

How Resource Disparity Makes the Death Penalty Unconstitutional: An Eighth Amendment Argument Against Structurally Imbalanced Capital Trials

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ABSTRACT

Currently, attorneys utilize Sixth Amendment ineffective assistance of counsel claims as the method for challenging inadequate capital defense representation. This article argues that such challenges should be brought under the Eighth Amendment as well, as the Eighth Amendment provides the opportunity to challenge death penalty systems as a whole, whereas Sixth Amendment challenges focus only on the death sentences of individual defendants.

The Eighth Amendment demands that death penalty schemes impose death sentences in a reliable and non-arbitrary manner. In order to meet the constitutionally mandated reliability, current death penalty jurisprudence requires a jury to make an individualized assessment of the particular defendant, together with the specifics of the crime, before a death sentence can be imposed. To make the individualized assessment, the jury considers evidence of mitigation presented by the defense and evidence of aggravation presented by the prosecution during the sentencing phase of a capital trial.

In many parts of the United States, there exist substantial disparities between the resources enjoyed by those prosecuting capital defendants and those defending them. The State in those areas is better equipped to investigate and present evidence of aggravation than the defendant is to present evidence of mitigation. Juries

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in those places therefore consider depictions of defendants and circumstances of offenses which skew in favor of the better-resourced prosecution, creating the substantial risk that death sentences will be imposed in an arbitrary manner—as a result of skewed depictions and not as a result of accurate assessments of the individual offender and offense. The Eighth Amendment prohibits death penalty schemes that generate a substantial risk that capital punishment will be imposed in an arbitrary manner. Thus, the death penalty should be challenged as unconstitutional when it operates under meaningful resource disparities.

The Supreme Court's infamous decision in McCleskey v. Kemp, in which the Court held that a capital sentencing system influenced by the arbitrary factor of race was still constitutional under the Eighth Amendment, may seem to preclude a successful Eighth Amendment challenge to death penalty systems influenced by the arbitrary factor of resource disparity. This article argues it does not. McCleskey, when looked at comprehensively and carefully, supports the premise that death penalty systems possessing a substantial and preventable risk of yielding arbitrary death sentences violate the Eighth Amendment. Therefore, capital defense attorneys should begin using the Eighth Amendment as a way to challenge death penalty schemes.

INTRODUCTION

Ineffective assistance of counsel claims, rooted in the Sixth Amendment, are commonly brought by defendants in death penalty appeals to challenge deficient defense representation.¹ Though prevalent, these claims are insufficient at addressing inadequate capital representation. First, the claims are frequently unsuccessful.² Second, they do nothing to challenge the underlying issue: the systemic inadequacy of capital defense in our country. Ineffective assistance of counsel claims challenge only the action (or inaction) of a specific defense attorney (or attorneys) in a specific case, and its effect on a specific defendant.³ But there is a system-wide failure to provide capital defendants with effective representation,⁴ and ineffective assistance of counsel claims do not challenge that fundamental problem.

The inability of Sixth Amendment ineffective assistance of counsel claims to address a generally under-resourced and subsequently inadequate capital representation system compels a different strategy, and the Eighth Amendment provides a framework for that strategy. The Eighth Amendment provides an opportunity to challenge inadequate, under-resourced capital representation systemically, instead of challenging discreet instances of inadequate representation in individual cases.

The Eighth Amendment prohibits the infliction of “cruel and unusual punishments,”⁵ and relevant death penalty jurisprudence has interpreted that language to include a prohibition against arbitrarily or

¹ See, e.g., Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 427 (2011) (“The majority of [habeas corpus] petitions now present at least one claim of ineffective assistance of counsel . . .”).

² See, e.g., Kelly Reissmann, “*Our System Is Broken*”: *A Study of the Crisis Facing the Death-Eligible Defendant*, 23 N. ILL. U. L. REV. 43, 44 (2002) (“Even in capital cases, most claims of ineffective assistance are dismissed as ‘tactical decisions’ or nonprejudicial error.”).

³ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (explaining that a defendant claiming ineffective assistance of counsel first “must show that counsel’s performance was deficient” and then must show “that the deficient performance prejudiced the defense”).

⁴ See, e.g., Reissmann, *supra* note 2, at 67 (“Several reasons emerge to explain the crisis of ineffective counsel in American death penalty jurisprudence. . . . [A]ttorneys who practice capital defense and the clients they represent are hampered by more than one crippling disability.”).

⁵ U.S. CONST. amend. VIII.

unreliably imposed death sentences.⁶ Capital punishment systems that create “a substantial risk that the punishment [of death] will be inflicted in an arbitrary and capricious manner” violate the Eighth Amendment.⁷ In jurisdictions with meaningful resource disparities between the capital prosecution and defense, such a risk exists. An inadequately resourced defense, when pitted against a much better resourced prosecution, yields distorted capital trials and a consequential risk of arbitrary sentencing outcomes. This article argues that death penalty systems in areas with meaningful resource disparities violate the Eighth Amendment.

A prosecution enjoying significantly more resources than the defense is better able to present a picture of the defendant as deserving of death than the defense is able to present a picture of the defendant as deserving of life. This is regardless of what a complete and accurate presentation of the unique circumstances of the offender and offense might portray. Because the prosecution is better able to depict the defendant as death-worthy, there is a higher likelihood that the jury will find him or her to be so. These distorted depictions create a substantial risk that death sentences issued will be the product of an arbitrary factor: resource disparity. With that substantial risk, the entire death penalty scheme in those places with meaningful resource disparities is unconstitutional, in violation of the Eighth Amendment.

The infamous case *McCleskey v. Kemp*⁸ may seem to present a barrier to such a claim, but this article argues it actually does not. In that case, Mr. McCleskey brought an Eighth Amendment challenge based on evidence of racial bias within the capital sentencing system.⁹ He argued that such a bias leads to arbitrary death sentences and thus violates the Eighth Amendment.¹⁰ Mr. McCleskey presented significant data to prove that bias existed.¹¹ However, a majority of the Court concluded that racial bias in sentencing did not amount to an Eighth Amendment violation.¹² The Court pointed to Mr. McCleskey’s inability to show that bias affected his particular sentence and would not accept the argument that, whether or not bias could be proved in his individual case, the entire scheme was unconstitutional.¹³ Mr. McCleskey’s death sentence was

⁶ See *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (discussing *Furman v. Georgia*, 408 U.S. 238 (1972)); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

⁷ *Godfrey*, 446 U.S. at 427.

⁸ 481 U.S. 279 (1987).

⁹ See *id.* at 286.

¹⁰ *Id.* at 308.

¹¹ See *id.*

¹² *Id.*

¹³ *Id.*

upheld.¹⁴

On its face, *McCleskey* seems to preclude a successful Eighth Amendment challenge to death penalty schemes in areas with capital prosecution and defense disparities. After all, Mr. McCleskey was able to show that an arbitrary factor—race—influenced sentencing decisions, and yet the Court still decided that the Eighth Amendment had not been violated. In *McCleskey*'s wake, would not another challenge claiming that a different arbitrary factor—disparity—influences capital sentencing decisions also be unsuccessful? No, because the Eighth Amendment challenge this article proposes is distinguishable from *McCleskey*.

As Professors Louis Bilionis and Richard Rosen have argued, although Mr. McCleskey “could not show that the arbitrary factor of race had actually influenced the sentence he received, the Court did not find his claim deficient on that score.”¹⁵ Indeed, the Court had no choice but to acknowledge that such proof is not an indispensable prerequisite to an Eighth Amendment challenge.¹⁶ Thus, in coming to its decision that the Eighth Amendment had not been violated, the Court relied on its conclusion that, while Mr. McCleskey had indeed identified a risk of arbitrariness in sentencing decisions, the risk was not “constitutionally unacceptable.”¹⁷ What is constitutionally unacceptable depends “not only [on] the risk that is involved, but [on] the costs that reduction of the risk

¹⁴ *Id.* at 291.

¹⁵ This is a unique way of looking at *McCleskey*, as Professors Bilionis and Rosen themselves acknowledge.

If there is an Eighth Amendment decision more reviled—even by those who do not align themselves with the committed foes of capital punishment—we are unaware of it. Mention it, and almost anyone carrying a brief for further regulation of the death penalty will assume it is adverse precedent that needs to be distinguished—the theory being that anything so disappointing in its result must be equivalently disappointing in its reasoning. To invoke *McCleskey* as support for further regulation is virtually unheard of. Yet *McCleskey* is the leading word on what minimizing arbitrariness means in the constitutional balance, and its exposition of balancing—what counts, and how—is most supportive here.

Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1337 (1997).

¹⁶ *Id.* at 1338-39 (citing *McCleskey*, 481 U.S. at 308-09); see also *McCleskey*, 481 U.S. at 308-09 (“Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury’s decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. . . . The question ‘is at what point that risk becomes constitutionally unacceptable.’” (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986))).

¹⁷ Bilionis & Rosen, *supra* note 15, at 1340-41 (quoting *McCleskey*, 481 U.S. at 308-09).

would entail.”¹⁸ The Court emphasized it had done much to try to eliminate racial bias, but that the risk of racial bias in capital sentencing still existed because the prosecutor and the jury are given discretion in deciding the appropriate punishment, and discretion inevitably leaves open the opportunity for bias.¹⁹ The only way to further reduce the risk of racial bias would be to eliminate prosecutorial and jury discretion. But, in the Court’s view, that discretion is a necessary part of a constitutional death penalty scheme and could not be eliminated; the Court therefore held that the risk of racial bias is unavoidable and thus constitutionally permissible.²⁰

The majority in *McCleskey* found that there was no feasible way of combating racial bias and the risk of arbitrariness it presents. The Court felt it had done much to mitigate the risk of racial bias and that whatever remained could not be cured. Therefore, it decided that the risk of arbitrariness was a constitutionally acceptable one.

There is a significant distinction between the issue raised in *McCleskey* and the argument presented here. Disparity of resources *can* be addressed. Unlike in *McCleskey*, we would not have to sacrifice an inherent part of our death penalty system in order to remedy this particular risk of arbitrariness. Resource disparities between the capital prosecution and defense unnecessarily create a “substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.”²¹ This risk is “constitutionally unacceptable”²² because its source can be eliminated; our system may need prosecutorial and jury discretion, but it does not need structurally imbalanced adversaries. In fact, such imbalance only hurts the integrity of our justice system. For these reasons, death penalty systems operating under meaningful disparities are constitutionally invalid; they violate the Eighth Amendment and should be challenged accordingly.

Capital defense attorneys who represent clients in jurisdictions with asymmetrically resourced defense and prosecution should take advantage of the Eighth Amendment to challenge the system. These attorneys must first compile data in order to prove that a disparity in

¹⁸ *Id.* at 1341.

¹⁹ *Id.*

²⁰ *Id.* at 1341-42; *McCleskey*, 481 U.S. at 313 (“In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”).

²¹ *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

²² *McCleskey*, 481 U.S. at 309.

resources actually exists and is significant in their jurisdiction. That task may be difficult, but it is not insurmountable. With enough data in hand, attorneys can show that the death penalty schemes in their jurisdictions are unconstitutional.

Part I of this article provides a background on Eighth Amendment capital case law and summarizes what the Eighth Amendment requires of a capital sentencing system. Part II explores the disparities that exist between capital prosecution and defense in many areas of the United States. Part III details why those disparities yield capital sentencing schemes that violate the Eighth Amendment, and how they should be challenged accordingly.

I. Eighth Amendment Capital Jurisprudence

In the landmark case *Furman v. Georgia*, the United States Supreme Court declined to strike down capital punishment as a per se violation of the Eighth Amendment prohibition against cruel and unusual punishment.²³ The Court did conclude, however, that the death penalty violates the Eighth Amendment when “the punishment [is] inflicted in an arbitrary and capricious manner.”²⁴ Through *Furman* and later cases, the Supreme Court has said that non-arbitrary and non-capricious death verdicts are consistent²⁵ and reliable.²⁶ Under the relevant case law, reliability means that there exists a meaningful way to distinguish between those who are sentenced to die and those who are not.²⁷ Reliability in capital cases is vital because “the penalty of death is qualitatively different from a sentence of imprisonment Because of

²³ 408 U.S. 238, 310-11 (1972) (White, J., concurring).

²⁴ *Godfrey*, 446 U.S. at 427 (discussing *Furman*, 408 U.S. 238).

²⁵ Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 345 (1995) (“*Furman*’s core holding was that the Eighth Amendment demands an acceptable measure of consistency in sentencing decisions.”).

²⁶ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

²⁷ See, e.g., *Godfrey*, 446 U.S. at 427 (“A capital sentencing scheme must, in short, provide a ‘meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.’” (quoting *Furman*, 408 U.S. at 311 (White, J., concurring))); *Lockett v. Ohio*, 438 U.S. 586, 601 (1978) (“[T]he sentencing process must permit consideration of the ‘character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death,’ . . . in order to ensure the reliability, under Eighth Amendment standards, of the determination that ‘death is the appropriate punishment in a specific case.’” (quoting *Woodson*, 428 U.S. at 304)).

that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”²⁸

The determination of whether or not death is appropriate is most broadly made through limiting the eligibility for capital punishment. Narrowing eligibility is accomplished both by restricting the list of capital²⁹ crimes and by restricting the list of capital-eligible individuals—for instance, rape is no longer a capital offense,³⁰ and juveniles³¹ and individuals with an intellectual disability³² are no longer death-eligible. Exercising these limitations ensures that those inherently less culpable³³ cannot be subject to the punishment reserved for “the worst of the worst.”³⁴

During trial, the narrowing process continues. Once a death-eligible defendant is found guilty of a capital offense, the trial moves into the penalty phase, in which the jury³⁵ must determine whether the defendant should indeed be sentenced to death.³⁶ To arrive at this decision, the jury considers evidence of aggravating and mitigating factors. Evidence of aggravation is evidence presented by the prosecution that highlights certain details of the particular murder or murderer in an attempt to persuade the jury that the defendant deserves

²⁸ *Woodson*, 428 U.S. at 305.

²⁹ In order to be capital, a case must both be death-eligible and charged as capital. As explained below, death-eligibility is limited to specific offenses and specific offenders. Once dealing with a death-eligible case, the prosecutor still has wide discretion in deciding whether to actually seek the death penalty. See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 74 (2007).

³⁰ See *Coker v. Georgia*, 433 U.S. 584 (1977).

³¹ See *Roper v. Simmons*, 543 U.S. 551 (2005).

³² See *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, intellectual disability is referred to by its previous term, mental retardation. See *id.*

³³ See, e.g., *id.* at 318 (“[People with an intellectual disability] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, [and] to control impulses Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.” (footnotes omitted)).

³⁴ As Justice Stevens said in dissent in *Kansas v. Marsh*, “there is the point to which the particulars of crime and criminal are relevant: within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst.’” 548 U.S. 163, 206 (2006).

³⁵ This article uses the term “jury,” but a judge may be the fact-finder and/or sentencer in a capital trial if the defendant waives his or her Sixth Amendment jury trial right.

³⁶ “At the penalty phase of a capital case, the central issue is no longer a factual inquiry into whether the defendant committed any crimes; it is the highly-charged moral and emotional issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live.” Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 334-35 (1983).

a death sentence.³⁷ Evidence of mitigation is presented by the defense and “tends to humanize the defendant, explain the crime, and counterbalance the brutality of the crime or public sensationalism,” with the hope that the jury will then decide to spare the person’s life.³⁸

States differ slightly in how they deal with evidence of aggravation and mitigation. In all states, the jury must find at least one aggravating factor beyond a reasonable doubt in order for a death sentence to be legally permissible.³⁹ Some states direct that the mandatory aggravating factor be found at the guilt phase of the trial and some require that it be found at the penalty phase.⁴⁰ Regardless of when the mandatory aggravating factor is determined, it is always at the penalty phase that evidence of aggravation is presented juxtaposed to evidence of mitigation. During the penalty phase, the jury considers whether or not to impose death based on the aggravating and mitigating evidence presented.⁴¹

Aggravating factors are laid out by statute and vary from state to state. The jury must find at least one statutory aggravating factor in order for a defendant to be death-eligible, but states may allow for the consideration of non-statutory aggravating factors in addition to the statutory ones.⁴² Some examples of common statutory aggravating factors are: that the murder was “especially heinous, atrocious, or cruel;”⁴³ that “the defendant knowingly created a great risk of death to many persons;”⁴⁴ and, that the murder “was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit,

³⁷ Craig M. Cooley, *Mapping the Monster’s Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 32, 41 (2005).

³⁸ Leona D. Jochnowitz, *Missed Mitigation: Counsel’s Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing*, 43 CRIM. L. BULL. 3 (2007).

³⁹ Vick, *supra* note 25, at 353.

⁴⁰ *Capital Punishment*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 770, 778 (2007).

⁴¹ *See, e.g.*, Vick, *supra* note 25, at 354.

⁴² *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

⁴³ This particular language is taken from the Alabama Code, ALA. CODE § 13A-5-49 (West, Westlaw through 2012 Reg. and Spec. Sess.), but similar statutes are quite common. The Supreme Court has held that aggravating factors like this one are only constitutional if they are made more definitive by providing a narrowed construction to the otherwise vague terms used. *See, e.g.*, *Walton v. Arizona*, 497 U.S. 639, 652-55 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

⁴⁴ IDAHO CODE ANN. § 19-2515 (West, Westlaw through 2012 2d Reg. Sess. of 61st Legis.).

rape, robbery, burglary or kidnapping.”⁴⁵

Mitigating factors, unlike aggravating factors, are not limited by statute; the Supreme Court has ruled that the jury’s consideration of mitigating evidence cannot be restricted as long as it is offered “as a basis for a sentence less than death.”⁴⁶ Typical mitigating factors include “family history; youthfulness; underdeveloped intellect and maturity; favorable prospects for rehabilitation; poverty; military service; cooperation with authorities; character . . . [and lack of] prior criminal history.”⁴⁷

The purpose of aggravating and mitigating evidence is to guide the jury toward a result that fits the character of the crime together with the character of the defendant,⁴⁸ and consequently to sentence the so-called “worst of the worst” to die while allowing all others to live. If a particular murder involved especially horrifying facts but was committed by a man who suffered years of physical and emotional abuse, a jury might be persuaded that the mitigating evidence of abuse justifies a conclusion that the defendant does not deserve to die.⁴⁹ On the other hand, if a similar murder was committed by someone who had not suffered abuse, the jury might then conclude that the defendant’s deserved place is with “the worst of the worst” on death row.⁵⁰

For the system to remain constitutional according to current death penalty jurisprudence, the jury must consider aggravating and mitigating factors before it imposes death. More particularly, the jury must carefully consider both the unique circumstances of the crime and characteristics of the defendant in order to yield non-arbitrary, consistent, and reliable determinations of who does and does not deserve to die.⁵¹ Implicit in using this structure as the basis for a

⁴⁵ ALA. CODE § 13A-5-49.

⁴⁶ *Lockett v. Ohio*, 438 U.S. 586, 601 (1978); *see also* *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

⁴⁷ *Cooley*, *supra* note 37, at 48 (citations omitted).

⁴⁸ *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (“What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.”).

⁴⁹ *See* Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1216 (1999) (“A defendant’s history of childhood abuse is paradigmatic mitigating evidence in a death penalty case because it has the potential to transform a juror’s perception of the defendant from an individual who deserves to die to a person for whom life imprisonment is a just punishment.”).

⁵⁰ *See id.*

⁵¹ *Lockett*, 438 U.S. at 601 (“[T]he sentencing process must permit consideration of the ‘character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of

constitutional death penalty is a reliance on the proper functioning of the adversarial system. Evidence supporting the unique circumstances and characteristics of the crime and the defendant must be accurately and completely presented to the jury for it to consider aggravating and mitigating factors properly.

Having an accurate and complete presentation of both aggravation and mitigation requires a balanced adversarial system, one in which the prosecution and the defense are allocated similar resources. In an imbalanced system, the jury makes its sentencing decision based on a skewed depiction of the aggravation or mitigation that exists in a case. The better-resourced side is able to present a stronger case than the other side—the evidence it presents will accordingly seem more compelling than that of its opposition. In such systems, a substantial risk exists that sentencing determinations will be based on the arbitrary factor of resource allocation instead of the unique characteristics of the offender and the offense. It is in this risk that the death penalty system violates the Eighth Amendment.⁵²

II. DISPARITY BETWEEN THE PROSECUTION AND DEFENSE

It is not a novel point that indigent defense systems are underfunded in America. Across the country, public defenders and private attorneys appointed to defend indigent clients are overworked and underpaid.⁵³ These conditions exist generally in criminal cases, but also specifically in capital cases. Because capital defense demands more experience, training, and resources in order for counsel to be “even

death . . . in order to ensure the reliability, under Eighth Amendment standards, of the determination that ‘death is the appropriate punishment in a specific case.’” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

⁵² See *supra* notes 25-28 and accompanying text.

⁵³ See generally AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE* (2004) [hereinafter *GIDEON'S BROKEN PROMISE*], available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2006), available at <http://www.constitutionproject.org/pdf/139.pdf>; Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

minimally competent,”⁵⁴ the problems created by underfunding in non-capital cases are magnified in capital cases.⁵⁵ And in some places, the quality of defense gets worse as the stakes get higher—the least able attorneys represent those clients facing death.⁵⁶

Not only is the defense extremely underfunded and under-resourced, but the prosecution is comparatively better-funded and better-resourced.⁵⁷ As the American Bar Association reported:

[R]ecent figures indicate that state and local indigent defense expenditures in fiscal year 2002 were approximately \$2.8 billion . . . [yet] in 2001, nearly \$5 billion was being spent in prosecuting criminal cases in state and local jurisdictions. And that doesn't include the amounts that are spent by police, forensic labs, and so forth that are not directly part of the prosecutor's office.⁵⁸

It is true that prosecutors prosecute some non-indigent defendants, so the funding allocated to the prosecution and to indigent defense must not be exactly equal. However, estimates are that between eighty and ninety percent of state prosecutions are against indigent defendants.⁵⁹ Even taking prosecutions of non-indigent defendants into account, there often exists a huge gap between resources allocated to the prosecution and those allocated to indigent defense.

⁵⁴ Carol S. Steiker & Jordan Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 374 (2010) (“The inadequacy of resources and the absence of meaningful supervision of counsel are also prevalent throughout the criminal justice system, but these problems appear with greater regularity and severity on the capital side as a consequence [of] the special training, experience, and funding necessary to ensure even minimally competent capital representation.”).

⁵⁵ *Id.*

⁵⁶ See Vick, *supra* note 25, at 337 (“The attorneys defending death penalty cases, as a class, are less experienced and far more likely to be disciplined for unprofessional conduct than the bar as a whole.”).

⁵⁷ “[P]rosecutors’ offices are not flush with cash, but they still possess considerably greater assets than many of the defense lawyers representing indigent defendants.” Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 VAND. L. REV. 307, 325 (2010).

⁵⁸ GIDEON’S BROKEN PROMISE, *supra* note 53, at 13-14 (internal quotations omitted).

⁵⁹ *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) [hereinafter *Hearing*] (statement of Hon. Robert C. “Bobby” Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security).

Disparity in resources between the prosecution and the defense has serious consequences in capital trials. Some states and counties appoint private attorneys to represent defendants facing the death penalty, others assign these cases to the public defender office, and still others do both.⁶⁰ In all systems, the disparity matters. As Professor Stephen Smith explains:

By virtue of their significant resource advantages over public defenders and appointed counsel and strong incentives to avoid embarrassing defeats in capital cases, prosecutors will diligently investigate and vigorously present the case for death. Resource-constrained public defenders and court-appointed counsel will be in no position to match (or, in many cases, even come close to matching) the effort and resources that prosecutors will invest in capital cases.⁶¹

An overworked, underfunded defense simply is no match for a relatively resource-laden prosecution.

A. Data on Disparity

Research reveals that disparity is a fact spanning many states and multiple regions. In Florida, for example, a study showed that “overall prosecutorial resources substantially exceeded those of indigent defense . . . even after adjusting for in-kind services and for the varying responsibilities of prosecution and defense.”⁶² In 2010, a public defender from the Miami-Dade County office reported that his office received \$150,000 in federal grant money while the prosecutor’s office received almost \$4.3 million.⁶³ In Tennessee, a group compared resources for the prosecution and the defense in fiscal years 2004-2005 and found that the defense received less than half the amount as the prosecution from the state—and that was an extremely conservative illustration of the disparity because “the investigative and forensic expert resources made available

⁶⁰ *See id.* at 1.

⁶¹ Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 376 (2008).

⁶² *The Balance Sheet Approach Comparing Prosecution and Defense Resources*, SPANGENBERG REP. (The Spangenberg Group, West Newton, Mass.), July 1997, at 2.

⁶³ David Carroll, *Gideon Alert: Congressional Summit Offers Federal Recommendations to Stem Indigent Defense Crisis*, NAT’L LEGAL AID & DEFENDER ASS’N (Jun. 16, 2010, 10:50 PM), <http://www.nlada.net/jscri/blog/gideon-alert-congressional-summit-offers-federal-recommendations-stem-indigent-defense-cr>.

to the prosecution by all of the local law enforcement agencies in the ninety-five counties and many municipalities in this state, as well as by the FBI, DEA, and other federal agencies” were not factored into the calculation of prosecutorial resources.⁶⁴ In Virginia, during the 2004 fiscal year, “[n]o public defender office receive[d] money to supplement salaries or to hire support staff, paralegals or additional attorneys,” but fifty-six of the 120 district attorney offices “reported receiving supplemental local funds to boost staff salaries . . . totaling \$7,484,391.93.”⁶⁵ In California, indigent defense receives an average of \$60.90 in funding for every \$100 given to the prosecution.⁶⁶

As a result of the disparity, capital defenders generally receive lower salaries, inherit higher caseloads, and have less access to investigators and experts than prosecutors.

1. Compensation Disparity

The American Bar Association Guidelines state: “Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.”⁶⁷ The Guidelines further require that appointed counsel in capital cases be paid “at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction,”⁶⁸ and that public defenders in capital cases be compensated proportionately to prosecutors in that jurisdiction.⁶⁹ Proportional compensation for prosecutors and defenders is necessary to prevent the prosecution from gaining “an advantage in recruiting and retaining competent attorneys.”⁷⁰ Yet, evidence shows that salary parity is more often the exception than the norm.

In general, “entry-level prosecutors earn higher salaries than

⁶⁴ William P. Redick, Jr., Bradley A. MacLean & M. Shane Truett, *Pretend Justice—Defense Representation In Tennessee Death Penalty Cases*, 38 U. MEM. L. REV. 303, 350 (2008).

⁶⁵ THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 35 (2004).

⁶⁶ GIDEON’S BROKEN PROMISE, *supra* note 53, at 14.

⁶⁷ GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES, Guideline 9.1(B) (2003) [hereinafter ABA GUIDELINES], reprinted in 31 HOFSTRA L. REV. 913 (2003).

⁶⁸ *Id.* at 9.1(B)(3).

⁶⁹ *Id.* at 9.1(B)(2).

⁷⁰ Scott Wallace, *Parity: The Fail-Safe Standard*, NAT’L LEGAL AID & DEFENDER ASS’N (2001), http://www.nlada.org/Defender/Defender_Standards/Standards_Attach7 (last visited Jan. 4, 2013).

entry-level public defenders [and t]he salary differences persist at every level of experience.⁷¹ For instance,

In Baton Rouge, the twenty-seven [public defenders] earn between \$18,000 and \$35,000 annually, figures that are about 30% less than the salaries in the district attorney's office. Public defender salaries in Alameda County, California ranged much higher than in Baton Rouge, anywhere in excess of \$50,000 to greater than \$130,000, but the top prosecutor salaries there far exceeded those of the public defender office. In Georgia, entry-level district attorney and public defender positions both start out at the same annual salary, but the upper limit on the public defender salary scale is lower than that of the district attorney salary. The average salary for a Portland, Oregon public defender in 2000 was \$45,426 compared to \$61,638 for a prosecutor there.⁷²

Relatedly, and again notwithstanding the ABA's requirements, appointed capital defense attorneys are often paid well below market rate and at times not even enough to cover overhead costs.⁷³ In Florida, for instance, as of 2007, fees for capital appointment were capped at \$15,000—an amount a Miami defense attorney considered so low that it would bar any attorney from accepting an appointment.⁷⁴ In Georgia in 2007, two appointed capital attorneys stopped receiving payment from the state altogether because it had run out of funds.⁷⁵ A 2005 Ohio case illustrates both how low appointed counsel pay can be and how especially inadequate it is when compared with prosecutorial resources. In that case, the compensation two appointed defense attorneys split and also

⁷¹ Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 230 (2004).

⁷² Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1062 (2006) (citations omitted).

⁷³ See Vick, *supra* note 25, at 336; ABA GUIDELINES, *supra* note 67, at 9.1 cmt. ("In particular, compensation of attorneys for death penalty representation remains notoriously inadequate.")

⁷⁴ Susannah A. Nesmith & Trenton Daniel, *Legal Plan for Poor Faulted*, MIAMI HERALD, May 5, 2007, at 1B (writing that, in response to the recently-lowered capital appointment fee cap, capital defense attorney Bruce Fleisher said, "No one's going to do that for \$15,000.")

⁷⁵ *Weis v. Georgia*, 694 S.E.2d 350, 353 (Ga. 2010).

used to pay staff and cover other case expenses was \$40,000⁷⁶—the same amount the prosecution paid for a single expert witness.⁷⁷

Low compensation in comparison to the prosecution often yields a relatively lower-quality defense. “Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all.”⁷⁸ Many public defender offices find it hard to attract and retain experienced attorneys with the low salaries they must offer.⁷⁹ Capital defenders face the same problem.⁸⁰ A bipartisan state commission tasked with researching and reporting on the current status of the death penalty in California concluded that “there is a declining pool of competent experienced criminal defense lawyers who are willing to accept employment to handle death penalty trials, because they are not supplied sufficient funding to provide competent representation.”⁸¹ The low compensation provided to capital defenders results in lower quality defense; capital prosecutors’ performances are not affected similarly because they generally enjoy more generous compensation.

2. *Expert and Investigative Resource Disparity*

In *Rompilla v. Beard*, the Supreme Court ruled that defense counsel in a capital case were ineffective for failing to look at a file from their client’s prior conviction.⁸² Justice Kennedy in his opinion noted that at the time of Mr. Rompilla’s trial, the public defender’s office representing him had two investigators for two thousand cases.⁸³ One investigator per one thousand cases is a dismal ratio; it becomes especially so when compared to investigative resources available to the prosecution.

In all states, the prosecution has access to services for free that

⁷⁶ Backus & Marcus, *supra* note 72, at 1060.

⁷⁷ *Id.* at 1061.

⁷⁸ GIDEON’S BROKEN PROMISE, *supra* note 53, at 7.

⁷⁹ Wright, *supra* note 71, at 231; Vick, *supra* note 25, at 337 (“[P]ublic defenders are so poorly paid in most jurisdictions that defender offices cannot retain experienced death penalty lawyers.”).

⁸⁰ Wright, *supra* note 71, at n.44.

⁸¹ CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 30 (2008).

⁸² 545 U.S. 374 (2005).

⁸³ *Id.* at 403.

the defense needs to pay for in order to receive.⁸⁴ These services include access to local law enforcement agencies, state and federal forensic services, state and local investigative agencies, and national, state, and local databases.⁸⁵ Expert witnesses are also often readily available to the prosecution at no cost at all. The prosecution can simply hire experts already on the state payroll and, in doing so, avoid increasing the prosecution's budget.⁸⁶ Government experts available to the prosecution include "crime investigation and laboratory professionals, psychiatrists, scientists, and doctors."⁸⁷

If defense counsel wants to obtain similar services, they usually have to request funding from the court⁸⁸ or from state agencies charged with organizing and operating indigent defense.⁸⁹ Courts and agencies are often unwilling to grant the money requested or are simply unable to do so because of insufficient budgets or strict statutory caps.⁹⁰ Often, capital defense attorneys do not even request funding for assistance because

⁸⁴ See Wright, *supra* note 71, at 237 ("[T]he prosecution uses state and federal forensic services that do not appear in the prosecutor's office budget."); ABA GUIDELINES, *supra* note 67, at 9.1 cmt.

⁸⁵ See, e.g., S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—a Report on Reforms in Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371, 380 (2002); ABA GUIDELINES, *supra* note 67, at 9.1 cmt. ("A prosecution office will not only benefit from the formal resources of its jurisdiction (e.g., a state crime laboratory) and co-operating ones (e.g., the FBI), but from many informal ones as well. For example, a prosecutor seeking to locate a witness in a distant city can frequently enlist the assistance of a local police department; defense counsel will have to pay to send out an investigator.").

⁸⁶ Wright, *supra* note 71, at 237.

⁸⁷ Backus & Marcus, *supra* note 72, at 1099.

⁸⁸ See, e.g., Steiker & Steiker, *supra* note 54, at 392-93 ("[I]n many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services.").

⁸⁹ An example of such an agency is the Georgia Public Defender Standards Council (GPDSC). See GA. PUB. DEFENDER STANDARDS COUNCIL, <http://www.gpdsc.com> (last visited Jan. 4, 2013).

⁹⁰ See, e.g., Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 691-92 (2010) (discussing a 2010 capital case in Georgia in which the appointed lawyers could not get funds for investigation or experts); Emily J. Groendyke, *Ake v. Oklahoma: Proposals for Making the Right a Reality*, 10 N.Y.U. J. Legis. & Pub. Pol'y 367, 387 (2006-2007) (discussing a case in which the defense requested funding for an electrophoresis expert to rebut the claim that evidence collected from the victim's apartment belonged to the defendant and the trial court denied funding); Backus & Marcus, *supra* note 72, at 1098 (discussing Georgia attorneys who "commented that getting investigators, even in death penalty cases, was 'like pulling teeth'" (citation omitted)).

they know nothing will be granted.⁹¹

But having access to investigators and experts is crucial at all stages of the criminal processes, not least at sentencing. Studies show that “many different types of mitigation resonate with jurors. Low intelligence, mental illness, child abuse, extreme poverty . . . can lead jurors to choose life over death.”⁹² Without investigators and experts, discovering and showing that type of mitigation—let alone rebutting the prosecution’s evidence of aggravation—becomes virtually impossible.⁹³ The prosecution, on the other hand, enters the penalty phase of a capital trial with the knowledge, findings, and opinions of an entire team, and often challenges a defense that stands comparatively alone.

3. Workload Disparity

Much research exists on the staggering, often crippling, caseloads of public defenders and appointed counsel.⁹⁴ The problem is worsening in some places as the number of prosecutions increases without corresponding funding increases to the defense to defend the surging prosecutions.⁹⁵ Not much data exists specifically regarding caseloads of *capital* defense attorneys; there are, however, some anecdotes and

⁹¹ Bright, *supra* note 53, at 1846.

⁹² John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1038 (2008).

⁹³ See Cooley, *supra* note 37, at 59 (“Considering the sheer volume of potential witnesses and documents counsel must locate [for a capital penalty phase], it is obvious that a psychosocial investigation is not within the ken of a competent attorney.” (internal quotations omitted)); Blume et al., *supra* note 92, at 1041 (“[T]he [capital] defense team must secure appropriate expert assistance, primarily from mental health experts.”).

⁹⁴ See, e.g., Bilionis & Rosen, *supra* note 15, at 1320 (“Underpaid, undertrained, and poorly supported court-appointed attorneys drawn from the ranks of local general practitioners, or better trained by still seriously overworked and understaffed public defender offices—these are the grist of *Gideon’s* mill.”); Bright, *supra* note 90; Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87 (2010).

⁹⁵ See, e.g., NORMAN LEFSTEIN, AM. BAR ASS’N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 24 (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf (“When the state established the public defender system in the early 1980s, one in 97 Missourians was under correctional control—either in jail or prison or on probation or parole. In 2007, by contrast, one in 36 was under correctional control, and 32 percent of those were incarcerated in prison or jail. . . . The state’s vast increases in criminal prosecutions have not included commensurately increasing resources for the public defender.” (quoting Missouri *ex. rel.* Mo. Pub. Defender Comm’n v. Pratte, 298 S.W.3d 870, 877 (Mo. 2009) (en banc))).

statistics that shed light on the situation.

For instance, in the recent Georgia capital trial of Jamie Ryan Weis, one of Weis's public defenders "was lead counsel in 103 felony cases, and part of a defense team in over 400 cases. The other was the administrator of a four-county circuit public defender office and represented clients in 91 felony cases."⁹⁶ In 2004, a public defender in Louisiana asked to be removed from a second-degree murder case because she already had 373 cases pending—one of those cases was a capital case in which she was first chair.⁹⁷ In Missouri, in fiscal year 2009, "[t]he statewide public defender system had the capacity to spend only 7.7 hours per case, including trial, appellate and capital cases."⁹⁸ Likewise, in Tennessee, public defenders have "dramatically excessive" caseloads—individual public defenders handle close to one thousand cases per year.⁹⁹ Yet, in order to save money, Tennessee courts are encouraged to assign public defenders to capital cases and discouraged from relying on the alternative of appointed counsel.¹⁰⁰ The push of capital cases to the already extremely overburdened public defenders "further jeopardizes the quality of the defense representation and the reliability of the outcome of capital trials."¹⁰¹

It is clear that capital defender caseloads in certain parts of our country are extremely heavy. Precisely comparing capital defender caseloads to those of capital prosecutors is difficult because of the lack of data available on the issue—but one thing is certain: prosecutors have an automatic safety valve should their work burden become too high. Prosecutors always have the option of not prosecuting certain cases at all or not pursuing the death penalty in certain cases if they are overburdened.¹⁰² Public defenders, on the other hand, have no control

⁹⁶ Bright, *supra* note 90, at 692.

⁹⁷ See *Louisiana v. Bell*, 896 So. 2d 1236, 1239-40 (La. Ct. App. 2005).

⁹⁸ Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 867 (2010) (quoting *Missouri ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 873 (Mo. 2009) (en banc)).

⁹⁹ Redick et al., *supra* note 64, at 335-36.

¹⁰⁰ *Id.* at 335. Although appointed death penalty attorneys in Tennessee are paid "sub-standard rates," they still pose an additional cost to the state, as opposed to already-salaried public defenders. *Id.*

¹⁰¹ *Id.*

¹⁰² Gershowitz, *supra* note 29 ("Prosecutors have incredibly wide discretion to choose which cases they will pursue, and their discretion is nearly as broad in determining whether to seek the death penalty.").

over how many cases they have at one time.¹⁰³ Appointed capital lawyers also often lack that control because they must accept an excessive number of cases in order to make a living off of their typically very low pay.¹⁰⁴ For prosecutors, prosecuting fewer cases or not seeking the death penalty may be a difficult choice due to personal or political persuasions, but it is still a choice available.¹⁰⁵ Capital defenders do not have that option, but instead must defend every case the district attorney chooses to make capital.

III. RESOURCE DISPARITY MAKES A DEATH PENALTY SCHEME UNCONSTITUTIONAL

The state has structured the system in a way that yields unreliable results. The resource disparity between prosecutors and defense attorneys in many jurisdictions creates unbalanced adversarial systems. Under this imbalance, the jury considers aggravation and mitigation skewed in favor of the better-resourced and better-prepared prosecution. This structural imbalance generates a risk that the death penalty will be imposed arbitrarily. Decisions of who deserves to die risk being the product of resource disparity instead of the product of an accurate consideration of the particular offender and offense. Under the Eighth Amendment, a system that creates such a risk is unconstitutional.

A. Accurate Presentation of Mitigation and Aggravation Is Necessary for the Constitutional Imposition of Capital Punishment

1. *The Importance of Mitigation*

Mitigation is crucial to the constitutionality of the death penalty.

¹⁰³ LEFSTEIN, *supra* note 95, at 23 (“[I]hose who provide defense services have no control over the number of cases in which police make arrests and in which prosecutors decide to file charges requiring the appointment of counsel.”).

¹⁰⁴ *Hearing*, *supra* note 59, at 2 (“Lack of funding also results in excessive caseloads for many defense attorneys. Some defense attorneys, appointed by judges, accept far more cases than they can competently handle just to make a living wage.”).

¹⁰⁵ See, e.g., Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, A Response to Adam Gersbowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 147 (2011) (“Prosecutors *task themselves* through their own discretionary choices. If the tasks are too large, prosecutors have significant authority—even if they lack sufficient motivation—to change course.”)

“[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”¹⁰⁶ What a defendant can present in mitigation is virtually unlimited.¹⁰⁷ Any evidence related to the defendant or the offense that might persuade the jury to give life instead of death is permitted.¹⁰⁸ The Supreme Court has made it clear that the Eighth Amendment demands unrestricted mitigation because unless the jury can give “independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense,” there exists “the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”¹⁰⁹

Mitigation, like aggravation, is a way to guarantee reliability. Eighth Amendment jurisprudence relies on mitigation evidence as the keystone in imposing the death penalty only on “the worst of the worst.”¹¹⁰ The Eighth Amendment demands that all mitigating evidence be presented to the jury because this evidence is what determines whether or not death is the appropriate punishment for each particular capital defendant.

Mitigation allows the jury to see the defendant as a human being, and recognition of the humanity of a capital defendant has long been considered a necessary component of the lawful imposition of a death sentence.¹¹¹ Without knowing details about the defendant or the

¹⁰⁶ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

¹⁰⁷ *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[T]he Eighth and Fourteenth Amendments require that the [jury], in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (“Just as the State may not by statute preclude the [jury] from considering any mitigating factor, neither may the [jury] refuse to consider, as a matter of law, any relevant mitigating evidence.”).

¹⁰⁸ *See Lockett*, 438 U.S. at 604; *Eddings*, 455 U.S. at 113-14.

¹⁰⁹ *Lockett*, 438 U.S. at 605.

¹¹⁰ *See Vick*, *supra* note 25, at 351 (“Under the Eighth Amendment, a legitimate retributive judgment must take into account, among other things, evidence that tends to emphasize the defendant’s redeeming traits, explain (if not excuse) the defendant’s acts, or show how circumstances partly or wholly beyond the defendant’s control caused his life or personality to deteriorate to the point where he could commit a heinous crime.”); *Eddings*, 455 U.S. at 112 (“[T]he rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.”).

¹¹¹ *See Eddings*, 455 U.S. at 110 (“[T]he rule in *Lockett* is the product of a considerable history reflecting the law’s effort to develop a system of capital punishment at once

circumstances of his or her life, it is impossible to make a reasoned decision about whether or not he or she merits capital punishment. The sentencing body must have a full picture of the person they are judging in order to judge that person appropriately.

2. *The Intersection of Mitigation and Aggravation*

Mitigating evidence does not exist separately from aggravation. Both are presented alongside each other during the penalty phase of a capital trial, and it is the consideration of these two bodies of evidence together that results in the sentencing decision.

Though the jury must find one statutorily defined aggravating factor in order for death to be an option, once it finds that one factor, states may allow the jury to consider any other evidence “relevant to the defendant’s culpability.”¹¹² As Justice Stevens wrote in the majority opinion of *Zant v. Stephens*,

[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.¹¹³

In order to make the “individualized determination,”¹¹⁴ the jury at the penalty phase considers evidence of mitigation, the prosecution’s refutation to mitigation evidence presented, evidence of aggravation, and the defense’s refutation to aggravation evidence presented.¹¹⁵ The role of

consistent and principled but also human and sensible to the uniqueness of the individual.”).

¹¹² Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 234 (1992) (citing *Zant v. Stephens*, 462 U.S. 862 (1983), and *Barclay v. Florida*, 463 U.S. 939 (1983)).

¹¹³ *Zant*, 462 U.S. 862, 878-79 (1983).

¹¹⁴ *Id.*

¹¹⁵ Examples of relevant statutes: “The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the

the defense counsel in the penalty phase of a capital trial is to “blunt the impact of evidence of aggravating circumstances” and also to show the existence of mitigating factors.¹¹⁶ The role of the prosecution is the opposite.

B. Resource Disparity’s Impact on the Evidence of Mitigation and Aggravation

During the penalty phase, the jury is called upon to make the decision of whether the defendant should be sentenced to live or die. The relative strength of aggravation or mitigation has tremendous weight on that decision. The more the jury hears, for example, about the gruesomeness of the crime, the defendant’s lack of remorse, or the defendant’s tendency toward violence, the more likely the jury is to find the defendant deserving of death.¹¹⁷ The more the decision-maker learns, for instance, about the defendant’s troubled childhood, sense of remorse, or loving relationship with his or her children, the more likely the decision-maker will recognize the defendant’s humanity and deem him or her worthy of life.¹¹⁸ The strength of the evidence provided by each side

sentencing proceeding” ARIZ. REV. STAT. ANN. § 13-751 (West, Westlaw through the 2d Reg. Sess. of the 50th Legis.); “In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence” CAL. PENAL CODE § 190.3 (West 2008); “[E]vidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances” FLA. STAT. ANN. § 921.141 (West, Westlaw through 2012 Sess. of 22d Legis.); “[E]vidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances . . . and any mitigating circumstances.” KAN. STAT. ANN. § 21-6617 (Supp. 2011); “Upon conviction of a defendant in cases where the death penalty may be imposed, a hearing shall be conducted. In such hearing, the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment” KY. REV. STAT. ANN. § 532.025 (West, Westlaw through 2012 Legislation); “The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates.” LA. CODE CRIM. PROC. ANN. art. 905.2 (2008).

¹¹⁶ Vick, *supra* note 25, at 364.

¹¹⁷ An empirical study found that jurors “shudder at sadistic violence, and they show little mercy to defendants who show no remorse. Moreover, they are deeply concerned that such a defendant will cause more harm to someone else unless he’s executed.” Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998).

¹¹⁸ See, e.g., William M. Bowen, Jr., *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 808 (“[M]y experience on

during the penalty phase determines the fate of the defendant, and the ability to investigate and present that evidence depends on the resources available to do so.

In many places in America, the system is structured so that the prosecution is always likely to present the stronger evidence.¹¹⁹ Resource disparities between the prosecution and the defense lead to an unbalanced adversarial system in which the defendant risks being sentenced to death as a result of disparate funding, as opposed to his or her unique characteristics and the circumstances of the crime. Sentences issued under such a system are based upon an inaccurate assessment of the defendant and the circumstances of the crime and thus neglect a key requirement of a constitutional death penalty: that sentencing reflect the “character and record of the individual offender and the circumstances of the particular offense.”¹²⁰

The disparities in compensation, workload, and collateral services result in capital defenders who are less experienced, less prepared, and less competent when compared to the prosecution. From 1973-1995, thirty-nine percent of all capital convictions were reversed for “egregiously incompetent defense lawyering.”¹²¹ In Illinois, thirty-three defendants sentenced to death were represented by an attorney who was disbarred prior or subsequent to the case.¹²² A study released in the 1990s revealed “that attorneys who represented death row inmates in six Southern states were disbarred, suspended, or otherwise disciplined at a rate that was 300% to 4,600% higher than the discipline rates for other lawyers in those states.”¹²³ Such incompetence often stems from a lack of adequate pay or resources, and these flailing attorneys are facing better-salaried, better-resourced prosecutors who come to trial with the free-flowing aid of law enforcement, investigators, and experts.¹²⁴

the court convinced me that when the background and character of the defendant have been thoroughly investigated and presented, there is a greater chance a death sentence will not be imposed or, if imposed, will be reversed on appeal.”); *id.* at 816 (“If we can make this monster that we call the defendant human, people will not want to execute him, even if they are in favor of the death penalty. But we have to make our client human, and the only way we can do that is through mitigation.”).

¹¹⁹ See *supra* Part II.

¹²⁰ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

¹²¹ See Steiker & Steiker, *supra* note 54, at 388.

¹²² Backus & Marcus, *supra* note 72, at 1092.

¹²³ Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 381 (2009) (citing Michael Tigar, *Lanyers, Jails, and the Law's Fake Bargains*, MONTHLY REV., July-Aug. 2001, at 29, available at <http://www.monthlyreview.org/0701tigar.htm>).

¹²⁴ See *supra* notes 84-87 and accompanying text.

In areas where meaningful disparities exist, the sentencing phases of trials are based not on a consideration of accurate mitigation and aggravation, but instead on a consideration of mitigation and aggravation tilted in favor of the always better-situated adversary: the prosecution. These systems sentence people to death based on a presentation of the “character and record of the individual offender and the circumstances of the particular offense”¹²⁵ that is likely to be incomplete and distorted. Decisions on who belongs amongst the “worst of the worst” are generated by skewed depictions of the defendant, his or her history, and the circumstances of the crime. *Furman* and its progeny make clear that the Eighth Amendment requires a death penalty scheme to provide a “meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.”¹²⁶ Resource disparity is not such a basis.

CONCLUSION

The Eighth Amendment provides a framework for challenging unbalanced capital defense systems and inadequate capital defense representation. It is a framework, however, that has been largely unutilized. The time has come to take advantage of what the Eighth Amendment offers.

In jurisdictions where there are significant resource disparities between the capital defense and prosecution, capital defense attorneys should challenge the death penalty system as unconstitutional. Where those disparities exist, the prosecution is better able to present evidence of aggravation than the defense is able to present evidence of mitigation. Thus, there is a risk that the death penalty will be imposed as a result of the imbalance created by the disparities, and not as a result of the specific characteristics of the offender and the offense.

When a death penalty scheme creates a “substantial risk that the punishment will be inflicted in an arbitrary and capricious manner,”¹²⁷ it violates the Eighth Amendment. Death penalty schemes operating under significant defense and prosecution resource disparities generate such a risk, and, unlike the risk in *McCleskey*, it is a risk that can be addressed without altering the core structure of our justice system. *McCleskey* does not present a barrier to Eighth Amendment claims based on resource

¹²⁵ *Woodson*, 428 U.S. at 304.

¹²⁶ *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring).

¹²⁷ *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

disparities that exist in certain death penalty systems, and thus those imbalanced systems should be challenged accordingly.