

Local Prosecutors and Capital Overrides

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ABSTRACT

The American death penalty is a localized phenomenon. County district attorneys choose when, if ever, to bring capital cases, and local juries choose whether to sentence a defendant to death. And yet, at the most critical point of the process, the time just before a State is about to execute an inmate, the local prosecutor has no power. Neither does the jury. Appellate courts, as well as governors with clemency power, ultimately decide if and when inmates will die.

Two recent examples, the execution of Marcellus Williams and the pending execution of Richard Glossip, concern cases where the local prosecutors made mistakes and no longer believe that execution is appropriate. In both cases, the prosecutors filed pleadings requesting that the courts and the respective clemency board / governor block the death sentence and reverse the jury's decision.

In none of these cases do the state courts seem willing to alter the prior decision. They are choosing finality over justice. While the instinct to make capital cases "final" is understandable given the average time of over two decades between sentencing and execution, the error rate in capital cases and over two hundred death row exonerees suggest that perhaps caution is not a bad idea.

With district attorneys asking for reconsideration of death sentences and state courts balking at such requests, this problem is an institutional choice problem. Courts and executive branch officials have the final say, while prosecutors do not. This symposium article argues that the state legislature can best remedy this problem by giving a veto power on executions to local prosecutors. Specifically, this article makes the case that local prosecutors should have the final say concerning executions instead of state courts, attorney generals, clemency boards, and governors because they remain in the best position to assess the aims of justice and remain insulated from the demands of finality.

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Part I of the article demonstrates that the American death penalty is a local phenomenon and as such, underscores the value of a prosecutorial veto. In Part II, the article demonstrates the limits on finality in capital cases by briefly exploring the frequency of error and innocence in capital cases. Part III explains how finality impedes justice, particularly in capital cases. And Part IV offers the proposal itself, providing a sample of a model statute and demonstrating why that statute may be necessary to achieve justice in some capital cases.

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INTRODUCTION

The American death penalty is a localized phenomenon.¹ County district attorneys² choose when, if ever, to bring capital cases, and local juries³ choose whether to sentence a defendant to death.⁴ And yet, at the most critical point of the process, the time before a state is about to execute an inmate, the local prosecutor has no power.⁵ Neither does the jury. Courts, as well as governors or boards with clemency power, ultimately decide if and when inmates will die.

Two recent examples, the execution of Marcellus Williams⁶ and the pending execution of Richard Glossip,⁷ concern cases where the local prosecutor's office made mistakes and prosecutors no longer believe that execution is appropriate.⁸ In each case, local prosecutors filed pleadings requesting that the courts and the

¹ See, e.g., DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 117 (2010) (“[T]he most important decisions about capital charging and sentencing remain matters for county-level decision-makers.”).

² Indeed, the charging decisions of local prosecutors in capital cases drive the geographic variation in death sentences. See, e.g., Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 305 (2009); Meg Beardsley, Sam Kamin, Justin F. Marceau & Scott Phillips, *Disquieting Discretion: Race, Geography, and the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. L. REV. 431, 431 (2015); Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 227–28 (2012); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–09 (2010).

³ Variation in jury sentencing decisions has long raised questions about the fairness of the death penalty. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 308–09 (Stewart, J., concurring) (comparing the arbitrariness of death sentences in jury sentencing to the arbitrariness of being struck by lightning); *Glossip v. Gross*, 576 U.S. 863, 920–22 (2015) (Breyer, J., dissenting) (highlighting the potential for racial bias in jury selection and sentencing).

⁴ The Court has made clear that juries decide the sentence in capital cases. *Hurst v. Florida*, 577 U.S. 92, 92 (2016). It is not clear that states follow the requirements of *Hurst*. Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 448 (2019); see also *infra* note 37 (noting that Florida also ignores the unanimity requirement).

⁵ This is different from less serious civil matters where both parties maintain the autonomy to settle the case and even withdraw the complaint.

⁶ Rachel Looker, *Missouri Executes Marcellus Williams After Two Decades on Death Row*, BBC NEWS, (Sep. 24, 2024), <https://www.bbc.com/news/articles/cz9p518j0nqo> [<https://perma.cc/38F2-LAWB>]. In Williams' case, St. Louis prosecuting attorney Wesley Bell unsuccessfully sought a new hearing based on DNA discovered on the murder weapon not belonging to Williams and the subsequent spoilation of evidence by investigators. *Id.*

⁷ *Glossip v. Oklahoma*, 604 U.S. 226, 231 (2025) (reversing the lower court's decision and remanding for a new trial).

⁸ In Williams' case, Bell noted that “[t]his outcome did not serve the interests of justice.” Looker, *supra* note 6. In Glossip's case, the prosecutor's office joined Glossip's appeal to the United States Supreme Court after the Oklahoma Court of Criminal Appeals upheld his death sentence. See *Glossip v. Oklahoma*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/glossip-v-oklahoma-3/> [<https://perma.cc/F2D9-NRPX>] (last visited Mar. 23, 2025).

respective clemency board or governor block the death sentence and reverse the jury's decision.⁹

In these cases, the state courts rarely alter the prior decision.¹⁰ In allowing error to persist, courts are choosing finality over justice.¹¹ While the instinct to make capital cases “final” is understandable given the average time of over two decades between sentencing and execution,¹² the error rate in capital cases¹³ and the over two hundred death row exonerees¹⁴ suggest that perhaps caution is not a bad idea.

With district attorneys asking for reconsideration of death sentences and state courts balking at such requests, this problem is an institutional choice problem. Courts and senior executive branch officials have the final say, while prosecutors do not. This symposium article argues that the state legislature can best remedy the problem by giving a veto power on executions to local prosecutors. Specifically, this article makes the case that local prosecutors should have the final say over state courts, attorney generals, clemency boards, and governors because they remain in the best position to assess the aims of justice and remain insulated from the demands of finality.¹⁵

Part I of the article shows that the American death penalty is a local phenomenon and as such, underscores the value of a prosecutorial veto. In Part II, the article demonstrates the limits on finality in capital cases by briefly summarizing the frequency of error and prevalence of innocence in capital cases. Part III explains how finality impedes justice, particularly in capital cases. And Part IV offers the proposal itself, providing a sample of a model statute and demonstrating why that statute may be necessary to achieve justice in some capital cases.

⁹ See sources *supra* note 8.

¹⁰ See sources *supra* note 8.

¹¹ See sources *supra* note 8.

¹² *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/H4DG-CLFB>] (last visited Mar. 23, 2025); *Average Time Between Sentencing and Execution for Inmates on Death Row in the United States from 1990 to 2021*, STATISTA (Aug. 20, 2024), <https://www.statista.com/statistics/199026/average-time-between-sentencing-and-execution-of-inmates-on-death-row-in-the-us/> [<https://perma.cc/QH8W-N3S3>].

¹³ JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, COLUM. L. SCH., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000), https://scholarship.law.columbia.edu/faculty_scholarship/1219 [perma.cc/G3HL-WUS9] (revealing an error rate of two-thirds in capital cases).

¹⁴ *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> [<https://perma.cc/428M-7N5Q>] (last visited Mar. 23, 2025).

¹⁵ This proposal helps to avoid the procedural thorniness that has arisen in Texas with the Robert Roberson case. Quinn Yeagain, *Texas Has Dug a Deep Hole It Can't Escape on a Particularly Thorny Issue*, SLATE (Jan. 3, 2025), <https://slate.com/news-and-politics/2025/01/death-penalty-robert-roberson-texas-sized-hole.html> [<https://perma.cc/LT8U-E2C3>]. Roberson's death sentence relied on the debunked junk science “shaken-baby” syndrome. *Id.* Legislators subpoenaed Roberson to testify before the legislature to block his execution, at least temporarily. *Id.*

I. THE DEATH PENALTY AS A LOCAL PHENOMENON

Views on the propriety and efficacy of the death penalty vary widely in the United States.¹⁶ Most states,¹⁷ and even most counties,¹⁸ seldom if ever sentence anyone to death, much less execute them.¹⁹ The decision, however, remains a local one.²⁰

A. Prosecution

States choose whether to have capital statutes,²¹ but prosecutors decide whether to use them.²² The decision about how to charge a case under state homicide law remains the decision of the district attorney.²³ And their re-election depends in part on making such decisions consistent with the values of the local community, particularly in high-profile homicide cases. Without the decision of the prosecutor to charge a case as a capital one, the death penalty ceases to exist.

Examining the use of the death penalty on a county level demonstrates the localized nature of its use. Historically, the death penalty has clustered around a few counties.²⁴ Seventy-five counties (fewer than 2.4% of counties) are responsible for half of all death sentences in state courts since 1972.²⁵ Prosecutions in just five coun-

¹⁶ See, e.g., *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/Death-Penalty.aspx> [https://perma.cc/R7K4-P35A] (last visited Nov. 3, 2025).

¹⁷ See, e.g., DEATH PENALTY INFO. CTR., *The Death Penalty in 2023: Year End Report*, <https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2023.pdf?dm=1701385056> [https://perma.cc/L72Y-MFJ3] (last visited Mar. 23, 2025).

¹⁸ See, e.g., Brandon L. Garrett, *Rare as Hens' Teeth: The New Geography of the American Death Penalty*, 42 HUM. RTS., no. 2, 2016, at 2.

¹⁹ *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1733327144> [https://perma.cc/4RCZ-APWG] (last visited Mar. 23, 2025).

²⁰ See sources, *supra* note 2.

²¹ See DEATH PENALTY INFO. CTR., *supra* note 19. This century, New York (2004), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), Washington (2018), New Hampshire (2019), Colorado (2020), Virginia (2021) have all abolished the death penalty. See, e.g., *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-landing> [https://perma.cc/4HR6-BJY5] (last visited Mar. 23, 2025).

²² Indeed, a handful of prosecutors are responsible for many of the death sentences. FAIR PUNISHMENT PROJECT, *AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY* 3, 18 (2016), https://dpic-cdn.org/production/documents/FairPunishmentProject-Top5Report_FINAL_2016_06.pdf [https://perma.cc/8FW2-VX2B] (highlighting five prosecutors responsible for a whopping 440 death sentences).

²³ In most jurisdictions, prosecutors must indicate the intention to charge the case as a capital case in the indictment.

²⁴ See, e.g., Smith, *supra* note 2, at 228–29; Gershowitz, *supra* note 2, at 314–18.

²⁵ *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2022),

ties accounted for more than 20% of all executions in the U.S. since 1976, and 84% of U.S. counties have not had any executions in a half-century.²⁶

Between 2004 and 2009, only 10% of counties imposed a death sentence and only 1% of counties imposed a death sentence each year.²⁷ Three California counties accounted for more than half of the death sentences imposed between 2004 and 2009.²⁸ Pennsylvania is also a notable example, with Allegheny County and Philadelphia County having similar populations, but almost half of the state's death row inmates coming from Philadelphia County and less than 5% from Allegheny.²⁹ Texas similarly has an overwhelming majority of its death sentences coming from just a few of the state's 254 counties.³⁰ And in Ohio, the number of death sentences from Hamilton County dwarfs that of Franklin County, despite Franklin County having over 200,000 more citizens.³¹ Given that even the most active death penalty counties do not impose the death penalty regularly, the best way to understand the death penalty is as a local phenomenon, not a state one.³²

B. Grand Juries and Trial Juries

In order for the imposition of a death sentence, a local grand jury must first provide a true bill that allows the capital case to proceed.³³ As with the prosecutor, this is typically a local decision, with the county's grand jury deciding whether probable cause exists to allow the case to proceed as a death penalty case.³⁴

At trial, the jury will then determine, if it finds the defendant guilty of capital homicide, whether to impose the death penalty.³⁵ In weighing aggravating and mitigating factors,³⁶ the local jury must unanimously find that the defendant's

<https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2022-year-end-report> [<https://perma.cc/7GPN-L4P9>].

²⁶ *Id.*

²⁷ See, e.g., Corinne Gearhart, Press Release, *DPIC's Year End Report: Death Sentences in U.S. Lowest Since Death Penalty Reinstated in 1976*, DEATH PENALTY INFO. CTR. (Dec. 18, 2009), <https://dpic-cdn.org/production/legacy/2009YrEndReportPress.pdf> [<https://perma.cc/HN9W-8RJR>].

²⁸ Smith, *supra* note 2, at 231.

²⁹ Gershowitz, *supra* note 2, at 314.

³⁰ *Id.* at 314–15.

³¹ *Id.* at 317.

³² Smith, *supra* note 2, at 232.

³³ See, e.g., MISS. CODE ANN. § 13-7-35 (West 2025); OHIO REV. CODE ANN. § 2939.20 (West 2025).

³⁴ See sources *supra* note 33.

³⁵ See, e.g., *Stages in a Capital Case*, DEATH PENALTY INFO. CTR. <https://deathpenaltyinfo.org/resources/high-school/about-the-death-penalty/stages-in-a-capital-case> [<https://perma.cc/J5B6-RATH>] (last visited Mar. 23, 2025).

³⁶ Some jurisdictions have different approaches, but most weigh aggravating and mitigating circumstances.

punishment should be death.³⁷

The idea here is that the citizens of the county, as jurors, determine the community standard. Views on capital punishment vary widely, and the types of homicides that should warrant death sentences also differ among citizens.³⁸ Delegating the decision to county juries reflects a decision to localize capital punishment.

C. Funding

Underscoring the localized nature of the death penalty is the funding of capital cases. Death penalty cases often cost several million dollars to prosecute.³⁹ States, though, do not fund capital cases. Counties do.⁴⁰

For some counties, the death penalty becomes less of an option because of the cost.⁴¹ The extensive trial costs in a capital case and the decades of litigation that follow a death sentence make choosing to pursue a capital case a more complicated choice than simply deciding whether the government should try to execute a criminal defendant.⁴² With the widespread use of life-without-parole (LWOP) sentences, which cost substantially less, it is no surprise that capital prosecutions have become increasingly rare.⁴³ Even juries in the most conservative counties in the United States often choose LWOP sentences over death sentences.⁴⁴

The bottom line is that capital punishment is a local phenomenon. County

³⁷ Ramos v. Louisiana, 590 U.S. 83, 93 (2020). Florida and Alabama, however, ignore this constitutional requirement in their capital sentencing. *See, e.g.*, Gary Fineout, *DeSantis Signs Bill to End Unanimous Death Sentence Requirement*, POLITICO (Apr. 20, 2023, at 02:28 PM EDT), <https://www.politico.com/news/2023/04/20/desantis-signs-bill-to-end-unanimous-death-sentence-requirement-00093095> [<https://perma.cc/D4H2-39JJ>].

³⁸ The disparities in sentencing outcomes do give rise to constitutional problems. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); *Glossip v. Gross*, 576 U.S. 863, 908 (2015) (Breyer, J., dissenting).

³⁹ *See, e.g.*, *State Studies on Monetary Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty> [<https://perma.cc/Z53H-9PGJ>] (last visited Mar. 23, 2025). Capital cases cost significantly more than life-without-parole sentences. *Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/policy/costs> [<https://perma.cc/E9PJ-SP58>] (last visited Mar. 23, 2025).

⁴⁰ *See, e.g.*, Gershowitz, *supra* note 2, at 345.

⁴¹ *See generally* Gershowitz, *supra* note 2.

⁴² *See, e.g.*, Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL STREET J. (Jan. 9, 2002, at 12:01 AM ET), <https://www.wsj.com/articles/SB1010527927506582520> [<https://perma.cc/63LT-YYRW>].

⁴³ *Death Sentencing Graphs by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/state-death-sentences-by-year> [<https://perma.cc/3N6N-XSK8>] (last visited Nov. 17, 2025).

⁴⁴ *See, e.g.*, *No Executions in the “Capital of Capital Punishment” for the First Time in 30 Years*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), <https://deathpenaltyinfo.org/no-executions-in-the-capital-of-capital-punishment-for-first-time-in-30-years> [<https://perma.cc/6ZH6-9VDW>].

prosecutors choose to bring capital cases, county jurors sentence defendants to death, and county governments fund the prosecution. The ultimate decision of whether the state will kill an inmate should remain with local authorities, not state politicians, whether judges, the attorney general's office, clemency boards, or the governor.⁴⁵

II. ERROR AND INNOCENCE

But the local nature of capital prosecutions does not, by itself, justify giving prosecutors a veto power over executions. The presence of error in capital cases, including many actual innocence cases, however, suggests that a veto power could be valuable in preventing injustice.

A. Error

Scholars have long documented error in capital cases, with prosecutors, defense attorneys, and judges long being aware of its pervasiveness. Several studies published by James Liebman and colleagues highlighted the extraordinary volume of error in capital cases.⁴⁶ For the two decades of cases assessed, the error rate in capital cases exceeded two-thirds; that is, courts reversed over two-thirds of capital cases based on errors.⁴⁷

According to the Liebman study, the overall rate of prejudicial error in capital cases was 68%.⁴⁸ And those were the mistakes that courts caught.⁴⁹ It is worth noting that while state courts caught the errors in 47% of the cases, federal courts found "serious error" (error undermining the credibility of the outcome) in 40% of the remaining cases.⁵⁰ Over the twenty-year period of the study, state courts threw out 2,370 death sentences.⁵¹

The types of errors that occurred most frequently related to (1) incompetent defense counsel that failed to search for and demonstrably missed important evidence demonstrating innocence or that the defendant did not deserve to die, and (2) police or prosecutors who suppressed evidence from the jury that indicated a likelihood of innocence or a decreased justification for a death sentence.⁵² In recent years, there has also been a proliferation of death sentences supported by junk science, such as the debunked shaken baby syndrome and unreliable bite mark

⁴⁵ State judges, as elected officials in most states, are of course politicians, as are governors.

⁴⁶ See LIEBMAN, FAGAN & WEST, *supra* note 13.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* It is reasonable to assume that many mistakes go unnoticed.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² LIEBMAN, FAGAN & WEST, *supra* note 13.

evidence.⁵³

Perhaps most significant was the widespread nature of the errors. The errors did not exist for a short time—they have persisted over decades.⁵⁴ And the errors have occurred throughout the country, not just in one or two geographic areas.⁵⁵

B. *Innocence*

The seriousness of the errors becomes most apparent in cases where the defendant is actually innocent of the homicide.⁵⁶ The Death Penalty Information Center has identified over two hundred cases in which states have exonerated an innocent death row inmate, often as the result of DNA evidence proving that the inmate did not commit the homicide in question.⁵⁷

Since 1973, states have exonerated over two hundred former death-row prisoners of all charges after wrongful convictions had put them on death row.⁵⁸ Florida (30), Illinois (22), and Texas (18) have sentenced the most innocent people to death.⁵⁹ Over half of the innocent individuals (108 / 200) are Black.⁶⁰

The development of DNA technology has provided some assistance in helping inmates prove their innocence.⁶¹ And yet, in many cases, DNA evidence is not available and less ironclad forms of evidence remain to assess innocence. When the prosecutor becomes convinced that there is a question, whether before or after trial, the seriousness of a death sentence demands further inquiry, not capitulation to finality.

Beyond the death row exonerees, there have been a number of capital cases in which there is strong evidence that states executed an innocent man. Highlighted by the Death Penalty Information Center, these cases reveal the pervasiveness of the innocence problem with the American death penalty.⁶²

⁵³ See, e.g., *Ten Years After Landmark Study, Junk Science Still Pervasive in Death-Penalty Cases*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), <https://deathpenaltyinfo.org/ten-years-after-landmark-study-junk-science-still-pervasive-in-death-penalty-cases> [<https://perma.cc/2BUA-Q5T5>].

⁵⁴ See LIEBMAN, FAGAN & WEST, *supra* note 13.

⁵⁵ *Id.*

⁵⁶ *Herrera v. Collins*, 506 U.S. 390, 393 (1993).

⁵⁷ DEATH PENALTY INFO. CTR., *supra* note 14.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See generally BRANDON GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2012).

⁶² *Innocence: Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> [<https://perma.cc/DKD7-HVTV>] (last visited Mar. 28, 2025) [hereinafter *Executed but Possibly Innocent*].

Texas executed Carlos DeLuna in 1989 for stabbing convenience store clerk Wanda Lopez to death in 1983.⁶³ Subsequent investigation into the case revealed another man, Carlos Hernandez, who had a record of similar crimes and repeatedly confessed to Lopez's murder was the more likely perpetrator.⁶⁴

Texas executed Ruben Cantu in 1993 for the shooting death of a San Antonio man during an attempted robbery in 1985.⁶⁵ Cantu was only seventeen at the time of the crime.⁶⁶ The prosecutor, jury forewoman, a key eyewitness, and Cantu's co-defendant have all expressed doubt about Cantu's guilt.⁶⁷ David Garza, Cantu's co-defendant, has issued an affidavit saying that he allowed Texas to accuse and subsequently execute Cantu even though Cantu was not with him on the evening of the crime.⁶⁸ And Juan Moreno, a key eyewitness wounded during the attempted robbery, indicated that he told police that Cantu was not the assailant but testified that he was in response to pressure from the police.⁶⁹

Missouri executed Larry Griffin in 1995 for the drive-by shooting death of Quentin Moss in 1981.⁷⁰ In addition to the testimony of a man injured in the shooting claiming that Griffin was not involved in the crime, the NAACP Legal Defense and Educational Fund discovered additional evidence casting doubt on Griffin's guilt, including testimony from a police officer on the scene that contradicts the testimony of the only eyewitness.⁷¹ Further to the proposal in this Article, local prosecutor

⁶³ *Id.*

⁶⁴ *Id.*; see also JAMES S. LIEBMAN & THE COLUMBIA DELUNA PROJECT, *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* 150 (2014); *THE PHANTOM*, Netflix (Oxford Films 2021); *The Wrong Carlos*, COLUMBIA UNIV. LIBRS., <https://wayback.archive-it.org/1914/20230728191214/https://thewrongcarlos.net/> [<https://perma.cc/6QDB-S7H8>] (last visited July 28, 2023).

⁶⁵ *Executed but Possibly Innocent*, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Garza stated, "part of me died when he died. You've got a 17-year-old who went to his grave for something he did not do. Texas murdered an innocent person." *Id.*

⁶⁹ *Id.* Moreno explained, "[t]he police were sure it was (Cantu) because he had hurt a police officer. They told me they were certain it was him, and that's why I testified That was bad to blame someone that was not there." *Id.* See also Lisa Olsen, *Did Texas Execute an Innocent Man?*, HOU. CHRON. (Nov. 20, 2005), <https://www.chron.com/news/houston-texas/article/Did-Texas-execute-an-innocent-man-1559704.php> [<https://perma.cc/R3WD-77K3>]; DAN RATHER REPORTS: *Did Texas Execute Innocent Men?* (DVD, released Apr. 7, 2010), (reporting on the DeLuna and Cantu cases); *Report Fails to Erase Doubt that Texas Executed an Innocent Man*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), <https://deathpenaltyinfo.org/report-fails-to-erase-doubt-that-texas-executed-an-innocent-man> [<https://perma.cc/R3WD-77K3>].

⁷⁰ *Executed but Possibly Innocent*, *supra* note 62.

⁷¹ *Id.*

Jennifer Joyce reopened the investigation into Griffin's case.⁷² On July 12, 2007, the St. Louis Circuit Attorney issued a report concluding that Griffin was guilty.⁷³

Virginia executed Joseph O'Dell in 1997 after convicting him for the murder, rape, and sodomy of Helen Schartner in 1985.⁷⁴ New DNA blood evidence cast considerable doubt on the guilt of O'Dell, as the blood evidence constituted the central link from O'Dell to the crime.⁷⁵ Virginia refused to conduct DNA tests on other pieces of evidence prior to executing him.⁷⁶

Texas executed David Spence in 1997 for the murder of three teenagers in 1982.⁷⁷ Muneer Deeb, a convenience store owner allegedly hired Spence to kill a girl, and Spence allegedly killed the victims by mistake.⁷⁸ Both the police lieutenant that supervised the murder investigation and the homicide detective that conducted the investigation concluded that Spence did not commit the crime.⁷⁹ No physical evidence connected Spence to the crime and the officer that pursued his case relied on prison inmates who received favors in exchange for testimony.⁸⁰

Florida executed Leo Jones in 1998 for the murder of a police officer in 1981.⁸¹ Jones signed a confession to the crime but later claimed that police coerced the confession.⁸² Subsequent ethical violations forced the policeman that arrested Jones

⁷² *Id.* See also All Things Considered, *Missouri Execution Case Reopened*, NAT'L. PUB. RADIO (July 12, 2005, at 12:00 AM ET), <https://www.npr.org/2005/07/12/4750621/missouri-execution-case-reopened> [<https://perma.cc/7WSP-BJSG>]; *Did Missouri Execute an Innocent Man?*, ASSOC. PRESS (July 12, 2005, at 7:41 PM EDT), <https://www.nbcnews.com/id/wbna8556687> [<https://perma.cc/HL32-69JZ>].

⁷³ DEATH PENALTY INFO. CTR., REPORT OF THE CIRCUIT ATTORNEY: ON THE MURDER OF QUINTIN MOSS AND CONVICTION OF LARRY GRIFFIN 11 (2007), https://dpic-cdn.org/production/legacy/finalreport_execsum.pdf [<https://perma.cc/R6W-STUU>].

⁷⁴ *Executed but Possibly Innocent*, *supra* note 62.

⁷⁵ *O'Dell v. Thompson*, 502 U.S. 995, 996 (1991) (Blackmun, J., dissenting from denial of certiorari, joined by Stevens, J. and O'Connor, J.). See also Lori Urs, *Commonwealth v. Joseph O'Dell: Truth and Justice or Confuse the Courts? The DNA Controversy*, 25 CRIM. & CIV. CONFINEMENT 311, 326 (1999).

⁷⁶ *Executed but Possibly Innocent*, *supra* note 62. See also Carl Rochelle, *Virginia Inmate Executed Despite International Campaign*, CNN (July 23, 1997, at 9:53 p.m. EDT), <https://www.cnn.com/US/9707/23/o.dell/index.html> [<https://perma.cc/FX2P-DPG4>].

⁷⁷ *Executed but Possibly Innocent*, *supra* note 62.

⁷⁸ *Id.*

⁷⁹ *Id.* The police lieutenant, Marvin Horton, stated, "I do not think David Spence committed this crime." *Id.* And the homicide detective, Ramon Salinas, said, "[m]y opinion is that David Spence was innocent. Nothing from the investigation ever led us to any evidence that he was involved." *Id.* See also Raymond Bonner & Sara Rimer, *A Closer Look at Five Cases that Resulted in Executions of Texas Inmates*, N.Y. TIMES (May 14, 2000), <https://archive.nytimes.com/www.nytimes.com/library/politics/camp/051400wh-bush-cases.html>. [<https://perma.cc/KM9M-XC55>].

⁸⁰ *Executed but Possibly Innocent*, *supra* note 62.

⁸¹ *Id.*

⁸² *Id.* See also Steve Mills, *Questions of Innocence: Legal Roadblocks Thwart New Evidence*

and the detective that took his confession to leave the force.⁸³ In addition, many witnesses came forward and accused another suspect.⁸⁴

Texas executed Gary Graham in 2000 for the 1981 robbery and shooting of Bobby Lambert outside of a Houston supermarket.⁸⁵ Graham was seventeen at the time of the homicide.⁸⁶ The primary evidence against Graham was the eyewitness testimony of witness Bernadine Skillern, who purportedly saw Graham's face for a few seconds through her car windshield from over thirty feet away.⁸⁷ Two other witnesses who worked at the grocery store and got a good look at the assailant said that Graham was not the killer.⁸⁸ The defense lawyer never interviewed these witnesses and they did not testify at trial.⁸⁹ Three of the jurors signed affidavits that they would have found Graham innocent in light of the other evidence unavailable at trial.⁹⁰

In 2000, Texas executed Claude Jones for the 1989 homicide of a liquor store owner.⁹¹ The only piece of physical evidence linking Jones to the crime was a strand of hair found at the crime scene, but DNA technology developed later showed that the hair did not belong to Jones.⁹² Even so, the Texas courts refused to stay Jones' execution.⁹³

on Appeal, CHI. TRIB. (Dec. 18, 2000), <https://deathpenaltyinfo.org/stories/questions-of-innocence-legal-roadblocks-thwart-new-evidence-on-appeal> [<https://perma.cc/NE6P-C8K8>].

⁸³ *Executed but Possibly Innocent*, *supra* note 62.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* See also Paul Duggan, *In Texas, a Battle Escalates as Execution Draws Near*, WASH. POST (June 22, 2000), <https://www.washingtonpost.com/archive/politics/2000/06/22/in-texas-a-battle-escalates-as-execution-draws-near/c81a79b5-99b0-4d65-8429-80bc03a5912a/> [<https://perma.cc/A4V7-HP7T>]; *Death Row Man Executed*, BBC NEWS (June 23, 2000, at 03:25 GMT), <http://news.bbc.co.uk/2/hi/americas/802425.stm> [<https://perma.cc/F5A7-XTS9>]; *The Case of Gary Graham - Facts*, CAP. PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/cases/graham> [<https://perma.cc/V2US-34DB>] (last visited Apr. 3, 2025).

⁹¹ *Executed but Possibly Innocent*, *supra* note 62.

⁹² *Id.*

⁹³ *Id.* Innocence Project Founder Barry Scheck explained, “[t]he DNA results prove that testimony about the hair sample on which this entire case rests was just wrong. Unreliable forensic science and a completely inadequate post-conviction review process cost Claude Jones his life.” *Id.* See also Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEX. OBSERVER (Nov. 11, 2010, at 7:57 PM, CST), <https://www.texasobserver.org/texas-observer-exclusive-dna-tests-undermine-evidence-in-texas-execution/> [<https://perma.cc/9H4T-6ZXB>].

Texas executed Cameron Todd Willingham in 2004 after convicting him of an arson that killed his three children in a 1991 house fire.⁹⁴ Four national arson experts concluded that the original investigation was erroneous, and it is possible that the fire was accidental.⁹⁵

In 2006, Tennessee executed Sedley Alley for the rape and murder of Lt. Cpl. Suzanne Collins near the barracks of the Naval Air Station in Millington, Tennessee.⁹⁶ Alley's trial lawyers failed to investigate factual inconsistencies between the forced confession of Alley by police.⁹⁷ Alley's clemency lawyers found numerous inconsistencies in the state evidence, found evidence pointing to another individual who fit the eyewitness description of the murderer, and discovered that Alley had been at home under police surveillance during the time of the rape and the murder.⁹⁸

Georgia executed Troy Davis in 2011 despite significant evidence that he did not commit the murder of police officer Mark MacPhail in Savannah, Georgia in a Burger King parking lot in 1989.⁹⁹ When some prosecution witnesses changed their stories after testifying against Davis, including pointing to another suspect, doubts about his guilt arose.¹⁰⁰ Despite a hearing in which a juror even testified that she

⁹⁴ *Executed but Possibly Innocent*, *supra* note 62. See also Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), <https://deathpenaltyinfo.org/stories/texas-man-executed-on-disproved-forensics> [https://perma.cc/WZM6-LSSQ] (last visited Sep. 13, 2025); Anderson Cooper 360 Blog, *Was an Innocent Man Executed in Texas?*, DEATH PENALTY INFO. CTR. (April 9, 2007), <https://deathpenaltyinfo.org/stories/was-an-innocent-man-executed-in-texas> [https://perma.cc/8VSK-VZRU] (last visited Sep. 13, 2025).

⁹⁵ *Executed but Possibly Innocent*, *supra* note 62. Arson expert Gerald Hurst said, “[t]here’s nothing to suggest to any reasonable arson investigator that this was an arson fire. It was just a fire.” *Id.* Former Louisiana State University fire instructor Kendall Ryland explained, “[it] made me sick to think this guy was executed based on this investigation They executed this guy and they’ve just got no idea—at least not scientifically—if he set the fire, or if the fire was even intentionally set.” *Id.* See also David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Aug. 31, 2009), <https://www.newyorker.com/magazine/2009/09/07/trial-by-fire> [https://perma.cc/L7W8-DGC5].

⁹⁶ *Executed but Possibly Innocent*, *supra* note 62.

⁹⁷ *Id.*

⁹⁸ *Id.* The Tennessee courts also refused to grant Alley's request to conduct DNA testing on clothing and the murder weapon. *Id.* See also Adam Tamburin, *Family of Executed Tennessee Inmate Calls for DNA Tests in Renewed Hope to 'Find the Truth,'* COM. APPEAL (May 1, 2019, at 4:39 p.m. CT), <https://www.commercialappeal.com/story/news/2019/05/01/sedley-alley-family-calls-dna-test-suzanne-collins/3642552002/> [https://perma.cc/QV2T-DTA8].

⁹⁹ Daniele Selby, *Nine Years After the Execution of Troy Davis, Innocent Black Men Are Still Being Sentenced to Death*, INNOCENCE PROJECT (Sep. 21, 2020), <https://innocenceproject.org/troy-davis-pervis-payne-race-death-penalty/> [https://perma.cc/MG3N-Y7MC].

¹⁰⁰ *Executed but Possibly Innocent*, *supra* note 62.

would change her vote based on the later evidence that emerged, the Georgia clemency board denied Davis' claim.¹⁰¹

In 2015, Texas executed Lester Bower for allegedly murdering four men in 1983, one of whom he met in order to purchase an ultralight aircraft.¹⁰² The key piece of evidence was the “unique” kind of ammunition used that Bower possessed.¹⁰³ The ammunition ended up not being as rare as advertised and the prosecutor had withheld information about a tip connecting the murders to drug trafficking.¹⁰⁴ Later, a woman came forward saying that her boyfriend and his friends had committed the murders after a drug deal had gone wrong.¹⁰⁵ The wife of one of the other men corroborated her story.¹⁰⁶

Also in 2015, Georgia executed Brian Terrell for the alleged murder of seventy-year old John Watson, a man whom Terrell had stolen checks from.¹⁰⁷ Physical evidence from the crime scene left substantial questions as to Terrell's guilt—footprints found near the victim's body were smaller than Terrell's feet, and none of the thirteen fingerprints found by investigators matched his fingerprints.¹⁰⁸ Georgia tried Terrell three times and only convicted Terrell with the testimony of his cousin Jermaine Johnson, who later admitted to lying to get a favorable deal in his own criminal case.¹⁰⁹

In 2016, Texas executed Richard Masterson for the death of Darrin Honeycutt, allegedly from strangulation during an episode of erotic asphyxiation.¹¹⁰ Later evidence revealed a botched autopsy with the most likely cause of death a heart

¹⁰¹ *Id.* A number of national figures supported Davis, including Pope Benedict XVI, former President Jimmy Carter, former FBI Director William Sessions, former Georgia Supreme Court Chief Justice Norman Fletcher and others, but to no avail. *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Three Supreme Court Justices said that Bower should have been granted a new sentencing hearing as a result of what they called a “glaring” constitutional error that precluded the jury's consideration of mitigating evidence in his case. *Bower v. Texas*, 575 U.S. 926, 926 (2015) (Breyer, J., dissenting from denial of certiorari). See also Mark Berman, *Texas Plans to Execute an Inmate Who Has Been on Death Row for 30 Years*, WASH. POST (June 2, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/02/texas-plans-to-execute-an-inmate-who-has-been-on-death-row-for-30-years/> [<https://perma.cc/Z4ZF-UWSZ>].

¹⁰⁷ *Georgia Executes Murderer Who Killed Elderly Man Rather Than Repay Him for Forged Checks*, ASSOC. PRESS (Dec. 9, 2015, at 5:39 a.m. ET), <https://www.jacksonville.com/story/news/crime/2015/12/09/georgia-executes-murderer-who-killed-elderly-man-rather-repay-him-forged/15691716007/> [<https://perma.cc/7T5K-9GBN>].

¹⁰⁸ *Executed but Possibly Innocent*, *supra* note 62.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

attack.¹¹¹ Texas subsequently executed Robert Pruett in 2017 for the 1999 stabbing death of correctional officer Daniel Nagle.¹¹² The evidence in the case was a bloody shank and a torn-up copy of a disciplinary note Nagle had given Pruett.¹¹³ The forensic methodology used to link Pruett to the murder weapon relied on junk science, the DNA on the weapon did not match Pruett, and Nagle had been working to identify fellow correctional officers involved in a drug smuggling and money laundering scheme.¹¹⁴

In 2018, Georgia executed Carlton Michael Gary for the alleged murder of three rape-murders of elderly white women with another half-dozen rapes and burglaries alleged.¹¹⁵ Dubbed the “Stocking Strangler,” the most damning testimony was eyewitness testimony of a victim, but the victim had initially told investigators she had been asleep.¹¹⁶ In one of the cases, post-conviction DNA testing of semen stains excluded Gary, but the state’s improper handling of the evidence at the other scenes precluded similar testing.¹¹⁷ Other inconsistencies in evidence likewise cast doubt on Gary’s guilt with respect to the other homicides.¹¹⁸

Alabama executed Domineque Ray in 2019 for the alleged rape, robbery, and murder of fifteen-year-old Tiffany Harville.¹¹⁹ No physical evidence linked Ray to the murder, and the only evidence that Harville had been raped and robbed came from a severely mentally ill man, Marcus Owden, who confessed to the crime and avoided the death penalty by implicating Ray.¹²⁰ Owden was also the only person who placed Ray in Selma at the time of the murder.¹²¹

In 2019, Texas executed Larry Swearingen for the 2000 murder of Melissa Trotter, who was strangled with a pair of pantyhose and whose body was later dumped in a state forest.¹²² The forensic evidence relied upon in the case resulted

¹¹¹ *Id.* See also Jordan Smith, *Did a Dubious Confession Sway a Medical Examiner’s Autopsy in a Texas Death Penalty Case?*, INTERCEPT (Jan. 19, 2016, at 1:46 p.m.), <https://theintercept.com/2016/01/19/richard-masterson-did-a-dubious-confession-sway-a-medical-examiners-autopsy-in-a-texas-death-penalty-case/> [<https://perma.cc/6TN6-87J4>].

¹¹² *Executed but Possibly Innocent*, *supra* note 62.

¹¹³ *Id.*

¹¹⁴ *Id.* See also Chase Hoffberger, *Death Watch: Killer or Fall Guy? Was Daniel Nagle Murdered by a Man Acting Alone, or Was It a Conspiracy?*, AUSTIN CHRON. (Apr. 24, 2015), <https://www.austinchronicle.com/news/2015-04-24/killer-or-fall-guy/> [<https://perma.cc/EP32-DNQM>].

¹¹⁵ *Executed but Possibly Innocent*, *supra* note 62.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see also DAVID ROSE, *THE BIG EDDY CLUB: THE STOCKING STRANGLINGS AND SOUTHERN JUSTICE* 282–92 (2007).

¹¹⁹ *Executed but Possibly Innocent*, *supra* note 62.

¹²⁰ *Id.* Also worth noting is that Ray’s conviction was not unanimous, but by an 11-1 vote. *Id.*

¹²¹ *Id.*

¹²² *Id.*

from questionable science, not to mention that Swearingen was in jail during most of the time between Trotter's abduction and the finding of her body.¹²³ In particular, DNA evidence under Trotter's fingernails was that of another male, not Swearingen.¹²⁴

In 2020, Missouri executed Walter Barton for the brutal 1991 stabbing death of 81-year-old Gladys Kuehler.¹²⁵ The evidence linking Barton to the crime was sparse, and the state had to try him five times to convict him.¹²⁶ The key testimony at the final trial was from Katherine Allen, who had 29 prior convictions for fraud, forgery, and related offenses.¹²⁷

Alabama executed Nathaniel Woods in 2020 for the 2005 killings of three Alabama police officers.¹²⁸ Prosecutors acknowledged that Woods' co-defendant, Kerry Spencer, shot the officers in an incident in a drug house.¹²⁹ The case also involved official misconduct, coerced informants, and race discrimination.¹³⁰

And in 2024, Missouri executed Marcellus Williams for his involvement in the 1998 murder of Felicia Gayle.¹³¹ The theory of Gayle's murder was a robbery gone wrong, and the only connection of Williams to the murder were two informants—a jailhouse informant, Henry Cole, and Williams' ex-girlfriend Laura Asaro.¹³² No physical evidence from the crime scene connected Williams to the crime.¹³³ DNA evidence from the crime scene was inconsistent with Mr. Williams' profile.¹³⁴ After further evidence revealed that the prior prosecutors had committed misconduct by destroying crime scene evidence including DNA and fingerprint evidence, the St.

¹²³ *Id.*

¹²⁴ *Id.* See also Jolie McCullough, *Texas Executed Larry Swearingen for a 1998 Texas Slaying. His Lawyer Says Bad Science Got Him on Death Row*, TEX. TRIB. (Aug. 21, 2019, at 7:00 P.M. CENTRAL), <https://www.texastribune.org/2019/08/21/larry-swearingen-execution-texas/> [<https://perma.cc/2B5W-UD7Z>].

¹²⁵ *Executed but Possibly Innocent, supra* note 62.

¹²⁶ *Id.*

¹²⁷ *Id.* See also Luke Nozicka, *Days Before Missouri Man's Execution, Jurors See New Evidence That Raises Doubts*, KAN. CITY STAR (May 12, 2020, at 5:00 AM), <https://www.kansascity.com/news/local/crime/article242536721.html> [<https://perma.cc/KK88-UDU7>].

¹²⁸ *Executed but Possibly Innocent, supra* note 62.

¹²⁹ *Id.*

¹³⁰ *Id.* See also Lauren Gill, *Alabama Prepares to Execute a Man Whose Case is Haunted by Police Misconduct*, APPEAL (Feb. 24, 2020), <https://theappeal.org/alabama-prepares-to-execute-a-man-whose-case-is-haunted-by-claims-of-police-misconduct/> [<https://perma.cc/Z565-V5L8>].

¹³¹ *Executed but Possibly Innocent, supra* note 62.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

Louis County prosecutor Wesley Bell filed a motion requesting that the court vacate Williams' death sentence, but the court denied his motion.¹³⁵

It is possible that some of these men were guilty of the crimes for which states executed them. But it is even more likely that some, if not most of them, were innocent individuals that states executed. The willingness of states to proceed with executions in cases where there is some doubt as to the guilt of the inmate underscores exactly why giving local prosecutors a veto is a good idea.

III. HOW FINALITY IMPEDES JUSTICE

While the legal standard of beyond a reasonable doubt offers some protection for capital defendants, once a jury has imposed a death sentence, the standard shifts to place the burden on the condemned to demonstrate error.¹³⁶ After the inmate has lost his direct appeal, he can challenge his conviction on constitutional grounds in habeas corpus.¹³⁷ But the applicable habeas statute, the Anti-terrorism and Effective Death Penalty Act (AEDPA), places a strong thumb on the scale in favor of the State.¹³⁸ Indeed, these cases pit the values of finality (considering the matter already settled), comity (deferring to prior decisions), and federalism (deferring to the state courts) against justice (the need to eliminate error in decision-making). AEDPA's requirements regularly favor the former values over the latter.

The costs of elevating finality (and even comity and federalism) over justice are debilitating on two levels. First, they deny the individual justice, meaning that individuals receive punishments they do not deserve. In the worst cases, the state executes an innocent individual. Systemically, the damage is equally bad, with the decision to elevate finality over justice compromising the legitimacy of judicial review and undermining public confidence in the criminal justice system.

On appeal, death row inmates face a procedural thicket of requirements prerequisite to an appellate court hearing the merits of their claims. Failing to raise claims at certain times results in procedural bars; similarly, failure to exhaust claims in state courts bars their consideration in federal court.¹³⁹ Even in cases of newly discovered evidence, a modern phenomenon with the development of DNA testing, the procedural hurdles petitioners face often prevent appellate courts from reaching the merits of claims.

Perhaps most disturbing about the appellate framework imposed by AEDPA

¹³⁵ *Id.* See also *Missouri Executes Marcellus Williams Despite Prosecutor's Opposition*, EQUAL J. INITIATIVE (Sep. 25, 2024), <https://eji.org/news/missouri-executes-marcellus-williams-despite-prosecutors-opposition/> [<https://perma.cc/TP69-45KC>].

¹³⁶ See generally BRANDON L. GARRETT & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* (2013).

¹³⁷ *Id.*

¹³⁸ *Id.* 28 U.S.C. § 2254 (West 2025).

¹³⁹ GARRETT & KOVARSKY, *supra* note 136.

and adopted by the courts is the absence of a freestanding innocence claim.¹⁴⁰ A petitioner cannot simply provide evidence of his innocence and receive relief. Rather, the petitioner must meet the procedural prerequisites in order to bring the innocence claim. So, it is entirely possible that procedural hurdles can block an innocent death row inmate from receiving relief.

Part of the challenge here is the tendency of state officials to fight obvious errors instead of simply correcting them. Perhaps it is human nature to try to save face, but it is common for state officials to continue to pursue prosecution or fight relief for inmates even when there is clear evidence of error or innocence.¹⁴¹

Indeed, the entire proposal of this article arises from the unwillingness of state judges to provide relief to death row inmates in cases of clear error. Valuing finality, often under the guise of procedural bars, allows jurists to ignore the inherent problems and pervasive error of many capital prosecutions.

IV. LOCAL PROSECUTORS AND CAPITAL OVERRIDES

In light of the errors in capital cases and the weight of finality in preventing the remedy of those errors, creating a mechanism by which states can remedy injustice seems useful. Clemency exists as one possibility, but its use is uneven at best. Further, in capital states, political pressure may discourage governors and clemency boards from providing relief, even in cases where the inmate is innocent.

Increasingly, however, local prosecutors have indicated a willingness to oppose the execution of the very inmates their office prosecuted in cases where error is evident, and innocence seems likely. This can particularly happen when new prosecutors take over an office from a district attorney who has made errors in prior cases.

The Marcellus Williams case is a recent example of this phenomenon. In his case, there was clear evidence of prosecutorial misconduct, including the destruction of evidence that could have exonerated Mr. Williams.¹⁴² Indeed, given the lack of evidence against him, Williams had a colorable claim of innocence.¹⁴³ The new district attorney, Wesley Bell, filed a motion asking for a vacation of Williams' death sentence.¹⁴⁴ The Missouri Attorney General opposed the motion, however, and the Court rejected the motion.¹⁴⁵ The Governor similarly denied clemency.¹⁴⁶ Missouri executed Williams on September 24, 2025.¹⁴⁷

¹⁴⁰ *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

¹⁴¹ See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 163–65 (2014) (Stevenson's description of Walter McMilan's case is a great example of this.)

¹⁴² *Executed but Possibly Innocent*, *supra* note 62; see EQUAL J. INITIATIVE, *supra* note 135.

¹⁴³ *Executed but Possibly Innocent*, *supra* note 62; see EQUAL J. INITIATIVE, *supra* note 135.

¹⁴⁴ *Executed but Possibly Innocent*, *supra* note 62; see EQUAL J. INITIATIVE, *supra* note 135.

¹⁴⁵ *Executed but Possibly Innocent*, *supra* note 62; see EQUAL J. INITIATIVE, *supra* note 135.

¹⁴⁶ *Executed but Possibly Innocent*, *supra* note 62; see EQUAL J. INITIATIVE, *supra* note 135.

¹⁴⁷ See EQUAL J. INITIATIVE, *supra* note 135.

In this situation, the senior executive branch officials and the judges chose finality over justice. The prosecutor's office thus lost its autonomy over the case, a case it chose to bring in the first place, after the trial court sentenced Williams.

The Richard Glossip case involves a similar institutional choice problem. In the early morning of January 7, 1997, Justin Sneed murdered Barry Van Treese with a baseball bat at the Best Budget Inn in Oklahoma City.¹⁴⁸ Van Treese owned the motel, and both Justin Sneed and petitioner Richard Glossip worked there.¹⁴⁹ In 1998, Oklahoma tried Glossip for the capital murder of Van Treese.¹⁵⁰ Its theory was that Glossip directed Sneed to kill Van Treese because Glossip feared that Van Treese was about to fire him.¹⁵¹ Sneed testified, providing the only direct evidence connecting Glossip to the murder.¹⁵² Despite the absence of forensic evidence linking Glossip to the crime, the jury convicted Glossip and sentenced him to death.¹⁵³

The Oklahoma Court of Appeals reversed the case based on glaring deficiencies in Sneed's account in his police interrogation that contained "obviously material" inconsistencies.¹⁵⁴ At the retrial, Oklahoma chose a different theory, alleging a murder-for-hire plot.¹⁵⁵ Again, Sneed's testimony was the only direct evidence against Glossip, with Sneed lying on the stand about seeing a psychiatrist during a colloquy with Assistant District Attorney Connie Smotherman, who had knowledge that he was lying.¹⁵⁶ The jury again found Glossip guilty and sentenced him to death.¹⁵⁷

The Oklahoma Court of Appeals upheld the death sentence by a vote of 3-2, with the dissenters questioning whether the state had adequately corroborated Sneed's testimony as required by Oklahoma law.

In 2015, Glossip brought a subsequent post-conviction challenge based on new evidence that Sneed had recanted his story, but the court of appeals denied his petition, again by a 3-2 vote.¹⁵⁸

After Oklahoma set an execution date in 2022, Glossip raised *Brady* (failure to disclose evidence) and *Napue* (suppression of false testimony) after the State

¹⁴⁸ Glossip v. Oklahoma, 604 U.S. 226, 231–34 (2025).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 234–36.

¹⁵⁴ *Id.* at 234–36. The failure of Glossip's lawyer to challenge these at trial constituted ineffective assistance of counsel.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ In the interim, Glossip and three other inmates had also brought method of execution challenges to Oklahoma's use of midazolam in lethal injections. The Supreme Court, however, ruled against Glossip and his fellow inmates. Glossip v. Gross, 576 U.S. 863, 863 (2015).

discovered additional materials that it failed to disclose before trial, including evidence that confirmed that Sneed had bipolar disorder.¹⁵⁹ The State disclosed this evidence and hired former district attorney Rex Duncan as Independent Counsel to review Glossip's case. Duncan found that "Glossip was deprived of a fair trial," that the "cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated," and that "a new trial is necessary to restore integrity to the process."¹⁶⁰

The state agreed that there were *Brady* and *Napue* errors and moved for a new trial.¹⁶¹ The Oklahoma Court of Appeals declined to hold an evidentiary hearing and denied Glossip's *Brady* and *Napue* claims because Glossip "should have known" about Sneed's condition based on trial testimony that the state provided Sneed lithium.¹⁶²

After the Oklahoma Pardon and Parole Board denied clemency by a 2-2 vote, Glossip appealed to the Court, which heard his case in October 2024.¹⁶³ Like Williams, the Glossip case involves the district attorney's office trying to stop the execution of an inmate it convinced a jury to convict and sentence to death.¹⁶⁴

For all of the reasons explained above—that the death penalty is a local institution, that errors and innocence are pervasive in capital cases, and because justice is more important than finality, particularly in capital cases, states should expand the power of district attorneys to prevent injustice.

To do so, however, state legislatures would have to enact a statute according district attorneys that power. The proposed statute aims to give prosecutors a tool to allow for second look sentencing in capital cases, followed by an execution veto.

A. *The Proposed Statute*

The idea of the proposed statute is to give county prosecutors and district

¹⁵⁹ *Glossip v. Oklahoma*, 604 U.S. 226, 231–34 (2025).

¹⁶⁰ Independent Counsel Report from Rex Duncan to Hon. Gentner Drummond, Att'y Gen. of Okla., Re: Independent Counsel Report in the Matter of Richard Eugene Glossip, Oklahoma County Case CF-1997 3–4, 19 (Apr. 3, 2023), https://oklahoma.gov/content/dam/ok/en/oag/news-documents/2023/april/glossip_report_4.3.2023_redacted.pdf [<https://perma.cc/LP6N-FS8R>].

¹⁶¹ *Glossip v. Oklahoma*, 604 U.S. at 240–41.

¹⁶² *Id.* at 253.

¹⁶³ *Id.* at 226, 263. The fifth member of the board recused himself because he is Connie Smotherman's husband. See Sean Murphy, *Oklahoma Board Denies Clemency for Death Row Inmate Glossip*, WBOY (Apr. 26, 2023, at 5:28 PM EDT), <https://www.wboy.com/news/national/fate-of-oklahoma-death-row-inmate-rests-with-parole-board/> [<https://perma.cc/W36U-KESB>].

¹⁶⁴ The Supreme Court did grant Glossip's appeal and reversed the Oklahoma Court of Appeals. *Glossip v. Oklahoma*, 604 U.S. 226, 226 (2025). The Court found a *Napue* error and remanded for the lower court to remedy, presumably to give Glossip a new trial. *Id.* at 256–58. The prosecutor has decided not to seek the death penalty. Gentner Drummond, *Attorney General's Office to Prosecute Richard Glossip for Non-Capital Murder*, OKLA. ATT'Y GEN.'S OFF. (June 9, 2025), <https://oklahoma.gov/oag/news/newsroom/2025/june/attorney-generals-office-to-prosecute-richard-glossip-for-non-capital-murder.html> [<https://perma.cc/SSG7-KW6K>].

attorneys the ability to block the execution of the inmates that their office prosecuted. If adopted, this statute would first give the prosecutor a tool to request a second look before giving the prosecutor the ability to block the execution.

Here is the proposed language:

The Prosecutor Capital Override Act

The county prosecutor or district attorney may, upon discovery of meaningful error or the possibility of innocence in a capital case, move the trial court to commute the capital sentence of an inmate whom their office prosecuted. Upon such a motion, the trial court may commute the capital sentence to a non-capital sentence or order a new trial.

The state shall not execute an inmate without first having the execution certified by the office of the county prosecutor or district attorney. The office must be the same office that brought the initial prosecution, and the office must make the certification in writing no fewer than thirty (30) days but no later than seven (7) days prior to the execution date. If no certification occurs seven (7) days prior to the execution date, the state may not reschedule the execution without a certification. The prosecutor may elect not to certify the death sentence in cases of meaningful error or actual innocence.

The statute has two parts—a second look provision and a prosecutor execution veto. The first part provides an avenue for the prosecutor to litigate a second look in cases where meaningful error or innocence suggest a second look is necessary and an execution would be improper.

The statute gives a direct lifeline under state law for a second look. Procedural bars and exhaustion requirements do not apply. Neither does AEDPA. The proposed statutory language gives the district attorney a tool to make a direct motion to the court.

It also gives the trial court the direct authority to commute the death sentence. Again, this provision is independent of whatever paths or procedures for relief might or might not exist depending on the posture of the case. The goal here is justice, not endless litigation.

Another important aspect of this commutation power is that it does not require a commutation to life without parole. If the error in question suggests that death is not proper but that the inmate still bears some level of criminal culpability, the court can lower the sentence accordingly without being limited to a mandatory LWOP sentence. In addition, in cases of innocence, the court can order a new trial, which would allow the district attorney to drop the case or enter a plea deal with the inmate for time served.

The second part of the proposed statute more directly addresses the institutional choice problem that involves both senior executive branch officials and judges. In

the case of finality, each of these actors can allow the execution to happen despite the prosecutor's misgivings about the state killing.

The veto, however, gives the prosecutor the ability to halt an execution. Under the statute, an execution cannot proceed unless the district attorney's office certifies the execution. By refusing to certify the execution, the district attorney can effectively block the execution indefinitely, as the state cannot select a new execution date without the certification. Without the approval of the prosecutor's office, then, the state cannot execute a death row inmate.

Having the certification occur within thirty days of the execution date ensures that prosecutor's office can account for late developing discovery of evidence, while also avoiding the dramatic intervention at the last possible minute. The requirement that the certification occur a minimum of seven days before the scheduled execution date aims to provide some rationality to the process.

It is also worth noting that the local prosecutor override statute does not accord the prosecutor expansive extra-judicial power. The prosecutor cannot override the guilty verdict, order the release of the inmate, or otherwise interfere with the legal process. But it does prevent the state from executing the inmate in situations where doubt remains as to the propriety of such an execution, either because of error or evidence of innocence.

The second look part of the statute encourages such resolution but does not demand it. The veto does give the prosecutor leverage in such a hearing in that no matter what the court decides, the prosecutor can still block the execution of an inmate it prosecuted.

B. How the Statute Supports Justice

The proposed statute provides an important safeguard against erroneous executions. It allows the prosecutor to prevent the state from executing the inmate that it prosecuted.

As discussed, the death penalty is a local phenomenon. And if the local prosecutor no longer thinks that the state should execute an inmate, the prosecutor should have the final say. It is worth remembering that the prosecutor, in the first instance, has the discretion concerning whether to bring a capital case and whether to pursue the death penalty.

If the prosecutor's office realizes that it made a mistake or that some inherent error exists in its prior capital prosecution, it should have the ability to remedy that mistake. It should not have to depend on courts to remedy this issue. It should not have to surrender its judgment to a procedural framework built to value finality over justice. It should not have to depend on clemency as a path to relief.

To be sure, if the very office that worked so hard to win a death sentence later has doubts about the efficacy of that sentence, the criminal justice system should prioritize that view. Whether because of mistakes of the prosecutor's office or merely because of later discovered evidence, the priority should be justice, not finality. In other words, the system should focus on getting the case right.

This is particularly true in capital cases because of the consequence of death. The Supreme Court has long noted that “death is different,” meaning that the death penalty is a unique punishment requiring more extensive procedural protections.¹⁶⁵ Specifically, the death penalty is the most severe punishment that a state can impose, and it is an irrevocable one—the state cannot remedy any errors once it kills the inmate.¹⁶⁶

As a result, states should adopt this simple statute to help safeguard against executing innocent inmates. The legislature in Texas recently went to extraordinary lengths to halt the execution of Robby Roberson, mandating him appear to testify before the legislature.¹⁶⁷ The local prosecutor override statute would achieve similar ends without such complicated procedural machinations.

Given the volume of error and innocence in many capital cases, the prosecutor override is a clear safeguard that can provide prosecutors a means to remedy errors, particularly those of their predecessors.

CONCLUSION

This symposium article has offered a statutory solution to a recently developing problem—cases where the district attorney whose office prosecuted a capital case and secured a death sentence no longer believes that sentence is appropriate either because of meaningful error or a likelihood of innocence, but where other state officials favor finality and accordingly are denying any form of relief.

The proposed statute allows for a second look hearing and a prosecutor veto—a capital override by the prosecutor. The reasons for adopting such a rule relate to the nature of capital punishment. First, it is a local phenomenon, not just with the decision-making of the prosecutor, grand jury, and jury who decide to pursue a death sentence, but also in terms of the county paying for the execution. Indeed, a death sentence in many ways reflects the conscience of the community, in imposing the sentence and paying the exorbitant cost of it.

Second, there is a long history of error in capital cases, including the exoneration of two hundred capital defendants. And the proposal is even more important in light of the execution of a number of inmates who were likely innocent, described here in detail to underscore the need for this kind of reform.

Finally, the loyalty to the value of finality, both in the structural arrangement of capital appeals, the habeas system, and AEDPA, and in the tendencies of senior

¹⁶⁵ See *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (“Death is a unique punishment in the United States.”); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan’s concurrence in *Furman* as the originator of this line of argument).

¹⁶⁶ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (“There is no question that death as a punishment is unique in its severity and irrevocability.”).

¹⁶⁷ Yeagain, *supra* note 15.

executive branch officials and judges, suggests the need for a direct path to justice to halt clear error and save innocent inmates from execution.

In light of these reasons, the local prosecutor override statute can be one more tool among many to help prevent the execution of innocent individuals. Even if states do not pursue this kind of reform, it is the hope of this article that it will embolden prosecutors, like the ones in the *Williams* and *Glossip* cases, to challenge injustice and fight against error in capital cases.

