Washington Supreme Court Strikes Down State’s Death Penalty

On October 11, the Supreme Court of the state of Washington unanimously struck down that state’s death penalty. The court declared the death penalty was unconstitutional, arbitrary and racially biased. The court’s opinion concluded that the death penalty is unequal in use and practice, and that it is meted out haphazardly, often depending on little more than geography or timing. The court also found that “the death penalty...is imposed in an arbitrary and racially biased manner.” The decision puts an end to capital punishment in Washington State, confirming a 2014 moratorium declared by the governor.

Twenty states have abolished the death penalty. Three others (Colorado, Pennsylvania and Oregon) have gubernatorial moratoria in place. While Arizona has 121 prisoners on its death row, there has not been an execution in more than three years and none are scheduled. This defacto moratorium results from a law suit over the yet to be resolved method of execution, with neither side apparently pushing the issue.

Twenty Executions in 2018—Four More Pending

On Monday, October 29, South Dakota executed Rodney Berget. Three days before, Juliet Yackel, a Chicago-based lawyer who had been retained in Berget’s state post-conviction proceedings as a mitigation investigator, filed a pleading called a petition for writ of prohibition that asked the Court to halt Berget’s execution and appoint her as his legal guardian “because he has an intellectual disability and [is] otherwise incompetent, rendering him ineligible to be executed.” Berget had waived a jury trial and pled guilty to murder for his involvement in the death of a prison guard, and had been attempting to waive his appeals.

At the close of the trial, he told the sentencing judge, “I believe I deserve the death penalty for what I’ve done.” Yackel’s petition described Berget as “intellectually disabled and suicidal.” Her motion alleged that he was not able to protect his own interests and that the attorneys assigned to do so had refused.

In 2002, the US Supreme Court ruled in Atkins v. Virginia that individuals with intellectual disability—then known as mental retardation—may not be executed. Yackel’s petition included a litany of evidence she said clearly demonstrates Berget’s ineligibility for the death penalty. In fact, she said it was one of the clearest-cut cases of intellectual disability she has ever worked on, and “not a close call.”

Edmund Zagorski was given a choice. Die by lethal injection or by electric chair. He chose the chair, and on November 1, after spending more than half his life on death row for killing two men in 1983, Zagorski was electrocuted by the state of Tennessee. He was the first in the state to die by electric chair since 2007 and the first in five years in the US.

There was no doubt of his guilt. He was convicted in the April 1983 murders of John Dale Dotson and Jimmy Porter, luring them into the words with the promise to sell them marijuana, then shooting them, slitting their throats and stealing their money. Zagorski never disputed the charges; he told his defense attorneys he wanted the death penalty and would not allow them to contact his family or dig into his past.

If jurors had known the details of his early life, according to later appeals, he may have avoided the death penalty. At the time, jurors had only two options: death or life with the possibility of parole. Six of the surviving jurors agreed life without parole was an appropriate sentence; today, a death sentence would not be given if just one juror wanted life without parole.

Zagorski’s final appeal, denied by the US Supreme Court just a few minutes before he was executed, argued it was unconstitutional to force him to choose between lethal injection and the chair. Thirty-four years and 22 appeals after his 1984 sentencing, he died by the method he felt was a marginally less excruciating alternative to lethal injection.
New Poll---Support for Death Penalty Continues to Drop

Fewer than half of Americans now believe the death penalty is fairly applied in the US, according to the 2018 Gallup crime poll of adults, conducted October 1-10. The 49% of Americans who said they believed the death penalty was "applied fairly" was the lowest Gallup has ever recorded since it first included the question in its crime poll in 2000. The percentage of US adults who said they believe the death penalty is unfairly applied rose to 45%, the highest since Gallup began asking the question, and the four-percentage-point difference between the two responses was the smallest in the history of Gallup's polling. The poll also found that, even as the number of new death sentences is near historic lows, the percentage of Americans saying that the death penalty is imposed too often continued to rise and the percentage saying it is not imposed enough continued to decline. Now, 57% of US adults said the death penalty was imposed either "too often" (29%) or "about the right amount" (28%). In 2010, just 18% said the death penalty was imposed too often. While a plurality of 37% said the death penalty was not imposed enough, that figure was down 16% from the 2005 level, when 53% said it was not imposed enough. Gallup analyst Justin McCarthy wrote, "As executions in the US have decreased along with the generally sinking crime rate, Americans have become more likely to say capital punishment is unfairly applied and that it is imposed too frequently."

Gallup measured overall support for capital punishment at 56%, which McCarthy described as "similar to last year, which marked the "lowest level of support for the practice since 1972." He said, "Support for capital punishment... has been trending downward since peaking at 80% in the mid-1990s during a high point in the violent crime rate." The poll measured opposition to the death penalty at 41%, the same as last year's 45-year high. A national Pew Research Center poll released in June reported support for the death penalty at 54% and opposition at 39%. A 2017 study reported that murders in the 37 states that authorized the death penalty in 1994 declined by 35.4% between then and 2014, but that death sentences declined by 76.5%—more than double that rate—over the same time frame.

Midterm Elections Reflect America’s Divided Views on Capital Punishment

Voters elected governors who pledged not to resume executions in three states with death-penalty moratoria (Pennsylvania, Oregon and Colorado) and resoundingly defeated an incumbent who tried to reinstate capital punishment in a non-death penalty state (Illinois). At the same time, two governors who had prevented death penalty repeal bills from going into effect in their states (Nebraska and New Hampshire) won reelection, and, while the race was too close to call at press time, Republican Ron DeSantis was ahead for the governorship of Florida against Democratic candidate Andrew Gillum, who had pledged to suspend executions in the state until he was sure the death penalty system was nondiscriminatory in its application. Continuing a national trend, voters in Orange County, California ousted their scandal-plagued top prosecutor, marking the ninth time since 2015 that local voters have replaced prosecutors in jurisdictions with the nation’s largest county death rows.

National Death Row Census Drops

For the first time in more than a quarter century, fewer than 2,500 prisoners across the US now face active death sentences. According to the latest Death Row USA national census by the NAACP Legal Defense Fund (LDF), released in September, 2,743 people were on state, federal and military death rows on April 1, 2018. That total includes 249 people who were previously sentenced to death but face the possibility of resentencing after a new trial or sentencing hearing as well as prisoners whose capital convictions or death sentences have been reversed, but whose reversals are still subject to appeal. Active death sentences were faced by 2,494 other prisoners. The Spring 2018 census reflects a decline of 100 prisoners on death row from the number reported a year earlier. Over the course of the last decade, the number has declined by 17%. The overall decline in the number of people on death rows across the country is greater than the number of executions in that period, meaning that more former death-row prisoners have been resentenced to life or less after overturning their death sentences, died from non-execution causes, or been exonerated than have been added to the row with new death sentences. 

California (740), Florida (354), and Texas (235) remain the nation’s largest death rows. Of the jurisdictions with at least 10 people on death row, those with the highest percentage of racial minorities are Texas, Louisiana, and Nebraska, each at 73%. The last time LDF recorded fewer than 2,500 prisoners facing active death sentences in the US was in January 1993, when the Winter 1992 Death Row USA reported that 2,483 of the 2,676 men and women then on death row had active death sentences.
Letter of the Law Trumps Justice

The Florida Supreme Court has upheld the death sentence imposed on William Roger Davis III, even though the sentence admittedly violates both the Florida and federal constitutions. In a decision issued on October 25, the Florida court refused to redress the unconstitutionality of the death sentence—imposed by a trial court judge after a bare 7-5 majority of jurors had recommended death—ruling that during an earlier proceeding before the trial court, Davis waived review of all claims relating to his conviction and death sentence. The appeals court held that this waiver barred Davis from renewing his challenge to the unconstitutional sentencing process on appeal.

Davis was convicted and sentenced to death in Seminole County (Tallahassee) for a 2009 murder, kidnapping and sexual battery. After hearing Davis accept responsibility for the crime and testify about his mental state when it occurred, five jurors recommended that he be spared the death penalty. At the time of trial, however, Florida was one of only three states that permitted judges to impose a death sentence with a less than unanimous jury vote, and its death-penalty statute directed the trial court to make its own independent findings of fact, independently weigh aggravating and mitigating circumstances, and impose a sentence of either life without parole or death. Last year the US Supreme court ruled that the death penalty may only be imposed with the unanimous recommendation of a jury.

Florida Halts Capital Retrial with 164th Exoneration

Newly discovered confessions and DNA evidence pointing to the chief witness as the actual killer caused prosecutors on the verge of a retrial to drop all charges against Clemente Aguirre in Seminole County, Florida. Jury selection had already begun when charges were finally dismissed, making Aguirre the 164th wrongfully convicted death-row prisoner to be exonerated in the US since 1973. The Florida Supreme Court had unanimously overturned his conviction in 2016 and even the original sentencing judge had come to believe him innocent, but prosecutors were hell bent to retry him anyway.

DNA evidence implicated Samantha Williams, the mentally ill daughter and granddaughter of the victims. Although she provided eyewitness testimony against Aguirre, Williams later confessed to at least five different people that she had murdered her relatives.

On death row since 2006, Aguirre is an undocumented immigrant from Honduras. His attorneys plan to file an asylum application on his behalf and will ask the immigration judge to release him from custody while the application proceeds. He is the third foreign national to be exonerated in the last year. Florida has more death-row exonerations than any other state, with 27. Ninety percent of those exonerations came in cases in which jury recommendations for death were not unanimous.

New Report Examines Worldwide Use of Death Penalty Against Women

Women face “widespread discriminatory practices in capital prosecution and detention” in death penalty countries around the world, according to a new report by the Cornell Center on the Death Penalty Worldwide and the World Coalition Against the Death Penalty, released at the UN in Geneva, Switzerland in September.

At least 500 women are on death rows around the world, and the report estimates that more than 100 women have been executed in the last decade. The report finds that death sentences are often imposed on women who are illiterate, mentally ill, intellectually disabled, or members of marginalized ethnic groups. The women’s histories of gender-based violence are frequently ignored by attorneys and judges in countries that retain the death penalty, and the report notes that gender bias, while sometimes operating in favor of more lenient sentencing for some women, can result in harsher treatment of women who are seen as violating gender expectations.
October Hosts ‘World Day Against the Death Penalty’

Marking World Day Against the Death Penalty, the government of Malaysia on October 10, 2018 announced its intention to abolish capital punishment in the Muslim nation of 30 million people. A continent away, the Council of Europe and the European Union issued a joint declaration reaffirming Europe's "strong opposition to capital punishment in all circumstances." In their joint statement, the Council of Europe and the European Union called the death penalty "an affront to human dignity" that "constitutes cruel, inhuman and degrading treatment and is contrary to the right to life. The death penalty has no established deterrent effect and it makes judicial errors irreversible." The Council of Europe and the EU will continue promoting the Global Alliance to "end trade in goods used for capital punishment and torture" to prevent even indirect involvement in death penalty use by third world countries. Europe's trade stance has directly affected executions in the US, as European countries have blocked the export of lethal-injection drugs.

REFLECTION

On August 16, 2018, the Arizona Supreme Court decided the case of State v. Bush, a death penalty case that was up on a direct appeal from Pima County. Although the opinion itself was unremarkable in terms of the result, the Court invited an appellate judge, Lawrence Winthrop, to join the court as Justice John Lopez did not participate in this case. Judge Winthrop concurred in part and dissented in part, but laid out a scathing dissent against the death penalty. In the longest section of the opinion, Winthrop was taken to task for his position by an apparently offended Justice John Pelander, who along with Justice Scott Bales, pointed out that this issue was not raised in the trial court, so it was not properly before the Court in State v. Bush, Supreme Court Case Number CR-11-0107-AP.

Judge Winthrop wrote a cogent opinion with a very interesting argument that uses the Arizona State Constitution as a basis for challenging the death penalty, as federal courts have rejected 8th Amendment challenges that the death penalty is cruel and unusual punishment. The dissent provides a basis for such a challenge by stating that state courts, “are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the US Constitution.” The Arizona Supreme Court has always interpreted the state’s Constitution to provide greater or broader protections to Arizona citizens. Winthrop reasons in his dissent that as a matter of state law (as challenged under the Arizona Constitution) the death penalty is unconstitutional, as it cannot be implemented in a way that is not cruel. Second, he states that the death penalty in Arizona is also “unconstitutionally unusual,” as it is arbitrary in its application. Further, Winthrop argues that the death penalty serves no penological goal, with the vast majority of research showing no deterrent effect, and therefore there is little benefit to be gained in sentencing a defendant to death. Finally, he cites the cost of the death penalty as a final argument.

Central to the argument are the evolving standards of decency that show a number of states abolishing the death penalty rather than enacting it. Judge Winthrop correctly points out that only 16 of the more than 3,000 counties/districts in the US have sentenced more than five defendants to death for homicide, and that Maricopa County, Arizona, has a rate 2.3 times higher than the remainder of the state for sentencing defendants to death.

While it may be true that the issue was not raised in the trial court, the argument needed expression and is now immortalized in an Arizona Supreme Court capital case opinion. The argument may be ahead of its time, as it is unique to Arizona capital case jurisprudence, but that time is coming. Often, it takes years of making the same arguments before the appellate courts before a defendant can receive consideration on an issue. With this dissenting opinion, the foundation for future arguments has been laid, and because of it the challenges to the death penalty in Arizona will be more formidable over time. It is my fervent hope that the foundation that has been laid with this dissent ultimately will result in the end of the death penalty in Arizona. Let’s hope that we will not have long to wait!

*Alan Tavassoli, President*

*Death Penalty Alternatives for Arizona*