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ARTICLE

MARYLAND REPEALS THE DEATH PENALTY, BUT LEAVES FIVE ON DEATH ROW: WHAT HAS THE STATE LEARNED FROM KIRK BLOODSWORTH?

By: Meredith Lenore Pendergrass¹

"If you save one from death, you have to save them all."
– Kirk Bloodsworth²

INTRODUCTION

Kirk Bloodsworth was sentenced to death in 1985 for the rape and murder of nine-year-old Dawn Hamilton.³ Five eyewitnesses identified Bloodsworth in two separate trials resulting in two separate convictions.⁴ It is hard to believe that every one of the five eyewitnesses could be wrong – but they were. “The gavel came down on my life and the sentence was death, the courtroom erupted in applause.”⁵ After nine years of incarceration, Bloodsworth walked out of prison on June 28, 1993, a free man.⁶ He was the first prisoner from death row to be exonerated based on DNA evidence.⁷

Kirk Bloodsworth’s experience is not uncommon. For every ten executions in the U.S., there is at least one person exonerated from death row.⁸ From 1976 through the end of 2012, there were 1,320 executions and

¹ J.D. Candidate, University of Baltimore School of Law, 2014. I owe a special thank you to Professor John Bessler for his thoughtful feedback and insights into this topic, and to Kirk Bloodsworth for taking the time to speak to me.

² Telephone Interview with Kirk Bloodsworth, Advocacy Dir., Witness to Innocence and the first DNA exoneree from death row in the U.S. (June 20, 2013) (responding to Governor O’Malley’s intention to review the five men on death row on a case-by-case basis, instead of commuting all of their sentences at once).

³ Rob Warden, *First DNA Death Row Exoneration*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/md/kirk-bloodsworth.html> (last visited February 20, 2014).

⁴ *Id.*

⁵ Interview by Margot Adler with Kirk Bloodsworth, on NPR NEWS (March 10, 2013), available at <http://www.npr.org/2013/03/10/173852138/once-on-death-row-he-now-fights-to-defeat-the-death-penalty>.

⁶ TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF ONE MAN’S TRIUMPH OVER INJUSTICE* 258 (2005).

⁷ *Id.*

⁸ *Executions by Year since 1976*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited June 26, 2013); *Innocence and the Death Penalty*, DEATH PENALTY INFORMATION CENTER,

142 exonerations of death row inmates across the nation.⁹ These statistics raise some troubling questions: should we continue to carry out death sentences with evidence that we are sentencing the innocent to death? Should Maryland, which repealed the death penalty in 2013, be wary of leaving death sentences in place?

This article examines the death penalty repeal in Maryland and asks if that repeal is inherently at odds with the fact that five men remain on death row in Maryland. This article begins by examining Maryland's death penalty and the role Kirk Bloodsworth, the only exoneree that was on Maryland's death row, has on affecting the repeal. Additionally, this article will discuss what should be done with the five men who remain on death row. This article concludes that the sentences of the men on death row should be commuted in large part because of the cautionary case of Kirk Bloodsworth, but also in line with Maryland's general consensus that the death penalty is no longer appropriate.

II. THE DEATH PENALTY IN MARYLAND

"I killed the thing that almost killed me." – Kirk Bloodsworth¹⁰

Maryland reinstated the death penalty in 1978 after backlash from the *Furman v. Georgia* decision.¹¹ Maryland officially repealed the death penalty in 2013, signifying the growing public aversion to the death penalty.¹² The repeal was effective on October 1, 2013, but did not retroactively apply to anyone currently on death row.¹³ The repeal legislation revoked any notices of intent to pursue the death penalty in active cases, replacing them with notice of pursuing life-without-parole sentences.¹⁴ There are five men left on Maryland's death row and Governor Martin O'Malley has not commuted their sentences to life without parole as of April 10, 2014.¹⁵ The question now is what is going to happen to the five men on death row in a state that just repealed the death penalty?

<http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited June 26, 2013).

⁹ *Id.*

¹⁰ Kirk Bloodsworth Answers Your Questions, ONE FOR TEN (April 16, 2013), <http://www.oneforten.com/kirk-bloodsworths-answers-to-your-questions> (last visited June 23, 2013).

¹¹ Maryland, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/maryland-1> (last visited June 27, 2013).

¹² S.B. 276, 433rd Gen. Assemb., Reg. Sess. (Md. 2013).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Brian Witte, *Maryland Death Penalty Repeal Signed Into Law By Martin O'Malley*, THE HUFFINGTON POST (May 2, 2013, 7:22 PM),

Prior to Maryland's 2013 repeal of the death penalty, there was no valid way to carry out a death sentence in the State.¹⁶ In 2006, the Court of Appeals of Maryland ruled that Maryland's death penalty protocols were in violation of the Administrative Procedures Act ("APA").¹⁷ The Court of Appeals of Maryland ruled that the lethal injection checklist must either be adopted in accordance with the APA, or the lethal injection checklist must be legislatively exempted from that requirement.¹⁸ No successful actions have been taken to rectify the illegal lethal injection method in Maryland, meaning there is no way to execute the five men now on death row.¹⁹ Maryland would have to take affirmative steps to remedy this in order to execute these five men, even though the death penalty has been repealed.²⁰

Despite Maryland's repeal legislation, America's death penalty debate still rages on, including in Maryland. As recently as May 31, 2013, a petition led by Baltimore County State's Attorney Scott Shellenberger, a death penalty proponent, fell short of the required signatures it needed to get on the ballot in 2014.²¹ The Baltimore County State's Attorney's Office is the office that prosecuted Kirk Bloodsworth.²² The leader of the office that produced the only death sentence to end in exoneration seems, ironically, the most vigilant in believing we should reinstate Maryland's death penalty in addition to pursuing the death penalty for the five men currently on death row.

III. KIRK BLOODSWORTH: HOW AN INNOCENT MAN GETS ON DEATH ROW

"No innocent man will ever be convicted and sentenced to death again. Not in my state." – Kirk Bloodsworth²³

After being sentenced to death for Dawn Hamilton's brutal rape and murder, Kirk Bloodsworth spent eight years, eleven months, nineteen days,

http://www.huffingtonpost.com/2013/05/02/maryland-death-penalty-repeal_n_3202249.html (last visited April 27, 2014).

¹⁶ *Evans v. State*, 396 Md. 256, 349-50, 914 A.2d 25, 80 (2006).

¹⁷ *Id.*

¹⁸ *Id.* at 350, 914 A.2d at 81.

¹⁹ DEP'T OF LEGIS. SERVS. FISCAL AND POLICY NOTE REVISED, S.B. 276, 433rd Gen. Assemb., Reg. Sess., at 3 (Md. 2013).

²⁰ *Evans*, 396 Md. at 350, 914 A.2d at 81.

²¹ John Wagner, *Petition Drive to Halt Maryland's Death Penalty Repeal Falls Short*, WASH. POST (May 31, 2013), http://www.washingtonpost.com/local/md-politics/petition-drive-to-halt-marylands-death-penalty-bill-falls-short/2013/05/31/1bd64bf6-ca1d-11e2-9f1a-1a7cdee20287_story.html.

²² Jennifer McMenamin, *Baltimore County State's Attorney Known for Stance on Death Penalty*, BALT. SUN (Dec. 28, 2006), http://articles.baltimoresun.com/2006-12-28/news/0612280027_1_sandy-oconnor-baltimore-county-prosecutor.

²³ ONE FOR TEN, *supra* note 10.

one hour and fifty-five minutes behind bars in the Maryland prison system.²⁴ The only problem was that Kirk Bloodsworth was not involved in Dawn Hamilton's murder; he was an innocent man caught up in a whirlwind of injustice.

Kirk Bloodsworth was finally released on June 28, 1993, due to DNA testing which led to his exoneration.²⁵ It took twenty years from his release in 1993 for Maryland to officially repeal the death penalty.²⁶ Bloodsworth is the only death row inmate in Maryland that has been exonerated, and he was the first death row inmate in the country to prove his innocence through DNA evidence.²⁷ He has spent the twenty years since his release advocating for the repeal of the death penalty across the country, especially in his home state of Maryland.²⁸ Bloodsworth stated that since his exoneration he has "worked to ensure no defendant is denied the critical testing that saved my life."²⁹ In 2004, he helped champion a federal law to provide funds for post-conviction DNA testing, entitled the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program.³⁰ Bloodsworth is the current Advocacy Director for Witness to Innocence, a coalition of death penalty exonerees that rallies for the end of capital punishment.³¹

Some advocates of the death penalty say that Kirk Bloodsworth is proof that the system works because he is an innocent man who was released; others say his death sentence was an injustice that we, as Americans, should not tolerate.³² His story is truly a cautionary tale of how flawed our justice system really is. "The adversarial system doesn't know who's guilty or who's innocent," Bloodsworth said after his release, "the millstone does not know who's under it."³³

²⁴ Junkin, *supra* note 6, at 268.

²⁵ *Id.* at 258.

²⁶ S.B. 276, 433rd Gen. Assemb., Reg. Sess. (Md. 2013).

²⁷ *The Innocence List*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited June 16, 2013).

²⁸ Scott Shane, *A Death Penalty Fight Comes Home*, N.Y. TIMES (Feb. 5, 2013) http://www.nytimes.com/2013/02/06/us/exonerated-inmate-seeks-end-to-maryland-death-penalty.html?pagewanted=1&_r=2.

²⁹ Kirk Bloodsworth, *Texas Must Test DNA Before Carrying Out Skinner Execution*, THE HUFFINGTON POST (Oct. 28, 2011, 11:16 AM), http://www.huffingtonpost.com/kirk-bloodsworth/hank-skinner-execution_b_1063609.html.

³⁰ 42 U.S.C.A. § 14136e (West 2004).

³¹ *Meet Our Staff*, WITNESS TO INNOCENCE, <http://www.witness-to-innocence.org/staff.html> (last visited June 25, 2013).

³² FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (Cambridge Univ. Press 2008), available at http://www.unc.edu/~fbaum/Innocence/Innocence_April_23_2007.pdf.

³³ Shane, *supra* note 28.

A. The Crime

On July 25, 1984, the partially nude body of nine-year-old Dawn Hamilton was discovered in a wooded area near Fontana Village in eastern Baltimore County.³⁴ Dawn Hamilton's skull was fractured, she had a patterned abrasion on her neck, she had been sodomized, and she had an eight-inch stick protruding from her vagina.³⁵ The medical examiner noted the cause of death as "blunt trauma to the head and strangulation."³⁶ Detective Ramsey and Detective Capel were assigned to the investigation of Dawn Hamilton's especially gruesome death. They received over five hundred tips from the concerned public demanding justice for Dawn Hamilton.³⁷

At the time of Dawn Hamilton's murder, Kirk Bloodsworth was an honorably discharged Marine with no criminal record.³⁸ He left his job and troubled marriage in Baltimore, Maryland, and returned to his hometown of Cambridge, Maryland.³⁹ His wife subsequently filed a missing person's report.⁴⁰ This information, in addition to a tip that he resembled the patchwork sketch of the suspect, triggered the interest of the police.⁴¹ Kirk Bloodsworth's actions and statements, while independently innocent, were twisted beyond recognition when viewed through the lens of suspicion for a child's rape and murder. These circumstances, coupled with five key eyewitness identifications placing Kirk Bloodsworth in the area of Fontana Village, led him to two convictions and one death sentence.⁴² While incarcerated he consistently wrote to anyone he could to proclaim his innocence, signing all correspondences "Kirk Bloodsworth – A.I.M. – an Innocent Man."⁴³

B. Eyewitness Identifications Leading to His Convictions

It is important to look at how Kirk Bloodsworth managed to be convicted, not once, but twice in the Maryland court system. Five eyewitness identifications, a resemblance to a carelessly composed sketch, and the lack of a solid alibi together led to his convictions. Eyewitness identifications have led to more wrongful convictions than any other factor in criminal

³⁴ *Bloodsworth v. State*, 76 Md. App. 23, 28, 543 A.2d 382, 384 (1988).

³⁵ *Id.* at 28, 543 A.2d at 385.

³⁶ *Id.*

³⁷ *Bloodsworth v. State*, 307 Md. 164, 172, 512 A.2d 1056, 1060 (1986).

³⁸ Junkin, *supra* note 6, at 65.

³⁹ *Id.* at 70.

⁴⁰ *Id.*

⁴¹ *Bloodsworth*, 76 Md. App. at 30, 543 A.2d at 386.

⁴² Rob Hiaasan, *The Second life of Kirk Bloodsworth*, BALT. SUN (July 30, 2000), <http://www.baltimoresun.com/news/maryland/bal-profile073000,0,2351215.story>.

⁴³ Junkin, *supra* note 6, at 235.

cases.⁴⁴ Juries consistently give more weight to eyewitness testimony than to an alibi when both are presented in a trial, making it hard to overcome the strength of eyewitness testimony.⁴⁵ In cases where no DNA evidence is admitted, such as Bloodsworth's case, the eyewitness testimony is the strongest evidence presented at trial.⁴⁶ Kirk Bloodsworth would not be eligible for the death penalty under the Maryland standards that were in place just prior to the State's death penalty repeal in 2013.⁴⁷ Maryland had enacted a specific restriction exempting defendants from the death penalty in cases that rely solely on eyewitness identification due to its unreliability.⁴⁸

Kirk Bloodsworth's story should cause concern in every Maryland citizen. When a former Marine with no criminal record can get swept so far into the criminal justice system that he lands on death row, no one can truly feel safe. The trial system overlooked numerous errors that led to five people being not only wrong, but also inconsistent, which should have triggered concern in either the courts or among detectives investigating the crime.

After being found guilty as an innocent man, a person has an uphill battle to tilt the scales of justice in one's favor. Once convicted, the presumption of innocence evaporates. By a stroke of luck, the science of DNA testing was developed,⁴⁹ specifically PCR testing which required a smaller sample of DNA to test without destroying the sample as a whole.⁵⁰ This was the only thing that saved Kirk Bloodsworth from a life of incarceration.

⁴⁴ *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited June 23, 2013).

⁴⁵ EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, 15 (1996), available at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>.

⁴⁶ *Bloodsworth*, 307 Md. at 178, 512 A.2d at 1065.

⁴⁷ MD. CODE ANN., CRIM. LAW § 2-202(c) (West 2009), repealed by S.B. 276, 433rd Gen. Assemb., Reg. Sess. (Md. 2013).

⁴⁸ H.B. 1043, 433rd Gen. Assemb., Reg. Sess. (Md. 2013).

⁴⁹ HOWARD COLEMAN & ERIC SWENSON, DNA IN THE COURTROOM CH. 1 (Genelex Press 1994), available at <http://genelex.com/dna-learning/book-1-science-law.html> ("The forensic use of DNA started with the work of Alec Jeffreys, a geneticist at the University of Leicester in Britain's Midlands. In 1984, Jeffreys invented the techniques that took human identification from the laboratory to the courtroom.").

⁵⁰ See Donald E. Riley, *DNA Testing: An Introduction For Non-Scientists An Illustrated Explanation*, SCIENTIFIC TESTIMONY (April 6, 2005), <http://www.scientific.org/tutorials/articles/riley/riley.html>. PCR is an abbreviation for "polymerase chain reaction." *Id.*

i. Christian Shipley

Christian Shipley was one of the key witnesses for the State, even though he was ten-years-old when the murder took place.⁵¹ He was one of the last two people to see Dawn Hamilton alive, and he potentially saw her killer.⁵² On the day of Dawn Hamilton's death, Christian was fishing with his friend Jackie Poling.⁵³ An unfamiliar man approached Christian and Jackie and admired a turtle that Jackie had caught.⁵⁴ Dawn Hamilton approached the three of them to ask for help looking for her cousin, but only the unknown man would help her look.⁵⁵ That was the last time anyone saw Dawn Hamilton.⁵⁶

Christian Shipley's original description of the man was a white male, six feet - five inches tall, slim to medium build, curly light brown hair and tan skin.⁵⁷ Christian Shipley worked with Detective Capel to create a composite sketch of the man using a Walt Disney Studios kit.⁵⁸ This kit was comprised of different facial parts drawn on clear foils that can be placed on top of each other to form a face.⁵⁹ Christian Shipley was unable to find the combination of features he felt looked like the man, but eventually agreed it was a decent resemblance to the man.⁶⁰

On August 8, 1984, more than two weeks after Dawn's murder, Christian Shipley identified Kirk Bloodsworth as looking just like the man at the pond but stated that the man at the pond did not have as much red in his hair.⁶¹ The detectives immediately sought an arrest warrant for Kirk Bloodsworth based on this identification.⁶²

Christian Shipley identified Kirk Bloodsworth in a lineup on August 13, 1984.⁶³ He later identified Kirk Bloodsworth in both trials, changing his description of the suspect to say he was six feet tall, but held firm that the suspect had blond hair, not red hair like Bloodsworth.⁶⁴ In the second trial he confirmed that the man he saw did not have the thick sideburns that Kirk

⁵¹ *Bloodsworth*, 307 Md. at 167-68, 512 A.2d at 1057.

⁵² *Bloodsworth*, 76 Md. App. at 28, 543 A.2d at 384-85.

⁵³ *Id.* at 28, 543 A.2d at 384.

⁵⁴ *Id.* at 28, 543 A.2d at 384-85.

⁵⁵ *Id.* at 28, 543 A.2d at 385.

⁵⁶ *See id.*

⁵⁷ Junkin, *supra* note 6, at 45.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 46.

⁶¹ *Id.* at 91.

⁶² *Id.* at 92.

⁶³ *Bloodsworth*, 76 Md. App. at 28, 543 A.2d at 385.

⁶⁴ Junkin, *supra* note 6, at 137.

Bloodsworth had when arrested.⁶⁵ These discrepancies were all disregarded by the detectives.

ii. Jackie Poling

Detective Capel attempted the same composite identification procedure with seven-year-old Jackie Poling as he did with Christian Shipley.⁶⁶ Jackie Poling described the man at the pond as six feet tall, skinny, with light brown curly hair.⁶⁷ Once Jackie began to have trouble making a satisfactory sketch with the Walt Disney Studios kit, Detective Capel showed Christian Shipley's sketch to Jackie and had him agree to it.⁶⁸ Detective Capel's colleagues were critical of this tactic when it was finally revealed because it contradicted the training they received.⁶⁹ It is highly suggestive to show a composite sketch to a witness instead of having the witness create a sketch based on his or her own recollections.⁷⁰

Over two weeks after the murder, Jackie Poling looked at a photo array of suspects in his home that included Kirk Bloodsworth.⁷¹ Jackie Poling said the man he saw at the pond was not in the photo array.⁷² Jackie Poling identified someone other than Kirk Bloodsworth in the lineup on August 13, 1984.⁷³ On September 4, 1984, Denise Poling, Jackie's mother, called the detectives and stated that Jackie Poling was afraid to identify Kirk Bloodsworth in the lineup, but that it was him.⁷⁴ The prosecution called Denise Poling to testify that Jackie was fearful during the lineup but identified Kirk Bloodsworth to her prior to leaving the police station.⁷⁵ When Jackie Poling testified in the first trial he did not even recognize Kirk Bloodsworth at the defense table.⁷⁶

⁶⁵ *Id.* at 208.

⁶⁶ *Id.* at 46.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 47.

⁷⁰ FRANCES FRIEL & JOHN GUINThER, BREAKING THE MOB 287 (Luniverse.com 2000). "Police have two methods to make such drawings. In one, the sketch is made entirely from the witness' recollection To create a composite the eyewitness is given a box of black-and-white photographs, almost invariable mugshots, of individuals who fit the basic description category . . . the witness is then asked to sort through and pick out those having aspects that most nearly fit the witness' memory of the suspect." *Id.*

⁷¹ Junkin, *supra* note 6, at 91.

⁷² *Id.*

⁷³ *Bloodsworth*, 76 Md. App. at 29, 543 A.2d at 385.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Junkin, *supra* note 6, at 47.

iii. Fay McCoullough

The same day of the murder, Detective Capel attempted to get a composite sketch from an adult eyewitness; Fay McCoullough had seen a strange man by the woods that morning.⁷⁷ She described the man as five-foot-seven to five-foot-eight, slim, with curly blond hair.⁷⁸ After being unable to come up with a composite sketch that was accurate, Detective Capel threw her sketch in the trash and disregarded her as a witness.⁷⁹ The investigators decided to use the sketch approved by the children to run on the news.⁸⁰ Fay McCoullough, and many others, also went to the lineup but did not recognize the strange man they saw in the area.⁸¹

iv. Nancy Hall

Nancy Hall told detectives that she saw a thin white man with dark brown, curly hair sitting on a transformer box on a nearby street on the morning of the murder.⁸² She had already seen Christian Shipley's composite on the news and thought it looked like someone she knew, Mickey Manzari.⁸³ As a direct result of her identification, Mickey Manzari was arrested on July 31, 1984, but later released because of a valid alibi.⁸⁴

Despite this misidentification, after Kirk Bloodsworth's arrest, Nancy Hall was contacted to identify Kirk Bloodsworth in a lineup at the station.⁸⁵ The problem was Kirk Bloodsworth had been arrested on Thursday, August 9, 1984, and the lineup was not going to be held until the following Monday.⁸⁶ The detectives called Nancy Hall and instructed her not to watch television until after the lineup because they had arrested Kirk Bloodsworth, and seeing images of him on the news could hurt the case.⁸⁷ Nancy Hall nevertheless watched the news all weekend long and identified Kirk Bloodsworth in the lineup Monday morning.⁸⁸ Nancy Hall admitted in her testimony at both trials to being high on marijuana the morning she saw Kirk Bloodsworth.⁸⁹

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Bloodsworth*, 76 Md. App. at 50, 543 A.2d at 395; Junkin, *supra* note 6, at 47.

⁸¹ Junkin, *supra* note 6, at 101.

⁸² *Id.* at 51.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 99.

⁸⁶ *Id.*

⁸⁷ Junkin, *supra* note 6, at 99.

⁸⁸ *Id.*

⁸⁹ *Id.*

v. Donna Ferguson

Donna Ferguson saw a white male sitting on an electric box on a nearby street that morning.⁹⁰ Later, she saw Dawn Hamilton go into the woods yelling for her cousin, and she heard a man offer to help her.⁹¹ Donna Ferguson admitted she had also smoked marijuana the morning of the crime.⁹² Donna Ferguson originally stated she did not see the man who offered to help Dawn Hamilton and did not know if it was the man from the electric box.⁹³ During trial, she said she actually had seen the man talking to Dawn Hamilton, she was a mere six feet away and got a good look at his face, and it was definitely Kirk Bloodsworth.⁹⁴

Donna Ferguson identified Kirk Bloodsworth in the same lineup as Nancy Hall. She had also received the same instruction not to watch television the weekend before the lineup.⁹⁵ Donna Ferguson did have the television on all weekend but did not admit to specifically watching the news before the lineup.⁹⁶

vi. James Keller

James Keller came into contact with the detectives after seeing Kirk Bloodsworth's image on the news more than two weeks after the murder.⁹⁷ As James Keller was driving by the pond on the morning Dawn Hamilton was killed, he believed he briefly saw Bloodsworth there.⁹⁸ James Keller was invited to the lineup even though he saw the news broadcasts showing what Kirk Bloodsworth looked like.⁹⁹ He testified at both trials.¹⁰⁰ When interviewed many years later in the quest for a new trial, James Keller identified someone other than Bloodsworth as the man he saw that morning, even though the array he was shown contained Bloodsworth's photograph.¹⁰¹

C. How the Appeals System Failed to Save an Innocent Man

After Kirk Bloodsworth's first conviction for Dawn Hamilton's rape and murder in 1985, he was entitled to an automatic appeal to the Court of

⁹⁰ *Id.* at 52.

⁹¹ *Id.*

⁹² *Id.* at 138.

⁹³ Junkin, *supra* note 6, at 52.

⁹⁴ *Id.* at 138.

⁹⁵ *Id.* at 100.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Bloodsworth*, 76 Md. App. at 30, 543 A.2d at 385.

⁹⁹ Junkin, *supra* note 6, at 100.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 186.

Appeals of Maryland.¹⁰² The Court of Appeals of Maryland overturned Bloodsworth's conviction because of a constitutional violation in the discovery process; he was denied potentially exculpatory material under *Brady v. Maryland*.¹⁰³ During the discovery process Bloodsworth had requested the State produce "any and all information of which it is aware including but not limited to line-ups, photospreads, or reports to law enforcement authorities, identifying or suggesting that someone other than the Defendant . . . was the perpetrator of this crime."¹⁰⁴ The State had an obligation to turn over all of that information. Specifically, the Court of Appeals of Maryland found error in withholding a report by Detective Mark Bacon about a potential suspect, Richard Gray.¹⁰⁵ Detective Bacon believed Gray was a potential suspect because Gray personally discovered some of Dawn Hamilton's clothes, had a young girl's underwear in his car, possible blood on his shirt, and described Dawn Hamilton's pocketbook before her body was found.¹⁰⁶

The case was remanded for a new trial based on the *Brady* violation and the Court of Appeals of Maryland made admissibility rulings on other issues raised in the appeal for the next trial.¹⁰⁷ Kirk Bloodsworth had already spent almost one year waiting for his first trial, and two years on death row when his second trial began in 1987.¹⁰⁸

The second trial led to a conviction for first degree murder and a first degree sex offense,¹⁰⁹ but this time Kirk Bloodsworth received two consecutive life sentences instead of the death penalty.¹¹⁰ He elected to have his trial judge sentence him instead of the jury, as he had in the first trial, but for the exact same crime he received a different sentence.¹¹¹ Bloodsworth no longer had automatic appeal rights to the Court of Appeals of Maryland;

¹⁰² *Bloodsworth*, 307 Md. at 166, 512 A.2d at 1057 ("The case reaches us pursuant to the provisions of Maryland Code (1957, 1982, Repl. Vol.) Art. 27, § 414 stating that whenever the death penalty is imposed, we shall review the sentence.").

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 171, 512 A.2d at 1059.

¹⁰⁵ *Id.* at 175-76, 512 A.2d at 1061-62.

¹⁰⁶ *Id.* at 173, 512 A.2d at 1062.

¹⁰⁷ *Id.* at 175-76, 512 A.2d at 1061-62.

¹⁰⁸ *State v. Bloodsworth*, Case No. 03-K-84-003138, Seq. No: 51 (Cir. Ct. for Balt. Cnty. Md. April 6, 1987) ("April 6, 1987 Jury Verdict: GUILTY on Counts One (1) and Three (3) (Note: As to Count #1, finding is Guilty as to First Degree Murder.")).

¹⁰⁹ *Id.*

¹¹⁰ *Bloodsworth*, 76 Md. App. at 26, 543 A.2d at 384.

¹¹¹ *State v. Bloodsworth*, No. 03-K-84-003138, Seq. No: 90 (Cir. Ct. for Balt. Cnty. Md. Mar. 22, 1985) ("March 22, 1985 Hearing had in re: Sentencing Defendant elects Court to decide sentencing."); *State v. Bloodsworth*, No. 03-K-84-003138, Seq. No: 95 (Cir. Ct. for Balt. Cnty. Md. Mar. 26, 1985) ("March 26, 1985 Warrant of Execution and Stay. (JWH)."); *State v. Bloodsworth*, No. 03-K-84-003138, Seq. No: 55 (Cir. Ct. for Balt. Cnty. Md. April 22, 1987) ("April 22, 1987 . . . Defendant elects Court to decide sentencing.").

instead he had the option of appealing to the Court of Special Appeals of Maryland, which he did.¹¹² The Court of Special Appeals of Maryland found no reversible error in his trial and affirmed his conviction in 1988.¹¹³

D. Getting Out

Kirk Bloodsworth spent the next five years of his incarceration searching for ways to prove his innocence. In 1992, he stumbled upon a book entitled *The Blooding*, by Joseph Wambaugh, which detailed an emerging science of DNA testing and how it led to the capture of a killer.¹¹⁴ Bloodsworth contacted Bob Morin, an attorney who was trying to help him, and insisted he submit evidence from the crime for DNA testing. The detectives and the FBI had mishandled the evidence and swabs from the crime scene, claiming there was nothing of value such as semen back in 1984, and certainly nothing of value today. However, Bloodsworth insisted, and Bob Morin negotiated the release of all of the evidence that remained to be sent to the lab for testing.¹¹⁵

The Honorable James T. Smith, who sentenced Kirk Bloodsworth to two consecutive life sentences instead of death, would play an integral role in his future release.¹¹⁶ Judge Smith apparently had some reservations about the outcome of the second trial and retained the physical evidence in a closet in his chambers so that it would not be destroyed.¹¹⁷ This preservation of evidence, which was eventually returned to the evidence locker, gave Bloodsworth the ability to test the items for DNA in 1992.¹¹⁸ The items were sent to a lab in Richmond, California, which not only discovered semen on the clothing but concluded that the semen excluded Bloodsworth as the

¹¹² State v. Bloodsworth, No. 03-K-84-003138, Seq. No: 70 (Cir. Ct. Md. Dec 15, 1987) (“Dec. 15. 1987 Original papers sent to the Court of Special Appeals of Maryland.”).

¹¹³ *Bloodsworth*, 76 Md. App at 56, 543 A.2d at 398.

¹¹⁴ Junkin, *supra* note 6, at 245, 250.

¹¹⁵ State v. Bloodsworth, No. 03-K-84-003138, Seq. No: 92-93 (Cir. Ct. for Balt. Cnty. Md. May 7, 1992) (“May 7, 1992 Order of Court that the Defendant’s Motion to release evidence is GRANTED and that the following items are released to the custody of Robert E. Morin, Attorney for Kirk Bloodsworth, and/or Ann Brobst, Assistant State’s Attorney. (1. State’s Exhibit 11-stick, 2. Exhibit Q2-shirt, 3. Exhibit Q1-panties)”).

¹¹⁶ Junkin, *supra* note 6, at 202.

¹¹⁷ *Id.* at 245.

¹¹⁸ Junkin, *supra*, note 6, at 245; *See also* State v. Bloodsworth, No. 03-K-84-003138, Seq. No: 92-93 (Cir. Ct. for Balt. Cnty. Md. May 7, 1992) (“May 7, 1992 Order of Court that the Defendant’s Motion to release evidence is GRANTED and that the following items are released to the custody of Robert E. Morin, Attorney for Kirk Bloodsworth, and/or Ann Brobst, Assistant State’s Attorney. (1.State’s Exhibit 11-stick, 2. Exhibit Q2-shirt, 3. Exhibit Q1-panties).”).

donor.¹¹⁹ Bloodsworth was released on June 28, 1993.¹²⁰ Governor William Schaefer issued Kirk Bloodsworth a full pardon in 1995.¹²¹

On the date of his release, standing outside of the prison gates, Bloodsworth stated that “since my arrest, I’ve lost so much It’s been a nine-year nightmare.”¹²² Kirk Bloodsworth had missed not only his mother’s funeral, but the last eight years of her life.¹²³ When he returned home to Cambridge, Maryland to begin a new life, he was plagued by the public perception that he was guilty.¹²⁴ The community shunned Kirk Bloodsworth, most believing that he was released on a technicality, and peppered his vehicle with notes that said things like “Child Killer.”¹²⁵

For ten years after his release the State’s Attorney’s Office in Baltimore County refused to acknowledge Kirk Bloodsworth’s innocence or to use the DNA sample to find the real killer.¹²⁶ After Bloodsworth’s release the head of the Baltimore County State’s Attorney’s Office, Sandra O’Connor, stated that while a DNA test undermined the integrity of Bloodsworth’s conviction, she was “not prepared to say he’s innocent.”¹²⁷ In 2003, after the State’s Attorney’s Office decided to run the DNA, the semen led to the arrest of the real killer, Kimberly Ruffner, an acquaintance of Bloodsworth in prison.¹²⁸

i. The Real Killer

Kimberly Ruffner had been arrested multiple times in the early 1980’s for sexual assaults on young girls in the area where Dawn Hamilton was killed,

¹¹⁹ Junkin, *supra* note 6, at 245, 256.

¹²⁰ State v. Bloodsworth, No. 03-K-84-003138, Seq. No: 97-98 (Cir. Ct. for Balt. Cnty. Md. June 28, 1993) (“June 28, 1993 Hearing had in re: Defendant’s motion for new trial – GRANTED. Nol Pros entire case. Defendant not present June 28, 1993 Order of Court that the defendant Kirk Bloodsworth, #187-307, to be released from confinement.”).

¹²¹ State v. Bloodsworth, No. 03-K-84-003138, Seq. No: 04 (Cir. Ct. for Balt. Cnty. Md. April 19, 1995) (“April 19, 1995 Order from William Donald Schaefer, Governor’s Office of the State of Maryland has received a FULL PARDON.”).

¹²² Junkin, *supra* note 6, at 260.

¹²³ *Id.*

¹²⁴ *Id.* at 262.

¹²⁵ *Id.* at 262, 266.

¹²⁶ State v. Bloodsworth, No: 3138CR84 Seq. No: 05 (Cir. Ct. for Balt. Cnty. Md. Oct. 29, 2003) (“October 29, 2003, TWO BOXES LABELED 84CR3138 EVIDENCE AND TRANSCRIPTS WERE PICKED UP BY KEVIN CARR, CLERK FOR THE STATE’S ATTORNEY’S OFFICE PER THE REQUEST OF ANN BROBST, STATE’S ATTORNEY.”).

¹²⁷ Junkin, *supra* note 6, at 261.

¹²⁸ *Id.* at 282.

which was near his home.¹²⁹ Ruffner was charged with the rape of an eleven-year-old girl in November of 1983, and after two hung juries, his third trial ended in an acquittal.¹³⁰ Thirteen days after his release from jail on July 12, 1984, Dawn Hamilton was killed.¹³¹ Six weeks later, on August 28, 1984, Ruffner raped a woman in her apartment and was arrested. Ruffner was convicted in that case and sentenced to forty-five years, which is how he ended up in the same prison as Bloodsworth.¹³²

After Ruffner's arrest for Dawn Hamilton's murder, Bloodsworth commented on Ruffner's lack of resemblance to the eyewitness descriptions or the police sketch, stating that "it just goes to the fallibility of the human condition."¹³³ Ruffner is five-foot-six and one-hundred-sixty pounds, much smaller than any eyewitness described.¹³⁴ Bloodsworth himself did not resemble the sketch, or the eyewitness description of the killer.¹³⁵ Ruffner later pled guilty to the rape and murder of Dawn Hamilton in 2004, and received a life sentence.¹³⁶ His life sentence for Dawn Hamilton's murder will begin after his current forty-five year sentence for rape concludes.¹³⁷ Ruffner is incarcerated at the Eastern Correctional Institution in Westover, Maryland.¹³⁸

E. The Cost of a Wrongful Conviction

The state of Maryland paid Kirk Bloodsworth a \$300,000 settlement for his nearly nine years in prison.¹³⁹ In comparison, in Illinois, Cook County agreed to a \$36 million settlement for four men who were wrongly

¹²⁹ See Stephanie Hanes, '84 Investigation Quick to Overlook the Culprit, THE BALTIMORE SUN (May 22, 2004), http://articles.baltimore-sun.com/2004-05-22/news/0405220166_1_ruffner-dawn-hamilton-bloodsworth.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Interview by Michel Martin with Kirk Bloodsworth, NPR NEWS (June 26, 2013), available at <http://www.npr.org/templates/story/story.php?storyId=195897858> [hereinafter *Bloodsworth Interview*]; see also Ian Cummings, *Exonerated death row survivor fights capital punishment in Kansas*, LAWRENCE JOURNAL-WORLD (April 15, 2013), available at <http://www2.ljworld.com/news/2013/apr/15/exonerated-death-row-survivor-fights-capital-punis>.

¹³⁴ Bloodsworth Interview, *supra* note 133.

¹³⁵ *Id.*

¹³⁶ *State v. Kimberly Shay Ruffner*, Case Number 03K03003612, available at <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.jis?caseId=03K03003612&loc=55&detailLoc=K>.

¹³⁷ Hanes, *supra* note 129.

¹³⁸ INMATE LOCATOR, M.D. DEP'T OF PUB. SAFETY & CORRECTIONAL SERVICES, <http://www.dpscs.state.md.us/inmate/search.do?searchType=detail&id=78303> (last visited June 28, 2013).

¹³⁹ Junkin, *supra* note 6, at 255-56.

convicted, with two having been sentenced to death.¹⁴⁰ One of the four men, Dennis Williams, spent eighteen years in prison and received \$13 million from Illinois for his wrongful conviction.¹⁴¹ There is no standardization for how compensation is applied across the states for those wrongly convicted, especially exonorees from death row. The \$300,000 Kirk Bloodsworth received barely covered his legal bills. It is a poor consolation for the debt owed to an innocent man the state of Maryland was planning on putting to death in 1985.

Kirk Bloodsworth's life will forever be changed by the almost nine years he spent incarcerated for the rape and murder of a young girl. If Judge Smith had not saved the evidence from the trial or if the lab had not found semen many years later, Kirk Bloodsworth would still be an incarcerated man, and there is no justice in that.

IV. IN LIGHT OF KIRK BLOODSWORTH'S CASE, WHAT SHOULD BE DONE WITH THE FIVE MEN ON DEATH ROW?

"You can release an innocent man from prison, but you can't release him from the grave."¹⁴²

The same system that twice convicted Kirk Bloodsworth for the most heinous of crimes is still holding five men on death row. Three of the men committed their crimes in 1983, thirty years before the repeal of Maryland's death penalty and just five years after it was reinstated after *Furman v. Georgia*.¹⁴³ Two of the men were convicted within one year of Kirk Bloodsworth by the same prosecuting office, the State's Attorney's Office for Baltimore County.¹⁴⁴ All of the men on death row have been convicted of extremely horrendous crimes, and there is stronger evidence of guilt than in Kirk Bloodsworth's case. On the other hand, until Kirk Bloodsworth's exoneration in 1993, the same could be said about his case – it was

¹⁴⁰ *In Memoriam: Dennis Williams*, ILLINOIS COALITION AGAINST THE DEATH PENALTY, <http://www.icadp.org/content/memoriam-dennis-williams> (last visited Feb. 21, 2014).

¹⁴¹ David Protes, *Remembering Death Row Exoneree*, HUFF POST CHICAGO (March 4, 2013, 11:03 AM), http://www.huffingtonpost.com/david-protes/dennis-williams-death_b_2792843.html.

¹⁴² INNOCENCE, NAT'L COAL. TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/pages/innocence> (last visited Feb. 21, 2014).

¹⁴³ Office of Attorney Gen., *Attorney General's Synopsis of Active Maryland Capital Cases*, GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION (April 17, 2008), http://www.goccp.maryland.gov/capitalpunishment/documents/G_-_Attorney_Generals_Synopsis_of_Active_Maryland_Capital_Cases.pdf [hereinafter *Attorney General's Synopsis*]; see MARYLAND, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/maryland-1> (last visited June 27, 2013).

¹⁴⁴ *Id.*

horrendous and there was strong evidence of guilt in the form of *five* eyewitnesses. The glaring problem with the death penalty is that you can never be certain if someone is guilty.

A. Maryland's Death Row

Taking a brief look at the five men still on death row reveals that they have committed horrific crimes, but only two would be eligible for the death penalty under the recently repealed Maryland statute.¹⁴⁵ All five were convicted and sentenced to death under the same Maryland murder statute as Kirk Bloodsworth, before the revisions of 2002 and 2009, and before repeal in 2013.¹⁴⁶

Anthony Grandison and Vernon Evans are both on death row for the murder of David Piechowicz and Susan Kennedy.¹⁴⁷ Grandison paid Evans \$9,000 to kill David and Cheryl Piechowicz before they could testify against him in a narcotics proceeding in federal court.¹⁴⁸ Evans mistakenly killed Susan Kennedy, Cheryl Piechowicz's sister, because she was filling in for her sister that day at work.¹⁴⁹ Evans shot nineteen bullets from a MAC-11 machine pistol killing both victims on April 28, 1983, in broad daylight.¹⁵⁰ Evans and Grandison were each convicted of two counts of first-degree murder and sentenced to death.¹⁵¹ There was no DNA evidence, videotapes of the crime being committed or voluntary confessions in either of their trials; they were convicted on mainly eyewitness testimony and the testimony of Vernon Evans' girlfriend.¹⁵²

John Booth was convicted, along with Willie Reid, of killing Irvin and Rose Bronstein on May 18, 1983.¹⁵³ They were seventy-eight and seventy-five years old, found dead in their home with twelve stab wounds each.¹⁵⁴ Allegedly, Booth and Reid, were motivated by a simple desire to get money

¹⁴⁵ MD. CODE ANN., CRIM. LAW § 2-202(c) (repealed by Acts 2013, c. 156, § 3 (2013)).

¹⁴⁶ MD. CODE, ART. 27, § 407-414A (repealed by Acts 2002, c. 26, § 1 (2002)) (containing the different statutory types of murder and the provisions for sentencing). MD. CODE ANN., CRIM. LAW § 2-202(c); *see infra* notes 151-63 and accompanying text (discussing of the convictions of the five death row inmates). Bloodsworth was convicted under Sections 407 (murder in the first degree) and 410 (murder during preparation of other crimes); *see Bloodsworth*, 76 Md. App. at 26, 543 A.2d at 384.

¹⁴⁷ GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, *supra* note 143.

¹⁴⁸ *Grandison v. State*, 390 Md. 412, 417, 889 A.2d 366, 369 (2005).

¹⁴⁹ *Grandison v. State*, 425 Md. 34, 41, 38 A.3d 352, 356 (2012).

¹⁵⁰ *Grandison*, 390 Md. at 424, 889 A.2d. at 369.

¹⁵¹ GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, *supra* note 143.

¹⁵² *See Evans v. State*, 304 Md. 487, 495, 499 A.2d 1261, 1265 (1985).

¹⁵³ *Booth v. State*, 306 Md. 172, 181, 507 A.2d 1098, 1102 (1986).

¹⁵⁴ *Id.*

for heroin.¹⁵⁵ Reid received two life sentences for the same crime that Booth received death.¹⁵⁶ The State presented no DNA evidence, videotapes of the crime being committed, or voluntary confessions, as would have been necessary under the most recently repealed statute in Maryland.¹⁵⁷

Heath Burch was convicted of murdering Robert and Cleo Davis, an elderly couple in their seventies, in their home on March 19, 1995.¹⁵⁸ Robert Davis died from eleven stab wounds from a pair of scissors.¹⁵⁹ Burch stole property from their home to sell to fuel his cocaine habit.¹⁶⁰ The trial court did not admit any DNA evidence or videotape of the crime, but the Court of Appeals of Maryland determined that the confession given was voluntary, which would qualify Burch for the death penalty under the most recently repealed statute.¹⁶¹ Jody Miles, the most recent addition to death row, was convicted of shooting Edward Atkinson in the head at point blank range during a robbery on April 2, 1997.¹⁶² Similar to Burch, there was a voluntary confession admitted at trial that would qualify him for the death penalty under the most recently repealed statute.¹⁶³

One of the main reasons the death penalty repeal and the commutation of these five sentences is so important is that Maryland has not been able to design a system that is applied in a fair and consistent way; it has been disproportionately used on African-American offenders with white victims, not for the most heinous of crimes.¹⁶⁴ Professor David Baldus¹⁶⁵ reported to the Maryland Commission on Capital Punishment that of the ten cases resulting in death sentences in Maryland (five already executed and five on death row), 70% involve an African-American offender and a Caucasian

¹⁵⁵ *Id.*

¹⁵⁶ Reid v. State, 305 Md. 9, 12, 501 A.2d 436, 427 (1985).

¹⁵⁷ See Booth, 306 Md. at 194, 507 A.2d at 1109.

¹⁵⁸ Burch v. Corcoran, 273 F.3d 577, 580 (4th Cir. 2001).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Burch v. State, 346 Md. 253, 268, 696 A.2d 443, 451 (1997).

¹⁶² Miles v. State, 365 Md. 488, 499, 781 A.2d 787, 793 (2001).

¹⁶³ See *id.* at 502, 781 A.2d at 795.

¹⁶⁴ Maryland Commission on Capital Punishment, *Final Report to the General Assembly*, GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION (December 12, 2008), <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf> [hereinafter *Final Report*].

¹⁶⁵ The late David C. Baldus was a professor of law at the University of Iowa College of Law. He co-authored two books, STATISTICAL PROOF OF DISCRIMINATION (1980) and EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) as well as numerous articles on capital punishment. Prior to his death, he and his colleague George Woodworth conducted empirical studies of capital charging and sentencing in many states including Maryland. His Georgia research conducted with Professor Woodworth formed the basis of petitioner's claims in *McCleskey v. Kemp*. See generally *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

victim, but that combination only comprises 23% of all death-eligible cases in Maryland.¹⁶⁶ The fact that this racial bias is inadvertent or unintentional does not make it acceptable; it creates an unconstitutional application of the death penalty in Maryland that we cannot remedy without repealing the entire death penalty and commuting the last five death sentences.¹⁶⁷

B. To Commute or Not to Commute

In 2008, the Maryland General Assembly created the Maryland Commission on Capital Punishment to study capital punishment in Maryland and make recommendations on areas of contention.¹⁶⁸ The Commission included figures such as Baltimore County State's Attorney Scott Shellenberger and Kirk Bloodsworth. The Commission ultimately recommended the death penalty's abolition in Maryland, with a minority report filed supporting the death penalty.¹⁶⁹ In discussing this report prior to the repeal of the death penalty, Governor Martin O'Malley stated "the death penalty is fundamentally and irredeemably incompatible with the most important foundational truths of our republic."¹⁷⁰

Maryland's bill repealing the death penalty was signed by Governor Martin O'Malley on May 2, 2013, but it did not apply to the five men currently on death row.¹⁷¹ Since Maryland now rejects the death penalty, it is unclear why it is still a valid option for the five men on death row and why a commutation of their sentences was not included in the legislation.

Those opposed to commuting the sentences of the five men on death row argue that the jury, the family of the victim, the prosecution and reviewing courts have all agreed these five men deserve death and the repeal of the death penalty in Maryland should not change that. Opponents claim that Maryland distinguishes itself from many other states by reserving the death penalty for only the worst of the worst offenders and has been "vigilant in the care taken in death penalty cases."¹⁷² They argue this is demonstrated by

¹⁶⁶ *Final Report*, *supra* note 164, at 11.

¹⁶⁷ *Id.* at 27.

¹⁶⁸ *Id.* at 7.

¹⁶⁹ *Id.* at 9.

¹⁷⁰ Governor Martin O'Malley, *On the Repeal of Capital Punishment in Maryland*, Testimony Before the Senate Judicial Proceedings Committee (Feb. 18, 2009), available at <http://www.governor.maryland.gov/blog/?p=2452>.

¹⁷¹ Chris Gordon et al, *Maryland Repeals the Death Penalty*, NBC WASH. (May 2, 2013), <http://www.nbcwashington.com/news/politics/NATL-DC-COPY-Md-Maryland-Governor-OMalley-Death-Penalty-Repeal-205864161.html>.

¹⁷² Maryland Commission on Capital Punishment, *Minority Report*, GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION (December 12, 2008), <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>. *Minority Report* appears at the end of the *Final Report* document. See *supra* note 164.

the fact that since its reenactment in 1978, only five people have been put to death, with five currently on death row in Maryland, making Maryland one of the lowest enforcers of the death penalty.¹⁷³ In comparison, 727 inmates are on death row in California and 500 inmates had been put to death in Texas.¹⁷⁴

Those in defense of the Maryland system point out that only one person has ever been sentenced to death and later exonerated, Kirk Bloodsworth. Many states have a much higher number of exonerations from death row such as Florida, which has twenty-four, and Illinois, which has twenty.¹⁷⁵ No evidence was put forth during the Commission study in 2008 that an innocent man has ever been put to death in Maryland.¹⁷⁶

Opponents of commutation argue that the need for the death penalty goes beyond victim retribution or payback for the crime. In Maryland over 300 people are serving life-without-parole sentences.¹⁷⁷ Those serving life-without-parole have absolutely nothing to lose if they kill a prison guard or anyone incarcerated with them. In addition, there is no punishment one can add to a life-without-parole sentence other than a death sentence; there is nothing preventing an inmate from killing someone in the prison with them. The Maryland General Assembly rejected an amendment to the death penalty repeal bill to allow an exception for death sentences for murders committed while confined in a correctional facility.¹⁷⁸ The legislature clearly does not agree that the prisons cannot function without the death penalty.

Prior to the repeal of the death penalty, Kirk Bloodsworth was referred to as “living and breathing proof that Maryland can and does get it wrong” and the “system that got it wrong for Kirk Bloodsworth is the same system that sentences people to die.”¹⁷⁹ The same system that sentenced Bloodsworth sentenced the five men currently on death row. The science that caught the error in the system and saved Bloodsworth, DNA evidence, is not available to all of the men currently on death row.¹⁸⁰ Defenders of execution argue

¹⁷³ *Id.* at 3.

¹⁷⁴ NUMBER OF EXECUTIONS BY STATE AND REGION SINCE 1976, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited June 16, 2013).

¹⁷⁵ INNOCENCE AND THE DEATH PENALTY, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited June 16, 2013).

¹⁷⁶ *Minority Report*, *supra* note 172, at 18.

¹⁷⁷ Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 31 (Oct. 2010), http://sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf.

¹⁷⁸ S.B. 276, 433d Sess. (Md. 2013); Sen. Proc. No. 37 (Amend. SB0276/193825/1 proposed by Senator Shank on Mar. 4, 2013, rejected 19-27), *available at* http://mgaleg.maryland.gov/2013RS/amds/bil_0006/sb0276_19382501.pdf.

¹⁷⁹ *Final Report*, *supra* note 164, at 81.

¹⁸⁰ *Id.* at 92-93.

that since 2001 anyone sentenced to the death penalty is entitled to DNA testing, if requested, using new and emerging techniques.¹⁸¹ However, advances in DNA testing can only assist in exonerating death row inmates convicted before its existence *if* the DNA was collected and preserved appropriately.¹⁸² More than half of the men on death row committed their crimes in 1983, before advances in DNA testing so there would be no reason for samples to be gathered and preserved at that time.¹⁸³ The mistakes made in Kirk Bloodsworth's case present the most compelling reasons the death penalty should remain abolished in Maryland and not be enforced for the five men currently on death row.

C. What Sentence is Appropriate Besides Death?

Governor O'Malley has been clear that the bill to repeal the death penalty does not apply to the five men on death row and that he would deal with them each on a case by case basis.¹⁸⁴ No exception was made to specifically exempt the crimes that these five men committed from the repeal, and enforcing or repealing their sentences was not included in the prospective legislation. The Maryland General Assembly rejected amendments that would allow death penalty exceptions for contract killing¹⁸⁵ and for murders of more than one person.¹⁸⁶ If passed, those amendments would include four of the five men on death row as exceptions to the death penalty repeal.¹⁸⁷ It appears the intent was not to put these men to death or it could have been written into the statute explicitly or with these crime exceptions. An amendment to the death penalty repeal bill that would allow a terrorist who killed more than 1,000 people to be eligible for the death penalty was

¹⁸¹ MD. CODE ANN., CRIM. PROC. § 8-201 (West 2013).

¹⁸² *Final Report*, *supra* note 164, at 86.

¹⁸³ *Attorney General's Synopsis*, *supra* note 143. The offenses for which Grandison, Evans, and Booth were charged all occurred in 1983. *See generally* Grandison, 390 Md. 412, 889 A.2d 366; *see generally* Evans, 304 Md. 487, 499 A.2d 1261; *see generally* Booth, 306 Md. 172, 507 A.2d 1098.

¹⁸⁴ Brian Witte, *Maryland Death Penalty Repeal Signed into Law by Martin O'Malley*, THE HUFFINGTON POST (May 2, 2013), http://www.huffingtonpost.com/2013/05/02/maryland-death-penalty-repeal_n_3202249.html.

¹⁸⁵ S.B. 276, 433d Sess. (Md. 2013); House Proc. No. 46A (Amend. SB0276/903927/01, proposed by Delegate O'Donnell on March 13, 2013, rejected 55-80), *available at* http://mgaleg.maryland.gov/2013RS/amds/bil_0006/sb0276_90392701.pdf.

¹⁸⁶ S.B. 276, 433d Sess. (Md. 2013); House Proc. No. 46A (Amend. SB0276/483222/01, proposed by Delegate McDonough on Mar. 13, 2013, rejected 57-78), *available at*

http://mgaleg.maryland.gov/2013RS/amds/bil_0006/sb0276_48322201.pdf.

¹⁸⁷ Witte, *supra* note 184.

rejected, leading one to conclude that the death penalty is no longer appropriate for *anyone* in Maryland.¹⁸⁸

Jody Miles and Heath Burch would be eligible to have their sentences commuted to life-without-parole without issue because their offenses occurred after Maryland adopted life-without-parole in 1987.¹⁸⁹ The statute, which referenced the governor's power, stated the governor had the authority to "commute or change sentence of death into a period of confinement the Governor considers expedient," and the proposed death penalty repeal legislation changed that to say the power to "change a sentence of death into a sentence of life without the possibility of parole."¹⁹⁰ Commutation of death sentences to life-without-parole for Jody Miles and Heath Burch is the best option for Governor O'Malley. It gives the protection that the men would never be released from prison, and it is consistent with his statement that the death penalty is at odds with our values as a people.¹⁹¹

i. Commuting to life sentences

The more complex issue facing Governor O'Malley is what to do with the three men on death row whose offenses occurred before the adoption of life-without-parole if he commutes their sentences. Anthony Grandison, Vernon Evans, and John Booth all committed their crimes in 1983, prior to the adoption of life-without-parole, which may open them up to some legal challenges if given that sentence.¹⁹²

In 1990, the Court of Appeals of Maryland was presented with a question of when the life-without-parole sentence could be used in the case of *Collins v. State*.¹⁹³ In *Collins*, the offense occurred on December 7, 1986, and the Court of Appeals of Maryland ruled that "the life without parole sentencing option is only available for offenses occurring after the effective date of the provision, July 1, 1987."¹⁹⁴ "The instant offense occurred prior to the

¹⁸⁸ S.B. 276, 433d Sess. (Md. 2013); House Proc. No. 46A (Amend. SB0276/91329/01, proposed by Delegate Parrott on Mar. 13, 2013, rejected 54-83), available at

http://mgaleg.maryland.gov/2013RS/amds/bil_0006/sb0276_91392901.pdf.

¹⁸⁹ *Year that States Adopted Life without Parole Sentencing*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing> (last visited June 16, 2013).

¹⁹⁰ S.B. 276, 433d Sess. (Md. 2013).

¹⁹¹ GOVERNOR MARTIN O'MALLEY, TESTIMONY TO REPEAL CAPITAL PUNISHMENT BEFORE THE SENATE JUDICIAL PROCEEDINGS COMMITTEE (Feb. 14, 2013), available at <http://www.governor.maryland.gov/blog/?p=8275>.

¹⁹² *Grandison*, 425 Md. 34, 38 A.3d 352; *Evans*, 396 Md. 256, 914 A.2d 25; *Booth v. State*, 349 Md. 421, 708 A.2d 681 (1998).

¹⁹³ *Collins v. State*, 318 Md. 269, 568 A.2d 1 (1990), cert. denied, 497 U.S. 1032, 110 S. Ct. 3296-97 (1990).

¹⁹⁴ *Id.* at 298, 568 A.2d at 15 (internal citation omitted).

effective date”; therefore, “the argument regarding a statutory right to the [life-without-parole] sentencing option has no merit.”¹⁹⁵ The Court of Appeals of Maryland found that the jury in that case should only have the option of death or life imprisonment, and based on this precedent, Grandison, Evans, and Booth are only eligible for those two sentences if they were given a new trial or resentencing hearing.¹⁹⁶

Giving these men standard life sentences could potentially cause public outcry because of the way the statute used to work when they were originally sentenced.¹⁹⁷ Baltimore County State’s Attorney Scott Shellenberger has expressed his concern that if these men were given mere life sentences that “the way this statute worked back then they would’ve been eligible for parole after 15 years . . . they’d immediately be eligible for parole and these are a number of individuals who committed some very heinous crimes . . . that would be a very, very dangerous thing to do.”¹⁹⁸ On paper it could seem like these three men would be getting an easy way out of their sentences but that is not the case.

In 1999, the Maryland Parole Commission was established with the power to make recommendations to the governor on granting parole for inmates who have served more than twenty-five years of their life sentences.¹⁹⁹ There is no constitutional right to parole, even if you have a life sentence, it is completely discretionary.²⁰⁰ Byron Warnken, Esq., a professor at the University of Baltimore School of Law, stated “I don’t think there’s any way in heck any of those five people would ever, ever be even seriously looked at for parole. Much less get parole.”²⁰¹ Additionally, the governor can refuse to parole anyone with a life sentence, and if they are refused parole the Parole Commission can discretionarily set how far out a future hearing will be held.²⁰² These are many safeguards in place that allow the governor to give these three men life sentences without any concern that they will be escaping punishment. Life sentences without being paroled would be equivalent to the harshest legal sentence in Maryland, life-without-parole sentences. No lifer, including former death row inmates, can be released without the governor’s approval, which is within his unregulated discretion. The governor can, in effect, give them life without ever choosing to parole them.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Hayley Bull, *Death Penalty Proponents Question Fate of Inmates on Death Row*, CAPITAL NEWS SERVICE (Feb. 19, 2013), <http://cnsmaryland.org/2013/02/19/death-penalty-proponents-question-fate-of-inmates-on-death-row/>.

¹⁹⁸ *Id.*

¹⁹⁹ See MD. CODE ANN., CORR. SERVS. § 7-301(d)(2) (2008, 2013 Supp.); 1999 Md. Laws, ch. 54 (later codified at MD. CODE ANN., CORR. SERVS. § 7-206(3)).

²⁰⁰ *Dennis v. Warden*, Md. House of Corr., 12 Md. App. 512, 280 A.2d 53 (1971).

²⁰¹ Bull, *supra* note 197.

²⁰² MD. CODE ANN., CORR. SERVS. § 7-301(d)(4) (2008, 2013 Supp.).

ii. Commuting to life without the possibility of parole with a conditional pardon

In order to avoid potential legal challenges, Governor O'Malley should grant conditional pardons to any of the men on death row who might have legal challenges to the commutation of their sentences to life-without-parole. In *Schick v. Reed*, the United States Supreme Court upheld a similar scenario with the President's conditional pardon power.²⁰³ In *Schick*, the Court ruled that commuting a death sentence to a conditional life sentence without the option to ever be paroled was valid even if that sentence did not exist at the time of the commission of the crime or at the time of the pardoning.²⁰⁴ The Supreme Court concluded that the President could use his pardoning power to do anything except aggravate the punishment, and that he did not aggravate the punishment by changing a death sentence into a life-without-parole sentence.²⁰⁵ The pardoning power derives from the Constitution and cannot be modified by any statute.²⁰⁶ The President's pardon power is intended to be used to "forgive the convicted person, in part or entirely . . . or to alter it with conditions which in themselves [are] constitutionally unobjectionable."²⁰⁷ The commutation power historically included the power to commute sentences on "conditions not specifically authorized by statute."²⁰⁸

The exact text of the presidential pardoning power is that "he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."²⁰⁹ In Maryland, the governor's pardoning power derives from the Maryland Constitution and is constructed in language very similar to the presidential power analyzed in *Schick*.²¹⁰ The Maryland Constitution reads that the governor "shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases, in which he is prohibited by other Articles of this Constitution."²¹¹

Under *Schick*, the almost identically worded presidential pardoning power meant any adaption of the sentence to lessen the punishment, was acceptable as long as it did not violate the Constitution.²¹² The Supreme Court found in *Schick* that life-without-parole was specifically a lesser punishment than death, meaning it would be lessening the punishment by giving life-without-parole instead of a death sentence. Here, the governor should follow this

²⁰³ *Schick v. Reed*, 419 U.S. 256, 266-67, 95 S. Ct. 379, 385-86 (1974).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 267-68, 95 S. Ct. at 385-86.

²⁰⁶ *Id.* at 266, 95 S. Ct. at 385.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ U.S. CONST. art. II, § 2, cl. 1.

²¹⁰ MD. CONST. art. II, § 20.

²¹¹ *Id.*

²¹² *Schick*, 419 U.S. at 266-67, 95 S. Ct. at 385.

ruling and use his pardoning power to give conditional pardons to Anthony Grandison, Vernon Evans, and John Booth for life-without-parole sentences, in addition to life-without-parole sentences to Jody Miles and Heath Burch.

D. Other States

No state has executed an inmate after repealing the death penalty.²¹³ New Jersey repealed the death penalty in 2007, applying it to the men currently on death row, which included two men who were sentenced before the state had life-without-parole.²¹⁴ To avoid the dilemma Governor Martin O'Malley is currently in, the governor of New Jersey commuted death sentences before repealing the death penalty.²¹⁵ Controversially, in 2003, the governor of Illinois commuted the death sentences of all 156 death row inmates.²¹⁶ In 2011, when Illinois repealed the death penalty, the governor commuted the death sentences of all fifteen men on death row to life-without-parole.²¹⁷ A bill to repeal the abolition of the death penalty in Illinois was recently introduced into the Senate indicating there is a continued debate going on after the clearing of the death row and the repeal of the death penalty.²¹⁸

Two other states, Connecticut and New Mexico, that have repealed the death penalty in recent years have kept the current death row inmates on death row.²¹⁹ The choice to not to commute the sentences of those on death row has led to a string of appeals in the courts for cruel and unusual punishment.²²⁰ The Supreme Court of Connecticut has yet to issue a ruling on whether the enforcement of the death penalty after its repeal constitutes cruel and unusual punishment.²²¹

²¹³ *Connecticut Supreme Court Considers Executions After Death Penalty Repeal*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/connecticut-supreme-court-considers-executions-after-death-penalty-repeal> (last visited June 18, 2013).

²¹⁴ Bull, *supra* note 197.

²¹⁵ *Id.*

²¹⁶ *Governor Clears Illinois Death Row*, BBC (Jan. 11, 2003, 10:27 PM), <http://news.bbc.co.uk/2/hi/americas/2649125.stm>.

²¹⁷ Dave McKinney, *Quinn Signs Bill Repealing Illinois' Death Penalty*, CHICAGO SUN TIMES (Sept. 24, 2012), <http://www.suntimes.com/news/politics/4225981-418/gov.-pat-quinn-signs-bill-repealing-illinois-death-penalty>.

²¹⁸ S.B. 2275, 98th Sess. (Ill. 2013).

²¹⁹ Maggie Clark, *Maryland Repeals Death Penalty, Sixth State in Six Years*, STATELINE (March 15, 2013), <http://www.pewstates.org/projects/stateline/headlines/maryland-repeals-death-penalty-sixth-state-in-six-years-85899458869>.

²²⁰ Bull, *supra* note 197.

²²¹ Kevin Barry, *Should Execution Repeal Empty Death Row?*, THE COURANT (May 3, 2013), http://articles.courant.com/2013-05-03/news/hc-op-barry-connecticut-weighs-fate-of-death-row-i-20130503_1_death-penalty-joshua-komisarjevsky-punishment.

The inmate at the center of the Connecticut death penalty appeals, Eduardo Santiago, has argued that repealing the law and attempting to enforce the death penalty on those convicted before the repeal targets a small number of specific individuals, running “afoul of the constitutional prohibitions of bills of attainder and *ex post facto* laws.”²²² Nothing distinguishes a murder committed on May 3, 2012, from an identical one committed on May 3, 2014, except the date of the offense. To enforce the death penalty for all cases that concluded before the passage of Maryland’s death penalty repeal is as arbitrary as it gets.

The Supreme Court *per curiam* opinion in *Furman v. Georgia*, as later articulated by the Court in *Gregg v. Georgia*, stated the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”²²³ That would suggest that what Maryland is doing by leaving five men on death row, seeking to enforce the death penalty on a select number of individuals after repealing it statewide, and for all pending cases, is irrational and arbitrary.

The courts have consistently used the evolving standards of decency, in light of objective standards of community values, to determine if the death penalty is unconstitutional.²²⁴ Specifically, the Court of Appeals of Maryland looked to the evolving standards of decency by examining whether the Maryland General Assembly had seen fit to exempt juveniles from the death penalty in 1984.²²⁵ The Court of Appeals of Maryland found it significant that the Maryland General Assembly had *not* exempted juveniles when a cruel and unusual punishment challenge was brought by a juvenile who received a death sentence at that time.²²⁶ Similarly here, the actions of the Maryland General Assembly should be examined when looking at the evolving standards of decency in Maryland. If the Maryland General Assembly does not feel that the death penalty is appropriate for anyone, not even a terrorist who kills more than 1,000 victims,²²⁷ why is it appropriate for Anthony Grandison, Vernon Evans, Heath Burch, John Booth, and Jody Miles?

²²² Supplemental Reply Brief of the Defendant at 3, *State v. Santiago*, 305 Conn. 101, 49 A.3d 566 (filed Nov. 13, 2012) (No. 17413), 2013 WL 5776218 at *10.

²²³ *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 2932 (1976).

²²⁴ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 564-67, 125 S. Ct. 1183, 1192-93 (2005); *Atkins v. Virginia*, 536 U.S. 304, 315-16, 122 S. Ct. 2242, 2248-49 (2002); *Enmund v. Florida*, 458 U.S. 782, 792-93, 102 S. Ct. 3368, 3374 (1982); *Gregg*, 428 U.S. at 179-81, 96 S.Ct at 2928-29.

²²⁵ *Trimble v. State*, 300 Md. 387, 478 A.2d 1143 (1984).

²²⁶ *Id.* at 421, 478 A.2d at 1160.

²²⁷ S.B. 276, 433d Sess. (Md. 2013); House Proc. No. 46A (Amend. SB0276/913929/01 proposed by Delegate Parrott on March 13, 2013, rejected 54-83), *available at* http://mgaleg.maryland.gov/2013RS/amds/bil_0006/sb0276_91392901.pdf.

V. CONCLUSION

The repeal of Maryland's death penalty represents the judgment of the legislature and the governor, that the death penalty is no longer consistent with the standards of decency in Maryland. To carry out an execution after making such judgment would be completely arbitrary and inconsistent with our values. Kirk Bloodsworth is living proof that not only does the Maryland system get it wrong, but it gets it wrong when a life is at stake. Kirk Bloodsworth has said that "since the system is run by human beings, I feel like the criminal justice system, in and of itself, is fallible because . . . we make constant mistakes."²²⁸

Benjamin Franklin was known for his opinion "that it is better [one hundred] guilty Persons should escape than that one innocent Person should suffer."²²⁹ Less dramatically, English Jurist William Blackstone stated that it is "[b]etter that ten guilty persons escape than that one innocent suffer."²³⁰ Yet, for every ten American executions there is at least one person exonerated from death row.²³¹

Interestingly, the Minority Report from the Maryland Commission on Capital Punishment states that "hundreds of years of jurisprudence have stood for the principle that it is better for ten men to go free than one innocent man to be convicted."²³² If the supporters of the death penalty in the Minority Report agree with that statistic, and that is the current ratio of executions to exonerations, all death row sentences should be commuted to life in order that we not convict, let alone put to death, an innocent man.

²²⁸ Bloodsworth Interview, *supra* note 133.

²²⁹ Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), 2 THE WORKS OF BENJAMIN FRANKLIN 480 (1970) (citing MARTIN MADAN, THOUGHTS ON EXECUTIVE JUSTICE 163 (2nd ed. 1785) (on file with the Harvard University Library System)). According to Franklin, "even the sanguinary author of the 'Thoughts' agrees to it". *Id.*

²³⁰ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND, at 358 (J.W. Jones trans., 1765-1769).

²³¹ *The Case Against the Death Penalty*, ACLU (Dec. 11, 2012)

<https://www.aclu.org/capital-punishment/case-against-death-penalty>.

²³² *Minority Report*, *supra* note 172, at 19.