

told a person who was doing a presentence report that it was Bell who had shot Graber.⁷⁹

The next day, Bell and Hall drove to a Dayton service station.⁸⁰ Hall used the shotgun to force the service attendant to give him the keys to the attendant's car and used the keys to put the attendant into the trunk of the car.⁸¹

Hall then drove away in the attendant's car and Bell drove Graber's car.⁸² A patrolman stopped Hall because of a defective muffler.⁸³ When the attendant pounded on the trunk lid, the patrolman rescued him and arrested Hall.⁸⁴ Bell drove past the patrolman and Hall and returned to Cincinnati where he abandoned Graber's car.⁸⁵

Bell was eventually arrested. He was first processed through the Juvenile Division of the Court of Common Pleas and was then bound over to the Hamilton County Grand Jury. He was indicted jointly with Hall, who was an adult, on counts of aggravated murder with specifications of aggravated robbery and kidnapping.⁸⁶ Although indicted jointly, Bell and Hall were tried separately.⁸⁷

At his trial, Bell waived a jury and received a three-judge panel.⁸⁸ Bell did not testify. His lawyer called only one witness, a police officer who had taken statements from Hall; however, the statements were not offered into evidence.⁸⁹ When Bell was arrested, he made a recorded statement to the police that was later admitted into evidence.⁹⁰ Bell denied that he had any intention to take part in a homicide.⁹¹ He said that it was Hall who took Graber from the trunk and into the bushes where he shot him.⁹² He also said that Hall fired two shots and that between the shots Hall ran to the car to get another shotgun shell.⁹³

The three-judge panel unanimously found Bell guilty of murder with the specification that the murder occurred in the course of a kidnapping.⁹⁴ The panel

⁷⁹ *Id.* at 640.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Ohio v. Bell*, 358 N.E.2d 556, 559 (1976).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 560.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

was then required by Ohio law to order a presentence investigation and a psychiatric investigation of Bell.⁹⁵ The psychiatrist's report stated that none of the three mitigating factors were present.⁹⁶ However, it did note that Bell claimed to have been unaware of what Hall was doing when he shot Graber.⁹⁷

The panel of judges unanimously found that Bell had not proved any of the three mitigating factors by a preponderance.⁹⁸ Having already found Bell guilty of aggravated murder, the panel imposed the death sentence. Subsequently, the Ohio Supreme Court unanimously upheld the conviction and death sentence.⁹⁹ Bell's lawyers then took his case to the U.S. Supreme Court.

Sandra Lockett's case and Willie Lee Bell's case raised the same issue, were argued seriatim,¹⁰⁰ and were decided on the same day.¹⁰¹ Could Ohio get away with just three forms of mitigation? Absolutely not. In opinions written by Chief Justice Burger, the Court held that all forms of mitigation must be available to a defendant who is facing death.¹⁰² Because they were not, Ohio's death penalty was unconstitutional. All persons on death row in Ohio had to be taken off death row. Ohio did not have a new death penalty statute until October 19, 1981.¹⁰³

II. 1980S TO PRESENT

At some point in 1981 the death penalty issue was brought to the appropriate Senate Committee. Because I was the Ohio ACLU's point guard in the battle against the death penalty, the Ohio ACLU's Executive Director, Benson Wolman, asked me to participate in every meeting of the Senate Committee. I was reluctant. My argument was "the legislature has screwed up the death penalty into unconstitutionality for years. Why should I help them get it right?" Wolman's answer was, "because they might enact something that we don't like that *just may be barely constitutional*." I said that I would participate in every meeting.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Bell v. Ohio, 438 U.S. 637, 640 (1978).

⁹⁸ Ohio v. Bell, 358 N.E.2d 556, 560 (1976)

⁹⁹ *Id.* at 565.

¹⁰⁰ Lockett's case was argued by Stanford Law Professor Anthony Amsterdam. Amsterdam spoke to the Court without notes and made the best argument I have ever heard in a courtroom. How did I hear it? I was there. Having asked me to write the ACLU's *amicus curia* brief for Willie Lee Bell, the ACLU asked me to attend the argument.

¹⁰¹ Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S.637 (1978).

¹⁰² *Id.*

¹⁰³ One may wonder why it took almost three years for the legislature to enact a death penalty statute. My understanding is that the person who then chaired the appropriate Senate committee was an abolitionist and did not want to move the proposed bill.

At the first meeting I was pleased to learn that the Senate committee chair was Paul Pfeifer. Senator Pfeifer had been a student of mine in 1964 at Ohio State where I had been teaching since 1961. We had a good relationship then and I saw no reason why we could not have a good relationship now. I told him that although I was an abolitionist I was not participating in the meetings to sink the death penalty but to ensure that the final version of the bill would be constitutional. I also told him that my idea of a constitutional death penalty was one that applied to fewer rather than more people and that gave those people more, rather than less, protection. Moreover, I told him that if I thought that any part of the bill would jeopardize constitutionality, I would immediately warn him. Senator Pfeifer liked what I said, and we worked together quite well. I drafted amendments to ensure that the proposed bill would conform to recent decisions of the U.S. Supreme Court, and I testified frequently about the amendments before both the Senate Judiciary Committee and its House counterpart. The bill passed both houses as amended and the death penalty was reinstated in Ohio on October 19, 1981.

A key element of the 1981 bill was that the death penalty could not be imposed on a person who was younger than 18.¹⁰⁴ Another key element was that the death penalty was limited to the two forms of aggravated murder, defined as: (1) killing purposely with prior calculation and design; and (2) killing purposely while engaged in various serious felonies,¹⁰⁵ which had to be supplemented by any one or more of eight aggravating factors.¹⁰⁶ A third key element related to mitigation.

The legislature amended the third existing mitigation factor and then, conforming to the decisions in *Lockett* and *Bell*, greatly expanded the number of mitigation factors from the three that already existed. The third factor was now the definition of “insanity”. The new factors were: “(4) the youth of the offender; (5) the offender’s lack of a significant history of prior criminal convictions and delinquency adjudications; (6) if the offender was a participant in the offense but not the principal offender, the degree of the offender’s participation in the offense and the degree of the offender’s participation in the acts that led to the death of the victim; (7) any other factors that are relevant to the issue of whether the offender should be sentenced to death.” Further, Section (C) provided that “the defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.”¹⁰⁷

I was pleased with the result, but I was still an abolitionist. I was still concerned with some of the matters I had written about in 1964: the death penalty as an investigative device and whether the death penalty was consonant with the fair

¹⁰⁴ Ohio Rev. Code § 2904(B) (1981).

¹⁰⁵ Ohio Rev. Code § 2903.01 (A) and (B) (1981).

¹⁰⁶ Ohio Rev. Code § 2929.04 (A) (1981).

¹⁰⁷ Ohio Rev. Code § 2929.04 (B) and (C). This statute is still in effect.

administration of justice.¹⁰⁸ The latter comprehended issues of inequality with reference to race, the county in which proceedings had taken place, the quality of representation by appointed versus hired counsel, and, most important to me, innocent defendants who were convicted and sentenced to a term of years or to death.¹⁰⁹

Yes, some of the defendants who are charged with, and convicted of, the most serious offenses are innocent. It happens in all states, including Ohio. That is why 43 states, including Ohio, have innocence projects, often associated with law schools. The Ohio Innocence Project (OIP) is associated with the College of Law at the University of Cincinnati. That is also why there is a National Registry of Exonerations which lists 2,409 exonerated persons since 1989 who were wrongly convicted.¹¹⁰

To the best of my knowledge, the academic who has written the most frequently about erroneous convictions is Professor Samuel R. Gross of Michigan Law School. He started in 1996¹¹¹ and was still writing about erroneous convictions in 2017.¹¹² Here is what I find very interesting:

Of the 1,900 individuals exonerated from January 1989 through October 2016:

- 91% were men and 9% were women.
- 47% were black, 39% were white, 12% were Hispanic and 2% were Native American, Asian or Other.
- 17% pled guilty, 76% were convicted . . . by juries and 7% . . . by judges.
- 77% were cleared without DNA evidence.
- 80% were imprisoned for more than one year . . . 57% for at least 5 years, and 38% for 10 to 39 years.

¹⁰⁸ See OHIO LEGIS. SERV. COMM'N, *supra* note 1.

¹⁰⁹ For a book dealing with many of these issues, see ANDREW WELSH-HUGGINS, *NO WINNERS HERE TONIGHT; RACE, POLITICS, AND GEOGRAPHY IN ONE OF THE COUNTRY'S BUSIEST DEATH PENALTY STATES* (Paul Finkelman & L. Diane Barnes eds. 2009). The book addresses issues that have arisen in Ohio. The author is an Associated Press reporter who handles law issues in Ohio. See also MARK GODSEY, *BLIND INJUSTICE; A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS* (2017).

¹¹⁰ Samuel R. Gross & Michael Shaffer, *Exonerations in the United States 1989–2012*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

¹¹¹ Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

¹¹² Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. JOUR. OF CRIM. LAW 753 (2017).

- As a group, the exonerated defendants spent more than 16,710 years in prison for crimes for which they should not have been convicted—an average of 9 years each.¹¹³

Professor Gross's article gives us percentages of exonerations by crime. For death-sentence murder the exoneration percentage was 6%. For other murder the exoneration percentage was 34%.¹¹⁴

I now want to move from general exoneration information to exoneration information that is specific to Ohio. I have divided the Ohio information into two parts: eleven persons who were exonerated while on death row and twenty-eight persons who were charged with a capital crime and who were exonerated while serving life or shorter sentences.¹¹⁵ I intend to discuss three cases from each category.

III. PERSONS WHO WERE EXONERATED WHILE ON DEATH ROW

A. Dale Bundy

Bundy was convicted of murdering Reynaldo Amodio during the holdup of a grocery store.¹¹⁶ Paul Cain, a clerk, was also killed.¹¹⁷ Sometime later, Russell McCoy, a "friend," told Bundy that he had murdered the two people he lived with and burned down their house.¹¹⁸ The next day Bundy read about the murders and arson and told the police, but McCoy had gone to Amarillo, TX.¹¹⁹ McCoy returned to Ohio, turned himself in to the police, confessed to the two murders and arson and also confessed to complicity in the murders of Amodio and Cain, then accused Bundy of shooting Amodio.¹²⁰ Bundy had been convicted of robbery seventeen

¹¹³ *Id.* at 756.

¹¹⁴ *Id.* at 757.

¹¹⁵ I have not found any case, Ohio or not, in which the defendant was exonerated after being executed and I would be surprised if I had found one. The closest I have come is a document from the Death Penalty Information Center entitled "Executed But Possibly Innocent." The document then discusses fifteen cases in which the defendant was executed but possibly innocent. I have investigated all of the cases and believe that many of them contain a strong argument for innocence. The DPIC document does mention some cases in which a governor gave a commutation or pardon to an executed person.

¹¹⁶ *Harry Dale Bundy*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=38> (last visited Oct. 13, 2019).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

years earlier.¹²¹ At Bundy's murder trial McCoy was the key witness and Bundy was convicted of murder and sentenced to death.¹²²

Three days before the execution, Norma Brajnovic, of Amarillo, TX was reading a true crime magazine that featured Bundy's conviction and sentence.¹²³ A picture of McCoy was in the article and Ms. Brajnovic remembered a strange conversation that she had had with McCoy in Amarillo.¹²⁴ After saying that he had no friends, McCoy admitted that he had already killed four people and said, "I am going to kill another one, but this one will be legal, a legal murder."¹²⁵ I am going to have the law do it for me."¹²⁶ Somehow, Ms. Brajnovic got the address of the Stark County Court of Appeals in Ohio and sent the Court a special delivery letter that got to them in time to stop the execution.¹²⁷ Following a hearing, Bundy got a new trial. He was acquitted.¹²⁸

B. Timothy Howard and Gary Lamar James

On December 21, 1976, two armed African-American men robbed a Columbus bank.¹²⁹ One of the two shot and killed a security guard.¹³⁰ Two eyewitnesses picked Howard and James out of a photo lineup.¹³¹ A few days later, the Columbus Dispatch newspaper published photographs of the two and identified them as suspects.¹³² The two went to the police to clear their names with alibis, but the police arrested them and charged them with capital murder.¹³³ They were tried separately.

The prosecution did not have any physical evidence that the defendants were guilty and the bank's security camera did not have film in it on the day in question, so the prosecution had to use eyewitnesses.¹³⁴ But the witnesses who testified had

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Timothy Howard*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3311> (last visited Oct. 13, 2019); *Gary Lamar James*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3322> (last visited Oct. 13, 2019).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

already seen the defendants' pictures in the newspaper.¹³⁵ To strengthen its case, the prosecution called a witness who claimed that, on the day before the robbery/murder, the defendants had robbed his U-Haul Rental store.¹³⁶ What the prosecution did not disclose to the juries was that the witness had been unable to pick out the robbers from a photo lineup.¹³⁷

Both defendants were convicted and sentenced to death; however, the sentences were commuted to life after the U.S. Supreme Court decided the *Lockett* and *Bell* cases.¹³⁸ While he was serving his life sentence, Howard persuaded the Centurion Ministries, a pro bono organization that investigated wrongful convictions, to take his case.¹³⁹ The investigator discovered that a Columbus police detective had suppressed evidence that the defendants were innocent.¹⁴⁰ The detective was eventually removed from the police department.¹⁴¹ The investigator also discovered that another police officer had lied when he testified that fingerprints found at the bank were smudged and could not be used.¹⁴² In fact, one fingerprint was clear and had not been made by either defendant.¹⁴³

Eventually the Franklin County Court of Common Pleas in Columbus held a hearing to consider the new evidence in Howard's case.¹⁴⁴ After the evidence had been presented, the judge and the prosecutor offered Howard a deal: if Howard pleaded no contest to manslaughter, he would be released from prison for time served.¹⁴⁵ Howard, who had insisted that he was innocent, refused!¹⁴⁶ Four months later, Howard's conviction was set aside.¹⁴⁷

The Franklin County prosecutor filed an appeal, but a wave of negative publicity caused second thoughts. When James passed a polygraph test, the prosecutor dismissed both cases.¹⁴⁸

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Howard was awarded \$2.5 million in compensation and James was awarded \$1.5 million.¹⁴⁹ Howard died shortly afterwards of a heart attack.¹⁵⁰

C. Wiley Bridgeman, Ronnie Bridgeman (aka Kwame Ajamu) and Ricky Jackson

On May 19, 1975, Harold Franks was shot and killed outside a grocery store on the east side of Cleveland, where he delivered money orders.¹⁵¹ The shooter also shot through the door of the store, injuring Ann Robinson, the co-owner.¹⁵² Two African-American men stole Franks' briefcase and fled to a nearby green car, driven by a third man.¹⁵³

Within a week, the police obtained a statement from Eddie Vernon.¹⁵⁴ Vernon said that Rickey Jackson was the shooter, that Ronnie Bridgeman was with Jackson, and that Wiley Bridgeman was the driver of the green car.¹⁵⁵ None of the three had a criminal record, but they were all charged with capital murder.¹⁵⁶

Vernon was twelve years old when he saw the police and thirteen when he testified.¹⁵⁷ He was the prosecution's key witness and he told the jury that he had just gotten off a school bus when he saw the shooting and identified the shooter and his accomplices.¹⁵⁸ All three defendants said they were elsewhere and produced alibi witnesses.¹⁵⁹ In addition, the defendants produced witnesses who said that Vernon was with them on the school bus when they all heard gunshots, but that none of them could see the robbers.¹⁶⁰ The jury did not believe the defendants and their witnesses and found the defendants guilty and sentenced them to death.¹⁶¹ However, there was much that the jury did not know.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Kwame Ajamu*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4555> (last visited Oct. 13, 2019); *Wiley Bridgeman*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4554> (last visited Oct. 13, 2019); *Ricky Jackson*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4553> (last visited Oct. 13, 2019).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

The jury did not know that Ann Robinson's husband had paid Vernon \$50 to testify.¹⁶² The jury did not know that Vernon had originally told the police that he was on the bus when the shots were fired.¹⁶³ Most importantly, the jury did not know that Vernon had not seen anything, that he tried to take back what he had told the police, that the police responded by threatening to arrest Vernon's parents for perjury, and that the police fed Vernon details of the crime.¹⁶⁴

The death sentences that had been imposed by the jury were commuted to life in prison (could this have been a result of the *Lockett* and *Bell* cases?).¹⁶⁵ Eventually lawyers with the Ohio Innocence Project (OIP) filed motions for new trials for all three defendants, a hearing was held, and the Cuyahoga County Prosecutor told the judge that he would not contest the motions for new trials.¹⁶⁶ The judge found all three former defendants innocent.¹⁶⁷ Then the prosecutor said that he would not oppose compensation.¹⁶⁸ Wiley Bridgeman received \$2.4 million, Ajamu received \$1.98 million, and Jackson received \$2.65 million.¹⁶⁹

"Jackson had served 39 years, three month and nine days—at that time the longest time in prison of any exonerated defendant in U.S. history."¹⁷⁰

IV. PERSONS WHO WERE EXONERATED WHILE SERVING A TERM OF YEARS FOR A CAPITAL CRIME

A. Anthony Harris

Anthony Harris, 12-years-old, lived in an apartment with his mother, Cynthia Harris, in New Philadelphia, Ohio.¹⁷¹ Living in the same building were Lori Duniver and her 5-year-old daughter, Devan.¹⁷² One day Devan went missing. When Mrs.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The money received by the defendants came from The Ohio Court of Claims. Thereafter, the defendants brought a federal civil rights action. It was dismissed by the District Judge. *Jackson v. City of Cleveland*, No. 1:15 CV 989, 2016 WL 3547834 (N.D. Ohio 2016). However, very recently the Court of Appeals for the Sixth Circuit reversed the District holding. *Jackson v. City of Cleveland*, 925 F.3d 793, 837 (6th Cir. 2019).

¹⁷¹ *Anthony Harris*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3281> (last visited Oct. 13, 2019).

¹⁷² *Id.*

Duniver was unable to find Devan, she called the police.¹⁷³ The next afternoon, searchers found Devan's body in a wooded area near the apartment building.¹⁷⁴ She had been stabbed many times in the throat.¹⁷⁵ Two weeks passed. Public pressure was on the police. The police then asked Ms. Harris to bring Anthony to the station.¹⁷⁶ For the record, I have to tell you that mother and son were African American.

Anthony was put in an interrogation room with the police chief of nearby Millersburg, Thomas Vaughn, who had taken a course in interrogation.¹⁷⁷ Cynthia Harris watched through a window but could hear nothing.¹⁷⁸ A tape recording was made of the interrogation. Anthony denied again and again harming Devan, but eventually the 12-year-old gave up.¹⁷⁹ He said "yes" when asked one more time if he had stabbed Devan in the throat.¹⁸⁰ When asked how many times, he said, "probably twice."¹⁸¹ When Vaughn asked Anthony to write it down, Anthony asked to see his mother.¹⁸² When the two were together, mother asked son if he had killed Devan.¹⁸³ The answer was "no." "Why did you say you did?" "I was just scared."¹⁸⁴

The County District Attorney, Amanda Bornhorst, listened to the tape and then ordered a police officer to arrest Anthony.¹⁸⁵ Anthony's case was heard in Juvenile Court by Judge Linda Cate.¹⁸⁶ She refused to suppress Anthony's confession.¹⁸⁷ An expert in false confessions testified that he believed that Anthony's confession was false and coerced.¹⁸⁸ Anthony's teachers testified that Anthony's behavior was good.¹⁸⁹ Judge Cate, nevertheless, found Anthony guilty and sentenced him to incarceration until he was 21.¹⁹⁰ A year later, the Fifth District Appellate Court set

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

aside the conviction on multiple grounds: the *Miranda* warning had been wrong and the confession had been coerced.¹⁹¹ Anthony was released from confinement.

Sometime later a federal civil action was filed on Anthony's behalf.¹⁹² During the litigation, Anthony's lawyers discovered evidence that should have been turned over to Anthony's criminal trial lawyer, but was not.¹⁹³ Some of the evidence pointed at other suspects, at leads that the police never pursued. Among the leads was that two trained dogs traced Devan's scent to the garage door of a home near the Duniver residence.¹⁹⁴ A convicted child molester, recently released from prison, lived adjacent to that home.¹⁹⁵

In 2005, New Philadelphia and Millersburg settled the civil action for \$1.5 million.¹⁹⁶

B. Floyd "Buzz" Fay

On the evening of March 28, 1978, Fred Ery was behind the counter of the carry-out that he owned in Perrysburg, Ohio.¹⁹⁷ He was talking with a customer when another person entered. That person was wearing a blue ski jacket and a full ski mask.¹⁹⁸ He was carrying a sawed-off shotgun.¹⁹⁹ Words were exchanged, a shot was fired, Ery fell to the floor seriously injured, and the shooter ran out.²⁰⁰ A police officer arrived and asked Ery who shot him.²⁰¹ Ery's answer was, "It looked like Buzz, but it couldn't have been."²⁰² Ery was taken to the hospital and as he lay there dying he kept muttering "Buzz."²⁰³ The police soon learned that Floyd Fay, who occasionally visited the carry-out, had the nickname "Buzz."²⁰⁴ They also learned that he had no criminal record, that he was a carpenter, and that his boss said he was the best in the crew.²⁰⁵ They learned from Ery's widow that Ery and Fay had

¹⁹¹ *In re Harris*, No. 1999AP030013, 2000 WL 748087 (Ohio Ct. App. Jun 7, 2000).

¹⁹² *Harris v. Bornhorst*, No. 5:03CV1827, 2004 WL 7340519 (N.D. Ohio 2004).

¹⁹³ *Harris*, *supra* note 171.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Floyd Fay*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=94> (last visited Oct. 13, 2019).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

not liked each other, and from someone else that Fay had become angry when Ery would not sell him a beer on Sunday.²⁰⁶

Although they had no hard evidence, the police arrested Fay and charged him with aggravated murder, a capital offense.²⁰⁷ Shortly before the trial, the U.S. Supreme Court decided two Ohio cases (guess which ones) that knocked out Ohio's death penalty. Fay now faced life imprisonment.²⁰⁸ Before the trial started the prosecutor offered Fay a deal: if Fay could pass a polygraph test, the charge would be dropped.²⁰⁹ If Fay failed the test, it would be used in evidence against him. Fay agreed.²¹⁰ The test was given by Ohio's Bureau of Criminal Identification and Investigations.²¹¹ Fay failed the test.²¹² Fay was offered a second test, this one in Dearborn, Michigan.²¹³ He failed that one too.²¹⁴ Fay went to trial, was found guilty, and sentenced to life imprisonment.²¹⁵

Fay tried to get a new trial, but failed.²¹⁶ However, the news of the trial was read by several polygraph experts. They also read the polygraph results and found that the results had been misread.²¹⁷ Fay then asked Public Defender Adrian Cimerman to take his case. Cimerman, who was certain of Fay's innocence, agreed.²¹⁸ Acting on a tip, Cimerman went to Germany and discovered evidence of the three men who were involved in Ery's death.²¹⁹ Cimerman returned to Ohio and presented the evidence to the prosecutor.²²⁰ The prosecutor, an investigator, and a detective went to Germany, contacted Ted Goodman, one of the three men, and offered him immunity if he would tell the prosecutor who killed Ery.²²¹ Goodman did.²²² The prosecutor returned to Ohio and joined with Cimerman in filing a motion

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

for Fay's release.²²³ The judge, who had been the original judge, agreed.²²⁴ He also said that if the U.S. Supreme Court had not dismembered Ohio's death penalty, Fay would have been executed.²²⁵

C. Clarence Elkins.

Clarence Elkins was married to Melinda Elkins.²²⁶ On the morning of June 7, 1998, Melinda's mother, Judith Johnson, of Barberton, Ohio, was beaten, raped and killed.²²⁷ Brooke Sutton, Judith's 6-year-old granddaughter, was beaten, raped, and left for dead.²²⁸ Brooke regained consciousness and was eventually questioned by the police. When the police asked Brooke to describe the killer, Brooke said that the killer "looked like Uncle Clarence," Mrs. Johnson's son-in-law.²²⁹ Although DNA testing of hairs found on Mrs. Johnson's body did not implicate Clarence Elkins, he was charged with murder and rape and was convicted on the basis of Brooke's identification and sentenced to life imprisonment.²³⁰

Three years later, Brooke recanted.²³¹ She remembered that the killer had brown eyes, but Clarence had blue eyes.²³² She said that she had been wrong when she accused him.²³³ Elkins' lawyers moved the court for a new trial.²³⁴ The prosecution opposed the motion, largely on the basis that the lawyers had Brooke hypnotized, a procedure that often distorted memory, especially in children.²³⁵ The judge denied the motion.²³⁶

Several years later, the OIP, now representing Elkins, had DNA tests conducted on traces of biological material recovered from Mrs. Johnson's vagina and fingernails and from Brooke's underwear.²³⁷ The DNA tests revealed the same male

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Clarence Elkins*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3202> (last visited Oct. 13, 2019).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

DNA profile in all three locations.²³⁸ It was not Clarence Elkins'.²³⁹ A new motion for a new trial was made by OIP. It, too, was denied.²⁴⁰

The defense investigation then took another path. After Brooke had been raped, she had walked to a neighbor's house.²⁴¹ Instead of calling the police, the neighbor, a woman, kept Brooke on the porch for about 30 minutes before driving her home.²⁴² Why? OIP investigators discovered that the woman's common-law husband was Earl Mann, who had a record of criminal violence, but who had been released from prison shortly before Ms. Johnson had been murdered and Brooke had been raped and who had subsequently been convicted for raping three young girls.²⁴³

Where was Mann now? He was in the same prison and cell block as Clarence Elkins.²⁴⁴ Elkins picked up a cigarette butt that Mann had dropped and mailed it to his lawyers.²⁴⁵ The lawyers had a DNA test done on the saliva that was on the butt. The DNA matched the DNA that had been collected at the crime scene of Ms. Johnson's murder and Brooke's rape.²⁴⁶

Was the prosecutor willing to release Elkins now? No! Enter Ohio Attorney General Jim Petro. Petro held a press conference to put pressure on the prosecutor.²⁴⁷ After another DNA test confirmed Mann's guilt, Elkins was released from prison.²⁴⁸ Mann pleaded guilty to everything and was sentenced to life without parole.²⁴⁹

The City of Barberton settled a lawsuit brought against Barberton police officers for \$5.25 million.²⁵⁰ The officers had been involved in the investigation and prosecution.

V. CONCLUSION

I have just described six Ohio murder cases. In all six, the defendant was innocent. In all six, the defendant was convicted. In three, the defendant was sentenced to death. In three, the defendant served time in a prison. I could have described thirty-nine Ohio cases in which an innocent defendant was convicted of a

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

capital offense and sentenced either to death or to imprisonment. Can one imagine the pain that the innocent convicts experienced? Their pain is one reason I oppose the death penalty.

In all of the cases I described or could have described, something that went wrong in the criminal law process: mistaken eyewitness identification; perjury; misconduct by police; misconduct by prosecutors who are more interested in climbing the political ladder than they are in justice;²⁵¹ incompetence by defense lawyers; false confessions, perhaps induced by police pressure; false or misleading forensic evidence; judges who give confusing instructions to juries; and functionaries, including jurors, who are racist. Each of these is a reason that has existed for a long, long time and will continue to exist. Each one is why I oppose the death penalty.²⁵²

There is a final reason why I am an abolitionist. I have been told by defense lawyers, whose judgment I trust, that when they enter a courtroom to defend someone, the functionaries of the courtroom act as though the arrest and indictment of the defendant means that the defendant is guilty. The atmosphere is one of “presumption of guilt” instead of “presumption of innocence.” I believe that such an atmosphere is a reason why so many innocent defendants have been convicted. That is my final reason for being an abolitionist.

²⁵¹ AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTIONS AND DEFENSE FUNCTION, Standard 3-1.2(b) (4th ed. 2015) (“The primary duty of the prosecutor is to seek justice, not merely to convict.”).

²⁵² It had long been believed that eyewitness misidentification was the leading cause of erroneous convictions. Now it is believed that perjury or false accusation is the leading cause. See Gross, *supra* note 112 at 770.

