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Too much cruelty, too little clemency

Texas nears 200th execution under current governor

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Texas long ago decided that the death penalty is a just and appropriate punishment for the most horrible crimes committed against our citizens. While we respect our friends in Europe, welcome their investment in our state and appreciate their interest in our laws, Texans are doing just fine governing Texas.

Spokesperson for Governor Rick Perry on EU call for halt to Texas executions, August 2007

1. A 'POINTLESS AND NEEDLESS' DEPRIVATION OF LIFE

On the evening of 9 January 2001, 37-year-old Jack Clark was taken from his prison cell in Texas, USA, and killed. This calculated killing was conducted by state government employees. It was not necessary. It could have been stopped. While deemed lawful by the courts, in the end it was a political choice to carry it out. Although such a killing could have, and has, occurred in a number of other US states both before and since – indeed one was carried out in Oklahoma on that same evening – it would not have happened in a majority of other countries at the beginning of the 21st century. Eight years later, even fewer countries operate this particular state policy. It is becoming less and less part of the modern world.

It was not the first time such a killing had happened in Texas – far from it – and it was not to be the last. However, the execution of Jack Clark was the first to be carried out under the governorship of Richard Perry, the Lieutenant Governor who had been sworn in as the state's 47th Governor three weeks earlier, on 21 December 2000, following the election of the previous governor, George W. Bush, to the office of US President. The outgoing governor's subsequent disregard for international law in the White House was perhaps less surprising to those familiar with his record on the death penalty in Texas where such disregard could be said to have been incubated. Meanwhile, under his successor in the Texas Governor's Mansion, the state's resort to judicial killing has continued apace, not infrequently breaching the USA's international obligations.

There were 152 executions in Texas during the nearly six years of the Bush governorship (1995-2000). Now looming is the 200th execution during Rick Perry's term in office.¹ The combined total of more than 350 executions in Texas under these two governors represents 30 per cent of the national total since executions resumed in the USA in 1977. Virginia is ranked second to Texas in executions. In 30 years, Virginia has killed 103 people in its death chamber, half the number put to death in Texas in eight. This is geographic bias on a grand scale. Texas, where about seven per cent of the population of the USA reside, and where fewer than 10 per cent of its murders occur, accounts for 37 per cent of the country's

¹ At the time of writing, there had been 197 executions during this period. The 200th execution was due to take place on 2 June 2009. As noted below, at least one capital clemency case came before Lt. Governor Perry when Governor Bush was out of state on the presidential campaign trail. The prisoner in question was executed, after a reprieve for DNA testing was rejected. The original trial judge now believes that the condemned man may have been innocent.

executions since 1977, and 41 per cent since 2001. Rid Texas of executions and, in terms of judicial death toll, the country could effectively be almost halfway to a nationwide moratorium.

Not every murder in the USA, or in Texas, is punishable by the death penalty and not every capital murder is punished by execution. Jack Clark, for example, was convicted of one of the 2,000 murders in Texas in 1989, and one of 21,500 murders nationwide that year. He became one of 26 defendants to be sentenced to death in Texas in 1991, and one of 268 nationwide. Under US capital law, only the “worst of the worst” crimes and offenders are subject to execution, resulting in an attrition rate by which only around one per cent of murders result in the death penalty. In the words of the US Supreme Court, the death penalty is “limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution”.² Carefully framed capital statutes, guided prosecutorial discretion, juror consideration of mitigating and aggravating factors, and multiple judicial appeals, ensure consistency, accuracy and fairness in capital justice. And then, in the words of the US Supreme Court’s Chief Justice in 1993, in a Texas death penalty case, because “it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible”, executive clemency provides “the ‘fail-safe’ in our criminal justice system”.

At least that is the theory. Reality is very different. Arbitrariness, discrimination and error mark the death penalty in Texas as elsewhere in the USA, along with the inescapable cruelty of this outdated punishment. Clemency all too often fails to prevent injustice.

International law recognizes that some countries retain the death penalty. However, this acknowledgment of present reality should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of Article 6.6 of the International Covenant on Civil and Political Rights. With a view to abolition, international standards require a narrowing of capital punishment and the application of safeguards aimed at minimizing arbitrariness and irrevocable error. Children, the mentally impaired, the inadequately defended, and those whose guilt remains in doubt are among those supposed to be protected from the death penalty. Those executed in Texas since Jack Clark was put to death have included individuals from each of these categories.

This report looks back at a few of the cases of prisoners executed in Texas during Governor Perry’s term in office, and forward to a few cases that may yet come across his desk. This is not to suggest that the governor alone is responsible for the fate of those on death row. Many people are involved in capital justice – from prosecutors to jurors, from legislators to prison staff, from judges to members of the clemency board. In some cases, even the prisoners themselves assist the state in its pursuit of execution. About one in 10 of the more than 1,150 executions carried out in the USA since 1977 have been of condemned inmates who had given up their appeals and “consented” to being killed by the state.³ While some prisoners give up their appeals after years on death row, the death wish of others precedes their trials. Their unwavering pursuit of execution suggests that for them, far from being the deterrent some politicians claim, the death penalty represents a form of escape, whether from the torments of their lives, their crimes, or their minds. There have been seven such executions in Texas during Governor Perry’s time in office. For example, **Christopher Swift** was put to death on 30 January 2007 after less than two years on death row. According to one of his trial lawyers, “receiving the death penalty is what he’s wanted from day one, from the first day I met him.” Christopher Swift had prevented his lawyers from presenting any witnesses at his 2005 trial. He waived his right to a lawyer for his automatic mandatory appeal, and when the death sentence was affirmed, asked for an execution date to be set.

² *Roper v. Simmons* (2005), quoting *Atkins v. Virginia* (2002).

³ See: USA: Prisoner-assisted homicide - more ‘volunteer’ executions loom, May 2007, <http://www.amnesty.org/en/library/info/AMR51/087/2007/en>.

The power of the Texas governor to intervene in death penalty cases is somewhat circumscribed. Under Texas law, while the governor has unfettered authority to issue a one-off 30-day reprieve for anyone facing execution, he or she cannot grant a longer reprieve or commute a death sentence without a recommendation to do so from a majority of the members of the state Board of Pardons and Paroles. At the same time, the governor can reject such a recommendation.

Nevertheless, it would be surprising if the governor would not have substantial influence with the Board if he or she chose to take stands in favour of clemency in capital cases. The governor appoints the Board's members (with state Senate confirmation), and the seven current members were all appointed by Governor Perry. Moreover, under the Texas Administrative Code, "The board shall investigate and consider a recommendation of commutation of sentence in any case, upon the written request of the governor." Before the Board decides on a case, then, the Governor could inform them that he favoured clemency. Following clemency denials by the Board, the Governor could use his power of reprieve to send such cases back with a clear message that he favours commutation.

Like his predecessor, however, Governor Perry has rarely exercised the power of reprieve.⁴ In one case where he did, in December 2004 he granted a 120-day reprieve to **Frances Elaine Newton** on the recommendation of the Board of Pardons and Paroles. In a statement, he said that "he saw no evidence of innocence", as the prisoner claimed, but decided to allow further review in the courts. He said that "justice delayed in this case is not justice denied". The Harris County District Attorney, whose office prosecuted Newton and who had opposed a reprieve, expressed his disappointment at the decision. He was quoted as saying: "On the other hand, it doesn't make any difference to me if she is executed today or in 120 days." When the case came back to Governor Perry in 2005, he refused to issue a 30-day reprieve, saying it "would only delay justice". Frances Newton was killed on 14 September 2005.⁵

Two years later, on 25 September 2007, Governor Perry denied the request for a 30-day reprieve in the case of **Michael Richard** facing execution that evening. On that same day, the US Supreme Court agreed to hear the case of *Baze v. Rees*, a challenge to the constitutionality of lethal injection, the method used by Texas in all its executions since 1982. The Court's consideration of this issue led to the suspension of executions nationwide for the next seven months. Michael Richard was put to death, however, after the Presiding Judge on the Texas Court of Criminal Appeals refused to keep her office open in order to receive his last-minute plea for a stay in light of the Supreme Court's announcement. At the time of writing, there were continuing moves in the state legislature to seek to impeach Judge Sharon Keller for "her apparent irresponsible refusal to abide by the prior practice of the Texas Court of Criminal Appeals in order to receive the appeal of Michael Richard, which conduct may have resulted in Mr Richard's deprivation of life without due process of law... by means of a potentially unlawful execution by lethal injection, and in the embarrassment of the State of Texas in a manner that casts severe doubt on the impartiality of the Texas Court of Criminal Appeals and the entire criminal justice system of this state".⁶

⁴ See USA: Killing without mercy – Clemency procedures in Texas, June 1999, <http://www.amnesty.org/en/library/info/AMR51/085/1999>.

⁵ Of the 197 executions carried out during Governor Perry's term in office by 29 April 2009, 46 were of prisoners who had been prosecuted in Harris County (where Houston is situated). Another 20 were prosecuted in Dallas County.

⁶ House Resolution 480. See also Miriam Rozen, 'Out of time: The last-day battle over the execution of Michael Wayne Richard', *Texas Lawyer*, 19 November 2007 ("Having exhausted their options with the courts, [Richard's lawyers] turned to the executive branch. [Attorney] Wiercioch says at about 7:40 pm, [attorney] Levin called Michael Bryant, assistant general counsel to Texas Gov. Rick Perry for the third time that day. Levin says Bryant told her that although the CCA clerk's office closed at 5 pm and the Supreme Court had decided to hear *Baze*, Perry would not grant Richard a reprieve, which Richard had requested in writing earlier that day. Bryant declines to comment for this article, referring all questions to the governor's press spokesman Robert Black. In an e-mail, Black's office, noting complaints filed after Sept. 25 against Keller with the State Commission on Judicial Conduct, the state agency charged with investigating allegations of misconduct by judges, says, 'Given that the facts surrounding the recent execution of Michael Richard are currently being reviewed by the Judicial Conduct Commission, it would be inappropriate for the

While the courthouse door was shut on Michael Richard, the door to clemency, if open, remains the tightest of squeezes for the vast majority of the Texas condemned, despite their frequently compelling petitions. Although Governor Perry has commuted the death sentences of some 30 Texas prisoners after they fell under the US Supreme Court rulings in 2005 and 2002 prohibiting the execution of juvenile offenders and people with mental retardation, it was not until nearly seven years after he took office that he commuted the death sentence of a prisoner facing imminent execution in whose case there was not a judicial ruling effectively requiring clemency. During this time, 163 condemned prisoners had been put to death in Texas. There has not been another such commutation since.

Not only that, but in 2004, in the case of an inmate suffering from very serious mental illness, Governor Perry rejected a recommendation for commutation by the Board of Pardons and Paroles (see Section 3). While Amnesty International considers that Governor Perry abdicated his responsibility to provide human rights leadership in this case, it was a reminder of political reality in Texas. Given that the state electorate has twice returned Governor Perry to office, his record on executions has clearly not registered enough concern among enough voters to cause him to change direction on this issue.⁷

Politicians in the USA frequently seek to justify the death penalty as democracy in action. The people want the death penalty, the argument goes. If they did not, they could vote for politicians and legislators who would bring about abolition. Of course, this argument assumes a fully informed electorate fully engaged on this issue, and an elected class fully responsive to such public opinion. In any event, respect for human rights should not be dependent on opinion polls or other indicators of majority public sentiment.⁸ As has surely been illustrated by US government conduct in recent years, just because democratically elected officials approve a policy or law for use against individuals deprived of their liberty that is incompatible with human dignity, it does not make it right.

Amnesty International opposes the death penalty in all cases, unconditionally. It is the ultimate cruel, inhuman and degrading punishment. To end the death penalty is to abandon a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly, in social and psychological terms as well as to the public purse (a fact which is drawing increasing public concern in the USA in the current economic climate).⁹ It has not been proved to have a unique deterrent effect. It tends to be applied in a discriminatory way, on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it.

The death penalty state perpetuates the myth that judicial killing is a constructive, effective tough-on-crime policy, when the reality is that the lethal power of the state is being turned against individuals often already socially or economically marginalized or psychologically scarred by dysfunctional

Governor's Office to comment. It should be noted, however, that the Governor's Office waits to proceed until the courts have completed their work").

⁷ After initially being sworn in as Governor from the position of Lt. Governor in December 2000, Rick Perry was subsequently elected to a four-year term on 5 November 2002 and re-elected on 7 November 2006.

⁸ See, USA: Death and democracy, 17 May 2007, <http://www.amnesty.org/en/library/info/AMR51/084/2007/en>.

⁹ The "Death Row Facts" given on the website of the Texas Department of Criminal Justice state that the "cost per execution for drugs used is \$86.08". It fails to provide the fuller picture. A senior Texas judge said in 2009, "The last time I lectured on the subject, a capital trial cost over \$3 million. Well, we can keep a person in prison for life for about \$500,000. Some say it costs too much to keep them locked up, but that doesn't square. It's a lot cheaper to keep them in a 9 by 6 cell instead of paying the attorneys' fees and all the other costs that go with a capital trial. Some counties can't afford it." Judge favors sentence other than death. *Cleburne Times-Review*, 13 April 2009.

backgrounds of deprivation, abuse and neglect. In case after case among the condemned, for example, a history of physical, sexual or emotional abuse is revealed. Time after time, lawyers appointed by the state to defend indigent capital defendants have failed to investigate such backgrounds, leaving juries in the dark about the life stories of those whose execution they are being urged by the state to approve.

On 14 November 2001, **Jeffrey Tucker** became the 15th prisoner to be put to death during Governor Perry's first term in office, providing an early indication that the quality of mercy in Texas would remain strained. In his final statement before being killed, Tucker apologised for the suffering caused to the family of the man he killed, saying "I never intended for your husband and father to be killed, it was just an accident. I sincerely regret any pain and sorrow". In terms of his selection to be among the USA's "worst of the worst" who should die for his crime, Jeffrey Tucker was one of 29 people sentenced to death in Texas in 1989 (and one of 258 nationwide), having committed one of the more than 2,000 murders in the state in 1988 (out of a national total of more than 20,500). The jury which sentenced him to death heard little of his abusive childhood and no expert evidence about its effects on his mental health. In 1997, both of his trial lawyers signed affidavits acknowledging their failure. One of them wrote: "it was certainly not due to any legal strategy, tactic or plan that we neglected to pursue and introduce documents or testimony regarding Mr Tucker's mental illness... The idea of investigating a client's childhood and mental health history was new to us." Both lawyers said they believed that such evidence could have saved their client's life.

A psychological evaluation in 1997 found compelling evidence that Jeffrey Tucker had experienced severe post traumatic stress disorder (PTSD) since adolescence. It suggested that if he had had appropriate treatment, the crime might never have happened. It found evidence that the shooting of the victim may have occurred during a PTSD flashback when the victim lunged at Tucker. Jeffrey Tucker had himself recalled that during this episode, "I saw my Dad jumping out at me. I was back there. Then the gun went off." The evaluation described Jeffrey Tucker's case as "a prototypical illustration of the possible long-term consequences of untreated childhood sexual abuse. A pervasive sense of stigmatization, betrayal, powerlessness, and traumatic sexualization derived from the child physical and sexual abuse that he endured, coalesced and literally 'ticked away', much like a psychological time bomb, until a constellation of certain external and internal stimuli and intrusive recollections 'detonated' within Jeffrey...". This is not, as defenders of the death penalty might suggest, to excuse violent crime, but to seek to explain it. The pursuit of answers to the complexity of criminal behaviour surely does not lie in the state eradication of a small selection of the human beings who commit murder.

The US Court of Appeals for the Fifth Circuit upheld Jeffrey Tucker's death sentence in 2001, adding that it did "not profess to be unmoved by the dreadful circumstances of Tucker's childhood, and we understand the relevance of such evidence to the jury's determination of Tucker's moral culpability at the time of the crime". After the courts washed their hands of the case, neither the Board of Pardons and Paroles, nor Governor Perry, were moved to stop the execution. Yet their ability to do so was not limited by the strictures of legal precedent to which judges may consider themselves bound.

Every death sentence passed and every execution carried out in Texas is based on a finding of the condemned individual's so-called "future dangerousness". Before passing a death sentence, a Texas capital jury must decide whether there is a "probability" that the defendant would commit "criminal acts of violence" that would "constitute a continuing threat to society" if allowed to live. This aspect of Texas capital sentencing – developed by the state legislature in 1973 as it moved swiftly to reinstate the death penalty after the US Supreme Court had invalidated the country's death penalty statutes in 1972 (in *Furman v. Georgia*) – continues to raise serious concerns. Texas prosecutors have repeatedly resorted to the highly dubious use of "expert" testimony purporting to be able to predict dangerousness. Research has shown such predictions to be wildly inaccurate. Not least because of the number of teenaged offenders and mentally impaired individuals sentenced to death (see Sections 2, 3 and 4), concerns about the future dangerousness scheme include whether it has allowed fear to drive juror decision-

making rather than an entirely rational consideration of defendant culpability. Moreover, Texas prosecutors have introduced a range of “evidence” at sentencing that purports to illustrate the individual’s dangerousness. This has included information about past convictions, unadjudicated acts, juvenile records, property crimes, and non-violent disciplinary problems in school.¹⁰ For example, seeking to persuade the jury to vote for the execution of **Troy Kunkle** for a crime committed when he was 18 years old, the prosecution presented three witnesses who worked at schools that Troy Kunkle had attended. They testified that he had had behaviour problems, such as truancy and failure to follow rules against smoking and disruption in the classroom. The death sentence passed by the jury was carried out in 2004.

According to the US Supreme Court in its death penalty rulings, “standards of decency” are evolving in the USA. Applying this framework, in 2002 it outlawed the execution of people with mental retardation, and three years later, it did the same in the case of people who were under 18 years old at the time of the crime. Against the latter category of defendant, in clear violation of international law, Texas had been the USA’s leading user of the death penalty to this point, and was a leader in the former category also. Texas was out of step even with national standards.

On 16 July 2007, Texas again moved away from national standards when Governor Perry signed into law a bill allowing execution for the non-homicidal rape of a child, joining five other states that allowed such use of the death penalty.¹¹ Within a year of Texas passing the law – which contradicted the requirement under international standards to narrow the scope of the death penalty – the US Supreme Court, applying its “evolving standards of decency” framework, ruled that such use of the death penalty was excessive.¹² The Texas administration had filed a legal brief in the case pleading with the Court to conclude that “the Constitution allows democratically elected legislatures to choose the most severe punishment” in such cases. The brief stated: “This Court’s precedents have long spoken of evolving standards of decency. Such evolution need not be in only one direction”. Responding to the Court’s subsequent ruling, Governor Perry issued a statement saying that “we recognize that our state is guided by the decisions of the US Supreme Court”. Nevertheless, he chose to quote from the Court’s dissenting opinion, and added that “I believe the vast majority of Texans agree that the death sentence is the appropriate punishment for someone convicted of raping a child”.

Again, the political attraction of the death penalty threatens to obscure human complexity. Six years earlier, on 20 August 2002, Governor Perry had allowed the execution of **Gary Etheridge** to proceed. Like many among the condemned in the USA, Etheridge had himself suffered a childhood of appalling abuse. In such cases the death penalty becomes part of a cycle of violence. Etheridge had been physically abused by his father, particularly when his father was drunk. He was repeatedly raped and physically abused by an older brother starting from when he was six years old. He began using drugs and getting into trouble with the law from the age of 12. As a young man, he attempted suicide on at least two occasions, once after being raped while serving a prison term for a prior, non-violent offence. His severe depression, when left untreated outside prison, contributed to his self-medicating with illegal drugs and to serious drug addiction. He was intoxicated on a combination of heroin and cocaine when, as a 26-year-old, he sexually assaulted and murdered a 15-year-old girl. At his trial for that murder, his lawyers were aware of the mitigating evidence of his horrific upbringing, but chose not to present it. They feared that this evidence could be used by the prosecutor to argue that Gary Etheridge would be a future danger if allowed to live. Indeed at the 1990 trial, the (elected) judge had referred to the defendant as a “piece of

¹⁰ Meghan Shapiro, An overdose of dangerousness: How ‘future dangerousness’ catches the least culpable capital defendants and undermines the rationale for the executions it supports. *American Journal of Criminal Law* (pre-publication version, 24 April 2009).

¹¹ USA: More about politics than child protection. The death penalty for sex crimes against children, 21 June 2006, <http://www.amnesty.org/en/library/info/AMR51/094/2006>.

¹² USA: Another step up the evolutionary ladder, Supreme Court prohibits death penalty for child rape, 26 June 2008, <http://www.amnesty.org/en/library/info/AMR51/069/2008/en>.

trash” and a “blight on society”. Such language has all too often been used by elected officials when advocating for the dehumanizing penalty that is capital punishment.

To date, Governor Perry has continued to offer his full support for the death penalty. On 17 June 2005, he signed into law a bill passed by the Texas legislature to change the terminology used on the death certificates of executed prisoners in his state. In a statement, Governor Perry said that “individuals who commit unspeakable crimes against Texas citizens and are put to death under Texas law are not victims. They are criminals and the final document that bears their name should reflect this fact.” The legislation required the death certificate to record the death as “judicially ordered execution”. There can be no masking the human reality of the death penalty, however. And, in the end, the only measurable impact of the 200 executions conducted during Governor Perry’s term in office – beyond the millions of dollars spent in getting these selected individuals to the death chamber – will have been the creation of 200 more dead bodies.

By focussing on cases of the condemned in this report, Amnesty International does not seek to downplay the seriousness of the crimes of which they were convicted or to minimize the suffering caused. It seeks only to further its aim of bringing about an end to the death penalty in Texas, the USA and worldwide.¹³ As is common among elected officials who advocate judicial killing, Governor Perry’s statements on the death penalty usually emphasize the heinous nature of the crimes for which those on death row have been convicted. It is beyond dispute that these crimes – all of them involving the murder of one or more people – are serious. But so too, are the many more murders that did not result in the death penalty.

The macabre milestone of the 200th execution under an eight-and-a-half-year governorship will hopefully give pause for thought for those in political or judicial office with the power over life and death in the capital justice system to reflect on how this policy flies in the face of widely held concepts of justice and human dignity. Any of them, whether judge or prosecutor, legislator or governor, can and should speak out for an end to this cruel and unnecessary punishment. Governor Rick Perry should join such calls, and work with the state legislature to abolish the death penalty in Texas. Meanwhile, he should do all in his power to prevent further executions in his state.

After the US Supreme Court, in *Baze v. Rees* on 16 April 2008, upheld the constitutionality of lethal injection as an execution method, Governor Perry issued a statement that “Texas is a law and order state, and I stand by the majority of Texans who support the death penalty as it is written in Texas law”. Texas resumed executions on 11 June 2008, and has carried out more than 30 since then.

Governor Perry’s response to the *Baze* ruling contrasts with the opinion in the ruling itself of the most senior Justice on the US Supreme Court, who wrote that “the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment”. Justice John Paul Stevens has served on the Court for 33 years, a time which has seen six Texas governors come and go and a seventh in his ninth year in office. More to the point, Justice Stevens has witnessed the entire “modern” era of the US death penalty from the bench of the country’s highest court. Given that theirs is the country’s leading executing state, it would behove the people and politicians of Texas to pay special attention to what Justice Stevens has said about what his experience has taught him about the death penalty, and recognize that it is a destructive and brutalizing waste of resources, a cruel tradition that belongs to history.

¹³ See <http://www.amnesty.org/en/death-penalty>. Also, for example, USA: The experiment that failed: A reflection on 30 years of executions, January 2007, <http://www.amnesty.org/en/library/info/AMR51/011/2007/en>.

2. KILLED FOR CRIMES COMMITTED WHEN CHILDREN

A long-standing principle of international law is that the death penalty must never be used against those who were under 18 years old at the time of the crime. When Governor Perry came to office in January 2001, Texas accounted for nine of the 17 such executions in the USA since 1977. Five more were to occur in the USA before the US Supreme Court outlawed this use of the death penalty in the USA in *Roper v. Simmons* on 1 March 2005. Four of these five people were killed in the Texas execution chamber after clemency was denied. When the *Roper* ruling was issued, Governor Perry issued a statement saying that prior to the ruling, “the state upheld the law as it was written and interpreted to ensure justice for the victims of some horrible crimes”. He did not mention the fact that he and his state, and the USA more broadly, had until then been violating international law.

The *Roper* ruling caused anger among conservatives for what was characterized as “judicial activism”. The founder of the evangelical Christian group Focus on the Family, for example, described Justice Anthony Kennedy, who authored the *Roper* opinion, as “the most dangerous man in America”. The then majority speaker of the US House of Representatives, Tom DeLay, a congressman from Texas, warned that under the Constitution, Congress could remove federal judges who failed to display “good behaviour”. John Cornyn, US Senator and former Texas Attorney General, was also perceived as supportive of this backlash.¹⁴

On 22 June 2005, Governor Perry, with some apparent reticence, commuted the death sentences of 28 Texas prisoners for crimes committed when they were 17 years old.¹⁵ His statement announcing the commutations emphasised that his hand had been forced by the *Roper* ruling: “While these individuals were convicted by juries of brutal murders and sentenced to die for their heinous crimes, I have no choice but to commute these sentences to life in prison as a result of the Supreme Court ruling”.

Governor Perry had earlier suggested that he had little choice but to allow the killing of **Napoleon Beazley**, one of the four people during his governorship for whom the *Roper* decision came too late. In a statement, the Governor said that “To delay his punishment would be to delay justice.” Even the evidence of racial discrimination in this case, coupled with the fact that Beazley was only 17 at the time of the crime, was not enough to persuade Governor Perry to intervene.¹⁶

John Luttig and Ivan Holland were both 63 years old when they met untimely deaths in the east Texas town of Tyler. Each was gunned down in a senseless act of violence. John Luttig, a wealthy white businessman, was shot at his Tyler home on 19 April 1994. Two years later, on 7 May 1996, Ivan Holland, a homeless African American man who lived on the streets of Tyler, was shot and left for dead outside a convenience store.

Ivan Holland’s assailants were three young white men, described as having a “Hitler fetish” and a habit of verbally abusing blacks, Jews and Hispanics. At a 1997 hearing, 23-year-old Todd Rasco said that when he told his two friends that he was contemplating suicide, they had urged him to “just kill a nigger” instead. The three had driven around Tyler, armed with Rasco’s new shotgun, looking for a black person to kill. Todd Rasco said that he had put socks on his hands so as not to leave fingerprints on the weapon,

¹⁴ See, for example, ‘And the verdict on Justice Kennedy is: Guilty’. Washington Post, 9 April 2005. ‘In battle to pick next Justice, right says avoid a Kennedy’. New York Times, 27 June 2005.

¹⁵ They included Nanon Williams. See USA: Dead Wrong. The case of Nanon Williams, child offender facing execution on flawed evidence, January 2004, <http://www.amnesty.org/en/library/info/AMR51/002/2004>. In December 2008, the US Court of Appeals remanded Nanon Williams’ case to the district court for an evidentiary hearing on his claim of ineffective assistance of counsel. A 29th Texas prisoner who was 17 at the time of the crime had his death sentence reduced to life imprisonment by the Texas Court of Criminal Appeals, also in June 2005.

¹⁶ See USA: Too young to vote, old enough to be executed: Texas set to kill another child offender, July 2001, <http://www.amnesty.org/en/library/info/AMR51/105/2001>.

and that he and his two friends later laughed when news reports indicated that police were looking for three Hispanic men. In a plea arrangement, Todd Rasco was sentenced to 45 years in prison. Twenty-one-year-old Chad Crow, was sentenced to 37 and a half years for encouraging Rasco to shoot Holland. Both inmates will be eligible for parole after serving half of their sentences.

John Luttig's attackers were three black teenagers. Their aim was to steal the Mercedes Benz in which John Luttig had just returned home. Napoleon Beazley was sentenced to death as the 17-year-old gunman. His two co-defendants, Cedric and Donald Coleman, who later said that Beazley was so remorseful after the shooting that they had to stop him committing suicide, were sentenced to life imprisonment for their role in the crime. They will be eligible for parole after 80 years, or about six decades after Todd Rasco and Chad Crow.

At Napoleon Beazley's trial in front of 12 white jurors, the two white prosecutors had referred to the black defendant as an "animal" whose "prey happened to be human beings". The prosecution had removed several African Americans from the jury pool, ensuring an all-white jury. One of them was a man who, a dozen years earlier, had been prosecuted and acquitted for drunk driving. This made him an unsuitable juror in the eyes of the prosecution. Not so for a white juror, who was selected despite having been convicted of driving while intoxicated. After the trial, it emerged that this same juror harboured profound racial prejudice, including by frequently refusing, in his job as a repairman, to fix items brought in by black customers. He later said of Napoleon Beazley, "the nigger got what he deserved", and the juror's wife confirmed that her husband "on more occasions than not" used the term "nigger" to describe African Americans.

Also voting for execution was a woman who appears to have been a long-time employee of one of John Luttig's business partners. This was not made known at jury selection. Nor was her presidency of the local branch of the United Daughters of the Confederacy, a heritage organization dedicated to the memory of the South. She had flown a confederate flag daily at her house, and had been featured on a website with a confederate flag. This does not prove racial bias, but as a senior federal judge wrote in 2001 in a separate case, it is a legitimate cause for concern.¹⁷

Napoleon Beazley was executed in Texas on the evening of 28 May 2002, despite a former Texas death row warden, 18 state legislators, the prosecutor from Beazley's home county, and even the judge who oversaw his trial and set his execution date, being among the thousands of people who had appealed for clemency. In his final statement before being killed, he said,

"The act I committed to put me here was not just heinous, it was senseless. But the person that committed that act is no longer here - I am. I'm not going to struggle physically against any restraints. I'm not going to shout, use profanity or make idle threats. Understand though that I'm not only upset, but I'm saddened by what is happening here tonight. I'm not only saddened, but disappointed that a system that is supposed to protect and uphold what is just and right can be so much like me when I made the same shameful mistake...Tonight we tell the world that there are no second chances in the eyes of justice...Tonight, we tell our children that in some instances, in some cases, killing is right."

¹⁷ "It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag *may* harbor racial bias against African Americans". *Blanding v USA*. US Court of Appeals for the Fourth Circuit, 18 May 2001. This opinion was written by Circuit Judge J. Michael Luttig, the son of John Luttig, the murder victim in the Beazley case.

A few hours earlier, in Missouri, the Missouri Supreme Court had granted an indefinite stay of execution to Christopher Simmons pending the outcome of a case then pending before the US Supreme Court to decide whether “standards of decency” in the USA had evolved to the extent that executing people with mental retardation constituted “cruel and unusual” punishment under the US Constitution. While Simmons was not himself raising a claim of such a mental disability, his appeal argued that a favourable US Supreme Court decision on that issue could lead to a ruling that a national consensus also existed against allowing the execution of those aged under 18 at the time of their crimes (Simmons, like Beazley, was 17 years old at the time of his crime).¹⁸

About a month earlier, the Texas Court of Criminal Appeals (TCCA) had denied a stay of execution for Napoleon Beazley on the same argument accepted by the Missouri Supreme Court in Christopher Simmons’ case. When Beazley’s lawyers heard on 28 May 2002 that Simmons had received his stay of execution, they asked the TCCA to reconsider its denial of a stay but were turned down by a vote of five to three about an hour before Napoleon Beazley’s execution. They also made a new appeal to Governor Perry’s office for a reprieve based upon Missouri’s decision but were turned down. On 20 June 2002, the US Supreme Court outlawed the execution of people with mental retardation and built on this ruling three years later by prohibiting the execution of child offenders, in *Roper v. Simmons*. The case the Court took to decide the child offender question was that of Christopher Simmons. Yet it had allowed Napoleon Beazley to go to his death, as had the Texas courts and Governor Perry.

Seven months before Governor Perry refused to stop Napoleon Beazley’s execution, he had allowed **Gerald Mitchell** to be killed in the Texas death chamber. Mitchell, too, was only 17 at the time of the crime. He too was an African American tried before an all-white jury, for the murder of a white person. After the original jury pool had been pared down to individuals who were qualified to serve, the state removed all seven African Americans from the remaining group using peremptory strikes, the right to dismiss jurors without giving a reason. After the prosecutor was challenged on his apparently discriminatory use of peremptory strikes, he stated that he used a basic standard when selecting jurors: “I was looking for someone who’s a solid citizen, who had a background in the community, had a stake in the community...” He also said that he did not want jurors who would view youth as such a mitigating factor that they could not vote for a death sentence, or those who would look at the defendant as if he were their son.

Here one might recall the opinion of Justice Stevens in the *Baze v. Rees* ruling in 2008 (see Section 1), in which he revealed that his more than three decades on the US Supreme Court had led him to conclude that the death penalty represented the “pointless and needless extinction of life”. He wrote that “of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community”. He added that the Supreme Court has allowed race “to continue to play an unacceptable role in capital cases. Thus, in *McCleskey v. Kemp* (1987) the Court upheld a death sentence despite the strong probability that [the defendant’s] sentencing jury... was influenced by the fact that [he was] black and his victim was white”. Studies have consistently shown that race, particularly race of victim, has an influence on who is sentenced to death in the USA.¹⁹

Like Napoleon Beazley and Gerald Mitchell, **T.J. Jones** was a black teenager convicted of killing a white person. His case also once again raised questions about the failure of wider society to address earlier indications of escalating criminal behaviour, something that is frequently thrown into stark relief when the state pursues a punishment which assumes absolute culpability on the part of the accused capital defendant. T.J. Jones, who was assessed as having borderline retardation and an IQ of 78, was executed

¹⁸ Generally, see USA: Indecent and internationally illegal. The death penalty against child offenders. September 2002, <http://www.amnesty.org/en/library/info/AMR51/143/2002>.

¹⁹ USA: Death by discrimination - the continuing role of race in capital cases, April 2003, <http://www.amnesty.org/en/library/info/AMR51/046/2003>.

in Texas on 8 August 2002 for a crime committed when he was 17 years old. At his trial, his mother had testified that she had sought official help with her son when he quit school at 15 and began to stay away from home and come into conflict with the law. She was unsuccessful. A psychologist testified at the trial that T.J. Jones could be offered rehabilitative programs, as he could have been if the authorities had offered appropriate intervention when he had come into contact with the juvenile justice system as a young teenager, as international law and standards require.

Three weeks after Jones was killed, African American **Toronto Patterson** was also put to death in Texas for a crime committed when he was 17. After his arrest, without a lawyer present, 17-year-old Patterson had given Dallas police a statement in which he admitted to being at the scene of the crime with two Jamaican drug dealers (whose existence was later verified by a trial witness), but did not admit to the murders themselves. However, after being held incommunicado for over four hours, Patterson confessed to the crime. In a separate case in Dallas a month later, 21-year-old Michael Martinez was arrested and charged with capital murder. He confessed to the same police officer, who apparently used the same techniques he had employed in Toronto Patterson's case. Martinez's confession was false, and he was later exonerated. Toronto Patterson's jury was not allowed to hear Martinez's testimony to weigh against Patterson's claim that his confession had been coerced and that he was innocent of the murders. He was sentenced to death. Executed on 28 August 2002 after Governor Perry refused to intervene, he maintained his innocence to the end. In his final statement, strapped down in preparation for his execution, Toronto Patterson said: "I feel a great deal of responsibility and guilt for all this crime. I should be punished for the crime, but I do not think I should die for a crime I did not commit." He was still only 24 years old.

2.1 DENYING POSSIBILITY OF CHANGE: YOUNG OFFENDERS STILL FACE DEATH PENALTY

Texas and other US jurisdictions can no longer execute people for crimes committed when they were younger than 18 years old. The US Supreme Court's 2005 *Roper v. Simmons* ruling, which Amnesty International had long campaigned for, belatedly brought the USA into line with the international prohibition of this use of the death penalty. This standard stems from recognition of the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility often associated with youth, and the particular capacity for change in a young person. Eighteen is a *minimum* standard.

In 1993, in the case of a Texas death row prisoner who was 19 at the time of the crime, the US Supreme Court emphasised that:

"youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults, and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions... [T]he signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."²⁰

Four years earlier, in the death penalty case of *Stanford v. Kentucky*, four Supreme Court Justices had noted that "age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals", and "it is in fact a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s." Sixteen years later, the *Roper* majority noted that "drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Indeed, scientific research shows that

²⁰ *Johnson v. Texas* (1993). Dorsie Johnson, black, was executed in 1997 for the murder of a white person.

development of the brain and psychological and emotional maturation continues at least into a person's early 20s.

Texas continues to sentence to death and execute offenders who were teenagers at the time of the crime, that is, 18 or 19 years old. For example, **Norman LeJames**, black, was sentenced to death in December 2008 for a crime committed when he was 19 years old. **Dexter Johnson**, black, was sentenced to death in 2007 for a crime committed 11 days after his 18th birthday. If the crime had been committed less than two weeks earlier, the state would have been categorically prohibited from seeking the death penalty.

In relation to the prisoners Texas executed for crimes committed when they were 17 years old before the 2005 *Roper* ruling stopped this practice, the question of race was a topical one. Eight of these 13 individuals were African American. In addition to the four prisoners executed in Texas since 2001 for crimes committed when they were 17 (all of whom, as noted above, were black), at least another 31 individuals have been put to death during Governor Perry's term in office for crimes committed when they were 18 or 19 years old.²¹ Nineteen of the 31 were African Americans, 13 of whom were executed for crimes involving white victims. At the time of writing, **Derrick Johnson**, black, was due on 30 April 2009 to become the 198th prisoner executed in Texas. He was sentenced to death for a murder committed 10 years earlier when he was 18 years old. Along with Derrick Johnson, there were another 30 prisoners on death row in Texas for crimes committed when they were 18 years old, and 15 who were aged 19 at the time of the crime.²² Twenty-seven of these 46 prisoners are black, 10 are Hispanic, one is Asian (a Cambodian national), and eight are white.

Among the 27 African American prisoners in this group is **Harvey Earvin**, who was 18 years old at the time of the crime, a murder committed during the robbery of a petrol station. That was in 1976. He was still only 19 when he arrived on death row in 1977. He is now 51. **Anthony Pierce**, also black, was about two weeks past his 18th birthday at the time of the crime, and was still 18 when he was sentenced to death in 1978. He will be 50 years old in July 2009.

On 3 March 2009, **Willie Pondexter** became the 193rd person to be executed in Texas during Governor Perry's term in office. This African American prisoner was sentenced to death for the murder in 1993 of an elderly white woman during a burglary committed with others when he was 19 years old. "At 19, you really don't think of the consequences", the 34-year-old Willie Pondexter said in an interview shortly before he was put to death. He said his role in the crime was one taken "basically out of stupidity and ignorance. I know what I did was wrong." "At 19, I was like, a follower. If I didn't go along, you're a punk. At 19, that's my thought process."

²¹ Willie Pondexter (19 at crime / executed 2009); Joseph Ries (19 / 2008); José Medellin (18 / 2008); Carlton Turner (19 / 2008); John Amador (18 / 2007); DaRoyce Mosley (19 / 2007); Kenneth Parr (18 / 2007); Joseph Nichols (2007 / 19); Ryan Dickson (18 / 2007); Vincent Gutierrez (18 / 2007); Willie Shannon (19 / 2006); Justin Fuller (18 / 2006); Derrick O'Brien (18 / 2006); Jermaine Herron (18 / 2006); Clyde Smith (18 / 2006); Troy Kunkle (18 / 2005); Ronald Howard (18 / 2005); Robert Shields (19 / 2005); Demarco McCullum (19 / 2004); Dominique Green (18 / 2004); Edward Green (18 / 2004); Jasen Busby (19 / 2004); Kenneth Bruce (19 / 2004); Cedric Ransom (18 / 2003); Henry Dunn (19 / 2003); Granville Riddle (19 / 2003); Javier Suárez Medina (19 / 2002); Reginald Reeves (19 / 2002); Monty Delk (19 / 2002); Emerson Rudd (18 / 2001).

²² Dexter Johnson (18 at crime); Norman LeJones (19); Juan Ramirez (18); Beunka Adams (19); Anthony Doyle (18); Damon Matthews (18); Richard Cobb (18); Charles Derrick (18); Clinton Young (18); Michael Perry (19); Irving Davies (18); Perry Williams (19); Miguel Paredes (18); Derrick Johnson (18); Obie Weathers (18); Reginald Blanton (18); Larry Estrada (18); Alvin Braziel (18); Robert Woodard (19); Juan Garcia (18); Michael Hall (18); Ray Jasper (19); Milton Mathis (19); Anthony Haynes (19); Richard Vasquez (18); Yokamon Hearn (19); Felix Rocha (18); Julius Murphy (18); Howard Guidry (18) Jose Martinez (18); Pablo Melendez (18); George Jones (19); Erica Sheppard (19); Billy Wardlow (18); Gaylon Walbey (18); Peter Cantu (18); Tony Ford (18); Randolph Greer (18); Robert Campbell (18); Kim Ly Lim (19); Bobby Hines (19); Gustavo Garcia (18); Brent Brewer (19); Marlin Nelson (19); Harvey Earvin (18); Anthony Pierce (18).

His lawyers had petitioned the Board of Pardons and Paroles and Governor Perry for clemency based on Willie Pondexter's rehabilitation on death row, arguing that he no longer posed a future danger to society as the trial jury had found. The clemency petition included statements from two of the jurors from his 1994 trial who no longer believed he should be put to death, given his record of non-violence and reform on death row. It also included statements by a prison guard who said that Willie Pondexter had "never posed a threat within the prison, even when given the opportunity to do so", and that "he would present a risk at all", even if placed within the general prison population. The Archbishop of Galveston-Houston appealed for clemency, writing in a letter dated 13 February 2009 to the clemency authorities:

"It is clear that throughout his youth, Willie Pondexter was not shown love or compassion. He was born to a mother who was mentally ill, abused him, and abandoned him for months at a time when she was hospitalized involuntarily. The young Mr Pondexter was left with his father, a violent man who carried on affairs with several women living in the home. He and his half-brothers and sisters were left to fend for themselves. After his brother's suicide, while in his teens, Mr Pondexter joined a gang.

These facts do not excuse Mr Pondexter's involvement in murder. The abuse and neglect do, however, explain what led to his participation in the crime. Now that he has been removed from this environment, Mr Pondexter has grown to be a peaceful man. By all accounts, over the past 14 years, Mr Pondexter has rehabilitated himself and poses no threat to the guards or his fellow inmates."

The clemency petition sought commutation of his death sentence or, alternatively, a 180-day reprieve so that his lawyers could have more time to collect statements from other prison guards who were apparently willing to testify to Willie Pondexter's rehabilitation. The lawyers presented evidence that the authorities had blocked their efforts to speak to such guards. Their efforts in the federal courts to obtain a stay of execution because of this alleged deliberate frustration of their efforts to investigate and secure evidence in support of the clemency petition were unsuccessful. So, too, was their clemency petition, which had noted that "the members of this Board and Governor Perry have a unique role in the system of capital punishment. It is you who measure and weigh the information provided, and have a most critical role: to decide between life and death." Once again, the Board and the governor chose death.

Four and a half year earlier, on 5 October 2004, Governor Perry had denied the request for a 30-day reprieve for **Edward Green**, who was put to death in the Texas execution chamber later that day. Edward Green was 18 years old at the time of the double murder, a crime that resulted from an apparently spontaneous decision by Green and his 17-year-old friend to rob the couple. A dozen years later, in interviews from death row, he described the crime as "a real act of ignorance, and there really was no motivating factor." He wondered "if I would have ended up here if I had somebody to take me in and show me what being a man is all about. I think the violence in me came from the lifestyle I was living and not being comfortable in myself. I used to be a real fool, and I liked to show everyone I was a fool". He expressed the wish to meet relatives of the victims if it would help them get "closure", adding that he had "never wanted to put them through that pain". In his final statement before being killed, he said "I can only apologize for all the pain I caused". The Governor's statement denying a reprieve focussed only on the "brutal and senseless murders" and that "there is no doubt about [Green's] guilt". Such a statement would seem to suggest a narrow view of the power of executive clemency.

Three months later, on 25 January 2005, **Troy Kunkle** was put to death in the Texas execution chamber. In his final statement, he said "I would like to ask you to forgive me. I made a mistake and I am sorry for what I did." He was 18 years and two months old at the time of the murder for which he was being killed. He had no prior criminal record, and at the time of the crime was emerging from a childhood of deprivation and abuse. When he was 12 years old, his father's mental health had deteriorated, resulting

in severe mood swings during which he would subject his son to severe physical abuse. It was during this time that the boy's problems at school escalated, conduct which would later be used by the state in its effort to persuade the jury to vote for his execution (see Section 1). In post-conviction evaluations, a psychologist concluded that Troy Kunkle was suffering from schizophrenia, a diagnosis he said was supported by prison records. He stated that much of Troy Kunkle's early adolescent behaviour problems could be "linked to his father's aggressive and psychotic behaviour" towards him throughout his childhood, as well as to the lack of nurturing when his mother was herself suffering from serious mental illness. The psychologist concluded that an expert evaluation at the time of the trial would likely have shown Troy Kunkle's emerging mental disorder, and the exacerbating effect of substance abuse on this. The jurors who sentenced him to death had heard no expert testimony, however.

If the murder for which **Ryan Dickson** was sentenced to death had been committed 17 days earlier, he would now be serving a life sentence, among those whose sentences were commuted by Governor Perry in June 2005 because they were 17 at the time of the crime. Instead he was put to death in the Texas death chamber in 2007 after Governor Perry failed to intervene. There were reasons for executive clemency in addition to the question of Dickson's youth at the time of the crime. After the trial, it had emerged that the prosecution had failed to give the defence audiotapes of pre-trial interviews of one of the key witnesses it used to establish Dickson's intent to commit murder (Dickson claimed to have shot the victim during a struggle). After this emerged, the trial court conducted a hearing and recommended that Ryan Dickson receive a new trial "because of the importance of preserving and maintaining the integrity of the adversarial trial process". The Texas Court of Criminal Appeals (TCCA) accepted the court's findings apart from the conclusion that "harm" from the prosecution's non-disclosure of the tape "may be presumed". It allowed the conviction and death sentence to stand. In 2006, the US Court of Appeals for the Fifth Circuit expressed its concern about the prosecution's failure to turn over the tapes, stating that "the preservation of our civil liberties depends upon the faithful and ethical exercise of power by those who bear the mantle of public trust." However, having reviewed the TCCA's decision "through the deferential lens" demanded by federal law, it upheld Ryan Dickson's death sentence, which was carried out on 26 April 2007.

A month earlier, Governor Perry had allowed the execution of **Vincent Gutierrez** to go ahead. Gutierrez and Randy Arroyo were sentenced to death for the murder of US Air Force Captain Jose Cobo, who was shot during a carjacking in San Antonio on 11 March 1997. Gutierrez and Arroyo were tried jointly after the trial judge refused their request to be tried separately. Randy Arroyo was 17 at the time of the crime and in 2005 became one of the Texas prisoners whose death sentence was commuted by Governor Perry as a result of the US Supreme Court's *Roper* ruling. Vincent Gutierrez, in contrast, was 18 years old at the time of the murder. At the 1998 trial, the jurors found the two defendants equally culpable and handed down death sentences. After Randy Arroyo's death sentence was commuted, at least six of the original trial jurors signed affidavits supporting the argument presented in Vincent Gutierrez's clemency petition to Governor Perry that it was unfair that he was facing execution while Randy Arroyo was not. International and national law required that Randy Arroyo not be executed. Fairness and justice demanded that Vincent Gutierrez also be spared.

The Texas authorities should reflect upon the concept of "evolving standards of decency", and recognize that the age 18 rule is a *minimum* legal standard that does not preclude further narrowing of the scope of the death penalty pending abolition. A study conducted more than 40 years ago noted that a number of countries set the minimum age for the death penalty above the age of 18. For example, Austria, Liechtenstein and Switzerland set the minimum age at 20; Chile, Denmark, Ethiopia, Gabon, Greece, Hungary, Lebanon, Peru, and Sudan set the minimum age at 21, and Paraguay set its minimum age at 22.²³ Today all these countries, apart from Ethiopia, Lebanon, Sudan and Vietnam, are abolitionist in law

²³ Clarence H. Patrick, The status of capital punishment: A world perspective. *Journal of Criminal Law, Criminology, and Police Science*, Vol. 5, No. 4, December 1965, pages 397-411.

or practice. Nearly a decade into the 21st century, it is long overdue for the USA to join the list of abolitionist countries. Texas can play its part in achieving this goal by imposing a moratorium on executions pending abolition in that state. In the meantime, at a minimum, in relation to the issues described above, the Board of Pardons and Paroles and Governor Perry should consider commuting the death sentences of anyone who was under 20 years old at the time of the crime.

3. KILLING CONDEMNED PRISONERS WITH MENTAL ILLNESS

As in the case of young offenders, by the time Governor Perry took office in December 2000, Texas was no stranger to killing condemned inmates suffering from serious mental illness.²⁴ A number of such prisoners have gone to their deaths in the state execution chamber since then. International human rights bodies and experts have long called for the death penalty not to be used against individuals suffering from mental disorders.

After first diagnosing **Monty Delk** with bipolar disorder with psychotic features, and possible schizoaffective disorder, and prescribing him anti-psychotic medication, the Texas authorities subsequently claimed that Delk – only 19 years old at the time of the crime – was faking his mental illness. If so, he fooled many mental health professionals, and his lawyer, and maintained his “act” for years, right up to his death.

Monty Delk’s lawyer told Amnesty International that he had had no rational communication with his client in the whole six years that he had represented him on appeal. Monty Delk displayed a pattern of disturbed behaviour over his years on death row, including covering himself in faeces, and incoherent jabbering. He repeatedly expressed delusional beliefs, such as that he was a submarine captain, a CIA or FBI agent, or a member of the military. At a court hearing in 1993, he responded to the judge in prolonged streams of unbroken gibberish. At another hearing in 1997, Monty Delk was gagged and then removed from the courtroom after repeatedly interrupting the court with nonsensical utterances. At the hearing, a former chief mental health officer with the Texas prison system said that his review of the prison records and his own contact with Monty Delk suggested that the prisoner suffered from a severe mental illness. Strapped down to the lethal injection table on 28 February 2002, he was asked if he had a final statement before being killed. Monty Delk replied:

“I’ve got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this”.

Two years later, on 18 May 2004, Governor Perry’s record on the death penalty registered a new low when he rejected a rare recommendation for clemency from the Texas Board of Pardons and Paroles. The case concerned **Kelsey Patterson**, a prisoner suffering from profound mental illness.²⁵

Kelsey Patterson had long suffered from paranoid schizophrenia, the symptoms of which can include hallucinations, delusions, confused thinking, and altered senses, emotions or behaviour. He was first diagnosed with this brain disorder in 1981. He was sentenced to death in 1993 for a double murder committed in 1992. There is no doubt that Kelsey Patterson shot Louis Oates and Dorothy Harris, and there would appear to be little doubt that mental illness lay behind this tragic crime. He made no attempt to avoid arrest – after shooting the victims, he put down the gun, undressed and was pacing up and down the street in his socks, shouting incomprehensibly, when the police arrived.

²⁴ See, for example, USA: Time for humanitarian intervention: the imminent execution of Larry Robison, July 1999, <http://www.amnesty.org/en/library/info/AMR51/107/1999>.

²⁵ USA: Another Texas injustice: The case of Kelsey Patterson, mentally ill man facing execution, March 2004, <http://www.amnesty.org/en/library/info/AMR51/047/2004>.

A jury found Kelsey Patterson competent to stand trial. Yet his behaviour at his competency hearing, and at the trial itself – when he repeatedly interrupted proceedings to offer rambling narrative about his implanted devices and other aspects of the conspiracy against him – provided compelling evidence that his delusions did not allow him a rational understanding of what was going on or the ability to consult with his lawyers. In 2000, a federal judge wrote that

“Patterson had no motive for the killings – he claims he commits acts involuntarily and outside forces control him through implants in his brain and body. Patterson has consistently maintained he is a victim of an elaborate conspiracy, and his lawyers and his doctors are part of that conspiracy. He refuses to cooperate with either; he has refused to be examined by mental health professionals since 1984, he refuses dental treatment, and he refuses to acknowledge that his lawyers represent him. Because of his lack of cooperation, it has been difficult for mental health professionals to determine with certainty whether he is exaggerating the extent of his delusions, or to determine whether he is incompetent or insane. All of the professionals who have tried to examine him agree that he is mentally ill. The most common diagnosis is paranoid schizophrenia.”

In an indication of his delusional thinking, after learning of his execution date, Patterson wrote rambling letters to various officials. In the letters he referred to a permanent stay of execution and an “amnesty” that he said he had received on grounds of innocence. For example, in a letter to the Texas Court of Criminal Appeals in February 2004, he wrote:

“the McClennan County state district court McClennan County has said stay and stay stay stay stay stay stay and stay stay stay always stay from execution to me my men from me Kelsey Patterson stay from murder and execution to me Kelsey Patterson...”

As his execution approached, a spokesperson for the Texas Department of Criminal Justice said: “Mr Patterson seemed even-tempered although he kept insisting to the warden that he had amnesty”.

On 17 May 2004, the Texas Board of Pardons and Paroles voted 5-1 that Kelsey Patterson’s death sentence should be commuted or, at a minimum, that he be granted a 120-day reprieve. Governor Perry rejected both recommendations. In his statement, he said: “This defendant is a very violent individual. Texas has no life without parole sentencing option, and no one can guarantee this defendant would never be freed to commit other crimes were his sentence commuted. In the interests of justice and public safety, I am denying the defendant’s request for clemency and a stay.”²⁶

Strapped down by the lethal injection team, Kelsey Patterson was asked by the warden whether he had a final statement before being killed. His response, as recorded by the prison authorities, was:

“Statement to what. State What. I am not guilty of the charge of capital murder. Steal me and my family’s money. My truth will always be my truth. There is no kin and no friend; no fear what you do to me. No kin to you undertaker. Murderer. [Portion of statement omitted due to profanity] Get my money. Give me my rights. Give me my rights. Give me my rights. Give me my life back.”

The following year, the Texas affiliate of the National Mental Health Association revealed that Texas ranked 49th out of the 50 US states in terms of its per client spending on mental health care. Certainly, Kelsey Patterson’s case had raised wider questions about society’s treatment of the mentally ill. His family had tried unsuccessfully to get treatment for him prior to his crime. This was not the first time that

²⁶ In 2005, the Texas legislature passed, and Governor Perry signed into law, a bill providing jurors in capital murder cases the option of sentencing a defendant to life imprisonment without the possibility of parole.

the Texas system had, in effect, buried its own failure in its execution chamber. **James Colburn's** family had also tried to get appropriate health care for his mental illness before the murder for which he was sent to death row. His sister told Amnesty International in an interview on 29 October 2002:

“When my parents’ insurance wouldn’t cover him after he was 18, he didn’t have insurance coverage. But James himself tried to check himself in to Tri County (hospital) in Conroe. James begged for help. He had been in Galveston mental hospital; he had been at one here in Houston. He had been in a lot of different facilities, but when he turned 18 and the insurance was cut off, my mother, we begged for help, begged for help... My grandparents and my parents drained their finances pretty much trying to help him. He tried himself, he went to the Tri County, he himself wanted help, and they, you know, just pushed him out on the street, gave him his SSI [social security] check, and just pushed him out there, and he was scared in society. He likes being in confined places, because he feels like he can fight those voices off if he is by himself.”

James Colburn, who had an extensive history of paranoid schizophrenia, was sentenced to death in 1995 for the 1994 murder of Peggy Murphy.²⁷ He was arrested on the day of the murder after he told a neighbour to call the police because he had killed a woman. Colburn waited until the police came, and at the police station gave a videotaped confession. He told police that he suffered from schizophrenia, and during his statement there were indications that he was struggling with his illness.

At the time of the murder, James Colburn was being treated on an outpatient basis, although his care was irregular. For periods in pre-trial detention, the Montgomery County Jail withheld his medication when Colburn refused to pay for it. Consequently, in October 1994, he was suicidal, and urinating and defecating on himself. Two weeks later, he was “very agitated and contemplating suicide” and was placed in restraints. In May 1995 he was again put in restraints as he reported having auditory hallucinations telling him to kill himself.

During his 1995 trial, James Colburn received injections of Haldol, an anti-psychotic drug which can have a powerful sedative effect. A lay observer, a nurse with experience of mentally ill patients, stated in an affidavit that Colburn appeared to fall asleep on frequent occasions during the proceedings. In her opinion, his “lethargic state prevented him from participating in his defence or even paying attention to his own murder trial”. The defence lawyers stated that they believed that Colburn was competent to stand trial; that is that he had a rational understanding of the proceedings and could assist in his defence. However, at one stage of the trial one of the lawyers had to ask for (and was granted) a recess in order that he could “walk my client around the room a little bit. He’s snoring kind of loud”. In an affidavit, the lawyer acknowledged that “Mr Colburn dozed occasionally during the trial”.

Before the trial, a psychologist was appointed by the court to evaluate whether James Colburn was sane at the time of the murder, and whether he was competent to stand trial. The psychologist concluded that he was both sane and competent. However, his examination of Colburn was conducted 10 months before the trial. In a post-conviction affidavit, the psychologist said that having learned of the Haldol injections and the apparent sedative effect they had on James Colburn, “it is my opinion that during the trial itself, as opposed to the date on which I examined him...it is not reasonably probable that... Mr Colburn was legally competent to stand trial”. He further suggested that proceedings should have been suspended to “adjust Mr Colburn’s medication so that he was oriented and aware”. A psychiatrist who conducted an assessment of James Colburn in 1997, and reviewed the records in the case, concluded that there were “serious questions and concerns regarding [Colburn’s] competency to stand trial at that time”, and that Colburn had been “seriously sedated during the time of his trial”.

²⁷ USA: James Colburn: mentally ill man scheduled for execution in Texas, October 2002, <http://www.amnesty.org/en/library/info/AMR51/158/2002>.

On 6 November 2002, the *Houston Chronicle* asked

“what justice is there, really, in carrying out a capital punishment sentence for a person who suffers from voices and hallucinations caused by a disabling major mental illness? Adequate mental health services may have spared Colburn years of suffering and might have spared his victim's life. It is no secret that Texas has inadequate resources for helping the mentally ill lead normal lives. Looked at another way, it would be better for all and a service to justice if such serious mental health issues were addressed before there is any need to deal with them within the criminal justice system and on death row.”

Nevertheless, the Texas Board of Pardons and Paroles rejected clemency, and Governor Perry refused to intervene. After the execution, which was carried out on 26 March 2003, James Colburn's sister said: “The state has killed a very mentally ill man. I feel sorry for the victim's family but I also feel sorry for my family right now, too.” Colburn's brother added: “Society is very uneducated when it comes to mental illness”.

3.1 STILL ALIVE, BUT ON DEATH ROW AND SUFFERING FROM MENTAL ILLNESS

The cases of other prisoners with serious mental illness facing execution may yet come before Governor Perry. He should work to stop their executions, and to commute their sentences even before an execution date is set. Two such cases are outlined below.

On the morning of 27 March 2004, police went to an apartment in Sherman, Texas, and found the bodies of a 20-year-old woman, a four-year-old boy and a one-year-old girl. They had been stabbed and had large, gaping wounds to their chests. Two hours later, **Andre Thomas** entered the police station and told police that he had just murdered his wife and wanted to turn himself in. Before going to the police he had walked to his father's house, with the apparent intention of calling his wife, whom he had just killed. He called her parents, leaving a message on their answering machine:

“This is Andre. I need y'all's help, something bad is happening to me and it keeps happening and I don't know what's going on. I need some help, I think I'm in hell. I need help. Somebody needs to come and help me. I need help bad. I'm desperate. I'm afraid to go to sleep. So when you get this message, come by the house, please.”

After the murders, Andre Thomas had stabbed himself in the chest, and was taken to hospital where he underwent surgery. Two days later, he was taken back to the police station and questioned. He said that he had killed his wife, son and stepdaughter, that God had told him to do it, that his wife had been “Jezebel”, and that his son was the “anti-Christ”. In another interview the next day, he repeated that he had killed the victims because they were evil and God had wanted him to do it, and that he had cut their hearts out of their chests, putting the children's hearts in his pockets, before stabbing himself.

On 2 April 2004, Andre Thomas gouged out his right eye while he was in his jail cell, yelling “It's God's will”. He said that he had been reading his Bible which had indicated that plucking out his eye might draw God's favour. Later, on death row, he would gouge out his left eye and eat it.

Andre Thomas was initially found incompetent to stand trial. The trial judge ordered him to be committed to psychiatric hospital where he received treatment and medication for the next five weeks. In late July 2004, the Chief Psychiatrist for the Competency Program at the hospital reported to the court that Thomas was now competent to stand trial. At the trial in March 2005 three mental health experts – two appointed by the court and one who was the jail psychologist – testified that Andre Thomas suffered from schizophrenia. Two of them declined to give an opinion as to whether Thomas had been legally insane at the time of the crime, while the third said that “I believe that he was operating under the effect of a

psychotic illness at that time, specifically schizophrenia, in which he believed that he was doing what was directed by or that he was at least operating under the direction of God in fighting these demons, saving the world; that that was all based upon a psychosis, and that based upon that psychosis, he did not know that that conduct at that time was wrong”.

The jury rejected Andre Thomas' plea of not guilty by reason of insanity, and he was sentenced to death. The death sentence was affirmed by the Texas Court of Criminal Appeals in October 2008, and in March 2009, that Court rejected his appeal against his sentence. One of the judges issued a separate statement on what she called “an extraordinarily tragic case”. Andre Thomas, Judge Cathy Cochran wrote, “has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia.” She noted that members of his family had long suffered from mental illness, including schizophrenia. Judge Cochran went on to point out that Andre Thomas had been abusing alcohol from the age of 10 and drugs from the age of 13. She continued:

“[Andre Thomas's] behaviour in the months before the killings became increasingly 'bizarre': He put duct tape over his mouth and refused to speak; he talked about how the dollar bill contains the meaning of life; he stated that he was experiencing *déjà vu* and reliving events time and again; he had a religious fixation and heard the voice of God. In the weeks before the murders, [Thomas] was heard by others talking about his auditory and visual hallucinations of God and demons.”

About three weeks before the murders, Andre Thomas tried to commit suicide. An order for his involuntary commitment to psychiatric care was obtained but never implemented. Two days before the murders, he stabbed himself, later explaining that he was a “fallen angel” who could “open the gates of Heaven” by stabbing himself through the heart. Judge Cochran continued:

“While there is no dispute that [Andre Thomas] was, in laymen's terms, 'crazy' at the time he killed his wife and the children, the legal question is whether he knew that what he was doing was 'wrong' or a 'crime' at the time he acted.... Nonetheless, this is a particularly tragic case because these horrendous deaths could have been avoided. Those around [Thomas] realized that he was mentally ill, and he was twice taken to hospitals to obtain help. In each instance, he left before he could be involuntarily committed for observation, diagnosis, or treatment... This is a sad case. [Andre Thomas] is clearly 'crazy', but he is also sane under Texas law”.

The law needs changing. Meanwhile, the power of executive clemency is not constrained in the way that individual judges may interpret the law as limiting their own power of remedy. Governor Perry should write to the Board of Pardons and Paroles and request a recommendation to commute Andre Thomas's death sentence.

He should do the same in the case of **Scott Panetti**. He was sentenced to death in 1995 for killing his parents-in-law in 1992.²⁸ He has a long history of serious mental illness, including schizophrenia. He was hospitalized more than a dozen times in numerous facilities before the crime. After the crime he said that “Sarge” (an auditory hallucination) controlled him at the time of the shootings, that divine intervention had meant that the victims did not suffer, and that demons had been laughing at him as he left the scene.

In July 1994 a hearing to determine whether Scott Panetti was competent to stand trial was declared a mistrial after the jury was unable to reach a verdict. A second hearing was held the following September. His lawyer testified that in the previous two years, he had had no useful communication with Scott

²⁸ See USA: ‘Where is the compassion?’ The imminent execution of Scott Panetti, mentally ill offender, January 2004, <http://www.amnesty.org/en/library/info/AMR51/011/2004>.

Panetti because of his delusional thinking. A psychiatrist for the defence concluded that Panetti was not competent to stand trial. A psychiatrist who testified for the prosecution agreed with the previous diagnoses of schizophrenia, and that Scott Panetti's delusional thinking could interfere with his communications with his legal counsel, particularly under situations of stress such as in a courtroom. However, he concluded that the defendant was competent to stand trial. The jury agreed.

Scott Panetti then waived his right to counsel, and the case went to trial with the defendant acting as his own lawyer. Scott Panetti dressed as a cowboy during the proceedings, and gave a rambling presentation in his defence. Numerous people who attended the trial as witnesses have variously described the trial as a "farce", a "joke", a "circus", and a "mockery". In post-conviction affidavits they concluded, from their prior knowledge of Panetti and their observations of him during the proceedings, that he was incompetent to stand trial. For example, a doctor who had previously treated Panetti for his mental illness stated: "I thought to myself 'My God. How in the world can our legal system allow an insane man to defend himself? How can this be just?'" Another doctor who had treated Scott Panetti for schizophrenia in 1986 concluded that Panetti was "acting out a role of an attorney as a facet of the mental illness, not a rational decision to represent himself". An attorney called by Scott Panetti as a witness later stated: "The courtroom had the atmosphere of a circus. The judge just seemed to let Scott run free with his irrational questions and courtroom antics."

Another lawyer, appointed as Panetti's stand-by counsel, wrote in an affidavit: "This was not a case for the death penalty. Scott's life history and long term mental problems made an excellent case for mitigating evidence. Scott did not present any mitigating evidence because he could not understand the proceeding." He recalled that Panetti had dressed in a costume "like an old TV western", including cowboy hat, trousers tucked into his cowboy boots, and cowboy shirt. The lawyer added that Scott Panetti had "wanted to subpoena Jesus Christ, JFK, actors, actresses, and people who had died... His trial was truly a judicial farce, and a mockery of self-representation. It should never have been allowed to happen". The lawyer said that he spoke to two jurors who "told me that Scott probably would not have received the death penalty if the case had been handled differently". Another lawyer spoke to two other jurors. They "said that if Scott had been represented by attorneys that he would not have received the death penalty". One suggested that the jurors had voted for death out of their fear of his irrational behaviour at the trial.

Scott Panetti's father recalled in an affidavit that his son's behaviour at the trial had been "very bizarre": "I wanted to tell the judge to stop the trial because my son was sick and incompetent". His sister said in her affidavit: "I think that justice broke down in my brother's trial. It was not fair to let a mentally ill man be his own attorney when he did not know what he was doing. I am sorry to say that the trial was a farce. It was a circus-like atmosphere. I never expected justice to allow this." The victims' daughter, has also described the trial as a "circus" and "a big joke". In a 1999 affidavit she said: "I know now that Scott is mentally ill and should not be put to death".

Scott Panetti was 24 hours from execution in 2004 when a federal judge issued a stay for the purposes of determining his competence for execution – whether he understood the reason for and reality of his punishment. The case eventually reached the US Supreme Court, which ruled on it on 28 June 2007, in *Panetti v. Quarterman*. The ruling drew attention to the shoddy standards of capital justice in Texas, and remanded the case to the lower courts, noting that there is "much in the record to support the conclusion that [Scott Panetti] suffers from severe delusions". The decision held out some hope for greater protection for him and other condemned prisoners suffering from serious mental illness.²⁹

Nearly two years later, however, Scott Panetti remains on death row, with his possible execution looming closer. In March 2008, the District Court found him competent for execution despite the evidence of his

²⁹ See, USA: Supreme Court tightens standard on 'competence' for execution, 29 June 2007, <http://www.amnesty.org/en/library/info/AMR51/114/2007/en>.

serious mental illness and that he suffers from the delusional belief that his execution is a satanic conspiracy. His case is now before the Court of Appeals for the Fifth Circuit. Governor Perry and the Texas Board of Pardons and Paroles should intervene in the case with a view to commutation.

4. CLEMENCY NO FAILSAFE AGAINST INCONSISTENCIES AFTER ATKINS

On 20 June 2002, in *Atkins v Virginia*, the US Supreme Court outlawed the execution of people with mental retardation. The Court did not define mental retardation, although it pointed to definitions used by the American Psychiatric Association and the American Association of Mental Retardation (AAMR, now the American Association on Intellectual and Developmental Disabilities, AAIDD). Under such definitions, mental retardation is a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning (generally indicated by an IQ of less than 70) accompanied by limitations in two or more adaptive skill areas such as communication, self-care, work, and functioning in the community. The Court noted that “not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.” The Court left it to individual states to develop “appropriate ways” to comply with the ruling. This opened the door to further inconsistency in the application of the US death penalty.

The *Atkins* decision noted that on 17 June 2001 Governor Perry had vetoed a bill passed by the Texas legislature exempting people with mental retardation from the death penalty. The Supreme Court also noted that in his veto statement Governor Perry had said that Texas did not execute such prisoners. It also noted that Texas was only one of five states since 1989 to “have executed offenders possessing a known IQ less than 70”. In a statement responding to the *Atkins* decision, Governor Perry said that “the state’s lawyers will continue to analyze the ruling to determine its impact on Texas law. It may be months, however, before state and federal courts rule on the specifics of our Texas law. Texas does not execute mentally retarded individuals who meet the three-pronged test cited in the High Court’s decision”. Clearly the state had been sentencing defendants with mental retardation to death, however, given that at least 10 Texas prisoners have had their death sentences commuted to life imprisonment on the grounds of mental retardation as a result of the *Atkins* ruling.³⁰ And before the *Atkins* decision, Texas accounted for nine of 44 of the USA’s executions since 1977 of people with mental retardation, more than any other state.³¹ It took nearly six years after the *Atkins* ruling for Texas prosecutors to agree not to seek the death penalty against John Penry, a man with an IQ in the range 50 to 63 whom the state had been trying to take to its execution chamber for nearly three decades.³²

Nearly seven years after the *Atkins* ruling, the Texas legislature has still not enacted a law to comply with it. In the absence of legislation, the TCCA took it upon itself to issue guidelines for trial courts in making retardation determinations. In February 2004, the Texas Court of Criminal Appeals (TCCA) wrote: “The Texas legislature has not yet enacted legislation to carry out the *Atkins* mandate... [W]e must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims”. It asked: “Is there, and should there be, a ‘mental retardation’ bright-line exemption from our state’s maximum statutory punishment?... [W]e decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature”. In February 2007, the TCCA emphasized that its 2004 guidelines “were intended only to be guidelines for trial courts to work

³⁰ Walter Bell, Darrell Carr, David DeBlanc, Doil Lane, Willie Moddon, Demetrius Simms, Robert Smith, Exzavier Stevenson, Alberto Valdez, Gregory van Alstyne.

³¹ See <http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states>.

³² USA: Beyond Reason - The imminent execution of John Paul Penry, December 1999, <http://www.amnesty.org/en/library/info/AMR51/195/1999>. Penry was sentenced to death in 1980. The US Supreme Court overturned this sentence in 1989. He was re-sentenced to death in 1990 and came three hours from execution in 2000 before the Supreme Court intervened again. Sentenced to death a third time in 2002, this was overturned by the Texas Court of Criminal Appeals. Texas appealed that ruling, but in 2006 the Supreme Court denied the appeal. In February 2008, an agreement was reached to sentence Penry to life imprisonment without the possibility of parole.

with until the Legislature was to reconvene and establish conclusively both the substantive laws and the procedures that would bring our codes into compliance with the mandate issued by *Atkins*. Yet to this day, no such guidance has been provided by the Legislature.” Two years later this remains the case. Meanwhile, the guidelines formulated by the TCCA, according to a recent law article “present an array of divergencies from the clinical definitions in applying *Atkins*”.³³

A clemency petition for **James Clark**, scheduled for execution in Texas in April 2007, sought commutation of his death sentence on the grounds that he had mental retardation. In an assessment in April 2003, clinical psychologist Dr George Denkowski, hired by the state, concluded that this was the case – he assessed Clark’s IQ at 65 and concluded that he had adaptive skill deficits in three areas (health and safety, social, and work). This was the fifth post-*Atkins* case that Dr Denkowski had worked on – in one other case he found that the defendant had mental retardation, in the other three he concluded that they did not have this level of impairment. Dr Denkowski found that Robert Smith had mental retardation, and an IQ of 63. An evidentiary hearing was conducted, and the court agreed. The Harris County prosecutor accepted this, citing Denkowski’s expertise, and Smith’s death sentence was commuted on 12 March 2004 by Governor Perry after receiving a recommendation from the Board of Pardons to do so.³⁴ A statement issued by the governor’s office noted that the court had based its finding on testimony by experts. In 2006 and 2007 Dr Denowski found that death row inmates Darrell Carr, Demetrius Simms, and Exzavier Stevenson had mental retardation. In each case, the Harris County prosecutor accepted Dr Denkowski’s finding and the death sentences were commuted by the courts. In two other Harris County cases, those of Coy Westbrook in 2006 and Brian Davis in 2004, Dr Denkowski concluded that the inmate did not have retardation. They remain on death row.

In James Clark’s case, the Denton County prosecution did not accept Dr Denkowski’s finding of retardation. Instead it hired another psychologist, Dr Thomas Allen. He concluded that Clark was faking retardation to avoid execution. The defence had an assessment done by Dr Denis Keyes, an expert whose studies were among those cited in the *Atkins* ruling. Dr Keyes concluded that James Clark had retardation (and an IQ of 68). He noted that Dr Denkowski’s findings in Clark’s case were “credible and correct”. In contrast to this, Dr Keyes noted that Dr Allen “did no standardized testing (which is *required* for diagnosis *and* for ruling out a diagnosis).” Neither Dr Keyes nor Dr Denkowski found that James Clark had faked his retardation during their assessments, something that these experts specifically tested for.

An evidentiary hearing was held in the trial court in 2003. The judge deferred to Dr Allen’s conclusions, rejecting those of Drs Keyes and Denkowski. She held that an IQ score of 74 that Clark achieved in 1983 in youth custody was “the most reliable indicator” of his IQ because he then had no reason to fake retardation, whereas a finding now would determine whether he was executed or not. The judge ruled that the 1983 score did not meet the AAMR’s first criterion (IQ 70 or under) of mental retardation, even though with the generally accepted margin of error, a score of 74 falls within the range of 69-79. In addition, Dr James Flynn, an expert on assessing IQ scores to take account of changes over time, has concluded that “the best estimate” of James Clark’s 1983 score in terms of up-to-date norms would be about 68.57 (that is, very similar to Dr Keyes’ finding), and “it is almost certain that [Clark’s IQ] is not 70 or above”. In another post-*Atkins* case in 2006, the importance of the so-called “Flynn effect” and

³³ John H. Blume, Sheri Lynn Johnson, and Christopher Seeds. ‘Of *Atkins* and men: Deviations from clinical definitions of mental retardation in death penalty cases’. Cornell Law School, Legal Studies Research Paper Series, No. 09-001, (2009).

³⁴ This was the first time since Governor Perry took office in December 2000 that he had commuted a death sentence. During this period, 82 prisoners had been executed in Texas. In March 2007, Governor Perry commuted the death sentence of Doil Edward Lane on the recommendation of the Board of Pardons and Paroles after a court determined in November 2006 that Lane had mental retardation. The at least eight other Texas prisoners whose death sentences have been modified to life prison terms on the grounds of mental retardation were dealt with by the courts rather than by executive clemency.

the margin of error was recognized by the TCCA, when it remanded a case of an inmate with an IQ assessed at 81 to the trial court level for further evidentiary development on the retardation question.

In March 2004, the TCCA upheld the trial judge's findings in James Clark's case. Clemency was denied, Governor Perry did not intervene, and James Clark was put to death on 11 April 2007. Asked if he had a final statement before being killed, James Clark's response as recorded by the prison authorities was: "Uh, I don't know, Um, I don't know what to say. I don't know. (pauses) I didn't know anybody was there. Howdy."

There is growing concern about inconsistencies in determinations of mental retardation generated by divergent responses to the *Atkins* ruling by different states. A recent research article, for example, draws attention to the case of **Jeffrey Williams**, a Texas inmate with an IQ of 70 or below whose challenge to his death sentence has been unsuccessful due to application by the courts of criteria inconsistent with clinical definitions of mental retardation. The study argues that Jeffrey Williams is one of

"an ever-growing number of individuals who are inappropriately excluded from *Atkins's* reach based on distortions or novel amendments inconsistent with the scientific and clinical definitions. These deviations have a significant impact on the adjudication of mental retardation claims in capital cases. Left unaddressed, they ultimately permit what *Atkins* does not: the death-sentencing and execution of some capital defendants who have mental retardation".³⁵

At a minimum, given the irrevocable nature of the death penalty, the power of executive clemency should err on the side of caution when considering whether a prisoner's execution is unconstitutional. This did not happen in James Clark's case.

5. INADEQUATE REPRESENTATION, INEFFECTIVE CLEMENCY

As well as the right to seek commutation of his or her death sentence, under international standards anyone facing the possibility of the death penalty has the right to "adequate legal assistance at all stages of proceedings". In Amnesty International's view, breaches of this standard, not remedied by the courts, should result in commutation as a matter of course. The organization welcomes, for example, the fact that in Kentucky in 2007, Governor Ernie Fletcher commuted the death sentence of Jeffrey Leonard on the grounds that he had had inadequate legal representation at his trial. In Texas, however, no detainee has had his or her death sentence commuted on these grounds despite compelling claims regularly being raised in clemency petitions.

On 21 January 2004, **Kevin Zimmerman** became the 77th prisoner to be put to death during Governor Perry's term in office. He was executed after 14 years on death row. In late September 1987, he had been released from prison in his native Louisiana after serving a three-year sentence for possession of drugs. After he returned home to find that his wife was having an affair with his best friend, he embarked on an alcohol and drug binge with other friends. On the fifth day of this spree, he and two friends were drinking in a motel room in Texas when they were joined by fellow motel guest, Gilbert Hooks. Later that night, Zimmerman and Hooks got into an argument, and Hooks stabbed Zimmerman in the arm. Their fight continued and ended in Hooks being stabbed to death.

Kevin Zimmerman was charged with murder, not capital murder. With timely and effective representation, he would likely never have faced the death penalty. However, he was appointed a succession of lawyers who all withdrew from the case for various reasons, having done little or no work on the case. After a year, Zimmerman wrote letters to the prosecutor and court, in effect encouraging them to charge him with capital murder. In his letters he falsely claimed involvement in other crimes, and

³⁵ 'Of *Atkins* and men: Deviations from clinical definitions of mental retardation in death penalty cases', 2009, op. cit.

claimed that he had robbed Hooks. Murder during the course of a robbery is a capital offence, unlike plain murder. He was recharged, this time with capital murder. A doctor who later reviewed the case said in an affidavit that the claims in Zimmerman's letters were "patently absurd" and that the records indicate that at the time he was "psychotic", "potentially suicidal and required suicide prevention measures".

In July 1989, Kevin Zimmerman was appointed the lawyer who would represent him at his capital trial, his fifth attorney since he was first charged. She had no experience in capital cases and had never represented anyone charged with murder. She chose co-counsel who had no capital case experience. The lawyers failed to have Zimmerman evaluated for his mental competency to stand trial even though there was evidence that he might not be able to assist in his own defence. They did not investigate his family background, and did not learn that he had a history of mental problems beginning after a serious bicycle accident at the age of 11, as a result of which he had a metal plate put in his head. There were numerous relatives and neighbours who could have testified that his personality and behaviour changed after the accident. The lawyers failed to present expert psychiatric evidence to support the claim of self-defence or to present as mitigation evidence against the death penalty.

The defence lawyers did not investigate Gilbert Hooks's record of violence, including domestic violence and drunken brawls with strangers. During Zimmerman's appeal process, Hooks's fifth wife testified about his violence and drinking, and another wife confirmed his violent tendencies. Such evidence presented to the jury could have supported the self-defence claim and countered the prosecution's depiction of the victim as non-violent.

In 1997, an expert conducted an evaluation of Kevin Zimmermann, and found that his childhood brain injury had "materially affected his behavioral control, both as an adolescent and at the time of the stabbing". The expert concluded that the combination of his alcohol and drug consumption, his anger at having been stabbed, and fear for his safety "all contributed to his inability to regain control at the time of the crime". In 1995 another doctor had concluded that Zimmerman showed signs of a mental disorder characterized by impaired impulse control and judgment.

In 2003, a psychologist concluded that Kevin Zimmerman had suffered a "traumatic and serious frontal brain injury at the age of eleven which resulted in the development of seizures, personality changes, explosive outbursts as well as post-explosive amnesia." She said that "all available information points to Mr Zimmerman's crime as having been one committed under the influence of an explosive encephalopathic rage during which his impulse control, judgment, and memory were grossly impaired... [I]t should not be considered as a predatory/premeditated crime." She also concluded that Kevin Zimmerman's "behaviour at the time of the crime and around the time of his trial raises the strong probability that he was suffering from a separate mental illness or disorder" at those times. Kevin Zimmerman, who said he did not remember details of the stabbing, consistently expressed remorse over the death of Gilbert Hooks, including in his final statement before being put to death.

The poor quality of legal representation that indigent capital defendants receive, both at trial and for state-level appeals, remains a recurring theme in relation to Texas capital justice. Also recurring has been the failure of the clemency authorities to recognize the injustice and stop the executions of the inadequately represented.

In 2002, the Texas Defender Service (TDS) published a study having reviewed 251 habeas corpus applications filed on death penalty cases in Texas between September 1995 and the end of 2001. It found that "an alarmingly large proportion" of them were "perfunctory".³⁶ Matters outside the trial record – such as the withholding of evidence by the prosecutor or the failure of the defence lawyer to

³⁶ *Lethal indifference*. Texas Defender Service, 2002. www.texasdefender.org.

present particular evidence – are supposed to be presented via the state habeas corpus appeal. The habeas appeal lawyer must therefore conduct a thorough investigation of the inmate’s case. While a habeas appeal filed by a properly funded, experienced, competent lawyer might be expected to run to 150 pages, the TDS report found that:

“Of the 251 *habeas* applications reviewed, 76 (30%) were 30 pages or less. Of those, 37 applications (15%) were 15 pages or less. Twenty-two applications (9%) were 10 pages or less - quite a feat, because the procedural requirements for *habeas* petitions usually consume five pages alone. It is no surprise that many of the shortest petitions contained only record-based, direct-appeal-type claims presenting nothing for review, thereby forfeiting future review by the federal courts.”

Numerous individuals have been put to death despite evidence that their state habeas lawyers may have jeopardized their chances of relief through inadequate representation. After his 1995 trial, **Henry Dunn** was appointed a lawyer for his direct appeal who had never handled an appeal in a death penalty or any other case. The lawyer even filed a motion asking for more time so that he could attend a seminar to find out how to write such an appeal brief. The motion was denied. The appeal the lawyer filed for Dunn was rejected with several of the issues he raised dismissed on the grounds that they were inadequately presented in the appeal brief. Henry Dunn was appointed two lawyers for his habeas corpus appeals. They had also never handled any death penalty cases, and raised issues described as frivolous by the federal district court. They also failed to file a timely notice of intent to appeal, thus forfeiting Henry Dunn’s right to further challenge his conviction and sentence. He was put to death on 6 February 2003.

The lawyer appointed by the Texas Court of Criminal Appeals (TCCA) to represent **Johnny Joe Martinez** for his state-level habeas corpus petition had never handled such an appeal, and asked the court on several occasions for permission to withdraw from the case. In 1997, the lawyer filed an appeal, without having once spoken to or visited his client, having refused to accept telephone calls from him, and having sent him only one brief letter. The appeal was five and a half pages long. Two of the four claims raised comprised 17 lines of text with three inches of margin, with no cases cited. The appeal did not challenge the adequacy of Johnny Martinez’s trial representation, even though his trial lawyer had done little investigation or preparation for the sentencing phase.

The TCCA dismissed the appeal. One of the judges dissented, citing the brevity and lack of quality of the appeal. He wrote that the merits of the appeal should not be assessed, but that the adequacy of the appeal lawyer’s performance should be examined. The lawyer himself agreed with the dissent, again asking to withdraw from the case because of his inexperience. New lawyers later appointed for Martinez’s federal appeals discovered substantial mitigating factors that had not been presented to the trial jury, including evidence that Johnny Martinez had been subjected to sexual and physical abuse as a child, and of his dysfunctional family background, including his mother’s selling and use of heroin. Given Johnny Martinez’s youth (he was only 20 years old at the time of the crime), intoxication, remorse, cooperation with the police, and non-violent history, such mitigation evidence, the federal appeal lawyers argued, might have affected the sentence. However, the federal courts ruled that the claim of inadequate trial counsel was procedurally barred from being evaluated because the claim was not raised in the state courts. The federal district court expressed concern at this “harsh” outcome - given that the issue was lost to judicial review because of the incompetence of the state habeas lawyer - but the court considered itself bound by precedent. Johnny Martinez was executed on 22 May 2002 (see further below).

Carlos Granados was put to death in Texas on 10 January 2007. For his state-level habeas appeal in 2001, his lawyer had filed a two-page petition raising a single issue. He never met with the prisoner. On the day of the execution six years later, the TCCA refused to grant a stay, acknowledging that the 2001 habeas petition had been “unusually brief” but writing that “in some circumstances, brevity is the wisest

course. A single valid claim is all that is necessary to achieve the desired result...A single, well-crafted sentence may speak volumes while a 150 page application may be full of sound and fury signifying nothing". In a concurring statement, three of the judges said that Granados "was found guilty of a brutal crime and may well deserve his sentence of death." They noted the trial testimony of a clinical psychologist who had included race and ethnicity in his list of 22 factors predictive of "future dangerousness".³⁷ Agreeing with the decision not to stop the execution, the judges stated that this testimony "may or may not have improperly influenced the punishment assessed by the jury". Governor Perry was asked to stay the execution, but refused to intervene.

5.1 APPEAL DEADLINES MISSED IN ASSEMBLY LINE OF DEATH

On 8 November 2006, **Willie Shannon** was put to death in the Texas execution chamber. In his final statement he maintained that the murder for which he was being killed had been an accident. He was 19 years old at the time of the crime. At the sentencing phase of his trial, the defence lawyers had failed to present a single witness.

After the Texas Court of Criminal Appeals had upheld his conviction and death sentence, the case moved into the federal courts. After an appeal was filed in the case in March 2002, the state moved to have the federal District Court reject the petition because it had been filed too late under the time limits for filing federal appeals required under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996. This Act placed new restrictions on prisoners raising claims of constitutional violations in *habeas corpus* petitions. It also imposed time limits on the raising of constitutional claims, restricted the federal courts' ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited "successive" appeals except in narrow circumstances.

Signing the AEDPA into law on 24 April 1996, President Bill Clinton had stated that "from now on, criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences." The AEDPA prioritizes finality over fairness. In 1998, following his mission to the USA, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, wrote that: "The enactment of the 1996 Anti-terrorism and Effective Death Penalty Act...[has] further jeopardized the implementation of the right to a fair trial as provided for in the [International Covenant on Civil and Political Rights] and other international instruments".

In July 2005, the District Court granted the state's motion to dismiss Willie Shannon's petition because it had been filed too late under the AEDPA. In April 2006, the US Court of Appeals for the Fifth Circuit affirmed the District Court's ruling, stating that "equitable remedies are not intended for those who sleep on their rights".

Willie Shannon is one of at least four condemned prisoners who have been executed in Texas during Governor Perry's term in office without their federal appeals being heard on the merits because their lawyers had filed them too late under the deadlines imposed by federal law. **Robert Lookingbill** was executed on 22 January 2003. In June 2002, when a three-judge panel of the Court of Appeals for the Fifth Circuit upheld the District Court's ruling to dismiss his federal habeas petition as untimely filed under the AEDPA, one of the judges had dissented, arguing that "a strong argument can be made that the petition was timely filed because Lookingbill's twice-requested court-appointed lawyer, not Lookingbill, was derelict in failing to file a petition before the limitations period expired". The judge took his two colleagues to task, "especially where the consequences of error are so grave", for holding that the prisoner himself could have filed a "skeletal" federal habeas corpus petition. This, said the dissenting

³⁷ The psychologist said at the trial that "race or ethnicity is not politically correct, but we know that minorities are over-represented in the prison system. The prison system is about 40 per cent black and 40 per cent Hispanic, and 20 per cent white and others..." Carlos Granados was Hispanic.

judge, would impose “an unfair and unrealistic burden upon an unsophisticated prisoner represented by a dilatory court-appointed attorney”.

In **Leonardo Rojas**'s case, in addition to his federal petition being denied because it had been filed too late, his representation during state-level appeals had been inadequate. His court-appointed state habeas lawyer, on disciplinary probation at the time of his appointment and disciplined again by the State Bar two weeks later, filed a 15-page habeas corpus petition, raising 13 claims, which were all based on the trial record. Twelve were procedurally defaulted for not having been raised on direct appeal. Leonard Rojas was executed on 4 December 2002. Two months later, three judges on the Texas Court of Criminal Appeals filed a dissenting opinion arguing that the court should have granted Rojas relief “because it appointed an attorney who should not have been appointed to represent a capital defendant in his one opportunity to raise claims not based solely on the record” (that is, in a habeas corpus petition).

There are others still facing execution in Texas whose federal petitions have been dismissed on the grounds that they were untimely filed under the AEDPA. One of them is **Quintin Phillippe Jones**, sentenced to death in 2001 for murdering his aunt when he was 20 years old. On 4 March 2009, a federal District Court judge granted the state's motion to dismiss Jones's federal petition on the grounds that it had been filed too late. He noted that the precedent of the Fifth Circuit was that “mere attorney error or neglect is not an extraordinary circumstance” that would allow the prisoner to overcome the missed deadline (that is, warranting “equitable tolling” of the time allowed under the statute), and that the US Supreme Court had ruled in 2007 (*Lawrence v. Florida*) that a death row prisoner was not entitled to such relief under the AEDPA due to his lawyer's “mistake in miscalculating the limitations period”. District Judge Terry Means wrote:

“This Court recognizes that, because this is a case in which the death penalty has been assessed, there is a very serious consequence of a decision by a federal district court to dismiss a federal petition because it was not filed within the statutory limitations period... Counsel had 167 days after being appointed by this Court to file a timely petition, a more-than-sufficient amount of time to do so, especially given his prior knowledge of the case [he was also Jones's state habeas lawyer]. Nevertheless, he failed to do so.

Troubled as this Court may be by these facts, it would be acting contrary to controlling precedent on this issue were it to rule that alleged or actual instances of ineffective assistance of counsel, without any evidence of deceitful or other similarly egregious conduct on counsel's part, constitute rare and extraordinary circumstances under which equitable tolling is warranted. Indeed, the Fifth Circuit has directly stated that ‘ineffective assistance of counsel is irrelevant to the tolling decision’ and has held that granting equitable tolling due to the alleged ineffective assistance of federal habeas counsel is an abuse of discretion”.

Quintin Jones has said that he heard through another lawyer that his own attorney had not filed the petition on time. “I'm the one who pays for his mistake”, he added.³⁸

Another prisoner facing this situation is **Marlin Enos Nelson**, who has been on death row for over two decades. After the Texas Court of Criminal Appeals had denied relief on his state habeas corpus petition on 11 September 2002, there were 98 days left of the one-year time limit under the AEDPA for filing a federal petition, which was thus due by 19 December 2002. A motion for the appointment of federal habeas counsel was filed on 17 September 2002, but the District Court did not appoint a lawyer until 13 March 2003, almost three months after the AEDPA's statute of limitations had expired. On 30 April 2003 the lawyer asked for an extension until 13 June 2003 to file the petition. The petition was eventually filed on 22 August 2003, 246 days after expiry of the time limit under the AEDPA. By then,

³⁸ Lawyer's late filings can be deadly for inmates. Houston Chronicle, 22 March 2009.

the District Court had not yet said whether it would grant the extension that the lawyer had sought in April, but the judge did grant it on 10 February 2004 without ruling whether the petition had been filed too late. On 31 March 2005, the judge ruled that it had indeed been late and dismissed the petition as time-barred. Marlin Nelson's counsel turned to the Court of Appeals for the Fifth Circuit, but that court denied relief on 9 February 2007 on the basis that there were no "rare or exceptional circumstances" to justify reversing the District Court's decision that the petition had been untimely filed.

In similar vein, **Keith Steven Thurmond's** federal habeas corpus petition was dismissed by the District Court on the grounds that it had been filed too late. The lawyer had missed the deadline by one day, filing it on 1 September 2006 when it was due by 31 August 2006. He appealed to the Fifth Circuit, arguing that he had attempted to file the petition on 31 August 2006 in the court's after-hours filing box, but that it had not been working. However, the Court of Appeals rejected this. It noted that the lawyer had waited until the very last day to file the petition after normal office hours, despite having had more than eight months to prepare the petition. It also noted that the lawyer had had problems with the machine for late filing in relation to another case a few months earlier (the same lawyer had represented **Johnny Ray Johnson**, who was executed on 12 February 2009 after his federal petition was also filed a day late). Therefore, the Fifth Circuit ruled, "this court cannot find that Thurmond was diligently pursuing his rights" and "no extraordinary circumstances stood in his way". Keith Thurmond has been on death row since 2002. He may now face an execution date. According to the Houston Chronicle in March 2009, he had not seen his lawyer for a year; "So what am I supposed to do now?" Thurmond said.³⁹ It is clear what the clemency authorities should do if the courts fail to provide relief.

6. ONE BULLET, TWO DEFENDANTS, RARE CLEMENCY

The UN Guidelines on the Role of Prosecutors require that prosecutors "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system". Again, in capital cases where this standard has not been met, executive clemency should be used to provide a remedy where courts have not.

On 13 October 1980, 24-year-old Willie Williams and 19-year-old **Joseph Nichols**, both black, robbed a grocery store in Houston. There were three employees in the store – 70-year-old Claude Shaffer, white; Cindy Johnson, white; and Teresa Ishman, black. During the robbery, Claude Shaffer was shot. He died from a single bullet wound. Both assailants had fired their weapons. Cindy Johnson was interviewed by police at the scene, but Teresa Ishman left. She returned and gave her name as Teresa McGee, but was not interviewed at the scene. Defence lawyers later tried to locate Teresa "McGee", but to no avail, and she played no part in the trials.

Willie Williams was brought to trial first. He pleaded guilty to killing Claude Shaffer. He said that Nichols had fired first but had not hit Shaffer. He said that Nichols was "already out the door and I had the gun still pointed back toward the old man. I thought [Shaffer] was coming up on me and I just fired". The state presented the medical examiner's evidence in support of its theory that Williams had shot Shaffer. The prosecutor said to the jury:

"Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence... there is only one bullet that could possibly have done it and that was Willie Williams'... Nichols is out the door."

The "law of parties" formed no part of the jury instruction. This is the Texas law under which the distinction between principal actor and accomplice in a crime is abolished and each defendant may be

³⁹ *Ibid.*

held equally culpable. Williams was sentenced to death in January 1981. He was executed on 20 January 1995.

Joseph Nichols was brought to trial in July 1981. The state argued that regardless of who fired the fatal shot, Nichols was guilty under the law of parties. The defence argued “abandonment”, that is that the murder had occurred after Nichols had left the crime. The jury found him guilty of capital murder, but a mistrial was declared after the jury was unable to reach a sentencing verdict. Following the trial, the prosecution interviewed some of the jurors and learned that their doubts about whether Joseph Nichols had been the person who had fired the fatal shot had left them unable to agree on the death penalty.

Joseph Nichols was retried in February 1982 by the same prosecutor. The jury was instructed on the law of parties, but this time the prosecution primarily argued that Nichols had fired the fatal shot. It did not base this about-turn on any additional investigation. The prosecutor argued that

“Willie could not have shot [Shaffer]... [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that”.

The prosecution relied heavily on the testimony of Cindy Johnson, arguing to the jury: “I’ll tell you that it was [Nichols’s] hand that did the killing. How do you know that? Cindy saw it. She told you”. Additionally, the state presented evidence from the same medical examiner as in Williams’ trial to support this new theory that the bullet came from Nichols’s position in the store. In March 1982, the jury voted for a death sentence.

In 1992, a federal judge ruled that the prosecution had presented false evidence by changing its argument from Nichols’s first trial to his retrial (Nichols II). Judge David Hittner said:

“The State argued, the jury found, and the court accepted the determination in the Williams trial that Williams was the triggerman, not just a party to the offence. That fact was established as the truth. This court has concluded that the prosecutor in charge of Nichols II offered evidence and argued to the jury and court that Nichols was the triggerman. By prior judicial determination, the evidence submitted was necessarily false. Accordingly, this court finds that the prosecutor in charge of Nichols II knowingly used false evidence to obtain the conviction and sentence in Nichols II.”

Judge Hittner concluded that “the due process boundary upon prosecutorial misconduct and the appearance of basic fairness derived from that boundary command a determination that, in a criminal prosecution, the State is constitutionally [barred] from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial”. He said that “Williams and Nichols cannot both be guilty of firing the same bullet because physics will not permit it”. He ordered that Nichols be released or retried. However, the state appealed and the Fifth Circuit Court of Appeals overturned Judge Hittner’s ruling.

In 1992, Judge Hittner had ordered the state to produce all its files in the case. These revealed that Teresa McGee was in fact Teresa Ishman; that the state had known her true identity before Nichols’s trials; had known that she would not be at the Houston address provided to the defence; and had interviewed her in the county jail prior to extraditing her to Louisiana on a shoplifting charge (the reason Ishman had assumed a false name). Her statements during those interviews threw doubt on the reliability of Cindy Johnson’s testimony. For example, she claimed that Johnson could not have seen the fatal shots fired because she had been hiding in the bathroom at the time. Judge Hittner had not considered the non-disclosure of evidence because it had not been ruled on in state court. The issue was returned to the state courts which concluded that the prosecution had failed to inform Nichols’s lawyers about the location and true identity of Teresa Ishman, and that her testimony would have in some respects been

favourable to Nichols, but that the suppression of her name and identity had not affected the outcome of the trial.

Joseph Nichols was executed on 7 March 2007 after the Board of Pardons and Paroles denied clemency, and Governor Perry failed to intervene.

Five months later, Governor Perry commuted **Kenneth Foster's** death sentence in a case with echoes of the Joseph Nichols case. While this clemency was welcome – the first time Governor Perry had commuted a death sentence that was not required by a court ruling – it remains a matter for regret that he failed to do so for Joseph Nichols.

Kenneth Foster, black, was sentenced to death in 1997 for the murder of Michael LaHood, a white man, in 1996. **Mauriceo Brown**, the person who actually shot LaHood, was executed in July 2006. Kenneth Foster, in a car some 30 metres from the crime when it was committed, was convicted under the “law of parties”. Kenneth Foster, who was 19 at the time of the crime, maintained that he did not know that Brown would either rob or kill Michael LaHood. There was evidence not heard at trial that the murder was an unplanned act committed by Mauriceo Brown, as the latter himself claimed.

In 2005, a federal district judge found a “fundamental constitutional defect in Foster's sentence”. In 1982, the US Supreme Court had ruled in *Enmund v. Florida* – in the case of a man who had been in a parked car while his accomplices committed robbery and murder in a house nearby – that the death penalty is disproportionate if it is imposed on a defendant who did not himself kill, attempt to kill, or intend to kill the victim. The Court modified this rule five years later in *Tison v. Arizona* when it held that a defendant who participates in a crime that leads to murder and whose “mental state is one of reckless indifference to the value of human life” may be sentenced to death. The federal judge ruled that Foster's jury had not been asked to determine if he had any intent to kill LaHood, and that this failure represented a misapplication of the law. However, Texas appealed to the Fifth Circuit Court of Appeals, which overturned the decision.

On the morning of 30 August 2007, the Texas Board of Pardons and Paroles announced that it had voted 6-1 to recommend to Governor Perry that he commute Kenneth Foster's death sentence. Shortly before Foster was due to be put to death, Governor Perry announced that he had accepted the recommendation. In his statement, he said: “After carefully considering the facts of this case, along with the recommendations from the Board of Pardons and Paroles, I believe the right and just decision is to commute Foster's sentence from the death penalty to life imprisonment. I am concerned about Texas law that allows capital murder defendants to be tried simultaneously, and it is an issue I think the legislature should examine.” Foster and Brown had been jointly tried.

José Briseño received a stay of execution five days before his execution was due to be carried out on 7 April 2009. The Texas Board of Pardons and Paroles had not yet announced a decision on his clemency petition when the stay was granted by the state Court of Criminal Appeals. If the death sentence is again upheld in the courts, however, the case will come back to the Board and the Governor.

José Briseño was sentenced to death in 1992 for the murder of a Texas county Sheriff who was stabbed and shot in his home in January 1991. Sheriff Ben Murray died after being stabbed and then shot once in the head. It was the only bullet fired in the house. José Briseño maintains that he is innocent of the murder, which he says was committed by his co-defendant Albert Gonzalez. The latter was sentenced to life imprisonment for capital murder in a separate trial after Briseño had been sentenced to death.

José Briseño maintains that he told his trial lawyer what had happened – that Gonzalez had stabbed Sheriff Murray; that he, José Briseño, had himself been cut when he tried to intervene; that he had already run out of the house when Gonzalez shot the Sheriff; and that Gonzalez had been shot in the left

wrist (presumably by the same bullet that went through the victim's head) – but that the lawyer had told him not to tell him what had happened. The jury never heard José Briseño's version of what had transpired.

According to José Briseño's current lawyers, his account of the crime is consistent with the evidence – José Briseño had been arrested with cuts on his hands and some of the blood in the house was his – and raises enough doubt about his conviction to warrant judicial relief or executive clemency. In addition to the circumstantial blood and wounds evidence, the prosecution's case against Briseño had relied upon the testimony of a jailhouse informant who had initiated a plea bargain on his own charges in exchange for his testimony. This is a notoriously unreliable form of evidence, and has contributed to numerous wrongful capital convictions in the USA over the years.

José Briseño's lawyers argue that, in contrast to the prosecution's theory that José Briseño must have fired the bullet that killed Murray and wounded Gonzalez, the latter's inconsistent statements and an examination of the forensic evidence supports the theory that Gonzalez was holding the Sheriff around the neck with his left arm when he shot the gun with his right hand. While Amnesty International is not in a position to know whether José Briseño did or did not shoot or stab the Sheriff, and opposes his death sentence either way, it emphasizes that international standards prohibit the use of the death penalty where there is "room for an alternative explanation of the facts".

In addition to the innocence claim, José Briseño's appeal lawyers maintain that he has mental retardation. The claim that his execution would therefore be unconstitutional has narrowly failed in the courts, however. A psychologist retained by the defence assessed José Briseño's IQ at 72, while for the prosecution a psychologist assessed it at 74. Both these scores, taking into account a five-point margin of error, fall within the range of IQ 70 or below indicating mental retardation. However, the prosecution psychologist argued that a lesser margin of error applied when there were two scores, and that the IQ range therefore should be assessed at 72-74 (rather than 67-79), just outside the mental retardation range. While two experts for the defence disagreed with this, and assessed the prisoner as having mental retardation, the courts have adopted the prosecution expert's position and rejected the claim.

Whatever the rights and wrongs of this under US law, the evidence of José Briseño's limited intellectual functioning places him, at most, in the borderline mental retardation range. This fact, coupled with the evidence that calls into question the reliability of his conviction, surely makes for a compelling case for executive clemency in the event the death sentence is upheld by the courts.

7. 'FUTURE DANGEROUSNESS': UNRELIABLE PREDICTIONS

A prerequisite for a death sentence in Texas is a finding by the jury that the defendant will pose a future danger to society, including in prison, if allowed to live. This is known as the "future dangerousness" question. This sentencing scheme has contributed to dubious prosecutorial tactics in the pursuit of death sentences, including the use of "expert" witnesses. The most notorious of these "experts" has been Dr James Grigson, a Dallas forensic psychiatrist who testified for the state in over 140 capital trials in Texas. Dubbed "Dr Death" for his conduct in such cases, he repeatedly told capital juries of his absolute certainty that the defendant would commit future acts of violence. In the vast majority of the cases, the jurors voted for death.

Dr Grigson testified at the sentencing phase of **Bobby Cook's** 1994 murder trial. He did not examine Cook, or make any diagnosis of any disorder, but testified that on the basis of the investigative files of the case, statements given by witnesses and the defendant's criminal history (none of Cook's prior convictions involved acts of violence against another person), Bobby Cook "most certainly represents a very dangerous threat to society and, in my opinion, he will commit future acts of violence". Bobby Cook's defence lawyer failed to challenge the credibility of Dr Grigson's testimony. Cook was sentenced to

death, and on 11 March 2003 became the 60th prisoner to be put to death during Governor Perry's term in office.

In 1982, the American Psychiatric Association (APA) had filed an *amicus curiae* (friend of the court) brief with the US Supreme Court in a case involving Dr Grigson's testimony. The APA wrote that the "unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession", and estimated that two-thirds of such predictions were wrong. Despite this, the US Supreme Court ruled, in *Barefoot v Estelle*, that such testimony in capital cases was not unconstitutional. Three Justices dissented, arguing that "when a person's life is at stake – no matter how heinous his offense – a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself." The *Barefoot* precedent still stands.

Rodolfo Hernandez was put to death in Texas on 30 April 2002. Before his 1985 trial, because he had been treated for various mental disorders over the previous 15 years, and because there were doubts about his sanity at the time of the crime and his competence to stand trial, his lawyer filed a motion for the judge to appoint a "qualified disinterested expert" to conduct a mental examination. The motion requested that the defence lawyers be allowed to be present at the examination or at least that the session be videotaped for future reference. The motion made clear that the lawyers objected to any such examination if these requirements were not met.

The court denied the motion, instead appointing Dr John Sparks, who proceeded to interview Hernandez, but did not review his extensive psychiatric or medical records, except for a single 1974 report indicating that Rodolfo Hernandez suffered from schizophrenia. He concluded that Hernandez had an antisocial personality disorder, was not mentally ill, and was competent to stand trial. The defence was not told that the scope of the examination would include an assessment of future dangerousness. Hernandez was not warned by Dr Sparks that anything he said during the examination could be used at the sentencing phase of his trial.

Rodolfo Hernandez was duly convicted and the trial moved into its sentencing phase. The prosecution called Dr Sparks as an expert witness. He testified to his expertise, saying that he had been involved in some 1500 criminal cases as a forensic psychiatrist. He was asked to assume as true a detailed description of a "hypothetical" capital offender and murder which was identical to the case against Rodolfo Hernandez, including dates and places. Dr Sparks was then asked to give his opinion on whether such a defendant would commit future acts of criminal violence and hence pose a continuing threat to society. The defence objected, but was overruled. Dr Sparks testified that there was "a high likelihood" that such defendant would commit future acts of violence.

On cross-examination, the defence lawyers introduced Hernandez's medical records, showing that he had been diagnosed with chronic paranoid schizophrenia, and that he had been treated with anti-psychotic medication, electro-shock therapy and other methods. The defence lawyers elicited testimony from Dr Sparks that it could be possible that Hernandez had symptoms of schizophrenia at and around the time of the crime. However, the prosecution then asked him to give his opinion as to how he would diagnose the "hypothetical" offender that had earlier been described. Dr Sparks responded that, "assuming a great deal", the case suggested an anti-social personality disorder. He agreed with the prosecutor's suggestion that it would "be fair to say then that this type of person could kill without any problem whatsoever".

After the defence attempted to raise the evidence of the defendant's history of serious mental illness, the prosecution abandoned its "hypothetical" scenario and asked Dr Sparks if he had examined Rodolfo Hernandez prior to the trial. Dr Sparks responded that he had. The defence objected. The prosecution argued that it had been the defence which had "opened the door" to mental health diagnoses. The judge ruled that Dr Sparks would be allowed to testify as to his "medical findings", which had been "opened up

by questions” presented by the defence. However, the judge said that Dr Sparks would not be allowed to give his opinion on Hernandez’s future dangerousness based upon his interview with the defendant. Of course, he already had done, albeit under the guise of a “hypothetical” question.

Under further questioning, Dr Sparks testified that he had diagnosed Hernandez as having anti-social personality disorder. He further testified that if he had reviewed Hernandez’s records, he would have diagnosed him with paranoid schizophrenia in remission as well as anti-social personality disorder. He added that people suffering from paranoid schizophrenia “are generally well organized, are generally reasonably intelligent, and although the plans may be part of the illness, they can make and do make plans.”

Rodolfo Hernandez’s death sentence survived the appeals process with minimal dissent. A judge on the US Court of Appeals for the Fifth Circuit did protest, describing the Fifth Circuit’s acceptance of the Texas Court of Criminal Appeals “terse” order affirming the death sentence as “highly creative”. He concluded that the unconstitutional use of Dr Sparks’s testimony “had a substantial and injurious influence on the jury’s determination of the issue of future dangerousness”:

“Dr Sparks was unequivocal in his testimony regarding Hernandez’s future dangerousness. He stated that an offender who had committed a crime identical in every detail with Hernandez’s offense had an anti-social personality disorder and was therefore a continuing threat to society. He revealed that, based on his examination of Hernandez, Hernandez had an anti-social personality disorder. Even when confronted with records that might have indicated that Hernandez’s behavior was attributable to paranoid schizophrenia, he adhered to his original conclusion based on his examination of Hernandez that Hernandez’s behavior was attributable to the anti-social personality disorder, conceding only that he would have altered his diagnosis to reflect paranoid schizophrenia in remission, in addition to the anti-social personality disorder”.

The *Barefoot v. Estelle* decision still stands after more than 20 years. Although the US Supreme Court in 1993 held that trial judges must act as “gate-keepers to assess the credibility of scientific evidence before it is presented to a jury, the Court has not reconsidered its *Barefoot* ruling in light of that subsequent *Daubert* decision.

The prosecution’s use of experts to seek to persuade jurors to make findings of future dangerousness in capital cases continues to draw concern, and such cases may yet come before the clemency authorities. This is, for example, an issue in the case of **Noah Espada**, who was 20 years old at the time of the 2004 murder for which he was sentenced to death in Texas in 2005. At the sentencing phase of the trial, the prosecution presented a psychiatrist, Dr Richard Coons, to testify on the issue of Noah Espada’s future dangerousness. Espada was sentenced to death, and in his subsequent appeal to the Texas Court of Criminal Appeals, the Texas Psychological Association filed an *amicus curiae* brief in which it said that viewed against established principles,

“the work done by Dr Coons in this case did not satisfy current professional standards regarding the appropriate basis for developing an opinion regarding the future dangerousness of a capital defendant. Dr Coons did not base his opinion on scientific methods. He did it his way. His testimony during the sentencing phase of Mr Espada’s trial offered nothing more than a wholly unstructured, subjective judgment – the type of prediction of ‘future dangerousness’ that has consistently been shown to be unreliable. Dr Coons gave no consideration to applicable base rates of violence, and he concluded without foundation that there was a ‘probability’ that Mr Espada, even while incarcerated, would present ‘a continuing threat to society’. Further, Dr Coons admitted that his opinion did not derive from statistically analyzed data drawn from valid and reliable research but rather solely from his personal experience. He reviewed a limited array of

records provided by the prosecution. He could not identify any standard psychiatric or medical procedures used in arriving at a determination or predicting future dangerousness. He relied on no empirical data. He could not identify any study that had validated a particular method for assessing future dangerousness, much less any 'method' he had used... In effect, Dr Coons did no more in this case than a lay witness could have done..."

The testimony of Dr Coons is not an anomaly. Expert testimony on future dangerousness has long been called into question as scientifically unsound...

Even more troubling is that, although Dr Coons' expert opinion in this case had no scientific validity, expert testimony like that offered by Dr Coons is highly influential with jurors."⁴⁰

In November 2008, the TCCA upheld Noah Espada's death sentence. Two of the judges dissented, arguing that such predictions of future dangerousness failed basic tests of reliability:

"The fact that there seems to be no evidence at all, anywhere, of the reliability of these predictions of future dangerousness should be dispositive... Our laws permit people with communicable diseases to be quarantined. The laws are based on scientific research that has shown that, without quarantining, the diseases will spread. Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that his behaviour can be predicted."

7.1 UNDERMINING CULPABILITY DETERMINATIONS?

Despite serious questions about the accuracy and even constitutionality of the Texas sentencing scheme, executions continue with clemency failing to stem the tide. Any hopes that executive clemency under Governor Perry's state leadership would be markedly different from his predecessor's term in office were dashed early on with the case of **Johnny Joe Martinez**. In an unusually close vote, the Texas Board of Pardons and Paroles decided by nine votes to eight to reject clemency. Governor Perry declined to intervene despite compelling reasons to do so.

In his final statement before being killed on 22 May 2002, Johnny Martinez once again expressed his remorse for his crime, as he had done ever since the murder. He was sentenced to death for the murder of Clay Peterson during a robbery of the shop where Peterson worked. Within half an hour of the 1993 murder Martinez had telephoned the police from a nearby motel, and told them of the crime. When the police arrived, the young man surrendered without resistance. The arresting officer described him as "very cooperative" and "concerned about what happened". At the police station, Johnny Martinez confessed to stabbing Clay Peterson. He assisted the police in their search for the murder weapon. The interrogating officer described Martinez as "very upset" and "remorseful". At the sentencing phase of the subsequent trial, Johnny Martinez expressed his remorse and an inability to explain why he had committed this act of violence. He had no history of violence and no criminal convictions.

⁴⁰ The question of how much weight jurors give to such testimony had previously been addressed by a Texas Court of Criminal Appeals Judge who wrote: "It seems to me that when Dr Grigson testifies at the punishment phase of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty... When Dr Grigson speaks to a lay jury...the defendant should stop what he is then doing and commence writing out his last will and testament – because he will in all probability soon be ordered by the trial judge to suffer a premature death." One of the jurors who sentenced Texas defendant David Wayne Stoker to death said later of Dr Grigson: "You couldn't help but listen to what he was saying. [He's] a doctor. He had a lot of influence on what we decided." David Stoker was executed in 1997 despite doubts about his guilt. See *Unethical: Psychiatric testimony used to kill, in USA: The execution of mentally ill offenders*, January 2006, <http://www.amnesty.org/en/library/info/AMR51/003/2006>, pages 137-143.

The Texas Court of Criminal Appeals (TCCA) upheld Martinez's death sentence in 1996. Four of the nine judges dissented, saying that the evidence of his future dangerousness – as noted above, the prerequisite for a death sentence in Texas – was insufficient to support a death sentence and that the majority had “contorted” the facts of the case in order to uphold the death sentence. One of the dissenters wrote:

“we have the duty of ensuring death sentences are imposed in an evenhanded, rational and consistent manner... Today, the majority shirks that responsibility and issues an opinion that insulates jury verdicts from meaningful appellate review... In light of the majority opinion, there is no longer any assurance that the death penalty will not be wantonly or freakishly imposed”.

Another wrote:

“Every murder committed in the course of a robbery is in some way cold-blooded and senseless. Each such murder does not, however, merit the death penalty, our most final punishment... This opinion will probably set a precedent ensuring that never again will there be facts that this Court will find insufficient to support an affirmative answer to the [future dangerousness question]”.

According to a forthcoming law review article on the concept of future dangerousness in the context of the US capital justice system:

“future dangerousness transforms the capital sentencing inquiry into one of unscientific, misinformed prediction, and in so doing takes the focus entirely away from any meaningful culpability consideration. In this way, future dangerousness manages to simultaneously undermine the retributive rationale for executions it supports and trap many of the least-culpable capital defendants...”

A review of executions based on future dangerousness reveals a trend consistent with the elimination of culpability determinations...: a morass of strikingly young defendants without particularly aggravated crimes, and frequently with lessened culpability due to additional factors that are universally recognized as mitigating”.⁴¹

Johnny Joe Martinez was 20 years old when he killed Clay Peterson. As noted in Section 2 above, Texas led the USA in the execution of people for crimes committed as children (under 18-year-olds) before the US Supreme Court outlawed this practice in 2005, and it continues to sentence to death and execute youthful offenders. Every one of those death sentences was based on a finding of “future dangerousness”, raising the question of whether the Texas sentencing scheme undermines the mitigating effect that should be attributed to youth. Although the US Supreme Court ruled in 1993 that the Texas sentencing scheme did allow jurors to give mitigating effect to the 19-year-old defendant's youthfulness, four of the Justices had dissented.⁴²

Mexican national **Javier Suárez Medina** was 19 years old when he shot police officer Lawrence Cadena as he was delivering a bag of cocaine to him, unaware that Cadena was an undercover narcotics officer. The teenager claimed that he only made the delivery under threat from the actual dealers. He never denied shooting Officer Cadena, but maintained that he fired in fear when he heard what he thought were gunshots. Before the shooting, Javier Suárez had no criminal record. At his trial, the defence presented 15 witnesses who testified to his non-violent character.

⁴¹ Meghan Shapiro, An overdose of dangerousness: How ‘future dangerousness’ catches the least culpable capital defendants and undermines the rationale for the executions it supports. *American Journal of Criminal Law* (pre-publication version, 24 April 2009).

⁴² *Johnson v. Texas, op. cit.*

The prosecution had little or no evidence to give to the jury that Javier Suárez would pose a danger if allowed to live. It presented alleged instances of school disobedience, and of an occurrence of joyriding with others in a stolen car. However, after both sides had concluded their presentations, the state produced a surprise witness who had just come forward. While watching the trial coverage on television, Michael Mesley said he had recognized Javier Suárez Medina as the man who had shot him in the face in a 1987 night time robbery. He was allowed to testify, over the objections of the defence.

The defence was given only days to confront this dramatic testimony which the state used to argue “future dangerousness”. They produced Javier Suárez Medina’s employment records showing that he had worked until two hours after Michael Mesley had been shot. However, the prosecution implied that he could have arranged for a fellow employee to “punch” his time card, thus allowing him to leave early.

Javier Suárez Medina maintained that he did not shoot Michael Mesley. No physical evidence linked him to that crime, which remained unsolved, and post-conviction investigations undermined the state’s theory that a colleague could have covered for his absence at work. In addition, an expert concluded that Mesley’s positive identification was unreliable, since it was based on a brief view of the robber’s face under poor lighting and highly stressful circumstances.

In many US states outside Texas, Javier Suárez Medina’s death sentence would have been overturned on appeal because the prosecution’s introduction of this “unadjudicated” evidence would have been illegal. Use of such testimony to support a death sentence has also been found to violate international law.⁴³

7.2 NO REASSESSMENT OF ‘FUTURE DANGEROUSNESS’ FOR CLEMENCY

Governor Perry refused to stop the execution of Javier Suárez Medina, saying that he had “reviewed all of the information presented to me”, including the international treaty violation in his case (see Section 9 below). In his final statement before being killed by the state on 14 August 2002, Javier Suárez Medina said: “I’d like to apologize to the Cadena family for whatever hurt and suffering I’ve caused them. I sincerely ask in your heart to forgive me.” Members of the police officer’s family were among the witnesses to the execution. After the execution, his lawyer said: “Javier specifically asked that it be made known to the Cadena family that he deeply regrets the crime and the suffering that they’ve endured, and that he really wants the family to find closure and peace.”

Such words would seem to belie the tag of “future dangerousness” attached to the capital defendant to send him to the execution chamber. It has been pointed out that

“dangerousness-based executions are carried out as if time froze at the time of the sentencing when, in reality, the defendant has aged approximately a decade, and events may have transpired that either tend to disprove the original dangerousness prediction, or call into question its continuing validity”.⁴⁴

James Allridge spent 17 years on death row. Twenty-two years old at the time of the crime, he was 41 when he was killed in the Texas execution chamber on 26 August 2004. Lawyers had appealed for clemency on the grounds of his rehabilitation, his acceptance of responsibility for his crime, and his remorse for his actions. His petition was supported by a veteran official of the Texas prison system, and

⁴³ In 2001, federal death row prisoner Juan Raul Garza was executed despite a call for commutation by the Inter-American Commission on Human Rights (IACHR). The IACHR had found that the introduction of evidence of Garza’s involvement in unsolved crimes for which he had never been tried or convicted had been “antithetical to the most basic and fundamental judicial guarantees”. It concluded that Garza had been sentenced to death “in an arbitrary and capricious manner” and that his execution would be a “deliberate and egregious violation” of US obligations under international law.

⁴⁴ Meghan Shapiro, *An overdose of dangerousness. op. cit*

two former death row guards. One of the guards said: “James was the kind of prisoner that made everybody’s life easier as far as being able to work around the death row inmates. James probably saved a lot of correctional officers’ lives and they didn’t even know it, just by calming the situation. James is deserving of clemency because he is the perfect role model inmate. I think if James was put back in [general inmate] population he would continue to be a good role model prisoner.” The second guard stated in an affidavit that “James would not be a threat to society if his death sentence were to be commuted to a life sentence.” At least four of the jurors who sentenced James Allridge to death also supported clemency.

Rehabilitation has been the reason given for executive clemency in a number of cases in other states. In Texas, however, rehabilitation – or to put it in terms of the Texas sentencing scheme, human proof of the unreliability of future dangerousness determinations – appears not to register with the clemency authorities as a valid reason to spare the life of the condemned prisoner.

The question of future dangerousness may soon be an issue for consideration by the clemency authorities in the case of **David Lee Powell** who is on death row in Texas for the murder of a police officer, Ralph Ablanedo, committed 31 years ago in the state capital, Austin. Twenty-seven years old at the time of the crime, David Powell is now 58. More than 70 countries have legislated to abolish the death penalty since David Powell was first sent to death row.⁴⁵

Powell was sentenced to death in 1978. Prior to his trial, the judge had ordered that he be subjected to a psychiatric examination to assess his competence to stand trial and his sanity at the time of the crime. Dr Richard Coons (see Noah Espada case above) and a clinical psychologist examined Powell. Defence counsel had not been told that the experts would assess Powell’s future dangerousness, and Powell had not been advised that he could remain silent. Yet both experts testified at the subsequent sentencing hearing that, based on their examinations, they believed that David Powell would commit acts of future violence. The jury answered the future dangerousness question in the affirmative and Powell was sentenced to death. In 1989, the US Supreme Court overturned the death sentence, noting that “for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is literally a life or death matter which the defendant should not be required to face without the guiding hand of counsel”.

David Powell was brought to a retrial in November 1991, and again sentenced to death. In 1994, this was overturned by the Texas Court of Criminal Appeals on the basis of error in the instructions given to the jury. The case came to trial again in 1999. The defence lawyers had intended to pursue a theory that Powell’s former girlfriend, who was with him at the time of the crime, had been involved in the shooting. However, because their forensic investigation was not completed by the time the third trial began, they decided instead to defend David Powell from the death penalty by seeking to persuade the jury that he no longer posed a future danger.

As evidence of David Powell’s future dangerousness, the prosecution relied primarily on the facts of the crime committed over two decades earlier. It also presented evidence that in 1970, when Powell was a teenager (he was now approaching 50), he had stolen a car and used false identification. It also told the jury that in jail before his first trial, that is, in 1978, he had committed a number of relatively minor disciplinary infractions. Apparently clutching at straws, the prosecution added that he had received a number of disciplinary reports: in 1988 for having an extra pair of socks and shorts in his cell; in 1989 for playing his radio too loud; in 1990 for not making his bed before 6am, and for banging on a door when he was not allowed to telephone his lawyer; in 1991 for cursing at a guard when he was not allowed to have contact lens solution; in 1992 for putting his foot in the door when a guard was trying to close it; and in 1996 for refusing to obey an order to remove a poster from the wall of his cell.

⁴⁵ See <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.

The defence lawyers presented evidence that before David Powell became involved in drugs at the University of Texas, he had been a well-mannered, law-abiding young man and a promising student. His subsequent emotional and psychological descent led to increasing paranoia and irrational behaviour, leading up to the crime. After he came off drugs in prison, he returned to something like his former self, and became involved in, for example, helping other inmates to learn to read. Several prison guards testified that David Powell was a model inmate. At that time, Texas death row inmates had access to work in a prison garment factory, which Powell was allowed to do, and the assistant manager of that program testified that Powell was a good worker.

Nevertheless, for a third time, and 21 years after the crime, the jury decided that David Powell would pose a future danger to society if allowed to live, even in prison, and sentenced him to death.

Some nine years later, on 18 May 2008, the Austin Police Association (APA) took out a full page advertisement in the *Austin American-Statesman* newspaper, commemorating the 30th anniversary of Officer Ablanedo's death. The advertisement announced that members of the APA would be going to the hearing on Powell's federal appeal in the US Court of Appeals for the Fifth Circuit Court in New Orleans on 3 June 2008, and inviting officers to attend also. After the hearing, attended by about 25 Austin police officers, the president of the APA was quoted in the paper as saying "hopefully this last appeal will be done and we can move on with setting an execution date so we can move on and the family of Ralph Ablanedo can finally get closure".⁴⁶ David Powell's death sentence was upheld the following month by the US Court of Appeals for the Fifth Circuit, and on 23 March 2009, the US Supreme Court said that it would not consider the case. The state could set an execution date at any time.

David Powell's lawyers are seeking to get back into state court to raise a new challenge. This stems from information contained in the 18 May 2008 APA advertisement, which included the assertion that before he had been killed, Officer Ablanedo had "returned fire with nine shots." Until that time, the state's case had been that the officer had not fired his gun before he was shot by Powell with an AK-47 assault rifle. The lawyers are also continuing to investigate the possible role of Powell's former girlfriend in the shooting.

David Powell has spent more than half of his life on death row. In 1999, the year David Powell was sentenced to death for the third time, US Supreme Court Justice Stephen Breyer wrote in a death penalty case where the inmate had been on death row for nearly 20 years, that "Where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." This is surely reason enough for David Powell's sentence to be commuted.

Without the state's errors made in the earlier trials, David Powell might well have been executed by now. Those mistakes have provided an opportunity for the state to turn away from the mistake of killing him, and to recognise the "pointless and needless deprivation of life" that his execution would represent, to use the words of Justice Stevens in the *Baze* opinion in 2008. Justice Stevens joined the Supreme Court three years before David Powell first went to death row. Since then, Justice Stevens said, the death penalty's three "societal purposes" identified by the Court in 1976 in the decision allowing judicial killing to resume in the USA – incapacitation, deterrence and retribution – had all been called into question. And while "a natural response" to heinous crimes may be "a thirst for vengeance", he wrote, "our society has moved away from public and painful retribution towards ever more humane forms of punishment".

⁴⁶ Austin officers show support at killer's hearing. *Austin American-Statesman*, 4 June 2008.

8. AN INESCAPABLE FLAW – THE RISK OF IRREVERSIBLE ERROR

For many people, the death penalty's most intolerable flaw is the risk of irreversible error that accompanies it. In his 2008 opinion revealing his concerns about the US death penalty, Justice Stevens said that "the irrevocable nature of the consequences is of decisive importance to me" and pointed out that the risk of executing the innocent "can be entirely eliminated" by abolishing the death penalty. Abolition is indeed the only way to guarantee the elimination of this risk.

In its 2007 recommendation to the state legislature to abolish the death penalty, the New Jersey Death Penalty Study Commission, among its stated reasons were that any government interest in executing a small number of those guilty of murder "is not sufficiently compelling to justify the risk of making an irreversible mistake". New Jersey has since taken this step. So too has New Mexico. Signing an abolitionist bill into law on 18 March 2009, the Governor of New Mexico, Bill Richardson, explained that throughout his adult life he had been a supporter of the death penalty, but that in recent years he had come to the conclusion that its irrevocable nature rendered it an untenable punishment in an imperfect justice system:

"I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong. But the reality is the system is not perfect – far from it. The system is inherently defective. DNA testing has proved that. Innocent people have been put on death row all across the country. Even with advances in DNA and other forensic evidence technologies, we can't be 100-per cent sure that only the truly guilty are convicted of capital crimes. Evidence, including DNA evidence, can be manipulated. Prosecutors can still abuse their powers. We cannot ensure competent defense counsel for all defendants."

In April 2009, Texas Senior District Judge C.C. Cooke, a judge with 34 years experience on the bench, revealed that he used to be "very pro capital punishment" but now believes, "generally speaking", that life imprisonment without parole is "more palatable".⁴⁷ Among other things he cited his belief that one of the men he sentenced to death may have been innocent. That prisoner, **Richard Wayne Jones**, was executed on 22 August 2000. Richard Jones's lawyers had sought to have the execution stayed so that modern DNA tests could be carried out on crime-scene evidence. On 21 August, two of the jurors who sentenced Richard Jones to death voiced their support for such DNA tests to be carried out. Governor George W. Bush was out of Texas campaigning for the US presidency and left the decision to his Lieutenant Governor, Rick Perry. Neither Governor Bush nor Lt. Governor Perry intervened to issue a reprieve for DNA testing after the state Board of Pardons and Paroles had voted 17-0 to reject clemency for Jones. The prisoner went to his death protesting his innocence. In his final statement, Richard Jones said: "I want the victim's family to know I didn't commit this crime. I didn't kill your loved one."⁴⁸

Four years after Richard Jones was killed in the Texas death chamber, the same state policy was carried out on **Cameron Willingham**. In the moments before being killed on 17 February 2004, he said: "The only statement I want to make is that I am an innocent man - convicted of a crime I did not commit. I have been persecuted for 12 years for something I did not do."

Cameron Willingham was sentenced to death in 1992 for the arson murder of his three young children, who died in a house fire in December 1991. Since then, as part of an investigation by journalists on the Chicago Tribune, four national fire experts have concluded that the fire may have been started accidentally and that, in any event the original investigation of the fire had been flawed. Arson theories

⁴⁷ Judge favors sentence other than death. Cleburne Times-Review, 13 April 2009.

⁴⁸ See Amnesty International Urgent Action, 3 August 2000, <http://www.amnesty.org/en/library/info/AMR51/119/2000/en> and update, 22 August 2000, <http://www.amnesty.org/en/library/info/AMR51/135/2000/en>.

that have since been repudiated by scientific advances formed the basis of the prosecution's case against Willingham.

Willingham's death sentence was upheld by the courts, and his last chance of life failed when Governor Perry refused to stop his execution, despite being presented with a report from a leading fire expert who questioned the reliability of the conviction. The author of the report, Gerald Hurst, told the Tribune, "There's nothing to suggest to any reasonable arson investigator that this was an arson fire. It was just a fire." Another of the experts, Louisiana fire chief Kendall Ryland said it "made me sick to think this guy was executed based on this investigation.... They executed this guy and they've just got no idea - at least not scientifically - if he set the fire, or if the fire was even intentionally set."⁴⁹

The prosecution's case was also based on a statement by a jailhouse informant that Cameron Willingham had confessed to him in jail that he had set the fire. Such testimony has repeatedly been shown to be unreliable and has been implicated in a number of wrongful capital convictions in the USA.

A spokesperson for Governor Perry told the Chicago Tribune that the governor had considered "all of the factors" carefully before rejecting the request for a stay of execution. On learning of the new evidence, one of the jurors from the trial said: "Now I will have to live with this for the rest of my life. Maybe this man is innocent".

Less than a year after Cameron Willingham was put to death, **Ernest Willis** was released from death row in Texas on the grounds of innocence. He had been sentenced to death for a double arson murder in 1986. After a federal judge overturned the conviction, the new prosecutor on the case hired a fire expert who concluded that there was no evidence of arson. The state dismissed all charges, and Ernest Willis was released in October 2004. The prosecutor said that Willis "simply did not do the crime... I'm sorry this man was on death row for so long and that there were so many lost years."

8.1 THE CONTINUING RISK OF ERROR

Continued resort to the death penalty brings with the ever-present risk of lethal error. Another case that could yet come before the Board of Pardons and Paroles and Governor Perry is that of **Larry Swearingen**. He was 24 hours from execution in January 2009, when a three-judge panel of the US Court of Appeals for the Fifth Circuit issued a stay. He was sentenced to death in 2000 for the murder of Melissa Trotter in 1998. He maintains his innocence of the murder. Several forensic experts have provided statements and testimony supportive of his claim.

Melissa Trotter went missing on 8 December 1998. Larry Swearingen was arrested three days later, and has been incarcerated ever since. The body of Melissa Trotter was found in a forest on 2 January 1999. Larry Swearingen was tried for her murder, and sentenced to death.

A petition filed in the US Supreme Court argued that "the State's only theory of guilt, which was that Mr Swearingen killed the victim and left her body in the forest on December 8, 1998, twenty-five (25) days before the corpse was recovered on January 2, 1999, is not just implausible, it is utterly impossible." In support of this innocence claim, the petition cited the opinions of three current or former Chief Medical Examiners and another forensic pathologist. One of these experts, Dr Joye Carter, is the former Chief Medical Examiner of Harris County in Texas who performed the autopsy of Melissa Trotter and testified at Larry Swearingen's trial. At the trial she had testified that in her opinion, Melissa Trotter's death had occurred 25 days before her body was found. In an affidavit signed in 2007, Dr Carter stated that she had looked again at the case and changed her opinion. She stated that she had reviewed the autopsy report and photographs and also "several pieces of forensically important information that, to the best of my recollection, were not made available to [me] during trial or pretrial proceedings." This information

⁴⁹ Steve Mills and Maurice Possley. 'Texas man executed on disproved forensics'. Chicago Tribune, 9 December 2004.

included video footage of the crime scene taken on the day Melissa Trotter was found, medical records giving Melissa Trotter's weight immediately prior to her disappearance, and the temperature data for the area in which she was found for the period 8 December 1998 to 2 January 1999.

In her affidavit, Dr Carter concluded that Melissa Trotter's body had been left in the forest within two weeks of it being found. If accurate, this would mean that the body was dumped at a time when Larry Swearingen was already in custody. Another forensic pathologist, and former Chief Medical Examiner for Nueces County, Texas, Dr Lloyd White, has given a written statement that he supports Dr Carter's conclusions based on her 2007 re-evaluation of the evidence. He also agrees with Dr Gerald Larkin, another forensic expert, who concluded that "Ms Trotter's body was exposed in the wood for several days only, and not for two or three weeks". Dr White states that there is strong support for the conclusion that the body was left in the woods "at least one week after Mr Swearingen was incarcerated on December 11, 1998, and probably more than two weeks after".

The petition to the Supreme Court argued that the post-conviction expert evidence amounts to "uncontested forensic pathology showing that Mr Swearingen could not possibly have been the person who killed the victim. The only way to convict would be for the jury to conclude that Mr Swearingen had an accomplice who stored the body so it would not decompose and disposed of it later. That, however, is speculation so rank that the State has never even proposed it. Indeed, it collides with the State's insistence at all stages of proceedings that no one but Mr Swearingen killed the victim and threw her into the woods".

Larry Swearingen has repeatedly sought full DNA testing of crime scene evidence. According to his petition to the US Supreme Court, "the DNA analysis that the State has conducted so far is compelling evidence that Mr Swearingen is innocent. State examiners found male blood under the victim's fingernails. Testing excluded Mr Swearingen as the donor." The petition also notes that at an evidentiary hearing in 2008, a co-worker of Melissa Trotter had testified that, only weeks before her disappearance, another man had "made serious threats to rape and strangle the victim".

The Fifth Circuit panel which issued the stay on the eve of the execution did not address the merits of Larry Swearingen's innocence claims, but only considered whether they were sufficient to overcome the obstacles under federal law preventing the court from authorizing the filing of a successive habeas corpus petition in the lower District Court. Under this federal statute, the prisoner must show that "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense".

The Fifth Circuit said that there were "two independent gates" through which a motion to file a successive petition must pass before the merits of the prisoner's claim will be addressed. First, the Fifth Circuit would have to determine whether the motion made a *prima facie* case that the above requirements of the federal statute were met, including that there is "a sufficient showing of possible merit to warrant a fuller exploration by the District Court". Secondly, once the case was remanded to the District Court, the latter would also have to determine whether the requirements of the federal statute had been met before it could address the merits of the successive petition.

The Fifth Circuit court held that "given the importance of Dr Carter's expert testimony to the State's case, we find that Swearingen has made a *prima facie* showing that but for the constitutional error of the State sponsoring the false testimony of Dr Carter, no reasonable juror could find guilt beyond a reasonable doubt". The constitutional precedent on this issue is the 1972 Supreme Court ruling in *Giglio v. United States*. The Fifth Circuit also found that Larry Swearingen had made a *prima facie* case that his legal representation at trial had been constitutionally deficient, including in cross-examining Dr Carter. Here the precedent is *Strickland v. Washington* (1984). The Fifth Circuit panel therefore authorized Larry

Swearingen to file a successive habeas corpus petition in the District Court limited to these issues. The court stressed that “this grant is tentative” in that the District Court “must dismiss” the petition, “without reaching the merits”, if that court were to find that Swearingen had not satisfied the federal statutory requirements relating to successive petitions.

One of the three Fifth Circuit judges wrote a separate, concurring opinion. He said that he wished to address “the elephant that I perceive in the corner of this room: actual innocence”. Judge Jacques Wiener continued: “Consistently repeating the mantra that, to date, the Supreme Court of the United States has never expressly recognized actual innocence as a basis for habeas corpus relief in a death penalty case, this court has uniformly rejected stand-alone claims of actual innocence as a constitutional ground for prohibiting imposition of the death penalty.” Judge Wiener noted, however, that the Supreme Court had made certain statements that “at least strongly signal that, under the right circumstances, it might add those capital defendants who are actually innocent to the list of persons who – like the insane, the mentally retarded, and the very young – are constitutionally ineligible for the death penalty”.

Judge Wiener said that could foresee the “real possibility” that the District Court might interpret the expert forensic opinion as clear and convincing evidence that Larry Swearingen could not possibly have killed Melissa Trotter and yet still “find it impossible to force the actual-innocence camel through the eye of either the *Giglio* or *Strickland* needle, and thus have no choice but to deny habeas relief to an actually innocent person”. As such, Judge Wiener suggested, Swearingen’s predicament might be “the very case” for the full Fifth Circuit Court or the US Supreme Court to “recognize actual innocence as a ground for federal habeas relief”. He concluded that “to me, this question is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long”.

Too long coming in Texas has been recognition of the inherent flaws of the death penalty and the urgent need for a moratorium on executions pending abolition.

9. VIOLATIONS OF INTERNATIONAL LAW IN THE ‘LONE STAR STATE’

Texas is a strong advocate for what is known in the USA as “states’ rights” under the 10th amendment to the US Constitution.⁵⁰ On 9 April 2009, for example, Governor Perry joined with a number of Texas legislators promoting a resolution to back the notion of Texas sovereignty under the 10th amendment. In a statement the governor said: “I believe that our federal government has become oppressive in its size, its intrusion into the lives of our citizens, and its interference with the affairs of our state”.

Seven years earlier, Governor Perry had issued a statement that spoke of Texas sovereignty when refusing to stop the execution of Mexican national **Javier Suárez Medina** in the Texas death chamber:

“Today I denied requests for a 30-day stay of execution to Javier Suárez Medina... I respect the sovereignty of Mexico and its laws, and I know that [Mexican] President [Vicente] Fox recognizes the sovereignty of US and Texas law.”

Under international law, the notion of Texas sovereignty is irrelevant to the question presented by this case and others like it. Under the Vienna Convention on the Law of Treaties, a country’s internal laws and structure of government cannot be invoked as justification for its failure to comply with its international treaty obligations. Despite knowing from the outset that Javier Suárez Medina was a Mexican national, the Texas authorities never informed him of his right, under Article 36 of the Vienna Convention on Consular Relations (VCCR), to contact his consulate for assistance. This is not a paper right – it has real meaning and can have real effect. With the belated assistance of the Mexican government after his trial, Javier Suárez Medina’s appeal lawyers uncovered powerful mitigating evidence not heard by the jury. The appeal courts upheld the death sentence, however, and Governor Perry allowed the execution to go forward on 14 August 2002.

⁵⁰ The 10th amendment reads: “The powers not delegated to the United States [i.e. federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The execution of Javier Suárez Medina went ahead despite appeals from many quarters for a reprieve or commutation, including from the UN High Commissioner for Human Rights, the UN Sub-Commission on the Promotion and Protection of Human Rights, the Inter-American Commission on Human Rights, the European Union, and the American Bar Association. The governments of 16 individual countries either sent appeals for clemency or joined Mexico in signing on to an *amicus curiae* (friend of the court) brief urging the US Supreme Court to halt the execution and hold a full hearing to resolve the legal implications of the treaty violation in this case.

Following the execution, Mexico's President Fox cancelled a planned trip to Texas in late August 2002 during which he had been scheduled to meet President Bush and Governor Perry. A spokesman for President Fox was quoted as saying: "This decision is an unequivocal signal of rejection of the execution. It would be inappropriate, in these lamentable circumstances, to go ahead with the visit to Texas... Mexico is confident that the cancellation of this important presidential visit will contribute to a strengthening of the respect by all states for the rule of international law".

Six years later, Governor Perry allowed the execution of another Mexican national denied his consular rights. **José Medellín** was executed in Texas on 5 August 2008 for his part in the murders of two teenaged girls in Houston in 1993. In his final statement before being killed by the state, he said that he was sorry for the pain that his actions had caused.

José Medellín was barely 18 years old at the time of the crime (two co-defendants who were 17 subsequently had their death sentences commuted after the Supreme Court's *Roper* ruling in 2005). He was never advised by Texas authorities of his right to seek consular assistance. The Mexican Consulate did not learn about the case until nearly four years after José Medellín's arrest, by which time his trial and the initial appeal court decision affirming his conviction and death sentence had already concluded.

According to his clemency petition, during the investigation and prosecution of José Medellín's case, his court-appointed lead lawyer was under a six-month suspension from practising law for acting unethically in another case. He continued to represent José Medellín while suspended. Prior to the trial, the lawyer was held in contempt of court and arrested for violating his suspension. Time that should have been spent preparing his client's defence went instead to preparing and filing a habeas corpus petition to keep himself out of jail. Records indicate that the only investigator for the defence spent a total of just eight hours on the case prior to the trial. The defence failed to oppose the selection of jurors who indicated that they would automatically impose the death penalty. José Medellín's lawyers called no witnesses during the guilt phase of the trial. At the sentencing phase, their presentation of mitigating evidence lasted less than two hours.

An investigation funded by the Mexican Consulate found that José Medellín grew up in an environment of abject poverty in Mexico and was exposed to gang violence after he came to Houston to join his parents when he was nine. It also established that he suffered from depression, suicidal tendencies and alcohol dependency. If his trial lawyers had sought consular assistance, experts and investigators could have been retained by the Mexican Consulate to present the full range of mitigating evidence to the sentencing jury. In addition, consular monitoring of the case in the pre-trial stages could have exposed and remedied the inadequate legal representation that José Medellín was receiving.

On 31 March 2004, the International Court of Justice (ICJ) ruled in *Avena and Other Mexican Nationals* that the USA had violated its VCCR obligations in the cases of José Medellín and 50 other Mexican nationals on death row in the USA. As the necessary remedy, the ICJ ordered the USA to provide judicial "review and reconsideration" of the convictions and sentences, to determine if the defendants had been prejudiced by the VCCR violations. On 28 February 2005, President George W. Bush responded to the binding ICJ decision by seeking to have the state courts provide the necessary "review and

reconsideration” in all of the affected cases. The Texas Court of Criminal Appeals later ruled that the President lacked the constitutional authority to order state court compliance and that the *Avena* decision was not enforceable in the domestic courts.

José Medellín’s lawyers appealed to the US Supreme Court. Although the State of Texas argued to the Court that the President had overstepped his authority, it acknowledged that “Nobody disputes that the United States has an international law obligation to satisfy *Avena*.” On 25 March 2008, in *Medellín v. Texas*, the Supreme Court unanimously found that the ICJ’s *Avena* decision “constitutes an international law obligation on the part of the United States.” The Court also unanimously agreed that the reasons for complying with the ICJ judgment were “plainly compelling,” since its domestic enforcement would uphold “United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.” However, a 6-3 majority ruled that the ICJ’s decision “is not automatically binding domestic law” and that the authority for implementing it rested not with the President but with the US Congress. In a concurring opinion, one of the Justices urged Texas to recognize what was “at stake” and to do its part to ensure compliance with the USA’s international obligations.⁵¹ In a joint letter to Governor Perry, on 17 June 2008, US Secretary of State Condoleezza Rice and US Attorney General Michael Mukasey called on Texas to take the “steps necessary to give effect to the *Avena* decision”. The governor’s subsequent failure to stop the execution of José Medellín perhaps suggests that he viewed this as unwarranted federal government “interference with the affairs of our state”.

On 16 July 2008, the ICJ issued “provisional measures” in the cases of José Medellín and four other Mexican nationals facing execution in Texas (the other four did not have execution dates and remain on death row today). The ICJ ordered the USA “to take all measures necessary” to ensure that these individuals “are not executed... unless and until these five Mexican nationals receive review and reconsideration.” The Inter-American Commission on Human Rights also issued “precautionary measures” calling on Texas not to execute José Medellín until the Commission had ruled on his petition asserting that he was deprived of a fair trial.

On 4 August 2008, the Texas Board of Pardons and Paroles unanimously voted against recommending that Governor Perry commute the death sentence or grant a reprieve. The governor was left with the option of granting a 30-day stay of execution, and calling on the Board to reconsider. He refused to do so.

The Government of Mexico issued a statement after the execution which it said had been carried out “in clear contempt” of the ICJ order. The statement continued:

“The Government of Mexico sent the US Department of State a diplomatic note of protest for this violation of international law, expressing its concern for the precedent that it may create for the rights of Mexican nationals who may be detained in that country. The Ministry of Foreign Relations reiterates that the importance of this case fundamentally stems from the respect to the right to consular access and protection provided by consulates of every State to each of its nationals abroad... The Government of Mexico will continue to insist on the US obligation to review and reconsider the convictions and sentences of the other Mexican nationals included in the *Avena* decision. The Ministry of Foreign Relations reiterates its commitment with the consular protection of Mexican nationals abroad.”

Two days later, on 7 August 2008, **Heliberto Chi Aceituno**, a Honduran national, was put to death in the Texas execution chamber. He, too, had raised a VCCR claim on appeal.

⁵¹ See USA: Government must ensure meaningful judicial review of Mexican death row cases, 27 March 2008, <http://www.amnesty.org/en/library/info/AMR51/025/2008/en>.

There are some 24 foreign nationals on death row in Texas of 10 nationalities. At least some of them were denied their VCCR rights after arrest. Neither US Congress nor the Texas legislature has yet passed the legislation to ensure compliance with the ICJ ruling. On 14 July 2008, a bill known as the Avena Case Implementation Act was introduced in the US House of Representatives. Under its terms, affected foreign nationals would be granted access to “appropriate remedies” through the domestic courts for VCCR violations, including the reversal “of the conviction or sentence, where appropriate.” In Texas, Senator Rodney Ellis has introduced a bill (SB 125) to enforce VCCR obligations for foreign nationals arrested in Texas. It also provides for prisoners on death row in Texas, “whose rights, during and in relation to the investigation or prosecution of the offense, were infringed by a violation of the Vienna Convention on Consular Relations” to be able to file a motion in court in order “to obtain any appropriate relief required to remedy the harm done by the violation”, including reversal of the death sentence.

Meanwhile, the Board of Pardons and Paroles and Governor Perry should work to ensure that Texas no longer violates the USA’s treaty obligations in the state’s resort to the death penalty.

10. BREAKING ‘HABIT AND INATTENTION’, ENDING FAITH IN EXECUTIONS

In his 2008 opinion, in *Baze v. Rees*, revealing that his more than three decades on the US Supreme Court had led him to the conclusion that the death penalty amounted to the “pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes”, Justice Stevens said that he had been persuaded that:

“current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits”.

Today, 138 countries are abolitionist in law or practice. The USA, with Texas as its leading executing state, continues to resist taking such a step.

For some people, the death penalty is justice. For others, Amnesty International included, the death penalty is a cruel, inhuman and degrading punishment which, carried out, represents the ultimate denial of human rights. A US federal judge has described this difference of opinion thus:

“Few issues in American society have generated as much impassioned debate as the death penalty. At one end of the spectrum, abolitionists condemn the intentional taking of human life by the State as barbaric and profoundly immoral. At the other, proponents see death, even a painful death, as the only just punishment for crimes that inflict unimaginable suffering on victims and their surviving loved ones.”⁵²

Ironically, this debate will rarely be played out in the USA’s capital jury rooms. Those citizens who are “irrevocably” opposed to the death penalty, whether on moral, philosophical or religious grounds, or even those whose feelings about the death penalty would “prevent or substantially impair the performance of his duties as a juror”, can be excluded for cause by the prosecution.⁵³ The “death-qualification” process

⁵² *Morales v. Tilton*, Memorandum of intended decision; Request for response from defendants. United States District Court for the Northern District of California (Judge Jeremy Fogel), 15 December 2006.

⁵³ *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985). In 1992, in *Morgan v. Illinois*, the Court explicitly extended the *Witt* standard to include proponents of the death penalty. In other words, anyone whose support for the death penalty would “prevent or substantially impair” them from performing his or her duties as a juror can be dismissed for cause. See also *Uttecht v. Brown* (2007) involving a case from Washington State. During jury selection, the judge had dismissed a juror because he expressed doubts about imposing a death sentence. In a 5-4 decision, the Supreme Court held that the judge’s ruling should be given deference. Justice Stevens dissented: “Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve

produces jurors who are more pro-prosecution than their excludable counterparts.⁵⁴ Justice Stevens wrote in his *Baze* opinion that “of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community”. Litigation relating to the selection of capital juries in the USA, he continued, “has persuaded me that the process of obtaining a ‘death qualified jury’ is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction.”

Khristian Oliver is one of the more than 350 people awaiting execution in Texas. He is one of 48 people who were sentenced to death in that state in 1999, and one of 284 sentenced to death nationwide that year. He was convicted of one of the more than 1,300 murders committed in Texas in 1998, which in turn were among the nearly 17,000 murders in the USA that year. He was 20 years old at the time of the crime. His death sentence labels him as “the worst of the worst”, one of the tiny percentage of convicted murderers in the USA “whose extreme culpability makes them the most deserving of execution”. The route to such labeling is via the legislature, prosecutorial choice, juror deliberation, judicial review, and in the final step to the individual’s permanent condemnation, clemency consideration.

The previous governor of Texas, like Governor Rick Perry a death penalty supporter whose power of reprieve was rarely exercised, said in September 2001, “freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them”.⁵⁵ In their deliberations in death penalty cases, it appears that for some jurors “God is not neutral”. As has occurred in other cases, during their sentencing deliberations at Khristian Oliver’s trial, members of the jury had consulted various passages in the Bible, including one from the Old Testament that reads as follows: “And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death”.⁵⁶ Earlier the jurors had heard evidence that Khristian Oliver had struck the victim several times in the head with a gun after shooting him. The jury voted for a death sentence.

In 2008, the US Court of Appeals for the Fifth Circuit found that the jury’s use of the Bible “amounted to an improper external influence on the jury’s deliberations”, in violation of the US Constitution. Nevertheless, it upheld the death sentence, deferring to the decision by the Texas courts that the use of the Bible had not prejudiced the jury’s decision-making. On 20 April 2009, the US Supreme Court announced that it would not consider the case, despite an appeal for it do to so from nearly 50 former US federal and state prosecutors. Their brief pointed out that there was a split within federal courts as to whether juror consultation of the Bible during deliberations is constitutionally prohibited, as these prosecutors believe it is. This division, they wrote, “enables tainted capital sentences to stand and undermines public confidence in the ability of the US criminal justice system to render unbiased judgments”. Inconsistencies are surely intolerable where the death penalty is concerned. Yet inconsistencies remain a hallmark of US capital justice.

The power of executive clemency is not constrained in the way the judiciary may be. It is supposed to act as a failsafe, preventing injustices that the courts have been unwilling or unable to remedy. In Texas it has systematically failed to provide this failsafe, however. The denial of clemency would appear to have become a habit, and inattention to the compelling reasons for clemency the norm.

However, on a positive note, there is reason to believe that the USA is turning against the death penalty. Even its “death-qualified” jurors are apparently becoming more reluctant to vote for execution, and death sentencing in the USA continues to drop from its peak in the mid-1990s. The number of people

as jurors in capital cases. An individual’s opinion that a life sentence without the possibility of parole is the severest sentence that should be imposed in all but the most heinous cases does not even arguably ‘prevent or substantially impair the performance of his duties as a juror’. The *Uttecht* majority, Justice Stevens wrote, “appears to be under the impression that trial courts should be encouraging the inclusion of jurors who will impose the death penalty rather than only ensuring the exclusion of those who say that, in all circumstances, they cannot.”

⁵⁴ In 1986, the US Supreme Court acknowledged research that the “death qualification” of juries “produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries”. *Lockhart v. McCree*, 476 U.S. 162 (1986).

⁵⁵ President George W. Bush. Address to a Joint Session of Congress and the American People, 20 September 2001.

⁵⁶ Book of Numbers 35: 16 (King James Bible).

sentenced to death in 2007 was a third of what it was in 1996 and the lowest since 1977. This pattern is reflected in Texas too. In the five years from 1995 to 1999, Texas juries sent 192 men and women to death row, at an average of 38 per year. In the five years from 2004 to 2008, they sentenced 71 defendants to death, at an average of 14 per year.

This would seem to reflect a broader downturn in public support for the death penalty in the USA. An erosion of the public's belief in the deterrence value of the death penalty, an increased awareness of the frequency of wrongful convictions in capital cases, and a greater confidence that public safety can be guaranteed by life prison terms rather than death sentences have all contributed to the waning of enthusiasm for capital punishment.

Politicians and legislators in Texas and elsewhere in the United States of America should seize this opportunity to break their country's death penalty habit and lead the USA towards joining the clear majority of countries that have abandoned this punishment.

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