

THE CLEARINGHOUSE

OF NEW VOICES FOR CRIMINAL JUSTICE REFORM BULLETIN

AN INITIATIVE OF THE CONSTITUTION PROJECT

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June 2014

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Dear TCP Clearinghouse Member,

Hello!

My name is Sarah Turberville and I joined The Constitution Project in February of this year as Senior Counsel of its criminal justice program. One of my chief responsibilities is recruitment of the unlikely allies found in TCP's [Clearinghouse of New Voices](#) and making sure that those voices are strategically heard in debates where they will make a real difference. We developed the Clearinghouse as the "official" database of our many allies - from across the political spectrum - who can be particularly persuasive and influential in criminal justice reform campaigns on the federal and state levels. Our partners from across the country have found the Clearinghouse to be a vital tool in their work, as we have found it to be in our own.

Because of the success we have had with this approach in the criminal justice arena, and because of the overlap we see among issues TCP addresses, we are now developing "new voices" on rule of law issues, such as detention and treatment of terrorism suspects, privacy and surveillance, and governmental transparency.

The Clearinghouse is an ever-expanding and evolving catalog of individuals, organized by geographic area, political affiliation, and professional background and expertise, who have expressed concern on any number of important criminal justice issues. Our database includes former judges, prosecutors, policymakers, law enforcement and corrections officers, conservative opinion leaders and others whose opinions make a difference in today's overly-partisan debates. [Clearinghouse members are often willing to sign a letter, op-ed, or legal brief](#); make a phone call; or talk with the media to show support for various reform efforts in the states and federal government. They have spoken out on the death penalty, overincarceration, mandatory minimums, indigent defense, criminal discovery problems, conditions of confinement, excessive use of

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discovery problems, conditions of confinement, excessive use of force, and racial disparity - to name a just few issues.

Given the extraordinary growth and utility of the Clearinghouse, I will continue to carry on TCP's tradition of providing you with periodic updates on Clearinghouse activities. Our work is unique and it is my hope that in reviewing some of our recent accomplishments, you will keep us in mind if you are looking for new voices to support positive changes in the legal system, and will refer like-minded colleagues to us so we can add them to the Clearinghouse as well.

Below, you will read about the impact that Clearinghouse members have had in the last several months on broad criminal justice reform initiatives, as well as on individual legal cases. I am grateful for your support. I hope that you will continue to help us identify new voices that support justice reform as well as identify new opportunities to use those voices.

Yours truly,



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In Congress & the Executive Branch



Clearinghouse Signatories and Senate Judiciary Committee Back Smarter Sentencing Act

On January 30, the Senate Judiciary Committee voted 13-5 to approve the Smarter Sentencing Act of 2013 (S. 1410), sending it out for a vote of the full Senate. During the markup, Senator Durbin (D-IL), one of the bill's original sponsors, made reference to TCP's Clearinghouse [letter](#), which was signed by more than 100 prominent individuals, including former prosecutors and judges in support of passage of this bill.

This bill amends the current federal mandatory minimum sentencing structure by increasing judicial discretion during sentencing. It would reduce the mandatory minimum sentence for non-violent drug offenses while maintaining the current mandatory minimums for violent drug crimes. Supporters of the legislation believe it will reduce prison overcrowding, increase the fairness of sentencing for non-violent drug offenses and ease the financial burden extensive prison terms have had on the United States criminal justice system. The money that this bill would save the prison system is intended to go towards crime prevention and recidivism reduction tactics and an increased police presence.

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Former Judges and Prosecutors Back Reduced Sentences for Low-Level Drug Crimes

More than 40 former judges and prosecutors organized through the Clearinghouse backed efforts to reduce sentences for people convicted of low-level drug crimes, while still reserving harsher penalties for more serious offenders.

In a [letter](#) organized by TCP and delivered to the United States Sentencing Commission on March 18, the former government officials endorsed a proposed change in federal sentencing guidelines that would lower the base offense associated with various drug quantities involved in drug possession and distribution crimes. The officials' support for the change stems, in part, from the fact that it "would reduce applicable sentences by an average of 11 months, would have no negative impact on public safety and is a positive step towards controlling costs that will otherwise drain [Department of Justice] resources from other critical law enforcement activities," as stated in their letter to the Commission.

The amendment, which the sentencing commission proposed in January, would reduce sentences for about 70 percent of all drug trafficking offenders, and cut the federal prison population by 6,550 inmates within five years. On April 10, the Sentencing Commission voted unanimously to adopt the amendment, which will take effect November 1 after widely expected approval by Congress.

The Commission is now considering whether the proposed change to the federal sentencing guidelines should be made retroactive.

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In State Government



Clearinghouse Members Urge Fairness in the Administration of Capital Punishment

In February 2014, TCP organized a series of [letters](#) to members of the Florida legislature from Clearinghouse members urging the adoption of Senate Bill 334/House Bill 467, which would require a unanimous agreement by a jury when recommending a death sentence. Florida is currently one of only two states to allow the imposition of a death sentence upon a simple majority vote, and one of only three states that does not require the jury to be unanimous in determining whether a defendant should be sentenced to death. The signers of these letters are former prosecutors and judges, including former FBI Director Judge William S. Sessions and former Special Assistant Attorney General of Florida Bruce Jacob.

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In the Courthouse



Clearinghouse Members' *Amicus* Brief in *Hall v. Florida*

In December 2013, over 40 Clearinghouse members, including former judges and law enforcement officials, filed an [amicus brief](#) with the U.S. Supreme Court in support of Florida death row inmate Freddie Lee Hall's petition for a writ of *habeas corpus*. Among the signers were five former Attorneys General of the Commonwealth of Virginia and former Florida Supreme Court Justice Gerald Kogan. The brief argued that Florida's method of determining whether Hall is a person with an intellectual disability - and thus is ineligible for the death penalty - runs afoul of previous Court precedents and threatens to undermine public confidence in the fair and equal administration of the death penalty. The Court held arguments in this case on March 3, 2014, and on May 27, in a 5-4 ruling, held that Florida's use of a rigid IQ test score cutoff to determine eligibility for the death penalty violates the Eighth Amendment.

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Clearinghouse Members File *Amicus* Brief in Excessive Use-of-Force Case

In February 2014, Clearinghouse members with expertise in the fields of corrections, police accountability, and the use of force filed an [amicus brief](#) in the U.S. Supreme Court urging the Court to grant certiorari in the case of *Thomas v. Nugent*. This case involves a 21-year old man, Baron Pikes, who died after being electroshocked by a police officer at least eight times. A Section 1983 action was brought on behalf of Pikes' young son, claiming that the officer used excessive force, in violation of the Fourth Amendment. Counsel for Pikes' son contacted TCP to organize the *amicus* brief. The 5th Circuit held that the officer was immune from suit because it was not clearly established in 2008 that it was unconstitutional for police to use a Taser on a person multiple times, even when he did not pose a safety or flight risk. The Clearinghouse brief asked the Court to clarify that such devices cannot be used on people who are merely passively resisting but not posing a safety or flight risk.

The Court granted the petition, vacated the 5th Circuit's decision, and remanded for reconsideration in light of *Tolan v. Cotton*, another excessive force case from the 5th Circuit. The brief has received media attention, most notably in an article published in the [Christian Science Monitor](#) in May. TCP is grateful to the law firm Reed Smith for its assistance in drafting the Clearinghouse brief.

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Clearinghouse Brief Backs Federal Court's *Brady* Decision

At the request of counsel representing James Dennis, an inmate on Pennsylvania's death row, TCP recruited a distinguished group of former prosecutors and judges from 3rd Circuit states to sign on to a [brief](#) in support of *habeas* relief for Mr. Dennis before the U.S. Court of Appeals for the 3rd Circuit. The brief notes that multiple pieces of exculpatory evidence relating to Mr. Dennis' innocence were not disclosed to the defense at trial. While Mr. Dennis found no relief in state court for the *Brady* violations, the U.S. District Court for the Eastern District of Pennsylvania granted Mr. Dennis *habeas* relief in August of last year. The judge wrote: "I am concerned that James Dennis was wrongfully convicted and sentenced to die for a crime he did not commit. Regardless of Dennis' possible innocence, there can be no question that the Commonwealth violated his right to due process of law by withholding exculpatory evidence that would have made a difference at his trial. As a result, after serving over 20 years in prison, Dennis is entitled to receive either a new trial or his freedom." *Dennis v. Wetzel*, F.Supp.2d, 2013 WL 4457047, *26 (E.D. Pa. 2013).

The *amicus* brief supports the federal district court's findings, emphasizing that the standards employed by the state courts to deny Mr. Dennis relief not only unreasonably apply *Brady* and its

progeny, but also threaten to erode the standards of conduct to which prosecutors ought to hold themselves, as well as the public's confidence in the fairness of the criminal justice system. The Commonwealth appealed the federal court's decision, and objected to TCP's filing of a brief. Unfortunately, in a rare move, the 3rd Circuit denied TCP's request to file. TCP thanks the law firm of Wilmer Cutler Pickering Hale and Dorr for its excellent research and drafting of the brief.

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In the Media



Clearinghouse Statement Condemns Botched Oklahoma Execution

On April 29, Oklahoma death row inmate Clayton Lockett died of a heart attack shortly after a failed attempt at his execution by lethal injection. Witnesses stated that Mr. Lockett writhed, convulsed, spoke, and attempted to rise from the table, all after he had been declared unconscious. Shortly after the execution was halted, Mr. Lockett suffered a heart attack and died. The next day, TCP released a [statement](#) from former correctional officials condemning the gruesome execution attempt and calling for a halt to all executions until the completion and dissemination of an independent third-party investigation into the events of this botched execution. TCP Death Penalty Committee co-chair and former Texas Governor Mark White also released a [statement](#) calling for such an investigation. The statement from former correctional officials was quoted in a *Dallas Morning News* [editorial](#), and two of the signatories, Rev. Carroll Pickett and Steve J. Martin, were [interviewed](#) on *National Public Radio* about the impact of participating in executions on corrections officers and administrators.

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TCP Convenes Conversation with Evangelical Leaders on the Death Penalty

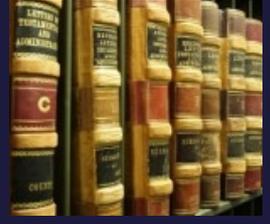
On March 27, TCP convened a "Conversation on the Death Penalty" with more than 20 evangelical leaders and Christian ethicists from across the country. Dr. David Gushee, the former head of Evangelicals for Human Rights, Distinguished University Professor of Christian Ethics at Mercer University's McAfee School of Theology, and member of TCP's death penalty committee led the meeting. TCP provided attendees with a preview copy of the then-forthcoming report by its bipartisan Death Penalty Committee (see story below).

The universal view among all leaders participating in the meeting, many of whom oppose capital punishment on moral grounds, was that TCP's findings and recommendations should be highly influential in their discussion among evangelical leaders and members of their congregations, many of whom are either supportive of or still developing their views on the fairness of capital punishment as presently administered in our country. The attendees also offered their assistance to TCP's work in criminal justice reform campaigns around the country. We are grateful to the law firm of Akin Gump for hosting and participating in the meeting. Following the release of TCP's report on the death penalty, *Irreversible Error* (described below), leaders from the evangelical community who attended our conversation on the death penalty assisted in outreach. Examples of their follow-up include: a [statement](#) from many members of the group in support of the report's recommendations; a [press release](#) detailing the position of those evangelical leaders who signed the statement of support; and the publication of various opinion pieces, including an [op-ed](#) published in the *Huffington Post Blog* by

Rev. Gabriel Salguero, an [op-ed](#) by theological scholar and Death Penalty Committee member Dr. David Gushee, and a [blog post](#) by Dr. Roger E. Olson, the Foy Valentine Professor of Christian Theology and Ethics at Baylor University.

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New Resources



A Groundbreaking New Report on the Death Penalty

TCP's Death Penalty Committee, chaired by former Texas Governor Mark White, Oklahoma City bombing prosecutor Beth Wilkinson, and former Chief Justice of the Florida Supreme Court Gerald Kogan, released its new report, [Irreversible Error](#), on capital punishment on May 7, 2014, in Washington, DC. The committee's findings and recommendations relate to a number of persistent areas of concern regarding administration of the death penalty in the United States - including wrongful execution, the right to counsel, and the disproportionate application of capital punishment, as well as some new areas of concern that have developed, such as the secret procurement of drugs for use in lethal injection. TCP's committee includes both supporters and opponents of capital punishment. It last released a report on the death penalty in 2005.

TCP released the report at a standing-room only issue briefing at the Washington, DC law offices of Akin Gump, a prominent national law firm. In addition to Governor White and former Virginia Attorney General Mark Earley, panelists included Anthony Graves, who was imprisoned in Texas for 18 years (16 of them on death row and most of them in solitary) for murders he did not commit, and Megan McCracken, a lethal injection expert from U.C. Berkeley School of Law's Death Penalty Clinic. Holding aloft a copy of the report, Graves told the audience that if Texas had implemented TCP's recommended changes before his arrest, it was unlikely he would ever have been convicted. The panel was moderated by Nicole Sprinzen, an Akin Gump attorney who led a team that assisted in drafting of the report. The event was webcast around the country and was covered heavily in the media.

Before and immediately following the release of *Irreversible Error*, we reached out to traditional media, and placed OpEds and blogs. Examples include a guest commentary from Governor White in [Politico](#) the day before the report's release. The [New York Times](#), the [Los Angeles Times](#), [USA Today](#), the [Wall Street Journal](#) and the [Washington Post](#) all carried stories the morning of the release, as did [CNN.com](#) and [MSNBC.com](#). Editorials in support of the recommendations include the [Dallas Morning News](#), the [Oklahoman](#), the [Los Angeles Times](#), the [Philadelphia Daily News](#), the [Burlington Times News](#), the [Orlando Sentinel](#), and the [Portage Daily Register](#). Examples of stories in more than 270 papers from around the country are available in the [newsroom](#) on our website, as are White's and Earley's appearances on [MSNBC](#) programs, and multiple other appearances by committee members. In addition to the extensive print media coverage, Earley's interview on the [Kojo Nnamdi Show](#), and multiple appearances by committee members on MSNBC and elsewhere, TCP Senior Counsel Sarah Turberville was interviewed by several broadcast media outlets, including [CBC Radio](#) and [Al Jazeera America](#).

Policymakers are already relying on *Irreversible Error* to support positive changes in the law. We have heard from a lawmaker in Idaho seeking reforms in his state, and the head of Ohio's death penalty task force has used our report to refute unwarranted criticisms of that state's report. We hope that you will similarly rely on *Irreversible Error* and disseminate it widely.

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Do you have suggestions for new Clearinghouse members?

TCP respects the relationships you have cultivated over the years, and it is our hope that we may be useful in convincing those who are on the cusp of committing to support reform to do so. If you have suggestions of other individuals whom we should include in the Clearinghouse -- former prosecutors with whom you used to work, former judges who sat with you on the bench, prison officials, state and federal legislators, conservatives, and others who would lend particular influence to efforts to reform the criminal justice system -- please let us know. And thank you!

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