

# INNOCENCE PROJECT

**Christina Swarns, Executive Director, Innocence Project**  
**Testimony Before**  
**The Presidential Commission on the Supreme Court of the United States**  
**June 25, 2021**

My name is Christina Swarns and I am the Executive Director of the Innocence Project. For almost 30 years, the Innocence Project has worked to exonerate the staggering number of innocent people who have been wrongfully convicted and, through strategic litigation and policy advocacy, to bring reform to the system responsible for their unjust imprisonment.

By relying on DNA to scientifically establish innocence, our precedent-setting work has not only freed hundreds of wrongfully convicted people, it also exposed the inaccuracy of unvalidated forensic science disciplines and investigative techniques. And, drawing on the lessons learned from our exoneration cases, we have advanced critical law and policy reforms that have fundamentally improved the reliability, accuracy, and fairness of the criminal legal system overall. To that end, the Innocence Project has frequently appeared in the Supreme Court of the United States, not only as party counsel but also as friend of the Court. *See, e.g., Johnson v. Arkansas* (20-48); *Anstey v. Terry* (20-628); *Reed v. Texas* (19-411); and *see Flores v. Texas* (20-5923); *McMillan v. Alabama* (20-193); *Ramos v. Louisiana* (18-5924).

I am therefore honored to submit testimony to inform this Commission’s analysis of “the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system.”<sup>1</sup>

The Innocence Project is uniquely positioned to contribute to the contemporary public debate around Supreme Court reform in connection with the Court’s death penalty docket. There is no area of the law in which reliability, accuracy, and fairness are more critical than capital punishment. And there is no court more important to the endeavor of trying to ensure the reliability, accuracy, and fairness of “the machinery of death” than the Supreme Court.<sup>2</sup>

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<sup>1</sup> Exec. Order No. 14023, 86 Fed. Reg. 19569 (April 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-04-14/pdf/2021-07756.pdf>.

<sup>2</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.”).

Nationally, since states began reenacting their capital sentencing schemes in the wake of *Furman v. Georgia*,<sup>3</sup> 185 people have been exonerated after being wrongfully convicted of a capital offense and condemned to death.<sup>4</sup> This means that for every eight executions in this country, one person has been exonerated.

Before turning to the three specific reform proposals we urge the Commission to consider with respect to the Supreme Court’s death penalty docket, I would like to make two preliminary points.

*First*, the risk of convicting and executing an innocent person is real and constitutionally unacceptable. Every year, the Innocence Project receives over 2,000 requests for assistance. Thus, we have assessed, to date, approximately 70,000 cases. The work of assessing those requests for assistance is intense and laborious. Sometimes—regardless of how guilty a person may have originally appeared—after poring over reams of court transcripts, scrutinizing pages of police reports, dissecting crime lab analyses, sifting through evidence and property logs, studying scores of witness statements, and developing new evidence, we are able to prove conclusively that they are innocent. Indeed, through such efforts, we have exonerated no less than 232 wrongfully convicted individuals. Thus, the work of the Innocence Project conclusively establishes that grave mistakes happen in the criminal legal system. People make errors, jump to conclusions, or act on assumptions that were wrong; and innocent people can be (and too often are) condemned to the fate of the guilty.

*Second*, we recognize that reasonable people disagree about whether the death penalty is a morally appropriate punishment for the most heinous, worst-of-the-worst crimes.<sup>5</sup> But, because there is no debate about the fact that no one should be executed for a crime they did not commit, our capital punishment system cannot turn a blind eye to the root causes of wrongful conviction. In the three decades since the Innocence Project was founded, we have identified key causes of wrongful conviction, including: mistaken eyewitness identification, false confession, unreliable jailhouse informant testimony, unreliable or misapplied forensic science, official misconduct, and poor lawyering. Our policy advocacy has produced many notable improvements such as, recently, post-conviction access to fingerprint databases in Tennessee and the recording of custodial interrogations in Ohio and Washington. Yet, none of the key contributors to wrongful conviction is anywhere near full remediation.<sup>6</sup>

With that background, I turn to Supreme Court reform, noting that we are treating changes to the substantive law governing capital cases as beyond the scope of this Commission’s mandate.

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<sup>3</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>4</sup> See Death Penalty Information Center, *DPIC Special Report: The Innocence Epidemic* (Feb. 18, 2021), <https://documents.deathpenaltyinfo.org/pdf/The-Innocence-Epidemic.pdf>.

<sup>5</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (“The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.”).

Supreme Court review of capital cases happens in two ways. First, of course, is through a “normal” cert petition that results in a granted case. But capital cases often come to the Court through a second important path—through emergency applications. The procedural aspects of those applications are squarely within this Commission’s purview. Emergency applications are brought either by a condemned person who is seeking to stay an execution date set by the state or federal government, or by a state or federal government official seeking to reinstate an execution date that has been stayed by a lower court. Regardless of whether the person condemned to death is the applicant or respondent, the result is the same: matters of life and death are decided by the Court in an extraordinarily condensed time frame, under tremendous pressure, without full briefing and argument, without the time for adequate amicus participation, and often without the time for fully considered decisions by the lower courts.

In that context, errors are inevitable. And Supreme Court stay litigation could not be more high stakes. Accordingly, our three concrete proposals for Supreme Court reform in connection with the Court’s death penalty docket are as follows:

- The rules should be changed to require a stay of execution whenever four Justices would vote to grant a petition for a writ of certiorari in a capital case. People under sentence of death should not be denied a merits hearing in the Supreme Court on the grounds that they will be executed before the Court can hear the case.
- The Court should apply a more rigorous standard of review before overturning a stay granted by a lower court. When a lower court that is closer to the facts deems a stay appropriate, the Court should act with particular caution before overturning that considered judgment.
- The Supreme Court should be required to automatically stay an execution to permit a full review of first-time habeas petitions.

I will address each of those in turn.

### **1. Four Votes—Not Five—Should Be Required for Stay Grants**

The number of Justices required to grant a stay of execution should be reduced from five votes to four.<sup>7</sup> Doing so provides at least two important benefits. First, it aligns the number of votes needed for a stay with the number of votes needed for a grant of certiorari, thus avoiding the intolerable situation in which a death-sentenced person might be executed before the Court can consider the merits of their case. Second, it more readily permits the Justices adequate time to review the merits of a capital cert petition in the normal course, rather than making a certiorari decision under the extraordinary time pressure that results from an unstayed execution date. If four Justices believe a capital case should be granted certiorari, or even if four Justices believe more time is needed for a full consideration of a petition, a stay should follow as a matter of course.

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<sup>7</sup> For a fuller discussion of this proposal, see Eric M. Freedman, *No Execution if Four Justices Object*, 43 Hofstra L. Rev. 101 (2015).

This reform builds on the Court’s historic practice of a “courtesy fifth.” Over the years, it has been common practice for a Justice to provide a fifth vote to stay an execution so that the four judges seeking to grant certiorari would be able to hear the case.<sup>8</sup> During his confirmation hearings, Chief Justice Roberts heralded the undeniable logic of a courtesy fifth vote in capital stay litigation: “[I]t obviously makes great sense,” he said, “You don’t want to moot the case by not staying the sentence.”<sup>9</sup>

More recently, however, the growing ideological divide of the Court has endangered the courtesy fifth vote. In 1990, for example, the Court declined to provide a critical fifth vote for a stay, prompting Justice Brennan in dissent to observe that “[f]or the first time in recent memory, a man will be executed after the Court has decided to hear his claim.”<sup>10</sup> And in 2008, four Justices requested the views of the Solicitor General and voted for a stay of execution, yet because there was no courtesy fifth vote, the petitioner was executed. Justice Breyer wrote that he found it “particularly disappointing that no Member of the majority has proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General’s view, once received.”<sup>11</sup> Consistent with these cases, the Court’s willingness to contribute a courtesy fifth vote for stays of execution has been described as “inconsistent” and happening in “fits and starts.”<sup>12</sup>

Moreover, even when certiorari has not yet been granted to a person under sentence of death, stays of execution are granted routinely over four dissents.<sup>13</sup> Such votes may reflect a discomfort with the outcome on the merits, may reflect a desire for a fuller record to be assembled, or may simply indicate that four Justices just need more time. Justice Blackmun noted the harm created by rushing decisions on capital cases: “I shall oppose —indeed, I resent—the necessity of our reviewing a petition for certiorari within 12 hours of its filing here, whether that time limit is occasioned by the state court or by this Court or by a Member of it. . . . In my view, capital cases should be treated with the same consideration, and on the same schedule, as other petitioners receive.”<sup>14</sup>

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<sup>8</sup> See *Straight v. Wainwright* 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., concurring in the denial of a stay) (“the Court has ordinarily stayed executions when four Members have voted to grant certiorari”).

<sup>9</sup> See Adam Liptak. “Going to Court, but Not in Time to Live.” *New York Times*. October 8, 2007. See also *Arthur v. Dunn*, 137 S.Ct. 14, 15 (Roberts. C.J.) (providing a fifth vote for a stay as a courtesy to allow the other four Justices “the opportunity to more fully consider the suitability of this case for review”).

<sup>10</sup> *Hamilton v. Texas*, 497 U.S. 1016, 1017 (1990).

<sup>11</sup> *Medellin v. Texas*, 554 U.S. 759, 765 (2008).

<sup>12</sup> Adam Liptak. “The Lethal Gaps in How the Supreme Court Handles the Death Penalty.” *New York Times*. December 12, 2016.

<sup>13</sup> See Eric M. Freedman, *No Execution if Four Justices Object*, 43 Hofstra L. Rev. 101, at 113 n.50 (2015) (listing cases).

<sup>14</sup> Memorandum from Harry A. Blackmun to the Conference, Sept. 20, 1985 at 2.

There is no serious concern that a minority of Justices would use this newly-granted stay power to obstruct the the majority by staying every execution and granting certiorari in every case.<sup>15</sup> Justices in the minority have not used their existing authority to disrupt the operation of the court.<sup>16</sup> Indeed, if the Court could more predictably grant stays of execution, some of the burden placed on the Court’s docket by capital cases today might actually be relieved. States would have less incentive to schedule execution dates that “force hasty review of often problematic cases” or generally to rush an execution before a federal appeal is complete.<sup>17</sup> And, as the process becomes more predictable, attorneys on both sides of these cases may have a better sense of whether it is a worthwhile endeavor to appeal to the Court.<sup>18</sup>

The death penalty is a singularly irreversible punishment. People who have been condemned to death deserve the right to exhaust their legal options in a fair, thoughtful, and consistent process. Our proposal to reduce the number of votes needed to grant a stay of execution from five to four Justices would bring the Court closer to actualizing these values for death penalty petitioners.

## **2. A Heightened Standard of Review Should Be Required To Reverse a Lower Court Stay of Execution**

Our second proposal is to alter the standard of review governing Supreme Court review of a lower court’s decision to grant a stay of execution.<sup>19</sup> As noted, stay litigation in the capital context is literally a matter of life and death. And, at the same time, circumstances conspire to make the risk of making an irreversible mistake particularly high: the time is short; amicus participation is limited by the time constraints; and there is no chance for full briefing and argument. This is a recipe for injustice.

There is no perfect solution, but one way to mitigate the risk of error is to recognize that the Supreme Court is not the only court in the process. Lower courts, too, review the substance of the claims, and often do so with more time for reflection. As commentators have noted, “the nature of execution litigation means that lower courts have substantially more time to review the evidence and the arguments presented” in capital cases.

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<sup>15</sup> Memorandum from William H. Rehnquist to the Conference, September 9, 1985 at 2.

<sup>16</sup> See Eric M. Freedman, *No Execution if Four Justices Object*, 43 Hofstra L. Rev. 101, 113 n.52 (2015).

<sup>17</sup> Memorandum from Harry A. Blackmun to the Conference, Sept. 20, 1985 at 2.

<sup>18</sup> Eric M. Freedman, *No Execution if Four Justices Object*, 43 Hofstra L. Rev. 101, 114 n.55 (2015).

<sup>19</sup> In advancing this position, we are expressly drawing on the thoughtful discussion of this proposal set forth by Amir H. Ali, Deputy Director of the Supreme Court & Appellate Program at the Roderick & Solange MacArthur Justice Center. See Testimony of Amir H. Ali, submitted for Hearing entitled *The Supreme Court’s Shadow Docket*, before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet (February 18, 2021), *reprinted at* <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf>.

This fact should be taken into account by an asymmetrical Supreme Court stay review standard. When a lower court has determined that a stay of execution should be granted because the Court has “reviewed the record and determined that an execution is likely to violate the law,” Supreme Court review should be deferential.<sup>20</sup> As some commentators have suggested, a request for a reversal of a decision granting a stay in such circumstances should be granted only when the lower court’s decision was “contrary to, or involved an unreasonable application of, clearly established federal law,” or when it rested on “an unreasonable determination of the facts in light of the evidence presented.”<sup>21</sup>

It is entirely appropriate for the Supreme Court to provide asymmetrical stay review, and to treat lower court stay denials with more deference because the consequences of a stay denial and a stay grant are asymmetrical. There is no way to undo or remediate the execution of an innocent person. And the work of the Innocence Project has demonstrated that the risk of wrongful conviction and wrongful execution is not hypothetical. Thus, as long as the death penalty is allowed to proceed, the Supreme Court must provide its death penalty docket with as robust a review for reliability, accuracy, and fairness as possible.

### **3. People Under Sentence of Death Should Receive an Automatic Stay of Execution To Ensure Review of First-Time Applications for Habeas Relief.**

Our final proposal—that the Supreme Court should be required to automatically grant a stay of execution to any defendant who has not yet completed a first federal habeas review—would ensure that no defendant is put to death without at least one full and fair opportunity to litigate his or her claims in federal court.

This is not a new or a partisan idea. In 1989, a committee led by retired Justice Powell argued for an automatic stay of execution throughout the pendency of first federal habeas corpus proceedings.<sup>22</sup> Justice Stevens articulated the key reasons for this change in connection with a denial of certiorari in a capital case. As he remarked, “[b]oth the interest in avoiding irreversible error in capital cases, and the interest in the efficient management of our docket, would be served by a routine practice of staying all executions scheduled in advance of the completion of our review of the denial of a capital defendant’s first application for a federal writ of habeas corpus.”<sup>23</sup> And, as Justice Stevens further observed, granting an automatic stay of execution pending the completion of a full round of federal habeas review is consistent with the goals of the Antiterrorism and Effective Death Penalty Act and would improve the balance between finality and justice in the Court’s review of capital cases.

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<sup>20</sup> Ali Testimony, at 5.

<sup>21</sup> Ali Testimony, at 6.

<sup>22</sup> Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, reprinted in 45 Crim. L. Rep. 3239 (1989).

<sup>23</sup> *Emmett v. Kelly*, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg J. respecting denial of certiorari).

While it may be unlikely for an execution to proceed while a first-time habeas petition pends, the assurance of an automatic stay is nevertheless called for given the gravity of what is at stake. Justice Stevens' point regarding the risk of irreversible error introduced when we rush to execute is not purely theoretical. As discussed, the astonishing error rate among people sentenced to death row—one in eight is exonerated—tells us that federal and state courts have, in fact, sanctioned the executions of factually innocent people. And, indisputably, people have been executed under circumstances that the Court later deemed unacceptable. For example, a unanimous Court struck down a Florida statute prohibiting consideration of relevant mitigating evidence and overturned the death sentence of the petitioner.<sup>24</sup> In the years before that opinion was issued, Florida executed at least thirteen men with nearly identical claims about the same statute.<sup>25</sup> Indeed, in a separate case, the Court expressed its regrets that the Fifth Circuit had made “a serious mistake” in allowing executions to proceed that had occurred only five years earlier.<sup>26</sup>

Justice Stevens' second point, that the rushed and unpredictable nature of stay decisions leads to a mismanagement of the Court's docket, articulates a serious risk of unjust outcomes for capital defendants. In the event that an execution date is set before the completion of first federal habeas proceedings, Justices may be forced to make quick determinations about cases without the benefit of a fully developed habeas record. The lack of an automatic stay may also disincentivize a lower court from comprehensively considering pending claims and may lead to improper denials of appropriate relief to those with scheduled execution dates.<sup>27</sup>

Finally, as Justice Stevens observed, by limiting the automatic stay of execution to circumstances where a first-time habeas petition pends, we would “give meaningful effect to the distinction Congress has drawn between first and successive habeas petitions” in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>28</sup> Legal scholars of all ideological backgrounds have identified the fundamental tension involved in habeas petitions as a balance between finality

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<sup>24</sup> *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

<sup>25</sup> Eric M. Freedman, No Execution if Four Justices Object, 43 Hofstra L. REV. 101, 102 n.7 (2015); See also Randy Hertz & James S. Liebman, 2 Federal Habeas Corpus Practice and Procedure § 38.2[c][ii], at 2073 n.50 (6th ed. 2011).

<sup>26</sup> *Stringer v. Black*, 503 U.S. 222, 237 (1992), regretting the outcomes of *Evans v. Thigpen*, 814 F.2d 658 (5th Cir. 1987) and *Johnson v. Thigpen* 481 U.S. 1061 (1987).

<sup>27</sup> See, e.g., *Berry v. Epps*, 506 F.3d 402, 404 (5th Cir. 2007) (“Our precedent requires the dismissal of 'eleventh hour' dilatory claims....”); *Grayson v. Allen*, 491 F.3d 1318, 1326 (11th Cir. 2007) (“If Grayson truly had intended to challenge Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule.”); *Harris v. Johnson*, 376 F.3d 414, 418 (5th Cir. 2004) (“By waiting as long as he did, Harris leaves little doubt that the real purpose behind his claim is to seek a delay of his execution ... “); Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 Yale L. & Pol'y Rev. 259, 293-296 (2009).

<sup>28</sup> *Muhammad v. Kelly*, 558 U.S. 1019, 1019 (2009); 28 U.S.C. §2244(b).

and justice.<sup>29</sup> On the one hand, courts' repeated dismissive treatment of successive habeas petitions—both before and after the passage of AEDPA—has led to the execution of people before some of their significant constitutional claims could be adjudicated.<sup>30</sup> On the other, some believe successive habeas petitions unnecessarily delay executions. The AEDPA, sought to “reduce delays in the execution of state and federal criminal sentences”<sup>31</sup> and to curb what it perceived to be “the abuse of the habeas corpus process.”<sup>32</sup> And it did so by drawing sharp distinction between first and successive habeas petitions.

An automatic stay of execution pending the completion of a first habeas review would improve the balance between competing values by ensuring that first-time petitions would be reviewed with adequate time for thoughtful contemplation by the courts.

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Death sentencing continues even though key contributors to wrongful conviction persist unremediated, and even in the face of unassailable evidence that our courts regularly send people to death row who—we later learn—are innocent. So long as these circumstances exist, the three reforms proposed herein offer a modicum of mitigation against the risk that we actually execute an innocent person. Thank you for giving me the opportunity to testify.

Respectfully,



Christina Swarns  
Executive Director

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<sup>29</sup> See e.g., Louis Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 65 (1956); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.- C.L. L. Rev. 579; John B. Morris Jr., *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 Yale L.J. 371 (1985); W. Blackstone, *Commentaries on the Laws of England* 133 (6th ed. Dublin 1775).

<sup>30</sup> John B. Morris Jr., *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 Yale L.J. 371 (1985).

<sup>31</sup> *Woodford v. Garceau*, 538 U.S. 202, 206 (2003).

<sup>32</sup> H.R. Rep. No. 104-23, p.8 (1995).