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COMMENTARY

The First Step in Overhauling Criminal Justice? Abolish the Death Penalty

"Abolishing the death penalty will not change the ideology of the current Supreme Court. Rather, it will take state and local officials and advocates to abolish," said Rachel A. Van Cleave, a professor of law and former dean at Golden Gate University School of Law.

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Rachel Van Cleave, Golden Gate University School of Law dean

[Criminal Law](#)

By Rachel A. Van Cleave

Since the killing of George Floyd by a police officer, many changes to criminal justice have been proposed and some have been enacted. However, none of these reforms will be meaningful unless and until we require the government to dismantle the laws and procedures that implement the death penalty, an inherently biased and horrific practice. The fact that the federal government and twenty-seven states still have the death penalty reveals an attitude that is diametrically counter to the mindset necessary to end mass incarceration.

Before discussing the death penalty cases before the U.S. Supreme Court this term, consider the backdrop of last year's Supreme Court term. From July 2020 through January 2021, the federal government went on an execution spree. After more than 17 years of no federal executions, the federal government executed 13 people in six months. Before this, Lewis Jones Jr. was executed on March 18, 2003 after President Bush refused to commute his sentence despite compelling evidence that he had been exposed to nerve gas while serving this country in the Gulf War.

This execution spree raised dozens of troubling issues, ranging from the health risks faced by lawyers, families of victims, and members of the press who traveled to witness the executions during a global pandemic—indeed, two people executed had COVID-19—to claims about the pain the drug pentobarbital was causing those executed—pain that is similar to being suffocated or drowned—to the federal government brushing aside procedural rules, to substantive questions about the mental illness or intellectual disability of some of those executed, concerns about juror bias, and claims of prosecutorial misconduct. Despite these serious questions, out of the 13 cases, the Supreme Court overturned stays that had been granted by lower courts in seven of these cases, as part of their “shadow docket.” The government claimed the need for emergency review, escaping full briefing and oral argument. The Supreme Court complied.

As Justice Sonia Sotomayor poignantly pointed out in her dissent in *United States v. Higgs*:

“Over the past six months, this Court has repeatedly sidestepped its usual deliberative processes, often at the Government’s request, allowing it to push forward with an unprecedented, breakneck timetable of executions. With due judicial consideration, some of the Government’s arguments may have prevailed and some or even many of these executions may have ultimately been allowed to proceed. Others may not have been. Either way, the Court should not have sanctioned these executions without resolving these critical issues. The stakes were simply too high.”

With the Supreme Court being this dismissive when people face execution by the government, how can we possibly be confident that reforms like abolishing qualified immunity for police officers who kill, or prohibiting racial profiling will truly repair our system? If the federal government and the 27 states that still employ this practice are not sufficiently outraged by this execution spree to work to end the death penalty, do we really think we can end mass incarceration?

Just one week before the high court opened the current term, it denied an emergency request for a stay of execution by Rick Allan Rhoades who was executed in Texas. His lawyers were trying to investigate how the jury had been selected and whether Black prospective jurors had been improperly excluded. Rhoades was the third person to be executed by the state of Texas this year, and the sixth person to be executed in the U.S. this year.

The day the Supreme Court opened the current term, Tuesday, Oct. 5, it denied a request to stop the execution of Ernest Lee Johnson. His lawyers wanted a hearing on Johnson’s intellectual disability since the court has held that it violates the Eighth Amendment to execute someone who is intellectually disabled. The state of Missouri executed Johnson.

The first death penalty case in which the Court heard oral argument this term, was the *U.S. v. Tsarnaev* case, the so-called Boston bomber. The bombs killed three people and injured 280. The First Circuit Court of Appeals reversed the death sentence finding that the trial court had not adequately screened jurors for potential bias following the pervasive news coverage. The appellate court also held that the trial court should have allowed Tsarnaev’s lawyers to present mitigating evidence regarding the influence of his brother, who was killed when the two tried to avoid capture. Rather than hold a new sentencing hearing, or just let Tsarnaev remain in federal prison for life, the U.S. Department of Justice appealed to the Supreme Court, which took the case up.

The two cases out of Arizona, consolidated as *Shinn v. Ramirez* will be argued on November 1. The cases are particularly troubling, and complicated, but yet raise a pretty fundamental question about the importance of a competent and effective lawyer in any criminal case, but especially when a defendant is facing the death penalty. To simplify, I explain one aspect of Arizona criminal procedure and one aspect of federal law under the Anti-Terrorism and Effective Death Penalty Act of 1996.

In Arizona a criminal defendant is not allowed to raise a claim of ineffective assistance of counsel on direct appeal from a conviction. Rather, this constitutional claim can be raised only in a collateral attack on a conviction in state court. So, if a person convicted in Arizona believes that they had ineffective counsel at trial, they have to wait until direct appeals are exhausted before raising this claim in a state collateral challenge to the conviction.

Federal habeas corpus law requires that someone who has been convicted in state court and wishes to attack the conviction in federal district court must have exhausted state appeals as to the claimed defect of the conviction.

Thus, if someone convicted in Arizona had ineffective assistance of counsel at trial, but the lawyer who represented him in the state collateral proceedings is also ineffective, and didn't raise the claim—the claim will not be heard in state court, due to the second incompetent attorney. Arizona argues, the convicted person has not exhausted state remedies as to this claim and should therefore be barred from raising it in a federal habeas challenge.

In a 2012 case, *Martinez v. Ryan*, the Supreme Court considered the effect of the Arizona rule in a case that did not involve the death penalty. The Court shied away from addressing whether there is a constitutional right to effective assistance of counsel at the stage of a collateral challenge in state court. Instead, the court focused on the issue of when procedural bar might be excused.

Chief Justice John Roberts and Justices Samuel Alito, Elena Kagan, Sonia Sotomayor, Ruth Bader Ginsberg and Stephen Breyer were in the majority, with Justice Anthony Kennedy who wrote the opinion. The court stated that Arizona's rule coupled with ineffective counsel at the state collateral stage would risk the Sixth Amendment claim not being heard at all—not in state court, due to ineffective counsel in the state collateral challenge, and not in federal court, if the Supreme Court found the claim to be procedurally barred. The court concluded that a defendant may be excused for failing to exhaust state remedies when his counsel at the state collateral stage was ineffective. Since the same issue is involved in *Shinn v. Ramirez*, it is likely that Supreme Court granted review to change the rule in *Martinez v. Ryan*.

In these two cases Barry Jones and David Ramirez have raised weighty issues about their trial attorneys. Barry Jones argues that his trial counsel did not pursue evidence that could show that he is actually innocent. David Ramirez argues that his counsel did not put on compelling mitigating evidence of his intellectual disability that could have resulted in a life sentence rather than the death penalty.

What relief are these two asking for before the Supreme Court? They are asking the Court to affirm the U.S. Court of Appeals for the Ninth Circuit, which concluded that they should each have a hearing on their Sixth Amendment claims. That is, that they should not be procedurally barred from having a federal district court hold a hearing on the ineffectiveness of their attorneys.

Arizona argues that granting a hearing to Jones and Ramirez will only encourage defense attorneys to sidestep state court review by deliberately omitting Sixth Amendment claims in state collateral review proceedings. This is a rather shocking assertion of unethical conduct, for which Arizona provides no evidence.

It is particularly troubling that the Court granted review in this case and in the *Tsarnaev* case, when lower courts found possibly flawed trials in these capital cases. It is clear that we cannot rely on the Supreme Court to support the reforms being proposed.

Abolishing the death penalty will not change the ideology of the current Supreme Court. Rather, it will take state and local officials and advocates to abolish. I believe that this is an indispensable step that can propel us closer to a truly reimagined and just criminal justice system.

Rachel A. Van Cleave is a professor of law and former dean at Golden Gate University School of Law. She is currently in Rome as a J. William Fulbright Scholar studying Italy's laws on sexual violence at Italy's Supreme Court of Cassazione.

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