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UNITED STATES OF AMERICA
Old habits die hard: The death penalty in Oklahoma

Introduction - Clinging to the wreckage of a broken system

"*Oklahoma is the 20th century success story. No other state went from frontier to the modern era so quickly, or with such energy... Our legacy will be a legacy of progress and hope. Each of us here, mothers and fathers, leaders and stakeholders, all will be judged by what we do to make this a better place.* " Governor Frank Keating, inaugural address, 11 January 1999

One of the 20th century's success stories was the progress made towards ridding the world of the death penalty. In this regard, Governor Frank Keating's claim of modernity for Oklahoma does not bear scrutiny. By 1907, when Oklahoma became the 46th state of the United States of America, five countries had abolished the death penalty.[1] Today the global human rights landscape has been transformed, with 108 countries abolitionist in law or practice. Yet as this list has steadily lengthened over the past two decades, the US execution rate has accelerated. Among the USA's 38 death penalty states, Oklahoma's executioners are becoming among the most active in the country.

Oklahoma's current death penalty law came into force in 1977, the same year that the United Nations General Assembly adopted a resolution which stated that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment."[2] Oklahoma has clearly failed to work towards that goal in the intervening 24 years. While it ranks 27th among the 50 US states in terms of population size, it lies eighth in the number of death sentences passed between 1973 and 1999. This was the highest per capita death sentencing rate in the country. Oklahoma also shares the highest rate of death sentences per murder in the USA (see appendix).

Oklahoma's determined commitment to capital punishment has shown little sign of softening over the decades. Perhaps one illustration of this is the case of Michael Bascum Selsor. He was sentenced to death in 1976 under Oklahoma's 1973 capital statute, which made the death penalty mandatory for anyone convicted of capital murder. Such laws were declared invalid by the US Supreme Court in 1976, and Michael Selsor's death sentence was changed to life imprisonment. He had served 20 years of this sentence when a federal court overturned his conviction in 1996 on the grounds of ineffective defence representation at the original trial. Tulsa County announced its intention to seek the death penalty again, and the courts ruled that it could do so even though the crime was committed when there was no valid

[1] Venezuela (1863); San Marino (1865); Costa Rica (1877); Ecuador (1906); Uruguay (1907).

[2] Resolution 32/61, adopted on 8 December 1977.

capital statute in effect. Michael Selsor was sentenced to death at his retrial in 1998, 23 years after the murder was committed on 15 September 1975. Aged 20 then, he is now 46.

Oklahoma carried out its first execution of the "modern" era in 1990, 24 years after James French became the last prisoner to be put to death under the state's previous death penalty laws. The lethal injection of Charles Coleman on 10 September 1990 led at least one person to recognize the cruel futility of executions. Greg Wilhoit was in a cell a short distance from the execution chamber where Coleman was put to death. Wilhoit recently recalled how he had "realized that the sun was not going to shine any brighter and the world was not a safer place just because Chuck had been put down".[3] Greg Wilhoit can also testify to another fatal flaw of the death penalty, namely the risk of irreversible error. He was released in 1993 after being found innocent of the crime for which he had been dispatched to death row in 1987. In June 2000, his sister wrote: "Greg lost eight years of his life, five of them spent on death row, lost his health, lost his livelihood, and worst of all missed watching his two daughters grow up and participate in their lives. No one apologized and he was not given one penny in compensation".[4]

A decade since Charles Coleman was put to death, Oklahoma is executing in greater numbers than at any time for the past 70 years and, in relation to its population, it is becoming a world leader in executions.[5]

- Oklahoma has executed more prisoners in the past two years than it did in the final two decades of executions (1946-1966) carried out under its earlier death penalty laws. It executed more prisoners in 2000 than it had in any year since 1933. It is likely to exceed this total in 2001;

- In the first 10 weeks of 2001, Oklahoma executed more prisoners than it did in the last 10 years of executions prior to 1966;

- Between January 1998 and March 2001, Oklahoma executed at the highest per capita rate of execution in the country;

- Oklahoma is currently executing at a higher per capita rate than, for example, China, Iran, and the Democratic Republic of Congo, three of the world's leading users of the death penalty.[6]

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[3] *Exonerated man backs moratorium.* Tulsa World, 21 January 2001.

[4] Edmond Sun, Letter to the Editor, 28 June 2000.

[5] At the same time, Oklahoma incarcerates people at the third highest rate of the 50 US states. As of 30 June 2000, the national average rate of incarceration (state and federal prisoners sentenced to more than one year) was 481 per 100,000 residents (up from 292 in 1990). At 681 per 100,000, Oklahoma was behind Louisiana (793) and Texas (779). *Prison and jail inmates at midyear 2000*. Bureau of Justice Statistics, March 2001.

[6] If Oklahoma executes 10 people in a year, this represents a per capita rate of one execution per 345,000 of population. Taking current approximate execution levels in the three named countries – Democratic Republic of Congo: if 100 executions in a year = one execution per 491,000 of population); Iran (if 120 executions in a year = one in 547,000). China (if 2,000 reported executions in a year (based on incomplete records) = one execution per 628,000 of population).

In response to recent appeals for clemency in Oklahoman capital cases, Governor Keating's office has issued a standard reply which points out that executions are only carried out for a small percentage of crimes and many death sentences are overturned on appeal. This is true. Although Oklahoma resorts to frequent use of the death penalty compared to other US states and a majority of countries, only a small number of those convicted of murder in Oklahoma, as elsewhere in the USA, ultimately face the death penalty.

OKLAHOMA - one of 50 US States	Overall ranking	Ranking per capita
Population (1995)	27th	--
Income (1999)	--	44th
Prisoner incarceration (2000)	18th	3rd
Executions since 1977	5th	4th
Executions since 1998	3rd	1st
Death row population (2001)	9th	3rd
Death sentences 1973 to 1999	8th	1st
Ratio of death sentences to murders, 1973 to 1999	1st	--
Cases of condemned prisoners later found to be innocent	3rd	--

See appendix for further details.

Between 1973 and 1999, the more than 6,500 murders committed in Oklahoma resulted in 294 death sentences. By 31 March 2001, 40 prisoners had been executed and around another 130 remained on death row. Does this mean that Oklahoma is successfully winnowing out those most "deserving" of execution? The evidence suggests otherwise; that, as elsewhere in the USA, capital justice is a lethal lottery. Questions of actual innocence, arbitrariness, discrimination, legal incompetence and official misconduct continue to characterize this cruel, inhuman and degrading punishment.

The question as to whether Oklahoma is reserving the ultimate punishment for the "worst of the worst" is particularly pertinent given that among the condemned have been, and continue to be, child offenders (defendants who were under 18 years old at the time of the crime) and the mentally impaired. As such, the state authorities are not only contradicting world trends in their relentless resort to the death penalty, but are violating international human rights standards as well.

As elsewhere in the USA, underresourced or inexperienced defence lawyers have faced prosecutors prepared to push the boundaries of professional conduct in their pursuit of capital convictions and death sentences. This has contributed to a high error rate in capital cases, greatly increasing the already immense costs of enforcing the death penalty. In other words, Oklahoma, the 44th poorest state in the USA[7], continues to use a punishment with huge financial and human costs, for no measurable societal benefit.

[7] Per capita personal income. Bureau of Economic Analysis, US Department of Commerce, 1999.

In June 2000, the findings of a substantial long-term study into the US death penalty were released. The report concluded that capital sentencing is "persistently and systematically fraught with error". The most common errors, the study found, are the result of "egregiously incompetent defense lawyers who didn't even look for - *and demonstrably missed* - important evidence that the defendant was innocent or did not deserve to die" and "police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury."[8] The study, which covered the period 1973-1995, revealed that appeal courts had found serious errors – those requiring a judicial remedy – in an average of 68 per cent of cases across the country as a whole. In Oklahoma, this figure was 75 per cent.

As the study pointed out, "[t]his much error, and the time needed to cure it, impose terrible costs on taxpayers, victims' families, the judicial system, and the wrongly condemned". The study also expressed "grave doubt" as to whether the courts catch all such errors.

Oklahoma, still clinging to the wreckage of this broken system, lies behind only Florida and Illinois in the number of people it has sentenced to death who were later released from death row after they were found to be innocent. Governor Ryan of Illinois responded to his state's "shameful" record of wrongful convictions in capital cases by imposing a moratorium on executions on 31 January 2000. His courageous decision has led to increasing calls for other states to follow his example. Among these voices are those of many religious leaders; for example, on 15 February 2001, 14 religious leaders from a dozen different denominations and faiths held a news conference to support a moratorium in Oklahoma.[9] Governor Keating and the state legislature have so far resisted their calls for a moratorium.

[8] *A broken system: Error rates in capital cases, 1973-1995*, James S. Liebman, Jeffrey Fagan and Valerie West. Columbia Law School, New York.

[9] One exception are the Southern Baptists, whose leadership continues to profess that the Bible supports the death penalty. It is the largest single religious denomination in Oklahoma.

On 3 February 1999, Pope John Paul II challenged the USA to reject the death penalty on the eve of Oklahoma's killing of Sean Sellers for crimes he committed when he was 16 years old – the first such execution in the USA for four decades. Governor Keating responded that the Pope was "wrong" and that Catholic theology supported capital punishment. The Archbishop of Oklahoma City, Eusebius Beltran, denounced the governor's response. In an open letter in December 2000, the Catholic Bishop of Tulsa, Edward Slattery, urged Governor Keating to support a five-year moratorium on executions in Oklahoma. The Governor responded: "I will continue to do my duty as governor and, lacking any evidence that Oklahoma's capital punishment statutes are applied unfairly in any way, I will not seek or order a moratorium on justice."[10] In January 2001 he described the death penalty as "a statement of moral outrage and justice sought and received".[11] "Maybe so", said one commentator in *Time* magazine after the execution of Wanda Jean Allen on 11 January, "But having executed a woman of marginal intelligence who had shamefully cut-rate trial representation, Bible-belt Oklahoma is no holier. It is no safer. It is no more civil."[12]

The death penalty imitates what it seeks to condemn. When Sean Sellers' final appeal was rejected in 1998, Oklahoma's Attorney General, Drew Edmondson, issued a press release to announce that he would immediately be seeking an execution date. He reiterated the state's reason for pursuing the killing: "Sean Sellers committed three coldly calculated murders..." In a grotesque juxtaposition, directly under these words in the news release was the heading "Execution Schedule", followed by the names of three men - Tuan Nguyen, John Wayne Duvall and John Walter Castro - and the exact times, to the minute, of their planned lethal injection by the Oklahoma authorities. All three were executed as scheduled.

Robert Brecheen was put to death in Oklahoma in 1995. At his trial the prosecutor had argued to the jurors: "Murder is the coldest word... It's cold. You think about the word and it will run down your spine, because what it's talking about is the deliberate intention of one human being to take from another the most precious thing they have, and that's their human life... How much colder and harder can a human being get, to go in there with the intention of taking a human life... thinking about it, to plan it out, to walk up there and do it?" The prosecutor's statement would have rung at least as true if he had substituted the word "execution" for "murder".

A year before Brecheen's execution, a federal judge dissented against his death sentence because the sheer weight of mitigating testimony which the defence lawyer could have presented to the jury, but did not, left "the distinct impression that [Brecheen's] conduct

[10] *Black leaders call for clemency.* The Oklahoman, 11 December 2000.

[11] *Keating reiterates support for death penalty*. Tulsa World, 8 January 2001.

[12] *A race to the death.* Time, 24 January 2001.

on the night of the murder was aberrational".[13] The same cannot be said about Oklahoma's behaviour. After 25 executions in as many months since January 1999, it is clearly an habitual killer.

Which is the more coldly calculated killing, the state's or the defendant's? The French writer Albert Camus suggested that for there to be equivalence, the death penalty would have to punish a criminal who had warned his victims of the date at which he would kill them and who, from that moment onward, had confined them at his mercy for months. "Such a monster is not encountered in private life", Camus contended.[14] In Oklahoma's case, the state compounds the cruelty by warehousing its male death row population for years in the notorious H-Unit of the State Penitentiary, in conditions which violate the international prohibition on cruel, inhuman and degrading treatment.

The state may respond that it is engaged in preventing future murders, or that it is helping relatives of what is inevitably a tiny percentage of Oklahoma's murder victims to come to terms with their grief. There are no good grounds to support either contention, and in fact there is evidence that this state-sanctioned killing may actually achieve the opposite. What is certain is that the government is participating in a culture of violence and in the process is creating more grieving relatives, namely the family of the condemned prisoner.

In his open letter to Governor Keating, Bishop Slattery spoke of the need to address the needs of the families of murder victims, but wrote: "Is duplicating the criminal's act, that is, taking another's life, the solution which builds a society and honors the loved one's memory? I ask you, Governor Keating and the people of Oklahoma, to ponder these questions... Capital punishment places the whole society in the position of life-taker. It makes all of us responsible for the death of another. It leaves no room for hope, healing or reconciliation. It is, at best, a desperate human solution which cries out for reform." The death penalty is an old habit dressed up as a legitimate response to violent crime. It is an illusory solution to an urgent social problem, and in the end represents little more than a failure of political vision. It is a wholly destructive exercise, a symptom of violence rather than an answer to it.

[13] *Brecheen v Reynolds*, US Court of Appeals, 10th Circuit (October 1994). Judge Ebel, dissenting.

[14] *Reflections on the guillotine*, Albert Camus, 1957.

Governor Keating claims that no US state went from frontier to the modern era as quickly as Oklahoma. One of the ways Oklahoma "modernized" was to put its electric chair into storage and switch to lethal injection, the first jurisdiction in the world to adopt this execution method.[15] As two US commentators recently wrote: "America appears to be constantly looking for ever more efficient ways to kill people... Will executions continue to evolve in more palatable and 'modern' ways, ever more distant from the executioner? Or will we give up the quest for the perfect method, recognizing that the strongest testimony to how little we have evolved since frontier days is the fact that we still do it at all?"[16]

As in his 1999 inaugural statement, Governor Keating made "legacy" a theme of his 2001 *State of the State* address: "Every one of us should seek this year to make some substantial commitment to the good of our state." Amnesty International urges him and the Oklahoma legislature to make their legacy a moratorium on executions, as a first step towards abolishing the death penalty for the good of their state and the country as a whole.

The die is cast: Choosing the "worst of the worst"

[15] Oklahoma adopted its lethal injection legislation on 11 May 1977, the day before Texas. Oklahoma authorizes electrocution if lethal injection is ever held to be unconstitutional, and firing squad if both lethal injection and electrocution are held unconstitutional. Source: *Capital punishment 1999*. Bureau of Justice Statistics, December 2000.

[16] *Who owns death? Capital punishment, the American conscience, and the end of executions.* Robert Jay Lifton and Greg Mitchell. HarperCollins, 2000.

"*This system for determining who should be punished by death is confusing and difficult to apply... This Court is often faced with the arduous task of parsing through the facts of some horrible, tragic crime to determine whether the defendant should be eligible for the death penalty and ultimately selected to die*." Oklahoma Court of Criminal Appeals[17]

After the US Supreme Court halted executions in 1972 because of the arbitrary way in which the death penalty was being administered, a number of states, including Oklahoma, moved quickly to rewrite their capital statutes in order to meet the Supreme Court's requirements. In 1976, the Court approved the new laws of three states, Texas, Florida and Georgia. Although varied, the laws shared certain characteristics, including criteria designed to channel or narrow sentencing discretion, and provisions for capital trials to be separated into two distinct phases, one to determine guilt, the second to decide punishment. In the same year, the Court also rejected laws that allowed for mandatory death sentences for capital crimes, as did Oklahoma's capital statute which had been introduced in 1973.

Oklahoma's current death penalty law came into force in 1977 and makes first-degree murder punishable by the death penalty if the crime involves one or more of eight aggravating factors ("aggravators").[18] At the sentencing phase of the trial, the jury will determine if the state has proved the existence of the alleged aggravator(s). It will then weigh them against the mitigating evidence presented by the defence in deciding between life and death. Some of Oklahoma's aggravators are narrowly defined, others less so. The latter arguably allow prosecutors unconstitutionally wide discretion to seek death sentences.[19] What is indisputable is that in 24 years, the state has failed to achieve the progressive narrowing of the death penalty sought by international standards. Indeed, its high ratio of death sentences to murders (see appendix) suggests that Oklahoma prosecutors are stretching their discretionary powers further than many of their counterparts elsewhere in the country.

"Heinous, atrocious or cruel"

[17] *Cheney v State*, 8 December 1995.

[18] 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person; 2. The defendant knowingly created a great risk of death to more than one person; 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; 4. The murder was especially heinous, atrocious, or cruel; 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or 8. The victim of the murder was a peace officer ... or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

[19] "An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v Stephens*, US Supreme Court (1983).

One of Oklahoma's aggravators allows "especially heinous, atrocious, or cruel" murders to be punished by execution. That prosecutor and jury can attach this aggravator to a killing that is less than first-degree capital murder is suggested by the case of Kenneth Hogan. He was convicted of killing his friend Lisa Stanley during an argument in 1988. The jury found one aggravating factor – that the "murder was especially heinous, atrocious, or cruel". Perhaps this is not surprising. Lisa Stanley had been stabbed two dozen times; the jury were shown "gruesome" photographs of the victim; and in arguing for death, the prosecutor suggested it would be unjust for Hogan to live in prison while his victim "lies cold in her grave". The Oklahoma Court of Criminal Appeals upheld the death sentence, but in 1999 the US Court of Appeals for the 10th Circuit granted Hogan a new trial.[20] The trial court had refused to let the jury consider the lesser offence of first-degree manslaughter, and the 10th Circuit noted evidence that it had been Stanley who had first attacked Hogan with the knife, and that a reasonable jury could have found that the killing occurred in the heat of passion without him having formed the intent to cause death.[21] The US Supreme Court dismissed the state's appeal in October 2000, and Hogan was transferred to jail pending retrial after 12 years on death row for a crime that may have warranted a lesser sentence.

Darrell Lynn Thomas was also on Oklahoma's death row for 12 years before the 10th Circuit ruled that he should have received a life prison term. Again, the sole aggravating factor alleged by the state in the 1987 murder of Glenda Jane Powell in Creek County was that it was "especially heinous, atrocious, or cruel". The Court of Criminal Appeals upheld Darrell Thomas' death sentence for the murder, saying that while there was "no direct evidence that Powell suffered before her death, there is certainly circumstantial evidence to support such a theory". In July 2000, the 10th Circuit court said that this opinion was based entirely on the lower court's assumption that no murderer would continue striking a victim if the first blow rendered the victim unconscious. The federal court said that this was "entirely unreasonable", in view of expert evidence that Powell had been stabbed twice *after* her death. It said that because the only aggravator alleged by the state was not supported by the evidence, the death sentence must be modified to life imprisonment.

As such cases show, selecting who will die for their crimes under this aggravator can become an exercise in the macabre, as jurors and judges speculate as to how much suffering was inflicted on a person before they died.

In 1994, Judge Lane of the Oklahoma Court of Criminal Appeals, joined by Judge Chapel, dissented against the death sentence of Jerald Wayne Harjo, a Native American convicted of the 1988 murder of 64-year-old Ruth Porter in Seminole County. The dissent wrote of the inherent problem with the "especially heinous, atrocious, or cruel" aggravator:

[20] The US Court of Appeals for the 10th Circuit is the final federal appeal court for Oklahoma cases before the US Supreme Court. The cases are reviewed by three-judge panels of the 16-member court, unless on appeal the Court agrees to a hearing before the full court.

[21] *Hogan v Gibson*, 8 December 1999.

"All murder is accomplished by physical abuse of some kind. Almost all persons in apprehension of death, whether natural, accidental or homicidal, struggle in some way as death overtakes them... [T]here exists within this aggravating factor a great potential for abuse. This is so, for every murder is at some level heinous, atrocious or cruel." The dissent said that the case of Ruth Porter, "a grandmother awakened and strangled to death...evokes a flood of human emotion". However, the dissent continued, when compared to other cases in which serious physical abuse had been found, the evidence was insufficient to support a finding of this aggravator. The other three judges disagreed, however, and Jerald Harjo remains on death row.

In 1987, the 10th Circuit Court of Appeals had ruled that the terms "heinous", "atrocious" or "cruel" did not alone offer constitutionally sufficient guidance to the jury. The US Supreme Court upheld this decision in *Maynard v Cartwright* in 1988. Oklahoma juries are now instructed that this aggravator "is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse". However, as Judge Lane's 1994 dissent noted, this additional definition "will effectively channel jury discretion only if this Court holds the levee [dam] against the ever present flood of human emotion".

Amnesty International is concerned that the Court of Criminal Appeals, via the doctrine of "harmless error", continues to allow prosecutors considerable leeway in appealing to the emotions of the jury. For example, at the 1998 trial of Danny Hooks, the prosecutor took liberties with the guiding instruction on "heinous, atrocious or cruel". In urging the jury to vote for death on the basis of this aggravator, he said: "The definition says that basically there must be torture or serious abuse. Serious physical abuse. And the simple test you might apply to this question is what would you call it if someone did it to you. Or worse, your sister, your mother, your daughter, your aunt, your niece. Is that torture? Is that serious abuse?". The Court of Criminal Appeals said that this "combination of misstated law and encouraging sympathy for the victims is error". Nevertheless it upheld the death sentence.

Recent cases indicate that the Court of Criminal Appeals, by using criteria such as "evidence that the victim was aware of the attack is sufficient to show torture", is allowing a wide range of murders to fall within the reach of this aggravator. Citing these examples, the 10th Circuit issued a warning to the state in February 2001: "Recent Oklahoma cases...have begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more and more often finding the existence of these elements in almost every murder... There is certainly a concern that Oklahoma's interpretation of its narrowing language could again render this aggravating factor unconstitutional".[22]

"Continuing threat"

[22] *Romano v Gibson*, US Court of Appeals, 10th Circuit, 13 February 2001.

Before the *Maynard* decision meant that jurors were given some guidance as to the definition of "heinous, atrocious or cruel", the latter was reportedly the aggravator most often alleged by the state in its pursuit of execution. Since *Maynard*, it seems that another aggravator may have taken its place as a potential catch-all: "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society".

In 1995, a federal judge, having reviewed Oklahoma capital cases, noted the absence of guidance as to "what particular evidence might support the continuing threat aggravating circumstance or what factors a jury must find before it may be determined that a defendant will be a continuing threat to society." The judge found that the state's failure to clarify the aggravator and instruct jurors accordingly had rendered the aggravator unconstitutionally vague.[23] However, the 10th Circuit court rejected his ruling, and Oklahoma juries remain in the dark, with no instruction or definition to help them decide if a case warrants this aggravator.[24]

In many cases, jurors may view the defendant as a future danger based solely on the offence of which they have just found him or her guilty. Research indicates that perceived "future dangerousness" is a factor that is highly aggravating in the minds of capital jurors, even if the defendant does not have a history of violent crime.[25]

In some cases, prosecutors may attempt to generate fear of a defendant's future dangerousness by using the potentially mitigating evidence of mental impairment to support the future-threat aggravator. For example, at the trial of Mark Johnson in 1993, the defence presented evidence that the defendant had borderline mental retardation. In arguing for a death sentence on the grounds that the murder was heinous and Johnson was a future threat, the Love County prosecutor told the jury that Johnson's brain damage and alcoholism were "really things that count against the defendant in this case". Johnson remains on death row.

Stephen Wood was executed in 1998 after giving up his appeals. At his 1995 trial, the prosecutor argued to the jury that it should consider the defendant's schizophrenia and brain damage as an aggravating factor because it would always render him liable to commit future acts of violence.

[23] *Williamson v Reynolds*. US District Court for the Eastern District of Oklahoma, 19 September 1995.

[24] "The fact that Oklahoma chooses to grant a sentencing jury wide discretion to make a predictive judgment about a defendant's probable future conduct does not render the sentencing scheme in general, or the continuing threat factor in particular, unconstitutional. Although this predictive judgment is not susceptible of "mathematical precision", we do not believe it is so vague as to create an unacceptable risk of randomness." *Nguyen v Reynolds*, 10th Circuit Court of Appeals, 1997.

[25] Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998).

At the 1998 Comanche County trial of Jervaughn Miller, the mother and sister of the murder victim presented "victim impact" testimony, including their opinion that the death penalty was the appropriate punishment. The prosecutor then elicited further, non-expert, testimony from them, apparently to bolster the future-threat aggravator. He asked the mother and sister in front of the jury why they thought Miller should be executed rather than receive a life sentence, with or without parole. The sister replied that "one day he could be living out in the streets. Somebody could cut him off in traffic, and there is their life or their children's life. Or even in jail he could kill more people." The mother replied: "He's a menace and a threat to everyone in society... I just don't think there is much hope for his rehabilitation." The jury sentenced Miller to death.

The future-threat aggravator has been attached to defendants who were later shown to be innocent. Ronald Williamson, a mentally ill man released in 1999, spent nine years on Oklahoma's death row for a crime he did not commit. Yet at his trial the jury decided he was a future threat to society and voted for his execution. The same happened at the trial of Adolph Munson. He was acquitted at a retrial in 1995, granted after it emerged that the state had withheld evidence of his innocence at the original proceedings. Ironically, in both the Williamson and Munson cases, the original trial juries had also found another aggravating factor that made the defendants eligible for the death penalty, namely that they had committed the murder in order to avoid arrest and prosecution.

"Murder to avoid arrest"

The murder-to-avoid-arrest aggravator seeks to describe the intent of the alleged offender at the time the murder was committed. Yet defendants have been sentenced to death whose premeditation in the crime was in doubt. This aggravator was the only one that Sequoyah County alleged against James Childress, who was sentenced to death in 1997 for the murder of rancher Jason Wilson, who had caught the 21-year-old Childress stealing one of his cattle. Childress said Wilson chased him for two to three hundred metres across the pasture. When Childress realised he could not outrun his pursuer, he said he told Wilson to stop and let him go, but that Wilson kept coming, saying he was going to "beat me to death". Childress, who is a haemophiliac, said he shot Wilson out of fear of the much larger man – Childress is 5'2" (1.57m) and 125 pounds, compared to Wilson who was 6'4" (1.93m) and 295 pounds. During deliberations, the jurors sent a note to the judge asking if they could consider a verdict of second-degree murder or manslaughter, but were told they could not. In 2000, the state Court of Criminal Appeals granted Childress a new trial, saying that the jury should have been given such a choice. The prosecution said that it would seek another death sentence at the retrial, which was pending at the time of writing.

The same aggravator was the only one alleged by the state against Scott Carpenter, when it pursued his execution for the murder of AJ Kelley in McIntosh County in 1994. The 19-year-old Native American confessed to having stabbed Kelley, telling police that he did not know why he had done it. Carpenter pleaded no contest to the murder. At his

sentencing, an expert witness testified about head injuries that Carpenter had suffered, and speculated that he may have had a seizure at the time of the killing.[26] Numerous witnesses described the defendant as quiet, respectful, cooperative, non-violent and a good student. He had no prior arrests or convictions. Nevertheless, the judge sentenced Carpenter to death. The Court of Criminal Appeals said that it was "significant" that murder-to-avoid-arrest was the sole aggravator, but rejected the claim that there was not enough evidence to support it. Scott Carpenter dropped his appeals and, on 8 May 1997, became the youngest person to be put to death in the USA since executions resumed in 1977.[27] He was 22. In a note given to AJ Kelley's relatives just before he died, he expressed his remorse and wrote: "I truly wish I could give an answer to the question of why this crime happened, but I have no answer. I have no answer for myself. This more than anything has troubled me through all my waking hours."[28] Carpenter's consistent inability to explain the murder suggests that he had never formed the intent in the crime necessary to justify the aggravator that the state used to facilitate its own premeditated killing.

Aggravated murder: A matter of opinion

Deciding whether a murder is "aggravated" and therefore deserving of the death penalty is not an exact science. Different juries will reach different conclusions even on the same crime, thereby injecting an inevitable inconsistency into the capital selection process. Such inconsistency will not necessarily be remedied on appeal.

William Raymond Mayes has spent over 10 years on death row in Oklahoma for the murder of Phillip Trammell in 1987. At his 1990 trial, the jury found a single aggravating factor, namely that the murder was "especially heinous, atrocious or cruel". Without this aggravator, Mayes could not have been sentenced to death. His co-defendant, Margaret Trammell, was tried separately for the murder. Her jury decided that the murder was not "especially heinous, atrocious or cruel" and she was sentenced to life imprisonment.

The same phenomenon is evident in the case of Maximo Lee Salazar, a Native American who was 19 years old at the time of the crime for which he is now on Oklahoma's death row. He was sentenced to death in 1988 for stabbing nine-year-old Jennifer Prill to death when she awoke during a burglary of the Prill home in Comanche County in 1987. The jury found three aggravating factors, namely that the defendant knowingly created a great risk of death to more than one person; that the murder was committed to avoid arrest or

[26] Carpenter suffered a head injury when he was six, when struck by a nail in the right temporal lobe. He suffered four other severe head injuries, the last of which occurred two months before the murder.

[27] A minute after the injection began, he started gasping and shaking. He convulsed, his body arching upwards, and he gasped for air for the next three minutes. A doctor pronounced him dead seven minutes later.

[28] *Execution of killer a quiet one*. Tulsa World, 9 May 1997.

prosecution; and that he was a continuing threat to society. The death sentence was overturned on appeal in 1993 because the jury had not been properly advised of its sentencing options.

At the resentencing in 1994, a different jury found only one of the three aggravating factors alleged by the state, namely that Salazar had created a great risk of death to more than one person. Although the intruder had no contact with anyone else in the house, the state argued that other people were in the home at the time and speculated that their lives would have been at risk if they had woken up and come to the child's room. In 1996, the death sentence was again overturned – on the grounds that the evidence was insufficient to support this contention.

Salazar's third sentencing again resulted in a death sentence. This time, the jury found two aggravating factors – the murder was committed to avoid arrest, and the defendant represented a continuing threat – both of which the second jury had rejected. In 1998, the Court of Criminal Appeals upheld this death sentence. It rejected the claim that Salazar's sentence should be overturned on the grounds of his alleged mental retardation.

The Childress, Carpenter and Salazar cases all suggest the potential existence of another aggravator, not legally provided for but present nonetheless – namely the identity of the victim, or the extent to which surviving relatives campaign for execution. In all three cases, family members have called for execution either inside or outside the courtroom, including in victim impact testimony presented to the jury.[29] Amnesty International is concerned that such testimony can act as a "superaggravator" and is a potential source of arbitrariness (see page 81).

In the Salazar case, the fact that the victim in this crime was a young child may also have been an additional unstated aggravating factor. Research indicates that a majority of capital jurors are far more likely to impose a death sentence if the murder victim is a child.[30] The fact that people accused of crimes against children are likely to receive particularly harsh punishment is suggested by the case of Timothy Edward Durham, sentenced to 3,120 years in prison in 1993 for the rape of an 11-year-old girl in Tulsa County in 1991. He was released in 1997 after DNA evidence showed that he had not committed the crime.[31]

[29] For example, Jennifer Prill's parents told the jury at the sentencing phase of Maximo Salazar's trial: "I feel we should carry on with the death sentence" and "I don't see that there's any other fitting end than death, the death sentence. The death sentence without benefit of judge and jury was what he gave freely to my child. I do not see that he can take from her and be entitled to keep his own."

[30] Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998). Over 60 per cent of the capital jurors surveyed said that they would be more likely to vote for a death sentence if the victim was a child.

[31] In 1998, Timothy Durham was awarded $50,000 for severe beatings he had received in Tulsa County jail in 1991 and 1994 at the hands of other inmates. Jail authorities had allegedly twice moved him from a two-man cell to one with as many as a dozen violent offenders.

Meanwhile, as Oklahoma attempts to select the "worst of the worst" crimes and offenders for the death penalty, the international community continues to turn away from judicial killing, even for the worst crimes. In 1998, the UN adopted the Statute for a permanent International Criminal Court. The Court will try what are considered to be humanity's most serious crimes – genocide, other crimes against humanity and war crimes. The maximum penalty that it will be able to impose is life imprisonment, subject to review after 25 years.

A lethal lottery - The impossibility of consistency in sentencing

"*[W]hile much has been said about the complexity of the Internal Revenue Code, our death penalty law is equally complex, tedious and full of "loopholes" and "technicalities".* Oklahoma Court of Criminal Appeals[32]

When Chief Justice Burger dissented from the US Supreme Court's 1972 *Furman v Georgia* decision to overturn the USA's capital laws because of the arbitrary way in which the death penalty was being applied, he acknowledged that it is inevitable that different juries will come up with different decisions, even on the same case: "It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance."

Surely for any society aspiring to the highest possible standards of justice, the fact that "no human institution performs with perfect consistency" is reason enough to reject this uniquely cruel, brutalizing and irreversible punishment once and for all. Instead, 25 years after the US Supreme Court lifted the *Furman*-imposed moratorium on executions, arbitrariness remains an overarching feature of US capital justice, and the Court presides over a body of death penalty law which "has become so complex and theoretically abstract that the only way to try to understand the reason for and impact of its many subtle distinctions is to resort to carefully crafted hypotheticals".[33]

Outcomes where one defendant is sentenced to death and another to a prison term for similar crimes or similar levels of culpability in the same crime arguably violate the USA's obligations under the International Covenant on Civil and Political Rights (ICCPR). Article 6(1) states that "[n]o one shall be arbitrarily deprived of his life". The Human Rights Committee, the expert body which monitors compliance with the ICCPR, has stated that

[32] *Cheney v State*, 1995.

[33] *Flamer v Delaware*, US Court of Appeals, Third Circuit, October 1995, 3-judge dissent.

'arbitrariness' should not be equated to 'against the law', but that it should be interpreted more broadly, to include notions of inappropriateness, injustice and lack of predictability. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions reiterated this in his 1998 report on the USA. Article 26 of the ICCPR which states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law", is particularly pertinent given the extent to which the geographic location of the murder, and the race or economic status of the defendant or victim appear to be key determinants in who is sentenced to death in the USA.

Two co-defendants; two outcomes

The "modern" era of the death penalty in the USA is essentially an experiment in guided discretionary capital sentencing – an attempt to ensure that only the most culpable perpetrators of the most heinous murders are subject to execution. Twenty-five years on, proponents of the system may seek to explain different outcomes in the same or similar cases by, for example, arguing that "aggravating and mitigating evidence is different in every case, even in cases of co-defendants".[34] However, Amnesty International believes that there is too much evidence of arbitrariness to draw any conclusion other than that the death penalty experiment has failed.

- At separate trials, Oklahoma County pursued the death penalty against Emmanuel Littlejohn and Glenn Bethany for the murder of Kenneth Meers in 1992. There was no physical evidence as to who fired the fatal shot, and witness testimony was not conclusive either. At Bethany's trial, the prosecutor argued that Bethany was the triggerman. At Littlejohn's trial, the very same prosecutor argued that Littlejohn had been the gunman. The jury in Bethany's case returned a sentence of life imprisonment without parole. Littlejohn's jury handed down a death sentence.

- Mark David Johnson and Ricky Masquat, both Native Americans, were tried separately in Love County for the murder of Billy Webb in 1991. According to the Court of Criminal Appeals, Webb survived long enough to tell police that Mark Johnson had hit him on the head with a baseball bat and that Ricky Masquat had doused him with petrol and set him on fire. Masquat's jury returned a sentence of life imprisonment without parole. Johnson's jury may have wished to do the same. During jury deliberations it sent a note to the judge, saying: "We need to know! Is life without parole firm – Does it mean he can never be paroled?" The trial judge told the jurors that their question was "inappropriate". The jurors then handed down a sentence of death.

- In April 2000, an Okmulgee County jury sentenced Benny Jones to life imprisonment without parole for the murder 10 years earlier of Eugene Slape. This was his third sentencing. At a joint trial in 1991, he and co-defendant Richard Hammon had both been sentenced to death. In 1995, their death sentences were overturned on appeal because of errors in jury selection. Both men were again sentenced to death, this time at separate sentencing hearings. In 1999, Jones' death sentence was again overturned by the Court of

[34] *Alverson v State*, Oklahoma Court of Criminal Appeals, 28 October 1999.

Criminal Appeals, again because of errors in jury selection. In 2000, the same Court upheld Hammon's death sentence, although two of the five judges dissented on the grounds of his mental retardation. Although both men were involved in the armed robbery, it was Benny Jones who actually shot Eugene Slape. He is now serving a life sentence, whereas Richard Hammon is still facing execution.

– In 1996, Oklahoma executed Steven Hatch for two murders committed by his severely mentally ill co-defendant Glen Ake in 1979. Ake shot dead Reverend Richard Douglass and his wife, Marilyn Douglass, after the two men had robbed the Douglass home. Hatch had already left the house when Ake shot the couple. They were sentenced to death at separate trials. Diagnosed with chronic paranoid schizophrenia, Glen Ake had initially been found incompetent to stand trial. After treatment in a mental hospital, he was ruled competent on the condition that he be treated with anti-psychotic medication during the proceedings. In a landmark decision, his conviction and sentence were overturned by the US Supreme Court because, despite the fact that his sanity was a significant factor at the trial, the defence was denied access to expert psychiatric assistance.[35] At his retrial, Glen Ake was sentenced to life imprisonment. At Hatch's clemency hearing, his appeal lawyer asked if his execution would serve justice "or vengeance because we can't reach the one who pulled the trigger?" Attorney General Edmondson displayed a disturbing attitude towards the execution of the mentally ill when he countered that the injustice was not that Hatch would be executed, but that Ake would not.[36] Glen Ake remains in Oklahoma State Penitentiary, where Hatch was put to death in August 1996.

Different prosecutors, different outcomes

Prosecutorial discretion is widely recognized as one of the main factors behind the inconsistency with which the death penalty is applied in the USA. The elected prosecutor in the county where the murder occurs decides whether to seek the death penalty or not. He or she may reach a plea agreement before the case goes to trial. For example:

– A week before the trial of 23-year-old Saul Ernesto Mendoza was due to start on 22 January 2001, Oklahoma County prosecutors agreed to drop pursuit of the death penalty against him in return for a guilty plea and a sentence of life imprisonment without the possibility of parole for the shooting of Juan Gonzales in Oklahoma City in 1999.

[35] *Ake v Oklahoma*, 1985.

[36] *Hatch denied clemency.* Tulsa World, 25 July 1996.

– In a plea agreement on 27 February 2001, 21-year-old Tracy Joevaun McGill pleaded guilty to the first-degree murders of Jessica Smith and Jessica Ridenhour in Tulsa in July 2000. For his part, the prosecutor recommended that McGill receive two sentences of life imprisonment without the possibility of parole. Although the Tulsa County District Attorney's Office had not formally filed its intention to seek the death penalty if the case had gone to trial, a prosecutor said that they were prepared to proceed with the death penalty as an option. The defendant and his lawyer reportedly agreed to the plea bargain after discussing that it would remove the possibility of a death sentence. The prosecutor said that he had consulted at length with the family members of the victims before reaching the plea agreement.[37]

Such prosecutorial decision-making may be influenced by a range of factors beyond the nature of the crime itself – from the prosecutor's personal feelings about the death penalty, to whether the county can afford the expense of capital proceedings, to whether the case is a high-profile crime, to the opinions of the victim's family members, to electoral considerations (for example, if the prosecutor is running for election and feels the need to be seen to be "tough" on crime). In the case of a crime involving more than one defendant, the prosecutor may choose to offer a plea bargain in return for testimony of one defendant against another.

– Richard Glossip was sentenced to death in Oklahoma County in June 1998 for the murder of Barry Van Treese in 1997. Van Treese owned the motel that Glossip managed. The motel's maintenance man, Justin Sneed, confessed to beating Van Treese to death with a baseball bat, but stated that he had been persuaded to do so by his employer Glossip, who had told him that Van Treese would have a large amount of money on him. Sneed testified against Glossip in return for a sentence of life imprisonment rather than death. In another case in another county, the prosecutor offered no such plea bargain to Vincent Allen Johnson. He was sentenced to death in 1991 for the murder of Shirley Mooneyham. The Pittsburgh County prosecution presented evidence at the trial that the victim's estranged husband and Johnson's employer had offered to pay Johnson to kill Mooneyham.[38]

– In November 1999, Joe Vance Tilley was sentenced to life imprisonment without the possibility of parole (LWOP) for shooting 15-year-old Kimberly Ann James dead in 1990. Tilley, who was 16 at the time of the crime, was already serving a LWOP sentence for another murder committed around the time of the James shooting. He was originally sentenced to death for the James murder, but was granted a resentencing hearing. That was cancelled when the Johnston County prosecutor reached an arrangement whereby Tilley agreed to LWOP and to waive his right to appeal that sentence. This arrangement was agreed to by the parents of the victim. In the case of Sean Sellers, sentenced to death for the murder of three people committed when he was 16, family members called for his execution

[37] *Murderer never to walk free.* Tulsa World, 28 February 2001.

[38] On 26 March 2001, the Oklahoma Attorney General asked the Court of Criminal Appeals to set an execution date for Vincent Johnson after the denial of his final appeal by the US Supreme Court. The Attorney General's news release noted that the estranged husband and employer "were upset with Mooneyham, and recruited Johnson to kill her". It also stated that they were both charged with murder and conspiracy to commit murder, and that the former husband was acquitted and charges were dropped against the employer.

and the Oklahoma County authorities never wavered from this objective. Sean Sellers was executed in February 1999.

– Roger Berget was executed in Oklahoma on 8 June 2000. He was sentenced to death for the 1985 abduction and murder of Rick Patterson. Roger Berget told police that he and Mikell Smith had abducted Patterson, but that it was Smith who had shot the victim. The prosecutor agreed not to seek the death penalty against Berget if he would plead guilty to first-degree murder and testify against Smith, in return for a life prison sentence. Berget agreed, but changed his mind after meeting Smith when they were held in the same jail. He said that he would refuse to testify against Smith and would instead accept sole responsibility for the murder. He pleaded guilty, and was sentenced to death by a judge. Mikell Smith was sentenced to death at a jury trial, but he was granted a new sentencing. In 1995, in exchange for a guilty plea, prosecutors agreed to a sentence of life imprisonment without parole. Smith has since been convicted of two killings of fellow inmates and the attempted murder of a guard, and is serving further life sentences without parole for these crimes. Other than at his own and Smith's trials, Roger Berget consistently maintained that it was Smith who shot Rick Patterson.

Different appeal judges, different outcomes

Roger Berget's trial lawyer admitted that his representation of Berget was inadequate, due to a combination of his inexperience and workload. He failed to fully investigate and present evidence of Berget's history of non-violent behaviour in criminal partnerships with more aggressive men (for example, Berget had once talked a partner out of killing a man during a burglary), his model behaviour when serving previous prison terms, or his mental state when he decided to plead guilty. Berget, who reportedly suffered from bipolar disorder (manic depressive illness), had attempted suicide shortly before the sentencing hearing. The lawyer stated in his affidavit: "I simply did not understand the importance of mental health evidence to present a full picture...this entire area was left uninvestigated."

As elsewhere in the USA, prisoners have gone to their deaths in Oklahoma after appeal courts refused to accept that their legal representation was constitutionally deficient. Others have obtained relief. It is frequently unclear why one defendant wins an appeal on this or other issues and another's all-but-identical claim is rejected. Often there is no other conclusion to draw than that one appellate judge interprets constitutional law differently to another.

In May 2000, two 10th Circuit judges wrote: "We simply cannot condone the administration of the death penalty on the basis of speculation", in granting Oklahoma death row inmate William Mayes an evidentiary hearing to establish if, as they believed, his representation had been inadequate. In effect, however, appeal court judges are asked to do just that – to make what amounts to an informed guess in ruling whether a defendant should live or die. As the third judge, Judge Brorby, pointed out in the Mayes case:

"[D]etermination of whether a lawyer's performance affected the outcome of a trial is, unavoidably, a subjective one, formulated in the mind of individual jurists, each bringing his or her own professional and life experiences to bear on the issue of what a jury would have concluded if...".

– At Williams Mayes' 1990 trial, the only mitigating testimony came from the defendant himself, who gave a brief description of his family, education, and work history and reiterated his claim of innocence. His statement covers seven pages of the 2,500 page trial transcript. The under-resourced court-appointed defence lawyer took little more than five minutes in arguing to the jury to spare his client's life. On appeal, 11 family members and acquaintances provided affidavits that they would have testified to Mayes' good character and the abuse and neglect he suffered as a child, but asserted that they had never been contacted by the trial lawyer. William Mayes' mother stated that she contacted the lawyer prior to the trial but was told "not to worry about it". The two 10th Circuit judges said that they were "deeply disturbed" by the case, and held that "the only possible inference" from the evidence was that the defence lawyer's performance "fell well short of the mark of reasonableness".[39] Judge Brorby dissented. He wrote that the death sentence should stand and no evidentiary hearing be granted.

– Two years earlier, faced with the appeal of Scotty Lee Moore, whose trial lawyer had failed to make a closing argument or fully investigate mitigating evidence of Moore's mental problems, Judge Brorby dissented from the decision of his two fellow judges to let the death sentence stand: "The devastating effect of some errors simply should not be overlooked. An attorney's failure to argue for his client's life during the sentencing phase of a capital case is that type of error. The absence of argument for the defendant in this situation leads inevitably, I believe, to a breakdown of the adversary system and a flawed trial... Perhaps the jury would have decided upon death no matter what Mr Moore's attorney argued, but perhaps most were leaning toward a life sentence and changed their minds when Mr Moore's attorney did not even appear to believe he could dispute the prosecutor's argument. There is no way to know, or, more importantly, to even make a meaningful guess".[40]

It is difficult to see how the same judge could be confident that Williams Mayes's legal representation had passed constitutional muster, and yet be so adamant that Scotty Moore's had not. Or, how two judges had thought that Moore's death sentence was fair and Mayes's was not. In any event, the result is that William Mayes has been granted a new sentencing, whereas Scotty Moore was executed on 3 June 1999. A similar illustration of the apparent inconsistency in appeal court outcomes is provided by comparing the cases of Robert Brecheen and Billy Battenfield, two men tried and sentenced to death in Oklahoma in the 1980s.

[39] *Mayes v Gibson*, 4 May 2000. The evidentiary hearing was held in September 2000, and in January 2001, Mayes was granted a new sentencing.

[40] *Moore v Reynolds*. 13 July 1998.

– At Robert Brecheen's 1983 trial for the murder of Marie Stubbs, no mitigating evidence was presented at the sentencing phase. On the advice of his lawyer, who had never tried a capital case before, Brecheen waived his right to present such evidence. Brecheen's appeal lawyers obtained 39 affidavits from witnesses who stated that they would have testified on the defendant's behalf if they had been asked. However, in 1994 a three-judge panel of the 10th Circuit voted 2-1 to uphold the death sentence, saying that the trial lawyer's performance had been adequate. In an affidavit, the trial lawyer admitted that his inexperience had caused him to be ineffective and wrote: "This case has troubled me deeply for many years because I know Robert did not receive a fair trial... A man was unfairly sentenced to die." Robert Brecheen was executed in 1995.

– What occurred at Billy Battenfield's 1985 trial for the murder of Donald Cantrell was very similar. Battenfield's lawyer presented no mitigating evidence after Battenfield waived his right to present such evidence. The lawyer failed to explain to his client the nature or purpose of mitigating evidence, and anyway had spent very little time investigating potential evidence to present. The lawyer intended to put Battenfield's parents on the stand to have them ask the jury to spare their son's life. After learning, during the trial, that this was the lawyer's strategy, Battenfield decided that he did not want to put his parents through the trauma of testifying.[41] On 3 January 2001, 15 years after his trial, a different three-judge panel of the 10th Circuit Court from the one that allowed Robert Brecheen to be executed, voted 2-1 to overturn Battenfield's death sentence, saying that the trial lawyer's performance had been inadequate.

Different states, different outcomes

Comparison between cases from different states offers yet further illustration of arbitrariness in sentencing outcomes. Two recent examples involve cases from Georgia and Texas.

– At the 1997 trial of Paris Powell in Oklahoma County, the prosecutor said to the jurors in his closing argument for them to vote for a death sentence: "Some of you indicated that you were students of the Bible. And there's no question that in Romans [one of the books in the New Testament], man shall submit to the government's laws, period." The Court of Criminal Appeals ruled in 2000 that the prosecutor had erred in making such biblical references, but ruled that this was harmless error and upheld Powell's death sentence.

– A month later, the Georgia Supreme Court overturned the death sentence of Anthony Carruthers. At his 1998 trial the prosecutor's argument for the death penalty had included the following: "...the Bible suggests to us why deterrence is appropriate. Romans tells us that every person is subject to the governing authority, every person is subject..." The Supreme Court ruled that the prosecutor had "invoked a higher moral authority and diverted

[41] In a later affidavit, Battenfield stated: "I did not want my parents to testify because I did not want to cause them any more grief and sadness. I personally witnessed my father crying and sobbing for the first time in my life after I was convicted. My dad was always rock solid and seeing him cry was so out of character for him that it made me feel that I had to spare him and my mom from any more stress."

the jury from the discretion provided to them under state law". The Court noted that "biblical references inject the often irrelevant and inflammatory issue of religion into the sentencing process and improperly appeal to the religious beliefs of jurors in their decision on whether a person should live or die".[42]

[42] *Carruthers v State*, Georgia Supreme Court, 6 March 2000.

– In January 2000, the Oklahoma Court of Criminal Appeals upheld the death sentence of James Patrick Malicoat, sentenced to death in Grady County in 1998 for the murder of his 13-month-old daughter. At the trial, over the objection of the defence, the state introduced a photograph of the baby taken two months before her death. The Court said that this photo was "irrelevant and should not have been admitted, and the State's use of it in closing argument compounded the error". Arguing for a death sentence, the prosecutor had held up this photograph of the live baby and compared it with four post-mortem photos. Nevertheless, the appeal court concluded that the use of the photo and other errors "did not contribute to Malicoat's death sentence".[43]

– In December 2000, the Texas Court of Criminal Appeals overturned the death sentence of Raymond Reese because the jury was shown a photograph of the murder victim lying in a coffin next to her unborn fetus. It was the only photo shown to the jury. The Court ruled that this may have inflamed jurors into voting for death, saying that it is "society's natural inclination... to protect the innocent and the vulnerable".[44]

The death penalty is the end result of a process subject to a range of human attributes, from sympathy to prejudice, from skill to incompetence, from commitment to indifference, from ignorance to confusion, from fear to misconduct. By the time an individual is strapped down in the lethal injection chamber, his or her fate will have passed under the watchful or not so watchful eye of many fellow humans, including police, prosecutors, defence lawyers, judges (elected and appointed), jurors, family members of the defendant and victim, expert and lay witnesses, journalists, politicians, and parole board members.

In the opinion of the Oklahoma Court of Criminal Appeals, "to state that this system has many problems is to state the obvious". Recalling a US Supreme Court Justice's 1994 conclusion that the capital justice system was unworkable, and that he would no longer vote to uphold death sentences, the Oklahoma appeal court said: "Justice Blackmun's approach is tempting, but in the final analysis it is too easy a way out". Instead, the Court said, "we are committed to try to make the system work irrespective of its inherent problems. In so doing, it is imperative that we apply the law of the Supreme Court and our prior case law fairly and consistently in every case."[45]

[43] Evidence that Malicoat had failed to pay child support was admitted. The appeal court said this was irrelevant and "could only serve to prejudice Malicoat further in the eyes of the jurors". The prosecutor read out in court a first-hand account of the baby's final hours, that is, as if from the child's perspective. The appeal court described this as "theatrical", and conduct that "very nearly constitutes an improper solicitation of sympathy for the victim". The prosecutor repeatedly described Malicoat as a "monster" and "evil". The appeal court noted that it had "repeatedly looked with disfavor on this sort of name-calling". It described as "improper and reprehensible" several of the prosecutor's arguments for execution. Nevertheless, it upheld the death sentence, ruling that these errors, individually and cumulatively, were harmless to the defendant.

[44] *Reese v State*, Texas Court of Criminal Appeals, 6 December 2000.

[45] *Cheney v State*, 1995. Recalling Justice Blackmun's dissent in *Callins v Collins*, 1994: "It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save

Six years on, the evidence of unfairness and inconsistency continues to mount. Inconsistency in sentencing is inescapable. But the irreversibility and singular cruelty of the death penalty make any inconsistency in the application of this punishment unacceptable.

Indecent: The use of the death penalty against the mentally ill

"*We believe the death penalty is never appropriate for a defendant suffering from schizophrenia or other serious brain disorders.*" National Alliance for the Mentally Ill, USA

Billy Keith McGregor is on death row in Oklahoma despite his long history of mental illness. He suffered seizures as a small child, began having delusions at the age of seven or eight, and was placed in a mental hospital in his mid-teens. There he was treated with heavy doses of medication and electro-shock therapy. When still a teenager, he was shot in the head, and pieces of bullet remained lodged in his brain. Later, incarcerated in Texas, he was diagnosed with a seizure disorder, the symptoms of which included blackouts and violent outbursts. Incarcerated in Oklahoma between 1980 and 1982, he was diagnosed with severe paranoid schizophrenia and treated with anti-psychotic drugs.

the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants "deserve" to die? – cannot be answered in the affirmative."

Billy McGregor was again diagnosed with paranoid schizophrenia prior to his 1983 capital trial for the murder of Virgie Plumb. He was granted a new trial on appeal, but was sentenced to death again in 1989 after a jury rejected his defence of not guilty by reason of insanity. Both in 1983 and 1989, he had been found competent to stand trial, that is that he would be able to understand the proceedings and assist in his defence. These competency determinations rested on the assumption that he would be treated with anti-psychotic medication during the proceedings. There were some indications at his 1989 trial that he was not being properly medicated and that he did not really understand the seriousness of his situation. For example, on one morning of the 1989 trial he asked the judge: "Do you want a game of basketball before we leave, one on one?" The defence lawyer described his client as "not extremely rational" and as having "talked nonsense the whole time". During the trial, McGregor complained of disorientation, headaches, flashbacks and blackouts. In August 2000, the US Court of Appeals for the 10th Circuit upheld Billy McGregor's death sentence[46].

Dion Smallwood was executed on 18 January 2001 for the 1992 murder of his girlfriend's adoptive mother, Lois Frederick. Initially found incompetent to stand trial, Smallwood was sent to a psychiatric hospital. Three months later, the hospital determined that he could stand trial, although it noted that he remained "a danger to himself and others", the standard in Oklahoma for commitment to a psychiatric facility.

Restoring defendants to competency prior to a death penalty trial raises questions of medical ethics. In Dion Smallwood's case, and others, an additional question to ponder is the apparent failure of professional intervention prior to the crime. Smallwood had sought psychiatric help less than a month before the murder because his condition was deteriorating. He went to a mental health facility, stating that he was having "a crisis", but the relevant counselor was busy and asked him to come back in two hours. Although she noted that he was "obviously in relapse", she did not follow up on his whereabouts when he did not return.

[46] However, the 10th Circuit granted a rehearing in front of the full (*en banc)* court. The court heard the case on 15 November 2000. At the time of writing, no decision had been issued. This was the first *en banc* hearing granted by the 10th Circuit Court in an Oklahoma capital case since *Maynard v Cartwright* in 1988.

The jurors who sentenced Smallwood to death never heard any expert mental health testimony from the defence at either stage of the 1993 trial.[47] A clinical psychologist, who assessed Smallwood after his conviction, found that he suffered from bipolar disorder (manic depressive illness): "This psychiatric disturbance when of the severity of that of Dion, disrupts all areas of functioning, relationships, occupational, social, and often requires hospitalization to prevent harm to self or others. Dion never had this necessary treatment". She said that had he received such treatment, "it is unlikely that his situation would have created the intense symptoms he experienced that culminated in the death of Mrs Frederick".[48] She also noted that Smallwood "clearly suffers from the additional severe complicating array of problems of his unfortunate life circumstances". His childhood was marked by poverty, violence, abuse, deprivation and parental abandonment. His father (Native American) and mother (Hispanic) suffered from mental problems, and his oldest brother has been diagnosed with paranoid schizophrenia and manic depression.

At the time of Smallwood's trial, Oklahoma law presumed that a criminal defendant was competent to stand trial unless he or she proved their incompetence by "clear and convincing" evidence. In 1996, in *Cooper v Oklahoma*, the US Supreme Court found that this burden of proof was unconstitutionally high, and that the standard must be a "preponderance" of the evidence. The case involved Byron Cooper, sentenced to death for the murder of an 86-year-old man during a burglary. He had been found competent to stand trial despite displaying mentally disturbed behaviour. For example, he spent much of the proceedings crouching in the fetal position and talking to himself. The State of Oklahoma had fought the appeal against his sentence. Shortly before the US Supreme Court heard oral arguments in the case, Attorney General Drew Edmondson wrote that the "effect of lowering that standard of proof – to make it easier for criminal defendants to hide behind a claim of mental incompetence – is to frustrate justice. This lawsuit is another example of why people are so disgusted with the criminal justice system. It represents another chance for the criminal to slap justice in the face."[49]

Surely justice was "frustrated" when, for example, Ronald Williamson was sent to Oklahoma's death row in 1988 for a crime he did not commit. He had a documented history of mental illness, including possible schizophrenia and bipolar disorder, going back to 1979. Yet despite this, and despite the fact that Williamson had been found incompetent to stand trial in the same court in an unrelated case under three years earlier, no competency

[47] The defence called a psychologist as an expert witness. However, the prosecution objected on the grounds that the lawyer had said that he would not be presenting such testimony at the first stage of the trial. The lawyer explained that the expert would be unable to appear at the sentencing, and that his testimony was relevant to whether the defendant could have formed the intent to kill. However, the court upheld the state's objection.

[48] According to the National Alliance for the Mentally Ill, "after accurate diagnosis, most people with bipolar disorder can be successfully treated with medication in 80 per cent to 90 per cent of all cases."

[49] *It's important to remember victims as convicted killer's appeal nears.* By Attorney General Drew Edmondson. The Oklahoma Gazette, 27 December 1995. W. A. Drew Edmondson was elected Attorney General in 1994, and was re-elected unopposed in 1998. He has announced that he will seek re-election in 2002. Byron Cooper was sentenced to life imprisonment without parole at his 1997 retrial.

determination was ever made. Despite Williamson's disturbed behaviour during a preliminary hearing in 1988 being such that it led his lawyer to ask the judge "do you want me to load him down with about a hundred milligrams of [medication]", the attorney never sought a competency hearing. Williamson was released in 1999.

The willingness of the Oklahoma authorities to seek the death penalty against the mentally ill appears not to have diminished over time. For example, the authorities have been pursuing the execution of Stephen Vann White for over 18 years for the 1982 stabbing murder of Shirley Mann in Okmulgee. Stephen White was first sentenced to death in 1984, at a time when already, "the majority of countries reported that [mental illness] precludes the possible sentencing or execution of capital offenders".[50] White had been found incompetent to stand trial in November 1983, but found competent five months later after treatment in Eastern State Hospital (ESH). His 1984 conviction was overturned in 1988 because the jury selection process had not been transcribed. At a December 1988 hearing, a doctor at ESH testified that White was incompetent to stand for retrial but that with anti-psychotic medication he could be restored to competency. After treatment at ESH, the doctor reported in February 1989 that White was competent as long as he was kept on the appropriate medication. White was sentenced to death at a retrial in May 1989.

Following the 1996 *Cooper* decision, Stephen White was granted a retrospective competency hearing to establish if he had been competent to stand trial under the revised standard of proof set by *Cooper*. At the hearing, held in 1997, the defence presented three expert witnesses and the two defence lawyers from the retrial. All five testified that, in their opinion, Stephen White had been incompetent in 1989. The two lawyers recalled that they had never had a meaningful conversation with him about the case, and that he had never participated in the preparation or presentation of his defence. The lead attorney, who had been practicing law for 28 years and had defended several hundred clients, said that he had never encountered a client who had behaved in this way before. All three mental health experts testified that Stephen White suffers from schizophrenia and organic brain syndrome. The latter, they claimed, was likely caused by White's long history of inhaling Toluene, a chemical found in paint, which can cause irreversible brain damage. In 1983, Stephen White's IQ was assessed at 67, placing him in the mental retardation range.

For its part, the state claimed that Stephen White was faking his mental illness and presented three witnesses in court who testified to this. Two of them were social workers, who were not qualified to make an expert diagnosis. The state also read into the record the 1983 opinion of two doctors from ESH, who had claimed that White was malingering. All three defence experts concluded that White was not faking. One of them stated that he could not conceive how ESH "would keep a patient over a six-year period in the hospital on ten different admissions for almost two years of his life", if he was a malingerer. Another

[50] *Capital punishment report of the* [UN] *Secretary General*. E/1985/43, 26 April 1985.

concluded that someone who was not genuinely mentally ill should not be given the medications that the state hospital was prescribing White, especially at such high dosages.

Nevertheless, at the 1997 hearing, the court found that Stephen White had been competent to stand trial eight years earlier. In 1999, the Court of Criminal Appeals overturned Stephen White's death sentence because the 1989 jury had not been properly informed of its sentencing options. In March 2001, Stephen White was still in H Unit of Oklahoma State Penitentiary awaiting a resentencing hearing, with Okmulgee County intending to seek a third death sentence nearly two decades after the crime. The prosecutor has allegedly stated that the husband of the victim wants the death penalty for White.

Oklahoma is thus no stranger to using the death penalty against the mentally ill. Indeed, the first person sentenced to death under its 1977 capital statute, and the first person executed under it, both suffered mental illness.[51] But perhaps there has been no clearer example of Oklahoma's willingness to use the ultimate punishment against the mentally ill than the case of Tuan Anh Nguyen, a former child refugee from Vietnam. Nguyen's mental health had deteriorated during his 12 years on death row, with symptoms that included psychotic-like episodes in his cell where he would scream for extended periods. There had been "no meaningful exchange" between him and his lawyers in a decade, because of his inability or refusal to communicate, or even to leave his cell.

In September 1998, a psychiatrist went to the prison and observed Tuan Nguyen - through the food tray hole at the bottom of the cell door after he refused to leave his cell. The psychiatrist believed that the prisoner was showing signs of a degenerative neurological disease, but that it was impossible to reach a conclusive diagnosis without proper testing. In October the defence lawyer wrote to the prison warden that there was "good reason to believe" that Tuan Nguyen was legally insane, that is, that he understood neither the reason for or reality of his looming execution. Two weeks later, the warden responded that the inmate was not insane. The warden did not make known what advice he had relied upon to make this determination, and the execution was carried out on 10 December 1998, Human Rights Day.

[51] Thomas Hays was the first person to be sentenced to death under the 1977 law. His mental illness later led to him being found incompetent for execution. He died in 1997 amidst allegations of medical neglect. In 1990, Charles Coleman became the first person executed in Oklahoma since 1966. He had a history of schizophrenia and brain damage first diagnosed when he was 15 years old. He also suffered from epileptic seizures throughout his life. The son of alcoholic parents, he was drinking alcohol regularly by the age of 12. According to experts, his brain damage could have resulted from foetal damage due to his mother's heavy drinking during pregnancy and from early neglect and malnutrition.

International standards prohibit the execution of prisoners "who have become insane"[52], and the US Supreme Court has ruled that the execution of the insane violates the constitution.[53] However, the ruling failed to specify procedures for determining whether a prisoner is insane, and offered little protection for those suffering severe mental health problems. In 1999, a Florida judge lamented the "minimal" standards that govern this area, which had resulted in his finding a seriously mentally ill prisoner competent for execution.[54] The growing gulf between the international community and the USA on this issue was reflected in a resolution adopted in April 2000 by the UN Commission on Human Rights, urging all retentionist countries "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person".[55]

The death penalty represents a refusal by society to accept even minimal responsibility in the crime that resulted in a punishment which assumes 100 per cent culpability on the part of the defendant. In some cases involving mentally impaired defendants in particular, there are indications that individuals within wider society failed to heed warnings that could have averted a tragedy. This is not to suggest that crimes committed by mentally impaired people are to be condoned or excused, or that they should not be punished. It is, however, to ask whether society could devote its energies and resources more constructively.

[52] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

[53] *Ford v Wainwright*, 1986.

[54] Florida Circuit Court Judge E. Randolph Bentley found Thomas Provenzano competent for execution despite finding that the prisoner believed he was being executed because he was Jesus Christ. The judge said that he was "troubled" in making this ruling, noting that the standard for competency was a "minimal standard". He said that his ruling "should not be misinterpreted as a finding that Thomas Provenzano is a normal human being without serious mental health problems, because he most certainly is not". Provenzano, who had long suffered from mental illness, including paranoid schizophrenia, was executed in Florida on 21 June 2000.

[55] E/CN.4/RES/2000/65. *The question of the death penalty*. (3e). Adopted 26 April 2000.

Cyril Wayne Ellis has been on Oklahoma's death row for 14 years. Should society take any responsibility in his crime? In the weeks leading up to it, Ellis had been displaying mental problems, including auditory hallucinations. A test taken at the time indicated possible paranoid schizophrenia. After an apparent suicide attempt, Ellis was treated in a psychiatric hospital. He left the hospital voluntarily after two days, in a disturbed state. On the same day, 30 January 1986, he attempted to buy a gun from a local shop. He did not have enough money to purchase the weapon, so one of the shop assistants agreed to loan him his own gun. Ellis then purchased ammunition from the shop and left. That transaction had appalling consequences. The following day, Cyril Ellis killed two people and injured several others during a shooting spree in Oklahoma City. He was sentenced to death for the two murders and to prison terms of 3,000 years, 2,000 years and 1,000 years for the other shootings.[56]

On 17 May 2000, an Oklahoma trial judge, William Hetherington, sentenced David Ray Alexander to life imprisonment without the possibility of parole for the murder of his mother and half-sister in Norman in 1997 when he was 18 years old. Alexander has had mental problems since he was two or three years old, suffers from schizophrenia and has mental retardation. He pleaded guilty to the murders, and the Cleveland County prosecutor urged the judge to impose a death sentence. The judge compared the case to that of Brett Ullery, over whose 1997 jury trial he had presided, and who was sentenced to death for a murder committed when he was 19. Ullery suffers from serious mental illness, schizoaffective disorder, and like Alexander, was believed to having a psychotic episode at the time of the crime. In 1999 the Court of Criminal Appeals changed Ullery's death sentence to life without parole after ruling that the mitigating evidence of his mental illness and other factors outweighed the aggravator.

Sentencing David Alexander three years later, Judge Hetherington said: "Here, once again, I am faced with the state arguing for the death penalty, seeking to execute a 21-year-old, who was 18 at the time of the homicides, and who is mentally ill and in this case also a retarded individual... As I stated during the Ullery sentencing, we do not do very well in handling mentally ill, retarded individuals who display possible threatening tendencies. In this case, documented tendencies for many years."[57]

Inhuman: The execution of people with mental retardation

"*In deciding to allow the killing of mentally retarded citizens, the majority swallows all sense of decency*." Oklahoma Court of Criminal Appeals, dissent, 1999

In April 1999, Judge Charles Chapel of the Oklahoma Court of Criminal Appeals made an impassioned dissent in the case of Robert Lambert, a man with an IQ of 68 who had been

[56] *Ellis v State*, Oklahoma Court of Criminal Appeals, 1992.

[57] *Judge gives Alexander life without parole.* The Norman Transcript, 18 May 2000.

condemned to death for the brutal murders of Laura Lee Sanders and Michael Houghton in October 1987: "A majority of the Court today approves the execution of a mentally retarded man who has the mental age of an eight-year-old boy... At issue is not whether Robert Wayne Lambert should be punished for his actions; he should. The question is how we as a society should punish the mentally retarded. The answer to this question speaks volumes about us as civilized, decent people. The majority's answer is shameful."[58]

Writing in an opinion agreeing with the majority's decision to uphold Lambert's death sentence, Judge Gary Lumpkin took issue with Judge Chapel's dissent: "My colleague's empathy for the plight of the Appellant in this case is commendable. On a human plane, each of us is touched and saddened when we must witness the fruits of human tragedy, as well as the human imperfections which caused that tragedy... However, this is an issue which is a matter for legislative determination... While my colleague's syntax seeks to tug at the heartstrings for the plight of the mentally retarded, and each of us would have empathy for those individuals as persons, that empathy does not allow us to subvert the legislative process."

In March 2000, Presiding Judge Strubhar joined Judge Chapel in dissenting from the Court's decision to uphold the death sentence of Richard Hammon, whose IQ has been measured as low as 67, and whose co-defendant – the actual gunman in the 1990 crime – is serving a life sentence (see page 15). Judge Strubhar wrote: "This Court should recognize there is a growing list of states that prohibit the executions of mentally retarded persons and that Oklahoma, now presented with this issue, should address this proposition. The Opinion issued by the majority state that this is an issue only for the legislature. I believe otherwise and am concerned that we failed to address the issue in this case."

[58] A person of average intellectual functioning would have an IQ of 100. An IQ below 70-75 is considered to be an indicator of retardation if existing concurrently with limitations in adaptive skills.

Oddly, less than a year later, in January 2001, Judge Strubhar joined the majority of the Court to uphold the death sentence of Darrin Lynn Pickens for the shooting of shop clerk Tommy Lee Hayes in 1990. Pickens' appeal lawyers had challenged the sentence on a number of grounds, including that Pickens has mental retardation. Again dissenting from his colleagues, Judge Chapel, who noted that the state had not disputed the mental disability claim, wrote: "Experts who testified at Pickens' trial estimated his mental age to be approximately that of a nine-year-old child. I conclude, therefore, that it is no more acceptable to execute Pickens that it is to execute a nine-year-old child."[59]

It is clearly within the reach of the judiciary to rule on the constitutionality of executing prisoners with mental retardation. The US Supreme Court did so in 1989 when it came within one vote of ruling that the execution of such individuals violated the constitutional ban on cruel and unusual punishments.[60] Twelve years on, the Court has agreed to revisit its 1989 decision and will rule on whether, in its view, US standards of decency have evolved to the point where such executions are unconstitutional.[61] A ruling is not expected until mid-2002.

[59] For more on the USA's use of the death penalty against people with mental retardation, see *Beyond Reason: The death penalty and offenders with mental retardation.* Human Rights Watch, March 2001.

[60] *Penry v Lynaugh.* See *Beyond reason: The imminent execution of John Paul Penry* (AMR 51/195/99, December 1999).

[61] On 26 March 2001, the US Supreme Court agreed to consider the issue in an appeal brought in the case of North Carolina death row inmate Ernest McCarver, whose IQ has been measured as low as 67.

As of 31 March 2001, 13 US states and the federal government prohibited the use of the death penalty against defendants with mental retardation, and several others were considering such legislation.[62] Research shows that a majority of people who support the death penalty oppose the execution of people with learning disabilities.[63] Research also suggests that evidence of mental retardation is highly mitigating in the minds of capital jurors, reinforcing the importance of adequate legal representation to discover and present this issue at trial.[64] The American Association on Mental Retardation, now in its 125th year, holds that the death penalty is disproportionate to the level of culpability possible for people with mental retardation. This expert organization is not saying that such individuals should not be held responsible for criminal acts – just not killed for them. The American Bar Association opposes the execution of such individuals. It took up this policy in 1989 after much research and deliberation. In the same year, the United Nations adopted a resolution opposing the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution".

The State of Oklahoma's current position, as expressed in a recent reply brief on the case of a mentally retarded prisoner, is that under (widely condemned) reservations lodged by the USA on ratifying the International Covenant on Civil and Political Rights in 1992, Oklahoma can execute whom it wants within the constraints set by the US Supreme Court. The state also asserts that the question of the execution of the mentally retarded should be left to the legislature and that there are adequate protections already in place: "Current law establishes that if a person is unable to appreciate the wrongfulness of his or her acts, such person cannot be convicted or punished for a crime... Certainly, such current laws would protect a person that is so retarded that they cannot appreciate the crime or the penalty."[65]

[62] The 13 are: Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee, Washington. Those considering legislation include, Nevada, Florida, Texas, North Carolina and Missouri.

[63] For example, one Oklahoma survey in 1999 found 76.4 per cent support for capital punishment in general, but also found that 77.6 per cent of these supporters opposed the execution of prisoners with mental retardation. *Survey of Oklahoma attitudes regarding capital punishment: A survey conducted for the Oklahoma Indigent Defense System.* Dr Ronald K. Gaddie. Cited in *Miller v State.* Brief of Appellant.

[64] Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998). In this study, 73.8 per cent of jurors said that they would be less likely to vote for a death sentence if there was evidence that the defendant had mental retardation.

[65] *Miller v State*, In the Court of Criminal Appeals of the State of Oklahoma. Brief of Appellee. 25 April 2000. The US reservations to which the Oklahoma Attorney General refers state that "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age." And: "The United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States". The USA's reservations have been widely condemned and found to be invalid by UN monitoring bodies. See *USA: A briefing for the UN Committee*

against Torture, AMR 51/56/00, May 2000.

As with the mentally ill, cases of mentally retarded defendants have raised questions about the adequacy of procedures used to determine competency to stand trial.

Jervaughn Miller was sent to Oklahoma's death row in 1999 for the murder of Timothy Rucker. At his trial, the defence presented expert testimony that Miller has mental retardation and an IQ of 59. A 1994 evaluation put his IQ at 61. There was also evidence that he was suffering from serious depression and post-traumatic stress, possibly as a result of abuse he suffered as a child or a sexual assault during an earlier prison term. Nevertheless, his lawyer proceeded to trial without having requested a competency determination of his client. Another experienced criminal defence lawyer who visited Miller in jail before the trial has stated her "absolute certainty" that he was incompetent to stand trial:

> Mr. Miller also did not have any understanding of the qualitative differences between first and second degree murder. When I discussed the seriousness and likelihood of a death penalty in his case, he acted like it was the first time he had heard any of it... Talking about mitigation evidence with Mr. Miller was impossible. I am absolutely positive he did not understand what I meant by "sentencing" being a separate part of the trial... I used the simplest descriptions in trying to explain...information to him. However, because of Mr. Miller's limited intelligence I found he was not capable of understanding. His intellectual limitations were obvious and proved to be a critical barrier between us.[66]

The psychologist who testified as a mitigation witness at the trial, has since stated her opinion on the competency issue:

> Although Jervaughn appeared to understand that he was charged with murder, his limited abilities in language, verbal comprehension and reasoning interfered with his fully understanding the implications of the legal issues in the charge of first degree murder and the choices that were discussed with him regarding the issues of plea bargaining. He was unable to consider all possibilities, making comparisons, and weighing their merits and consequences. His limited mental functioning interfered with his being able to assist his attorneys in his own best interests.... Jervaughn was severely depressed which further diminished his ability to think and he was preoccupied with suicidal thoughts.[67]

A post-conviction evidentiary hearing was held in the trial court in November 2000, and in January 2001 the judge ruled that Jervaughn Miller had been competent to stand trial

[66] Affidavit, Debbie Maddox. Ms Maddox had actually arranged for a psychiatrist to evaluate Miller, but Miller's lawyer cancelled it.

[67] Affidavit, Sally Church. Miller's appeal lawyers also arranged for a neuropsychologist to evaluate him. He has said: "It is my opinion, based upon Jervaughn Miller's level of mental retardation and his apparent psychotic depression, that he was unable to assist his counsel in an effective manner when he was tried on 16 November 1998." Affidavit, Dr Alan Hopewell.

in 1998. He based his decision primarily on the trial lawyer's testimony that he had believed Miller was competent. There is evidence that the lawyer, who admitted that he had difficulty communicating with Miller, was unprepared for the trial because he had expected him to accept a plea bargain in a case which the lawyer referred to as a "typical nigger deal" (see page 41).

Robert Clayton was executed on 1 March 2001. At his trial for the 1985 murder of Rhonda Timmons, a psychologist testified that the defendant, who had dropped out of school at the age of 12, had an IQ of 68. She said that the 24-year-old's test performances on "word recognition, spelling and arithmetic skills" placed him at third or fourth grade level (aged 8-10 years), that his "reality skills" were poor, and that he was emotionally immature, very dependent on others and had difficulty controlling his impulses and tendencies.[68] Prior to the trial, the court had found that there was doubt as to Clayton's mental competence and ordered an evaluation. A doctor carried out an examination on 11 July 1985 and, in a one paragraph report, found Clayton competent. However, the court did not hold a competency hearing. On appeal, the court was ordered to conduct a retrospective hearing, if feasible. The court first held a hearing to determine if it was feasible to hold a competency hearing nearly six years after the trial. The only expert witness who testified at the feasibility hearing said that the available records concerning Clayton's competency were "poor", and that it would not be possible to establish competency on such records. Nevertheless, the court held a competency hearing, and in September 1991 ruled that Clayton had been competent to stand trial on 1 March 1986. At the hearing, Clayton's trial lawyer recalled that he had had "significant doubts" about his client's competency during the trial. He described Clayton as having "the mentality of maybe like a seven or eight-year-old and he was unable to give me the details I wanted".[69]

On appeal, the US Court of Appeals for the 10th Circuit said that "the time gap between Clayton's trial and the competency determination is troubling". Furthermore it said that the report of the doctor who had found Clayton competent in 1985 was "admittedly brief". It also described as "troubling" the fact that one of the state's main expert witnesses at the retrospective competency hearing had "no independent recollection of Clayton, had no records or files... and could not identify the bases for his conclusion". Nevertheless the appeals court allowed Clayton's death sentence to stand.

Several prisoners alleged to have had learning disabilities have been executed in Oklahoma, including Wanda Jean Allen, Cornel Cooks, Charles Foster and Bobby Ross.

[68] *Clayton v Gibson*, US Court of Appeals for the 10th Circuit, December 1999.

[69] One of the police officers who questioned Clayton following the murder said he "seemed a little bit on the slow side", and that it took a "considerable amount" of explanation to help him understand his rights. The trial court ruled that one of Clayton's two confessions was inadmissible because he had not understood these rights. Mentally ill or mentally retarded individuals can be susceptible to giving false or misleading confessions. Billy McGregor (page 22) reportedly made several false confessions to police as well as the confession that was used against him. Ronald Williamson allegedly made a "dream" confession to police after 24 hours in jail. Another man with mental problems also confessed to the same murder (page 61).

Richard Hammon, Robert Lambert, Darrin Pickens and others alleged to have borderline or actual mental retardation remain on death row. They include Gilberto Martinez, a Cuban national, who is reported to have suffered serious brain complications in recent years, and had brain surgery in 1997 and 1998. In June 1999, a clinical psychologist examined Martinez and assessed him as having mental retardation, and an IQ of 63-64.

A person with an accurately scored IQ of below 70 is considered to be in the bottom two per cent of the US population in terms of intellectual ability. Less than two per cent of those convicted of murder receive the death penalty. Can a person with mental retardation be considered to be among the top two per cent of murderers in terms of culpability and punishment? The same question may be asked of children, against whom Oklahoma also remains willing to use the death penalty.

Illegal: Killing children who kill

"*My son wanted to be here. They say he can't because he's 16 and that's too young to witness an execution. If that is so, why can the state of Oklahoma convict, sentence to death and execute a 16-year-old child. I just don't understand.*" Final statement of John Walter Castro, executed 7 January 1999, Oklahoma.

Less than a month after John Castro's 16-year-old son was made fatherless by the State of Oklahoma, the same state killed Sean Sellers for crimes committed when he was a 16-year-old boy. On 4 February 1999 Sellers became the first person put to death in the USA for a crime committed at the age of 16 since 1959.[70]

International law prohibits the use of the death penalty against defendants who were under 18 years old at the time of the crime. Out of step with this long standing prohibition, the US Supreme Court in 1989 set 16 as the minimum age for death penalty eligibility in the USA. Oklahoma is one of seven US states since 1977 to have executed prisoners for crimes committed when they were 16 or 17 years old. Seventeen such prisoners have been put to death since the USA resumed executions in 1977; all but Sean Sellers were 17 at the time of the crimes for which they were condemned. Since January 1993, only six countries are known to have executed child offenders – Nigeria (1), Yemen (1), Pakistan (1), the Democratic Republic of Congo (1), Iran (2), and the USA (12). Yemen has since abolished such use of the death penalty, as has Pakistan (although it still has some child offenders on death row). China, which accounts for most of the world's executions, abolished this use of the death penalty in 1997.

In 1998, there were four child offenders on death row in Oklahoma. Since then, one has been executed and two have had their death sentences overturned on appeal. Scott Hain is the only person currently on death row in the state for a crime committed when he was

[70] See *Killing Hope: the imminent execution of Sean Sellers*, AMR 51/108/98, December 1998.

under 18 years old (he was 17). However, prosecutors continue to seek to add to that total:

- In September 2000, Oklahoma County announced its intention to seek the death penalty against Jack Chance, a 17-year-old with reported borderline mental retardation and a history of mental illness accused of the murder of his counsellor in July.

- On 21 December 2000, Oklahoma County announced that it would be seeking the death penalty against 17-year-old Trimaine Lamont Vick, accused of shooting David Kennedy, aged 21, during a robbery at the Kennedy home in August.

The UN Sub-Commission on the Promotion and Protection of Human Rights has affirmed that "the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law". The Sub-Commission called upon all countries that retain the death penalty for child offenders to abolish it as soon as possible and, "in the meantime, to remind their judges that the imposition of the death penalty against such offenders is in violation of international law".[71] International standards also require that prosecutors be "made aware of...human rights and fundamental freedoms recognized by national and international law".[72] There is little sign that judges or prosecutors in Oklahoma are aware of international law in this area, or if they are, that they have any intention of paying heed to it.

In a landmark case, *Thompson v Oklahoma* in 1988, the US Supreme Court ruled that Oklahoma's planned execution of William Wayne Thompson, who was 15 years old at the time of the crime, was unconstitutional. His sentence was overturned, and he is now serving a life sentence. However, the *Thompson* decision has not stopped some prosecutors in Oklahoma from attempting, or threatening, to seek the death penalty against 15-year-old defendants. In late 1996, Tulsa County District Attorney's Office sought to pursue a death sentence in the retrial of Adriel Simpson, who was 15 years and three months old at the time of the 1990 offence. In January 1997, the state Court of Criminal Appeals intervened and stopped the prosecutor's quest. The ruling persuaded the Tulsa County District Attorney's Office to also drop their pursuit of the death penalty against Courtney Lasean Kendricks, accused of a murder in 1996 when he was 15.

However, in August 1998 a Tulsa County prosecutor said he would "research the case law" to determine whether he could seek the death penalty against 15-year-old Dylan Shanks, charged with three murders committed on 7 August. He said that the prosecution were "anticipating" pursuing the death penalty unless their research ruled out that possibility. In the event, the prosecution did not pursue a death sentence.

[71] E/CN.4/Sub.2/2000/L.29. 14 August 2000.

[72] UN Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

In 1999, the First Assistant District Attorney of Pontotoc County in Ada indicated that he was willing to "make new law" in order to obtain a death sentence against Derrick Lester, accused of a murder when he was 15 years old. Following an urgent Amnesty International appeal, the prosecutor informed the organization that he had decided not to seek the death penalty against the teenager. In May 2000, like Adriel Simpson and Dylan Shanks, Derrick Lester was sentenced to life imprisonment without the possibility of parole after pleading guilty. In other words, rather than killing them, the state intends to let them die in prison.

Life imprisonment without the possibility of parole against children

Like the death penalty, life imprisonment without the possibility of release against those who were under 18 years old at the time of the crime violates international standards agreed to across the world in recognition of the immaturity of children and their capacity for rehabilitation.[73] Yet Oklahoma, along with other US states, continues to use this sentence against children. For example, Michael Cipriano, a teenager with a reported learning disability, was sentenced to life imprisonment without parole (LWOP) in Oklahoma County in June 2000 for shooting his 15-year-old girlfriend when he, too, was 15 years old. Other child offenders currently serving LWOP sentences in Oklahoma include: Thomas Loveless (16 at crime); Joe Vance Tilley (16); Richard Harjo (16); Ronald Jessie (16); Eric Elliott (17); Jerry Mooney (16); Jesus Manuel Corrales (16); Michelle Dawn Murphy (17); and Larry Donnelle Brown (17).

Amnesty International is concerned that defendants accused of crimes committed when they were 16 or 17 years old may opt to accept a plea bargain under which they agree to plead guilty and accept life in prison without parole, in order to avoid a possible death sentence. Yet neither punishment should be used or threatened against defendants who were under 18 at the time of the crime of which they are accused.

[73] Article 37(a) of the Convention on the Rights of the Child states: "Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age." Although the USA is one of only two countries not to have ratified the Convention (191 have ratified it), it has signed it, thereby binding itself in good faith not to do anything which would undermine the object and purpose of the treaty.

On 10 January 2001, Slint Tate was sentenced to life imprisonment without the possibility of parole for the murder of a reserve sheriff's deputy committed in July 1999 when Tate was 16 years old. His trial had been due to begin on 23 January 2001, at which the Rogers County prosecution intended to seek the death penalty. Instead, Slint Tate agreed to plead guilty to the shooting in exchange for LWOP. Members of the victim's family gave their consent to the plea agreement. The wife of the victim reportedly said: "I think it will be more of a punishment for him than the death penalty – having to sit there all day every day".[74]

Twenty years earlier, the State of Oklahoma wanted to kill Monty Lee Eddings for a murder of a police officer in 1977 when Eddings was 16 years old. In 1982, his death sentence was overturned by the US Supreme Court because the jury had not been allowed to hear important mitigating evidence of his abused childhood: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be more susceptible to influence and to psychological damage." [75] Monty Eddings is now 40 years old and serving a life sentence with the possibility of parole. Since his death sentence was overturned, the USA, Oklahoma included, has turned more punitive towards children who commit crimes. In doing so, it has diverged further from standards of juvenile justice agreed to in all corners of the globe.

Echoes from history: The impact of race

"*The Special Rapporteur remains concerned at the discriminatory manner in which the death penalty is applied in the United States of America and hopes that the advent of a new millennium will also offer an opportunity for that great country to envisage penal sanctions more in line with international human rights standards and with the prevailing tendency, which is towards the abolition of capital punishment*." UN Special Rapporteur on Contemporary Forms of Racism.[76]

On 25 May 1911, Laura Nelson, a black woman accused of murdering a white deputy sheriff, was lynched at Okemah in Oklahoma. She was dragged from the local jail by a mob and hanged together with her 15-year-old son from a bridge over the Canadian River. They were two of 23 African Americans lynched in 12 Oklahoma towns during the 10 years to 1921. A recent report points out that: "In some government participated in the deed. In some government performed the deed. In none did government prevent the deed. In none did government punish the deed."[77]

[74] *Teen gets life with no parole*. Tulsa World, 11 January 2001.

[75] *Eddings v Oklahoma*, 1982.

[76] E/CN.4/2000/16. 10 February 2000.

[77] *A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921*. 28 February 2001. In 27 of the 33 lynchings in Oklahoma between 1907 and 1920, the victims were black.

In December 1931, without a lawyer and in fear of being lynched, a young black man named Jess Hollins pleaded guilty to the rape of a white woman in Creek County, Oklahoma. In proceedings that took less than an hour, he was sentenced to death by a judge. The following year the state Court of Criminal Appeals overturned the conviction, ruling that Hollins, "with the terror of the mob in his mind", had not been in a position to waive his constitutional rights. Jess Hollins was sentenced to death for a second time, this time by an all-white jury. In May 1935, 30 hours from execution with his head already shaved for electrocution, he was granted a stay by the US Supreme Court. The Court overturned the conviction because blacks had been excluded from the jury solely on account of their race, a claim earlier rejected by the state Court of Criminal Appeals. In 1936, Hollins was tried for a third time, again in front of an all-white jury and sentenced to life in prison. He maintained his innocence and was backed up by numerous, black, witnesses. However his claim that he had had consensual sex with his accuser was something the white jurors were unwilling to believe. Between 1915 and 1966, Oklahoma executed five men for rape. All five were African Americans convicted of raping white women.

The history of the death penalty in the USA is one of racist use, and to this day race remains an element in the application of this punishment. In 1994, a US Supreme Court Justice said: "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."[78] In his 1998 report on the death penalty in the USA, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions noted that: "Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death."[79] Research into the US death penalty over the past two decades has consistently shown a pattern of sentencing anomalies which cannot be explained without reference to racial factors, particularly in relation to the race of the murder victim. In 1990, the General Accounting Office (an independent agency of the US government) issued a report on death penalty sentencing patterns. After reviewing and evaluating 28 major studies, the report concluded that 82 per cent of the surveys found a correlation between the race of the victim and the likelihood of a death sentence. The finding was "remarkably consistent across data sets, states, data collection methods and analytic techniques. . .[T]he race of victim effect was found at all stages of the criminal justice system process . .".[80]

The population of the USA is approximately 75 per cent white and 12 per cent black. Since 1976, blacks have been six to seven times more likely to be murdered than whites, with

[78] *Callins v Collins*, 1994, Justice Blackmun, dissenting.

[79] E/CN.4/1998/68/Add.3, para 148.

[80] *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, United States General Accounting Office, Report to Senate and House Committees of the Judiciary, 26 February 1990.

the result that blacks and whites are the victims of murder in the USA in about equal numbers. Fifty one per cent of those murdered from 1976 to 1999 were white, and 47 per cent were black. From 1989 to 1999, 48 per cent of murder victims were white and 49.5 per cent were black.[81]

As of 31 March 2001, 705 people had been executed in the USA since 1977. In over 80 per cent of the cases, the crimes involved white victims. Of the 40 executions carried out in Oklahoma, 33 (82.5 per cent) were for crimes involving white victims.

[81] *Homicide trends in the US. Trends by race.* Bureau of Justice Statistics. Of the 492,852 murders in the USA between 1976 and 1999, 252,342 were of whites, 229,829 were of blacks, and 10,681 were of "other".

Most murders in the USA are intraracial. Between 1976 and 1999, 86 per cent of white murder victims were killed by whites, and 94 per cent of black murder victims were killed by blacks. Of the 683 men and women executed by the end of 2000, 51.5 per cent were whites convicted of killing whites, 24 per cent blacks convicted of killing whites, 1.5 per cent whites convicted of killing blacks and 9.5 per cent were blacks convicted of killing blacks.[82]

Blacks are disproportionately represented on the country's death rows, accounting for about 42 per cent of condemned prisoners. The adult population of Oklahoma is about 79 per cent white, seven per cent Native American and seven per cent African American. The population of its death row is 55 per cent white, eight per cent Native American and 32 per cent African American. Of the 40 people executed since 1990, 22 (55 per cent) were white, 11 (27.5 per cent) were black, four (10 per cent) were Native American, two (5 per cent) were mixed ethnicity/race, and (2.5 per cent) one was Asian.

Such statistics alone do not prove racial bias in the justice system, and may reflect patterns of offending relating to wider social inequalities. For example, between 1976 and 1999 nearly six out of 10 felony murders involved black offenders. Nevertheless, when set alongside studies consistently showing race of victim, and/or race of defendant, as a factor in capital sentencing after taking account of other circumstances, it appears that, as in the past, the largely white US justice system places a higher value on white life than it does on the lives of blacks.[83] It is therefore relevant to consider aspects of how minority defendants are treated in the capital justice system, including the make-up of the juries they face.

As in the case of Jess Hollins 70 years ago, the modern era of US judicial killing has seen minority defendants convicted and sentenced to die across the country by all-white or almost all-white juries. Charles Ray Giddens, black, was convicted of murder by an all-white jury in Oklahoma in 1978. He spent four years on death row before being released due to the unreliable evidence used to support his conviction. Robert Miller, black, was convicted by an all-white Oklahoma jury of the rape and murder of two elderly white women. He was released in 1999 after he was found to be innocent.

Blacks may be under-represented in the pool from which the jurors are selected in the first place. For example, at the 1997 Tulsa County trial of Billy Don Alverson, who is black, of the 75 people in the jury pool there were only five African Americans, none of whom sat on the eventual jury. At the 1998 Oklahoma County trial of Danny Keith Hooks, who is African American, there were four blacks among the 65 prospective jurors. This means that blacks made up six per cent of the jury pool in comparison to 13.5 per cent of the

[82] *Death Row USA, Winter 2001*. NAACP Legal Defense and Educational Fund, Inc.

[83] See *Killing with prejudice: Race and the death penalty in the USA* (AMR 51/52/99, May 1999).

adult population of Oklahoma County (according to the 2000 census). After the jury selection process, the disparity was even more marked. All four blacks were excluded during jury selection, and the eventual jury consisted of 11 whites and one person who described herself as "not white", but who was not African American (see table).

One US newspaper recently concluded after conducting a six-month study into the application of the death penalty in North and South Carolina, that "minority defendants start out with an intolerable and indefensible disadvantage compared to white defendants... black citizens are under-represented on juries. Prosecutors often excuse potential black jurors because they are less likely to vote for a death penalty conviction."[84] The same appears to have occurred throughout the modern era of the death penalty in Oklahoma. For example, at the 1983 Oklahoma County trial of James Fisher, who is black, the prosecutor removed several black jurors and the eventual jury was all-white. In 1997, Paris Powell, black, was sentenced to death in Oklahoma County by a jury consisting of 11 whites and one black. Seven African Americans had been removed during jury selection, including four by the prosecutor's use of peremptory challenges, the right to exclude individuals deemed to be unsuitable without giving a reason. Fisher and Powell both remain on death row.

	African American
Oklahoma County adult population	**13.5%**
Jury pool at Danny Hooks's Oklahoma County trial, 1998	**6%**
Jurors selected at Danny Hooks's trial	**0%**
Tulsa County adult population	**10%**
Jury pool at Billy Alverson's Tulsa County trial, 1997	**6.7%**
Jurors selected at Billy Alverson's trial	**0%**

[84] *Uncertain justice: The death penalty on trial.* Charlotte Observer (North Carolina), September 2000.

Bobby Lynn Ross, an African American, was executed in Oklahoma on 9 December 1999 for the murder of a white police officer, Sergeant Steven Mahan, in January 1983. Ross was tried by an all-white jury. After the jury had been selected, the defence objected to its composition, "in that there were no black people called as jurymen in this case and the defendant feels he's denied a fair and impartial trial by his peers." The trial court overruled the objection. Again, there are echoes from history here. In 1925, the Oklahoma Court of Criminal Appeals had rejected a claim of racial discrimination in jury selection in the case of John Welch, an African American, who like Bobby Ross, had been convicted by an all-white jury of the murder of a police officer. The appeal court had been presented with uncontroverted evidence that although nearly one third of the residents of Muskogee County were African American, none had sat on a Muskogee County jury for over a decade. The Court said that the jury commissioners had "claimed, very positively, that no one was rejected for jury service on account of race."[85] Proving discriminatory juror selection remains a difficult task 75 years on.

In a 1986 decision, *Batson v Kentucky,* the US Supreme Court ruled that jurors could only be removed for "race neutral" reasons. To win an appeal on this issue, the defendant must show that "purposeful discrimination" took place. Proving "purposeful discrimination" is nearly impossible, since prosecutors need only present a vaguely plausible non-racial reason for dismissing potential jurors. For example, at the 1986 trial of Cyril Ellis, who is black, there were 10 minority jurors in the original jury pool, four blacks, four Native Americans, one Asian and one Hispanic. The eventual jury consisted of 11 whites and one Hispanic. The Oklahoma County prosecutor used four peremptory challenges to remove two African Americans and two Native Americans. When challenged, the prosecutor said that one of the blacks was removed because he was "inattentive", and the other because she had indicated that she might not be able to concentrate on the trial if it lasted beyond a week because she would worry about paying her bills. A white juror, who was a dentist, also expressed concern about his business but was not excluded by the state. In 1992, the Oklahoma Court of Criminal Appeals rejected the claim that this demonstrated racially motivated action on the prosecutor's part, arguing that the dentist had not specifically said that he could not pay full attention to the trial, nor that he would not be able to pay his bills. Cyril Ellis remains on death row.

Minority defendants other than African Americans may also face this issue. Stephen Vann White, who is Native American, was sentenced to death at a 1989 retrial in Okmulgee County. All three Native Americans in the jury pool were removed by the prosecutor using peremptory strikes. Two were women who were unmarried and unemployed – the prosecutor stated that employed and married jurors were preferred. The eventual jury is believed to have been all-white. In 1997, a retrospective competency hearing was held to establish if White had been competent to stand trial in 1989 (see page 24). At

[85] *Welch v State*, 1925.

the hearing, the prosecutor used three peremptory challenges to remove all three minority jurors, one African American and two Native Americans. The prosecutor explained that he had removed the Native Americans because, "despite the fact that they indicated they could serve, they both were diabetic", and excluded the black prospective juror because he was "inattentive".[86]

In 1991, the US Supreme Court, in *Powers v Ohio*, extended the *Batson* decision to cover the exclusion of jurors on the basis of race, even if they were not the same race as the defendant. Jay Wesley Neill is white and on death row in Oklahoma for a crime involving white victims committed in 1984 when he was 19 years old. At his retrial in 1992, all African Americans were removed during jury selection. Challenged by the defence lawyer, the Comanche County prosecutor gave the reasons for his peremptory challenges against African Americans. He said he had removed one of them because he was "leery about her close religious affiliation" (her husband was a minister), that she was a school teacher and "school teachers historically...tend to be forgiving in nature", that her austere type of dress made him uncomfortable, and that she nodded adamantly when the issue of the evidence necessary to return a guilty verdict was discussed. The state removed another of the African Americans because she had a stern look on her face, would not maintain eye contact with the prosecutor, and was "independent and haughty" in her actions. A third black juror was removed because he had retired from the military at a relatively low rank, was originally from a large urban area where killings occurred frequently, and he allegedly appeared to be taking the trial lightly. These were accepted by the trial court and the Oklahoma Court of Criminal Appeals as legitimate race-neutral reasons to strike the jurors.

Malcolm Rent Johnson, an African American, was executed in Oklahoma in 2000. He was sentenced to death in 1982 for the murder of an elderly white woman, Ura Alma Thompson, in 1981. He was tried by an all-white jury after the Oklahoma County District Attorney removed all three African Americans from the jury pool by using peremptory challenges.

[86] This same reason was given by a Comanche County prosecutor for the removal of an black juror at the 1996 resentencing of Maximo Salazar, who is Native American. The prosecutor said that the juror had been removed because he was wearing a gold earring in each ear, was approximately the same age as the defendant, and was inattentive during the selection process. The defence disputed that the juror had been inattentive, but the judge, without making a finding of fact, found the prosecutor had given "valid reasons" for the juror's exclusion.

Following the *Batson* decision, Malcolm Johnson's case was referred back to the trial court for an evidentiary hearing into the claim that racial discrimination lay behind the prosecutor's use of peremptory strikes. At the hearing, which took place four years after the trial, the prosecutor "did his best to reconstruct from the record, his memory, and from his own policies his reasoning in removing the particular jurors".[87] The state Court of Criminal Appeals found that his explanations were "both neutral and logical". These explanations included that one of the black jurors had a son the approximate age of Malcolm Johnson, and therefore might have sympathized with the defendant; another of the jurors was excluded because she had two relatives who had been convicted of crimes; and the third juror was a nurse, and a Catholic, both factors which the prosecutor considered might lead the juror to disfavour the death penalty.

Malcolm Johnson's appeal lawyers produced evidence that white jurors who shared such characteristics were allowed to sit on the jury, and that the prosecutor's ostensibly race neutral reasons were simply a pretext for the discriminatory use of peremptory strikes. On appeal in 1999, the 10th Circuit Court of Appeals described this as "troubling evidence" and noted that "it appears that the record may provide support for petitioner's pretext argument". Nevertheless, the Court declined to offer a remedy, and Malcolm Johnson went to his death on 6 January 2000 after 17 years on death row.

[87] *Johnson v State*, Oklahoma Court of Criminal Appeals, 9 February 1987.

On occasion, an allegation of racial discrimination has been levelled at the defendant's own lawyer. Cornel Cooks was executed in Oklahoma's death chamber a month before Malcolm Johnson. The quality of Cooks's legal representation at his trial raised serious concern (see page 45). At one of their first meetings, when the lawyer told the mentally impaired Cooks that the state was seeking the death penalty against him for the murder of Jennie Ridling in Comanche County in 1982, Cooks did not understand what that meant. The white lawyer told him, "that's what they do to niggers who rape white women."[88]

In 1998 a Comanche County jury voted to send Jervaughn Miller, an African American man, to death row. At an evidentiary hearing in 2000, the defence investigator assigned to the case testified that the night before Miller's family members were due to appear at the sentencing phase, she had told the defence lawyer and his co-counsel that she was having difficulty preparing the relatives as witnesses. She testified that the co-counsel had replied to her that there "was no sense messing with these street niggers", to which the lead lawyer allegedly agreed. The defence investigator testified that the two lawyers, both white, called the case a "TND" which they said stood for "typical nigger deal".[89]

According to Miller's appeal to the Oklahoma Court of Criminal Appeals, the lead lawyer also admitted that he may have called Miller "a stupid nigger". The appeal states that he "attempted to justify the use of these racial slurs by clarifying that he never made them in front of Miller or his family. Miller, however, overheard [the lawyer] say "he's not going to take the deal, let the stupid nigger fry". Despite the fact that [the lawyer] was confronted by his supervisor about making the racial slurs and told that this was something that should never be said, [he] had the audacity to state that if he had to do it over again, he would still describe the case as a TND".

The Division Chief at the Capital Trial Division of the Oklahoma Indigent Defense System attended the final two days of Miller's trial in her capacity as the lawyer's supervisor. She has stated in an affidavit that from her observations, the defence lawyer "was not prepared for the second stage. He did not even recognize the client's mother whom he had called to take the stand as a mitigation witness." She stated that he later admitted that he was unprepared, because he had thought Jervaughn Miller would accept a plea bargain before the trial.

The lawyer in question was forced to resign. Jervaughn Miller remains on death row. Other prisoners have gone to their deaths in Oklahoma's lethal injection chamber despite the fact that the quality of their trial representation fell short of international standards relating to capital cases.

[88] Cooks's white co-defendant was sentenced to life imprisonment.

[89] According to the appeal brief, the defence lawyer explained that a TND was one where "Nobody saw the actual crime being committed, but they all saw what led up to it because they all turned around and ran".

Death by default: Inadequate legal representation

"*Petitioner's trial counsel's performance during the second stage was constitutionally deficient as it was, in essence, non-existent."* US District Judge, 1999.[90]

In 1999, US District Judge Tim Leonard overturned James Fisher's 1983 death sentence. Presented with an appeal that the trial lawyer's performance had amounted to "unequivocal surrender" and a "complete abrogation of his duty to advocate Fisher's cause", Judge Leonard noted that the lawyer had spoken only nine words during the sentencing phase: "Of the nine words he uttered, four were the equivalent of judicial pleasantries and did nothing to advocate [Fisher's] case. The other five words formed an ill-founded, unsupported and ultimately rejected objection to one portion of the prosecutor's closing argument."[91]

James Fisher remains on Oklahoma's death row while Judge Leonard's decision is appealed to the federal 10th Circuit. The Court heard oral arguments on 12 February 2001, with the state arguing for reinstatement of the death sentence despite the performance of the trial lawyer.

In June 2000, Oklahoma death row inmate Bigler Jobe Stouffer was granted a new trial. The 10th Circuit agreed that his trial lawyer's performance had been constitutionally deficient. It pointed out that, at the first stage of the 1985 trial, Stouffer's lawyers had failed to make an opening statement, "exhibited ineptness at direct questioning", were "unable to conduct effective cross-examination of State's witnesses", and "presented closing arguments which were ineffective at proffering any semblance of a defense theory". The Court also noted that the ineffective representation had carried over into the sentencing phase of the trial and "resulted in a constitutionally unsupportable verdict of death". The trial lawyers' performance had "clearly prejudiced [Stouffer] by denying any reasonable prospect for avoiding the death penalty".[92] Oklahoma County District Attorney Robert Macy, whose office prosecuted the case, displayed a disturbing tolerance for low standards of defence representation: "I will argue forever and ever that this would not have changed the outcome of the trial. His counsel doesn't change the fact that he did it".[93]

[90] *Fisher v Ward*, US District Court for the Western District of Oklahoma, 29 September 1999.

[91] The nine words were: 1 - "Waive" (waiving opening statement); 2 - "Rest" (instead of presenting mitigating evidence); 3-7: "Judge, I object to that" (objecting to prosecutor's closing argument, his objection was overruled); 8 and 9: "We waive" (waiving closing argument).

[92] *Stouffer v Reynolds*, US Court of Appeals, 10th Circuit, 7 June 2000.

[93] *Everything was going just like the prosecution had planned - and then day turned to night.* Tulsa World, 24 September 2000.

Both Fisher's and Stouffer's death sentences had emerged from the Oklahoma appeal court intact. Between them the two men had spent 30 years on death row before a federal court accepted that the failings of their trial lawyers might have affected the outcome of the trials. The state fought such decisions all the way. It does this while at the same time claiming to have improved the public defender system for indigent defendants.[94]

International standards require that a person facing the death penalty be provided with "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases".[95] US constitutional law allows a lesser standard of representation, and poorly represented defendants have gone to their deaths in execution chambers around the country. Under a 1984 US Supreme Court decision, *Strickland v Washington*, an inmate has to prove that not only was the lawyer's performance deficient, but also that it had affected the outcome of the trial. The *Strickland* decision instructed appeal courts that judicial scrutiny of a defence lawyer's performance must be "highly deferential", "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance", and must avoid "the distorting effects of hindsight".

Norman Newsted was represented by a trial lawyer who presented no mitigation evidence or witnesses at the sentencing phase: nothing about his abused childhood, his use of drugs from his early teens, or his possible borderline mental retardation. A federal district court had held that the lawyer's complete failure to prepare any mitigating evidence for the penalty phase constituted ineffectiveness, but that prejudice had not been proved. The 10th Circuit agreed, paying strict deference to *Strickland*: "To look back is clairvoyant. Hindsight is never wrong; a trial never has such luxury". Newsted was executed in Oklahoma on 8 July 1999.

It is thus a major task to convince the appeal courts that a defence lawyer's performance prejudiced the fairness of a capital trial. In the case of Charles Taylor, the Oklahoma Court of Criminal Appeals ordered an evidentiary hearing into the claim that he had received ineffective representation at his 1996 trial for the murder of Michael Sauer, allegedly committed while under the influence of drugs and alcohol. At the 1999 hearing, the trial lawyer could not explain why he had not made an opening statement at either stage of the trial. He also did not recall discussing Taylor's testimony with him before the trial, or preparing him for cross-examination. An expert on drug and alcohol dependency, the sole expert witness called by the defence lawyer at the trial, testified that he had been contacted only at the last minute, and was still assessing Taylor on the first day of the trial. Ten

[94] A standard reply sent out from Governor Keating's office to people expressing concern about Oklahoma's death penalty, states: "One of the arguments made against the death penalty is inadequate resources for public defenders. In that regard it is worth noting that funding in Oklahoma for the Indigent Defense System has risen steadily over the past 10 years, from $961,000 in 1990 (0.03 per cent of the state budget) to $13,986,560 in 2000 (0.28 per cent of the budget)."

[95] UN Economic and Social Council, Resolution 1989/64, 24 May 1989.

relatives, acquaintances, work colleagues, and a minister, testified at the hearing that they would have provided mitigation testimony at the sentencing phase. Seven had been contacted at the time, but were never called at the trial. When asked if he had any idea what the witnesses would have said if he had called them, the lawyer responded that he "didn't care".

The trial court ruled that Taylor's lawyer had acted strategically and in February 2000 the Court of Criminal Appeals upheld the death sentence. Two of the five judges dissented. One simply stated: "[Taylor] alleges that his trial counsel was ineffective and this ineffectiveness severely prejudiced [his] defense. I agree." The other dissenter wrote: "There was never much, if any, doubt about Taylor's guilt. His only chance was to persuade the jury to sentence him to something less than death. As it turned out, he had no chance because his lawyer failed him... the jury heard nothing to offset the State's evidence."

Charles Foster was executed in Oklahoma on 25 May 2000. He was sentenced to death for the murder of Claude Wiley, a grocery store owner, on 1 April 1983. The state's key witness at the trial was Foster's wife, Eula Mae Foster. She testified that he had killed Wiley at the couple's home after Wiley had delivered groceries there. At the trial's guilt/innocence phase, her testimony was the only evidence linking Charles Foster to the crime. He denied knowing anything about the murder, and testified that at the time he had been at Wiley's grocery store, where his wife had sent him. He said that he completed his purchases, waited outside the store, and was still there when Eula Mae arrived in Wiley's truck, which he claimed she said she had borrowed in order to visit her mother in Texas. The couple were subsequently arrested in Texas; both were charged with the murder, but the charges against Eula Mae Foster were reduced. She was sentenced to three concurrent five-year prison terms, and released after nine months.

After the trial, Cecille Fuller, who was working as cashier at the grocery store on 1 April 1983, signed an affidavit that Foster was in the store at the time he said he was. She also confirmed that he waited outside, and that he had been picked up in a truck similar to one identified as Wiley's. Foster's trial lawyer had never contacted Fuller, or others at the store, to investigate his client's alibi.

In 1999, a 10th Circuit judge described the trial as "in essence a swearing match between Mr Foster and his wife", in which Cecille Fuller's post-conviction alibi evidence, bolstering Charles Foster's version of events and undermining Eula Mae's, should have been given weight. The 10th Circuit judge said that "there can be little doubt" that the defence lawyer's performance "fell far short of the mark", and that his failure to interview potential alibi witnesses "can hardly be considered a tactical decision entitled to deference". The judge cited numerous cases where appeal courts have held that a lawyer's failure to investigate and present testimony from independent alibi witnesses prejudiced the defendant.

However, the other two 10th Circuit judges voted to deny Foster's appeal, and he went to his death maintaining his innocence.

Charles Foster's trial lawyer had also failed to investigate his client's background, including evidence of his mental retardation, to present at the sentencing phase. Yet if he had persuaded just one juror to vote for life, a life sentence would have been the outcome. Two 10th Circuit judges recently wrote of the importance of mitigating evidence at a capital trial: "While cognizant of the heavy presumption of reasonableness we must afford trial counsel's actions, we are also conscious of the overwhelming importance of the role mitigation evidence plays in the just imposition of the death penalty. The presentation of mitigation evidence affords an opportunity to humanize and explain – to individualize – a defendant outside the constraints of the normal rules of evidence."[96] Yet Oklahoma inmates have been sentenced to death by jurors who were not presented with anything like the full picture of the defendant.

Indeed, with the advent of victim impact evidence in capital trials, on some occasions, jurors have been presented with more information about the background of the victim than the defendant. At the trial of Marcus Cargle, the prosecution presented extensive victim impact testimony, including a 12-page statement read by the mother of one of the victims in which she recalled anecdotes from her son's life from the age of four (he was 33 when he was killed). In contrast, the defence presented little mitigating evidence. The lawyer had intended for the parents to testify on their son's behalf, but the father told the judge that they had decided not to speak in mitigation because "Marcus – he makes no sense to me". In 1999, a federal judge ruled that Cargle should receive a resentencing because of ineffective defence representation at his trial. The state appealed, and at the time of writing, Cargle remained on death row.

[96] *Mayes v Gibson*, 4 May 2000.

Cornel Cooks was executed in Oklahoma on 2 December 1999 for the murder of Jennie Ridling in 1982. His lawyer had never handled a capital case before, having only finished law school two years earlier. The 10th Circuit Court was "troubled" that the lawyer had "called no witnesses, and presented no evidence on Mr Cooks' behalf" at the sentencing phase. The Court added in its 1998 opinion, "Indeed, we are unable to glean from the record any second stage strategy developed to defend Mr Cooks against the death penalty." Because of his lawyer's failure, the jurors never heard evidence of Cornel Cooks' abusive and deprived childhood, his mental impairment, his alcohol and substance abuse from a young age, his normally gentle nature and lack of a history of violence.[97] The 10th Circuit noted with particular concern that the trial lawyer knew Cornel Cooks was remorseful, but made no effort to present that to the jury.[98] Nevertheless, the Court upheld his death sentence.

On 11 January 2001, Wanda Jean Allen became the first African American woman to be executed in the USA since 1954. She had been sentenced to death in 1989 for shooting her lover, Gloria Leathers, in Oklahoma City in 1988. The two women, who had met in prison, had a turbulent relationship; each had called the police to their home on more than one occasion after domestic disputes. Gloria Leathers' death followed a protracted argument; Allen maintained she had acted in self-defence.

Allen's family approached a lawyer known to them. Believing that this was not a capital case, he agreed to take it for a fee of $5,000. The family made an initial payment of $800. The state then charged Wanda Jean Allen with first-degree murder and announced that it would seek the death penalty. The lawyer asked the judge to allow him to withdraw from the case on the grounds that he did not have the resources to represent a capital defendant. He had learned that the family was unable to pay for an investigator or any other expert to aid in the defence, and that they could not pay him the remaining $4,200 either. He offered to act as co-counsel, for free, if a public defender was appointed as lead counsel. The prosecution opposed the lawyer's motion, and the court refused to allow him to withdraw. He was therefore forced to defend Wanda Jean Allen on a total payment of $800, with no co-counsel,

[97] Cornel Cooks grew up in abject poverty. A psychologist described his family life as "chaotic", stating that the boy was a "throw-away child" and "a street child most of the time." His stepfather (he never knew his biological father) physically abused the children and their mother. Cooks had a history of childhood head injuries, and began drinking alcohol, encouraged by his stepfather, from the age of five. He sniffed solvents between the ages of 13 and 24, and said that he used "every drug imaginable, except heroin". As a teenager, he was in a special education program for children whose IQ scores fell between 55 and 75. His IQ had been measured at 75, but his performance in the program was at or below average. After dropping out of school, he joined the navy, but was discharged because he failed the aptitude tests.

[98] Research indicates that a defendant's perceived lack of remorse is a highly aggravating factor in the sentencing decision of capital jurors. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998). In the study, 40 per cent of the jurors surveyed said that they were more likely to vote for death if the defendant showed no remorse.

no investigator and no resources to hire expert witnesses. Furthermore, this was his first capital case.

In a 1991 affidavit, the defence lawyer stated that after the trial he had learned that when Allen was 15 years old, her IQ had been measured at 69, and that the doctor who examined her had recommended a neurological assessment because she manifested symptoms of brain damage. The lawyer stated "I did not search for any medical or psychological records or seek expert assistance" for use at the trial.

A psychologist conducted a comprehensive evaluation of Wanda Jean Allen in 1995 and found "clear and convincing evidence of cognitive and sensory-motor deficits and brain dysfunction" possibly linked to an adolescent head injury. At the age of 12, Allen had been hit by a truck and knocked unconscious, and at 14 or 15 she had been stabbed in the left temple. He found that Allen's "intellectual abilities are markedly impaired". He found "particularly significant left hemisphere dysfunction", impairing her "comprehension, her ability to logically express herself, her ability to analyse cause and effect relationships..". He also concluded that Allen was "more chronically vulnerable than others to becoming disorganized by everyday stresses - and thus more vulnerable to a loss of control under stress".

Defendants such as Wanda Jean Allen, represented by inexperienced or underresourced lawyers, have at the same time faced prosecutors highly motivated to obtain a death sentence. As described below, such motivation has regularly led to prosecutorial misconduct.

Prejudicing justice: Misconduct by Oklahoma prosecutors

"*Prosecutors shall, in accordance with the law, 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.*" UN Guidelines on the Role of Prosecutors[99]

Frequent prosecutorial misconduct has undermined respect for human rights, due process and the smooth functioning of the criminal justice system in Oklahoma. Despite frequent appeal court condemnation of such conduct, it persists.

The name of one prosecutor, Robert Macy, has cropped up particularly frequently in appellate rulings. He has held the post of Oklahoma County District Attorney since 1980, and in 1998 was elected, unopposed, to his fifth term. He recently reiterated his support for the death penalty in the following terms: "I feel like it makes my city, county and state a safer place for innocent people to live. And that's why I embrace it, not because I get any

[99] Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

enjoyment out of it."[100] He is reported to have personally prosecuted more than 50 defendants who received a death sentence, over a sixth of the state's total since 1973. Fourteen of the 27 prisoners executed in Oklahoma between January 1999 and 31 March 2001 were prosecuted in Oklahoma County.[101] The county's prosecutors have frequently engaged in conduct less than proper for government officials employed in a profession that entails responsibility over life and death. The District Attorney's reputation precedes him. For example, one of the reasons a defence lawyer gave to persuade Bobby Joe Fields to plead guilty to the murder of Louise Schem in 1994, and to waive his right to be tried by jury, was because Macy would be prosecuting: "She told him that since Bob Macy was going to be on the case, [Fields] would be in much worse shape with a jury than if some other assistant district attorney was trying the case alone."[102]

[100] *A proud and unwavering believer in the death penalty.* New York Times, 10 February 2001.

[101] Oklahoma County is accounting for more executions in the modern era of the death penalty than it did under Oklahoma's pre-1977 laws. Twelve of the 82 men (14.6 per cent) executed in Oklahoma between 1915 and 1966 were prosecuted in Oklahoma County. Fifteen of the 40 prisoners (37.5 per cent) put to death since 1990 were prosecuted there. About 19 per cent of Oklahoma's population lives in Oklahoma County.

[102] *Fields v State*, Court of Criminal Appeals, 1996. In the event the judge sentenced Fields to death.

In 1999, in a series of articles on prosecutorial misconduct, the *Chicago Tribune* singled out District Attorney Macy for particular attention. The newspaper's investigation of appeal court opinions on cases which he had prosecuted found that: "Macy has cheated. He has lied. He has bullied. Even when a man's life is at stake, Macy has spurned the rules of a fair trial, concealing evidence, misrepresenting evidence, or launching into abusive, improper arguments that had nothing to do with the evidence".[103]

Bob Macy responded to the *Chicago Tribune*'s findings, saying: "It's my obligation as District Attorney to present the evidence in the light most favourable to the state. The people are entitled to have a DA who argues their position very vigorously." Such "vigour" has apparently contributed to at least one defendant being condemned to die for a crime he did not commit. Clifford Henry Bowen's conviction and sentence were later thrown out on the grounds that the prosecution had withheld evidence (see page 60). Clifford Bowen was reportedly Bob Macy's first case. District Attorney Macy's conduct continues to test the courts:

- In January 2001, the Oklahoma Court of Criminal Appeals said that Bob Macy and his assistant prosecutor had "skirted the border of impropriety or engaged in outright improper conduct in both first and second stage" of the 1998 death penalty trial of Danny Keith Hooks.

- In October 2000, an Oklahoma district judge disqualified District Attorney Macy and his whole office from prosecuting Terry Nichols for his alleged role in the 1995 Oklahoma City bombing because of public comments about the case made by Mr Macy. The district judge ordered his disqualification after hearing expert testimony that his comments about the Nichols case could jeopardize his chance of a fair trial in Oklahoma. The judge concluded that Macy had violated a gag order and committed "a blatant violation of the rules of professional conduct". In December, the Court of Criminal Appeals upheld Macy's disqualification, but allowed his assistant prosecutors to remain on the Nichols case.[104]

- In December 1999, the US Court of Appeals for the 10th Circuit upheld a lower federal court ruling that 72-year-old Kenneth Paxton should receive a new sentencing hearing, citing "blatant misrepresentation" in Bob Macy's closing arguments to the jury. The 10th Circuit court used such words as "mendacious" and "deceitful" to describe the District Attorney's behaviour. The court said it had "no doubt that Mr Macy's conduct crossed the line between a hard blow and a foul one". District Attorney Macy responded that he had acted properly: "The case was reviewed by the state Court of Criminal Appeals, and they didn't find I did anything wrong."[105]

[103] '*True patriot*' *not quite a shining star*. Chicago Tribune, 9 January 1999.

[104] Nichols was sentenced in 1998 under federal law to life imprisonment without the possibility of parole. District Attorney Macy has vowed to seek the death penalty against Nichols in Oklahoma state court.

[105] *Court says DA acted improperly.* The Oklahoman, 30 December 1999.

At least one judge on the Court of Criminal Appeals believes that it should take concrete measures against repeated misconduct by Oklahoma County prosecutors. Judge Chapel, who had earlier accused his colleagues of "winking at a very serious constitutional violation"[106], wrote in January 2001: "We have repeatedly condemned the Oklahoma County District Attorney's reliance on improper argument. In addition to our warnings, federal reviewing courts have also repeatedly condemned Mr Macy and prosecutors from his office for their habitual misconduct in argument. This Court has let this flagrant disregard for our rulings pass too long." Judge Chapel said that, in his opinion, the case should be remanded for a resentencing hearing "as a sanction for deliberate prosecutorial misconduct", regardless of whether the misconduct had affected the outcome of the trial. His fellow judges disagreed.[107]

District Attorney Macy and his assistants are not the only Oklahoma prosecutors to be accused of misconduct; officials from other counties have regularly been reprimanded by the courts since the state reenacted the death penalty in 1977. For example:

- In 1982, the Court of Criminal Appeals granted Benjamin Brewer a new trial, citing the prosecutor's "overzealous" and "outrageous" conduct at the original proceedings four years earlier. During cross-examination of an expert witness, for example, the Tulsa County prosecutor repeatedly stabbed a photo of the murder victim with the knife used in the crime.[108]
- In 1988, the Court of Criminal Appeals expressed its "extreme disapproval" of the Pittsburg County prosecutor's argument during the sentencing phase of Ralph Brown's trial in which he had urged the jury to call the victim "back from the grave, put her on the stand under oath" and ask her if she thought that her murder was deserving of the death penalty. The Court said that this contravened the prohibition on arguments calculated to inflame the passions or prejudices of the jury, and reduced Brown's death sentence to life imprisonment.
- In 2000, the 10th Circuit granted Kenneth Nuckols a new trial, ruling that prosecutorial misconduct had deprived him of a fair trial in 1982, when he had been sentenced to death for the murder of Freddie Howell. At Nuckols' trial, the Pottawatomie County prosecutor had withheld from the defence evidence regarding the alleged criminal activities of the state's

[106] *Brown v State*, 31 December 1998. At Darwin Demond Brown's 1997 Tulsa County trial, the state introduced a confession obtained by police when he was under illegal arrest. The Court of Criminal Appeals found that the "purposeful and flagrant violation of Brown's basic constitutional rights tainted his statement to police", but decided there was enough other evidence against Brown to allow the conviction and death sentence to go undisturbed. Judge Chapel dissented: "[T]he majority winks at a very serious constitutional violation... this Court should reverse and require the State to do it right. If, as the majority argues, the evidence was otherwise sufficient, the outcome will be the same... Winking at serious constitutional errors, while expedient, degrades and demeans our rights." Darwin Brown, who was 18 at the time of the crime, remains on death row.

[107] *Hooks v State*, 22 January 2001, modified 12 March 2001, footnote 51.

[108] Brewer was sentenced to death at his retrial, and executed in 1996.

principal witness, Deputy Sheriff Billy Ware. Ware had been implicated in instances of theft at the jail, and in the selling of stolen guns connected to a second murder to which Nuckols had pleaded guilty. Ware's trial testimony was crucial to a successful prosecution, and yet the defence had been denied information which could have been used to challenge his credibility.

– In February 2001, a trial judge dismissed the state's request to seek the death penalty at the forthcoming trial of Frank Collier and Debra Duckworth. The judge said that the prosecution's handling of the case had been "incompetent, negligent, inattentive and unprofessional", that the repeated missing of deadlines gave the impression that "it's like some kind of traffic case" rather than a capital case, and that the only remedy was to make it a non-capital case. The Pittsburg County District Attorney described the ruling as "judicial activism", but her appeal against the decision was rejected in March by the Court of Criminal Appeals.

Prosecutorial misconduct will not necessarily be remedied on appeal, and the courts continue to allow prosecutors to engage in a wide range of questionable tactics in their pursuit of death sentences. Gilberto Hernandez Martinez was sentenced to death at a retrial in 1997.[109] The Court of Criminal Appeals upheld his death sentence in 1999 despite finding several instances of serious prosecutorial misconduct. The Court variously described the Tillman County prosecutor's arguments at the trial as "clearly improper", "troubling", "objectionable", "offensive", and "at the very edge of what we consider to be constitutionally acceptable". It highlighted the prosecutor's bid to "invoke societal alarm", for example by telling the jury that they had the "final say... on whether Tillman County and the world is safe from Gilberto Martinez". Nevertheless, the Court upheld the death sentence, also refusing to overturn it on the grounds of the prisoner's alleged mental retardation and the fact that he was denied his consular rights as a foreign national.[110]

[109] Gilberto Martinez was convicted of setting fire to the house of his girlfriend Mary Castillo in 1987 in which their three-year-old daughter Margaret Castillo and her four-year-old half-sister Reynalda Castillo died from carbon monoxide poisoning. Their three brothers, David (11), Louis (8) and Angel (6) escaped. In 1995, the Court of Criminal Appeals granted Martinez a new trial on the grounds that the defence had not been allowed to cross-examine the alleged eyewitness to the crime, 11-year-old David Castillo, leaving the jury unaware that the boy had a history of starting fires when his mother left him alone in charge of his younger siblings.

[110] Gilberto Martinez is a Cuban national. He was not informed upon arrest of his right to contact his consulate, as was the case for most of the 90 or so foreign nationals on US death rows. This widespread failure of police to inform arrested foreign nationals of their consular rights is a serious violation of US obligations under international treaty law, including Article 36 of the Vienna Convention on Consular Relations. In Martinez's case, the Oklahoma Court of Criminal Appeals appears to have misunderstood this issue. It rejected the appeal, saying that Martinez "has failed to show he made any request to state authorities to inform Cuban authorities of his arrest". The onus is not on the defendant to make the first move, but on the arresting authorities to inform the detainee of their right to contact their consulate. Gilberto Martinez came to the USA as a refugee, as did the other two foreign nationals on death row in Oklahoma, Hungh Thanh Le from Vietnam and Sahib Al-Mosawi from Iraq. While a refugee may be less likely than other foreign nationals to turn to the government of their native country for support, this does not absolve the host authorities from ensuring that the arrested person is immediately informed of their right to seek such assistance if they so wish.

Minimizing the jury's feeling of responsibility

In 2000, one of the jurors who had voted to sentence Robert Clayton to death at his trial 14 years earlier spoke of the enormity of the decision facing a capital jury: "You don't know how you will feel in that situation until you have to write 'life' or 'death' on a piece of paper. It's so huge. I don't know why I changed my vote. I really don't. It didn't feel right when I did it...I regret it to this day."[111] She had been the lone juror holding out for a life sentence before changing her vote to the death. Robert Clayton was executed on 1 March 2001.

After five hours of deliberations at the 1998 trial of Danny Hooks, the jury sent a note to the judge which said that they were 11 to one in favour of the death penalty, that the holdout juror was refusing to change her vote, and that the 11 wanted the juror replaced. The judge told them to continue deliberating, but 10 minutes later the jury sent out a second message that they were unable to reach unanimity. Subsequently the judge brought the jury out and spoke to them of logistical arrangements that had to be made, such as the reservation of motel rooms, if deliberations were to continue until the next day. The jury returned to their deliberations and reached a unanimous verdict for death within 30 minutes.

Two months later, on the third day of Jervaughn Miller's trial, after the jury had already found him guilty and heard one day of sentencing phase evidence, one of the jurors was dismissed after she had become visibly upset and told the judge that her emotions were "shot". In a subsequent affidavit, the juror said that she had felt coerced into changing her mind to vote for a guilty verdict; that the jurors had discussed, and some had already decided, punishment during the guilt/innocence deliberations; and that she had asked to be excused because she did not want to face this pressure again.

As the US Supreme Court noted in 1985 in *Caldwell v Mississippi*, the life-or-death decision that jurors face in capital trials is a "very difficult and uncomfortable choice". Jurors, the Court said, might find "highly attractive" a prosecutor's suggestion that persons other than themselves would bear "responsibility for any ultimate determination of death". The Court overturned Caldwell's death sentence because the prosecutor had misled the jury into believing that the responsibility for imposing the death penalty lay elsewhere, namely the appeal courts.

[111] *Execution date near, jurors relive 'traumatic' choice*. Tulsa World, 26 December 2000.

There is research indicating a tendency for capital jurors to seek to minimize their involvement in killing a fellow human being. One study found that "[d]uring jury deliberations, most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant's fate. Some turned to God, others to the bottle, and still others somehow interpreted the trial judge's instructions as saying 'the law' dictated a particular outcome". Another study found that in many cases jurors simply do not believe that defendants will ever be executed, and that "a substantial and disturbing minority of jurors do not accept sole responsibility for the sentence they impose", attributing most or part of that responsibility to the judge or the appeal courts.[112] At Sean Sellers' clemency hearing in 1999, one of the jurors from his 1986 trial pleaded for his life to be spared, recalling that the jury had not really believed that Oklahoma would carry out his execution, having not executed for 20 years. She claimed they voted for death because they feared his early release if they did not. Evidence continues to emerge from around the country of defendants being sentenced to death as a result of juror confusion or coercion.[113]

The Oklahoma Court of Criminal Appeals has stated that the "jury has the prime responsibility for deciding whether the death penalty should be imposed. We must be cautious to avoid any actions or directions which would tend to reduce the jurors' sense of responsibility for their decision".[114] Such caution has not been a favoured tactic of Oklahoma prosecutors, especially in Oklahoma County.

- At jury selection for the trial of 18-year-old William Bryson, District Attorney Macy told prospective jurors: "No one in this court is going to be asked to kill anyone, but we are going to ask the 12 jurors to return verdicts of death. Do you understand what I'm saying?"

- At Wanda Jean Allen's trial, the Oklahoma County prosecutor argued to the jury: "...you do not kill Wanda Jean Allen. All you do is return a death verdict. You don't kill her and I don't kill her. All you can do is return a death verdict. That's all you do."

- At the trial of Darrin Lynn Pickens, the Tulsa County prosecutor said in his closing argument for a death sentence: "...you don't have to live with the decision that you're going to execute him. You're not. You're not killing him. You're not executing him."

- Bob Macy told jurors that they were just "a small piece of the machinery that is designed to take people like Scotty Lee Moore and put them on death row." He also appealed to the jurors' sense of patriotism, comparing military service during wartime with handing down a

[112] *Where's the buck – Juror misperception of sentencing responsibility in death penalty cases*. Joseph L. Hoffman, 70 Indiana Law Journal (1995). And, *Jury responsibility in capital sentencing: An empirical study.* Theodore Eisenburg, Stephen P. Garvey and Martin T. Wells, 44 Bluff. Law Review 339 (1996).

[113] For example, see: *Memorandum to President Clinton: An appeal for human rights leadership as the first federal execution looms*, AMR 51/158/00, November 2000, pages 30-32.

[114] *Pickens v State*, 25 March 1993.

death sentence, and arguing that "we're the ones he is a threat to unless something is done about it."

– At the trial of teenager Sean Sellers, Macy said: "You don't kill anyone. What you do, you go out and you deliberate, and you decide, and if death is the appropriate verdict, you bring it back into the courtroom. That's all you do."

Sean Sellers, Scotty Moore, William Bryson and Wanda Jean Allen have all been executed. Darrin Pickens remains on death row.

John Joseph Romano is also on Oklahoma's death row. At his trial for the murder of Roger Sarfaty in 1987, the prosecution told the jury that Romano was already under a death sentence for the murder of Lloyd Thompson in 1986. In 1994, four US Supreme Court Justices stated that "the risk of diminished jury responsibility was grave in Romano's case. Revealing to the jury that Romano was condemned to die for the Thompson murder signalled to the jurors in the Sarfaty murder case that Romano faced execution regardless of their life-or-death decision in the case before them. Jurors so informed might well believe that Romano's fate had been sealed by the previous jury, and thus was not fully their responsibility." The four Justices noted that the prosecutor (Bob Macy) evidently believed that informing the jurors of the prior death sentence "would incline them toward death", as he insisted on introducing the evidence over the objection of the defence. However, five Justices voted to uphold the death sentence.

Invoking God and the Bible

Under the selection process for US capital juries, prospective jurors who say they are opposed to or have hesitations about the death penalty are likely to be excluded by the prosecution. This has been shown to lead to the selection of jurors who are more likely to convict and to believe the prosecution. For some prospective jurors, their opposition to the death penalty, and hence their removal by the prosecution, will stem from their religious beliefs.[115] Nevertheless, given that the USA is a highly religious society[116], many of the jurors who sit on capital trials will be religious believers.[117] Such jurors will presumably have reconciled

[115] In New Mexico in 1999, leading members of various faiths, including Jewish, Catholic, Buddhist, Quaker and Unitarian, brought a lawsuit claiming that the state discriminates against religious opponents of the death penalty by excluding them from capital juries. The New Mexico Supreme Court rejected the claim.

[116] "Polls indicate Americans are the most churchgoing in Protestantism and the most fundamentalist in Christendom". *American exceptionalism: a double-edged sword.* Seymour Martin Lipset. W.W. Norton and Company, 1996.

[117] At the 1998 trial of Kevin Young in Oklahoma County, it was alleged that one or more Bibles had been read in the juryroom during deliberations and may have swayed a holdout juror into voting for death. A post-conviction hearing was held into the allegation, and the trial judge ruled that one juror "may or may not have

their beliefs with their involvement in the death penalty. Yet they may be uniquely susceptible to suggestions by prosecutors that God or the Bible support the death penalty.[118] In some instances, this may be especially so where the juror is a Southern Baptist, whose leadership continues to contend that the Bible supports capital punishment. There are reportedly 775,000 Southern Baptists in Oklahoma, the largest religious denomination in the state.[119] The president of the Oklahoma Southern Baptist Convention recently said that most Southern Baptists believe the Bible supports capital punishment.[120]

– Robyn Leroy Parks was executed in Oklahoma in 1992, in a prolonged death described by one media witness as "painful and ugly".[121] At Parks's trial, the prosecutor argued to the jury: "You're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law... so it's not on your conscience. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know."

– At the Muskogee County trial of Michael Edward Long for the murder of Sheryl Graber and her four-year-old son, the prosecutor had concluded his argument for the jury to hand down a death sentence with the following quote from the Bible: "Whosoever shall harm one of these little ones who believeth in me, it is better that a millstone be handed about his neck, and he be drowned in the depth of the ocean."

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had a New Testament inside his brief-case during the second stage of trial". One juror testified at the hearing that a Bible was read in the juryroom, and that she had been swayed towards death by verses from it. However, the court found her testimony inconsistent and Young's death sentence has been allowed to stand.

[118] This is not to suggest that people of a particular faith will have a predictable attitude to executions. For example, an Oklahoma woman whose father was murdered in 1984, says that her interpretation is that the Bible allows the death penalty. However, she is "seeking a definitive personal stance". She has reconciled with one of the men who was sentenced to life imprisonment for the murder. Of the second defendant, who was sentenced to death, she has said: "I used to think his death would bring closure to me. I found out that I got closure from forgiving, and I've already found peace of mind. I don't have to go see [his execution]." *Chaplain finds forgiveness for her father's murderer.* Tulsa World, 11 February 2001.

[119] The Southern Baptist Convention has about 16 million members in the USA, the largest Protestant denomination. At its annual meeting in Florida in June 2000, this conservative religious group adopted a resolution supporting "the fair and equitable use of capital punishment by civil magistrates as a legitimate form of punishment for those guilty of murder or treasonous acts that result in death." A few days later, on CNN's *Larry King Live*, Albert Mohler, president of the Southern Baptist Theological Seminary in Kentucky, voiced his support for the internationally illegal execution of Gary Graham in Texas, carried out in Texas on 22 June, despite serious doubts over Graham's guilt. Mohler said: "The Bible makes very clear that God mandated capital punishment as a way of underlining and affirming the value of human life."

[120] *Religious community split over plans to execute 7 more killers*. Tulsa World, 11 January 2001.

[121] Two minutes after the lethal injection began, the muscles in his jaw, neck, and abdomen began to react spasmodically for almost a minute. He continued to gasp and gag for a further seven minutes. The journalist wrote that the execution was "overwhelming, stunning, disturbing – an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over." *11-Minute Execution Seemingly Took Forever*, Tulsa World, 11 March 1992.

The state Court of Criminal Appeals took issue with the Muskogee County prosecutor's Biblical reference: "This kind of rhetoric has no place in a criminal trial in the State of Oklahoma. Criminal procedure goes to extreme lengths to remove all possibility of a jury verdict or sentence even partially based on bias or prejudice. We call on jurors to perform the difficult task in a capital murder trial of deciding whether another human being lives or dies. For the prosecutor to attempt to make this task somehow easier by implying God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law of this State. We agree with the appellant: this statement is rank misconduct which we expect not to be repeated." However, the Court said that this misconduct was "harmless error" and had not prejudiced the trial. Michael Long was executed on 20 February 1998.

This prosecutorial misconduct persists. At the 1996 trial of Curtis Lee Washington for the murder of his former wife, Celia Washington, the prosecutor introduced both God and the Bible in the state's case for execution. Firstly, Oklahoma County District Attorney Macy read the jury a letter which had been written to him by Celia Washington's father, which included the following (with original spelling): "I would like to request. If I'm allowed to legally! that Curtis Washington received the maximum penalty, no leenity, no plea bargains. No life. Death as he took it. Our Bible say's eye for an eye... Please accomlish the right Godly justice."

In his closing argument to the jury, the prosecutor echoed the grieving man's request: "I submit to you that this defendant imposed death on Celia Washington and he deserves that equal punishment... Celia lies cold in the ground. And her daddy lies out there mourning the loss of his baby... Pray if you need to... But when you come back...bring justice with you. The only way you can see justice in this case is to bring back a verdict of death."

In 1999, the Court of Criminal Appeals noted that it had previously condemned prosecutors "who attempt to make the capital sentencing decision somehow easier by implying God is on the side of a death sentence", but said that it did not need to determine whether these arguments had in themselves prejudiced the defendant. It ruled instead that Washington had been denied a fair sentencing hearing because of the failure of his lawyer to challenge the state's case for execution. The Court amended Washington's death sentence to life imprisonment without the possibility of parole. Two of the five judges dissented. One accused the majority of being "hypersensitive" to the use of the biblical reference.

In the case of Jervaughn Miller, sentenced to death in Comanche County in 1999, the prosecutor has been accused of improperly eliciting testimony at the sentencing phase of the trial suggesting that God supports the death penalty. Towards the end of the victim impact statement by the victim's mother, the prosecutor asked her if she was a religious person. The witness replied that she was. The prosecutor then asked "Being a religious and serious person, have you given full consideration to the evidence in this case? She replied that she

had. The prosecutor then asked her, "Having done so, do you believe you have an opinion as to what the appropriate sentence would be?". The victim's mother responded that she believed that Miller should be executed.

Encouraging vengeance

At the 1996 capital trial of Lewis Gilbert, at which he was sentenced to death, the Cleveland County prosecutor argued to the jury that the victims "cried out from their graves for justice". During his closing argument for a death sentence, photographs of not only the murder victim in the case, but also of the bodies of two people allegedly killed by Gilbert in Missouri – crimes for which he had been neither prosecuted nor tried – were displayed on a six foot (1.8m) by four foot (1.2m) screen in the courtroom. In 1997, the Oklahoma Court of Criminal Appeals said that the photos were relevant to prove that the Gilbert was a continuing threat and therefore deserving of execution.[122] Yet in other cases, the Court has said that it is "improper to urge the jury to sentence out of revenge" and that the "State should not encourage the jury to impose the death penalty out of sympathy for the victims."[123]

The Court of Criminal Appeals has also pointed out that for the prosecution to argue that it is unfair for the defendant to live because the victim is dead "creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence."[124] Nevertheless, the Court continues to allow prosecutors to argue in this way with impunity. For example, it upheld the death sentence of Maximo Salazar in 1998. At his 1996 sentencing, the Comanche County prosecutor "resorted to another stock argument that is showing up in more and more cases – the advantages of life enjoyed by the Appellant as opposed to the disabilities suffered by the deceased victim. The prosecutor rhetorically asked what Jennifer Prill [the nine-year-old victim] would have given on the night of her homicide to have the opportunity to wake up in the morning, to know human companionship, to watch color TV, to listen to the radio, to play board games, to celebrate birthdays and Christmas and get gifts, to spend time with her family."[125]

Appealing to jurors to vote for execution out of a sense of vengeance appears to be a favoured tactic of District Attorney Macy and his assistant prosecutors. The following examples are all from Oklahoma County.

[122] The prosecution also presented family members of the Missouri victims to the jury. The Court of Criminal Appeals ruled that this was prosecutorial error, as victim impact testimony should be restricted to the family members of the victim in the case on trial. However, the Court said that the testimony was harmless as it was relevant to the continuing threat aggravator. *Gilbert v State*, 1997. Gilbert remains on death row.

[123] For example, *Paxton v State*, 1993 (citing *Sier v State*, 1973) and *Le v State*, 1997.

[124] *Le v State*, 1997.

[125] Brief of appellant.

- 1989 – at the trial of Robert Duckett for the murder of John Howard, the prosecutor closed his argument for a death sentence with: "Ladies and gentlemen, is it justice to send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while John Howard lies cold in his grave? Is that justice? Is that your concept of justice? How do [the victim's relatives] visit him?"
- 1990 – at Walanzo Robinson's trial for the murder of 26-year-old Dennis Hill, the prosecutor referred to the injustice of Hill being "26 forever", lying dead in his grave while Robinson is "sleeping in a clean bed, three meals a day, and his family coming down and visiting with him".

- 1992 – at the trial of Alfred Mitchell for the murder of Elaine Scott, committed two weeks after Mitchell turned 18, the prosecutor argued: "To lock the defendant up forever will not take from the defendant his family. It won't take from Alfred Brian Mitchell his friends, television, movies, three square meals a day... Are you 12 willing to allow him to go sit in a cell with three meals a day, color TV and live out the rest of his life? I suggest to you if you give him a life sentence or life without parole he will go down and sit on that bunk and laugh because he has won, because he hasn't got his just desserts for what he did to Elaine Scott and everybody".

- 1995 - at the trial of Hung Thanh Le for the murder of Hai Nguyen, "... a series of arguments by both prosecutors...essentially suggested it was unfair that Le should live while Nguyen was dead... They noted twice that Nguyen was dead while, if Le lived, he would be well-cared-for and well-fed with visits from his family".[126]

- 1996 – at the trial of Osbaldo Torres and George Ochoa, the prosecutor argued that if the jury sentenced the two men to life imprisonment, they would have food and shelter while the victims "lie cold in their graves".

- 1997 - at the trial of Terry Lyn Short, the prosecutor argued "that it was not justice to allow the defendant three meals a day, a clean place to sleep, and visits by his friends while the victim's mother daily grieves for her only son". The jury had just heard a highly emotional victim impact statement from the victim's mother, which the Court of Criminal Appeals in 1999 said came "very close to weighting the scales too far on the side of the prosecution by so intensely focussing on the emotional impact of the victim's loss."

- 1997 – at the trial of Paris Powell for the murder of Shauna Farrow, the prosecutor argued to the jury: "Is there any rightness to her, where she's at, in the grave, allowing him to live in the sun, receive his meals every day, lay on clean sheets every night, think about ways to manipulate the system until his next visit or letter? Is that right?"

[126] *Le v State*, Oklahoma Court of Criminal Appeals, 1997. Hai Nguyen and Hung Thanh Le had met in a refugee camp in Thailand. Hung Thanh Le, who had settled in Ohio, was visiting Hai Nguyen in Oklahoma City in November 1992 when the murder occurred.

- 1998 – in arguing for a death sentence for Kevin Young, the prosecutor said that the defendant did not deserve to live in a "prison environment, not have to go to work every day, get his meals prepared, have a nice clean place to live" while the murder victim "lies dead in his grave".

- 1998 – At the trial of Danny Hooks, the prosecutor's argument for execution included the following: "Do you really, really think that sending Danny Hooks to prison where he has a good bed, three meals a day, visits from his girlfriend, is that adequate punishment? I'm asking you, is that adequate punishment for the crime he committed...?"

In these cases, the Court of Criminal Appeals has repeatedly held that such argument by the state was improper and "not to be condoned". It provided no remedy, however, holding that the misconduct was "harmless error", and all 10 men named above remain on death row. In early 2000, Judge Chapel dissented from his colleagues' decision to uphold the death sentence of Paris Powell: "I cannot overlook the prosecutor's attempts to inflame the jury... As the majority notes, this same prosecutor was previously admonished not to argue that the victim was dead while the defendant slept on clean sheets and ate daily meals... The majority admits the prosecutor apparently chose to ignore this Court's explicit warning not to repeat the mistake, but once again fails to attach any consequence to the prosecutor's decision. I believe we should no longer let this error pass." Later in the year, the Court upheld Kevin Young's death sentence, noting: "We have repeatedly condemned prosecutors from Oklahoma County for making this type of argument and the prosecutor clearly should have known better." This time there was no dissent.

International standards state that prosecutors "should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law", and they "shall at all times maintain the honour and dignity of their profession".[127] The failure of the Oklahoma Court of Criminal Appeals to call prosecutors to account for their repeated misconduct risks undermining the rule of law and respect for human rights. As a US Supreme Court Justice has said, "adopting a broad presumption in favor of harmless error... has a corrosive impact on the administration of criminal justice. An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."[128]

- Mark Fowler and Billy Fox were executed on 23 and 25 January 2001 respectively. They were sentenced to death for the murder of three employees at a grocery store in 1985. District Attorney Macy asked the jury: "Is it adequate punishment just to lock them up on a clean bed with clean clothes and three meals a day? Is that adequate punishment for taking three lives?"

[127] UN Guidelines on the Role of Prosecutors, op.cit.

[128] *Rose v Clark*, US Supreme Court (1986), Justice Stevens, concurring.

> Eddie Trice was executed on 9 January 2001. At his trial for the rape and murder of 84-year-old Earnestine Jones in 1987, District Attorney Macy argued for execution: "At that point in [Ms Jones'] life, to be violated like that, beaten, and left to die there in her own blood, while he is out snorting cocaine, sleeping in a clean bed every night, three good meals a day, visits from your family; is that adequate punishment? Ain't no way. No way it is.... Ladies and gentlemen, I submit to you under the evidence, if ever a man needed to die, he is sitting right there."

Eddie Trice was under the influence of drugs and alcohol at the time of his brutal crime. Some of the mitigating factors, only partially raised at the trial, included: evidence that he had been raped while in a county jail at the age of 16; the fact that he was the product of a rape (his father raped his mother when she was 14 years old); the fact that he was abused by his two stepfathers and two of his mother's boyfriends; evidence that he was sexually molested by a priest when he was at kindergarten; the fact that he was sexually molested by another male adult when he was seven years old; various head injuries during childhood; a long history of drug and alcohol abuse; a post-conviction examination which indicated he was dyslexic, functionally illiterate with an IQ of 79, suffered from post-traumatic stress disorder, and exhibited psychotic paranoid thought disorder.

Oklahoma chose to warehouse Eddie Trice until it was given the green light to kill him, 13 years after the crime. When judged by history, what mitigating evidence could be raised on the state's behalf if it is to avoid absolute condemnation for its premeditated cruelty and participation in a cycle of violence?

Seven more reasons for abolition: Cases of actual innocence

"*I thought it was possible that this may be the eternity that I suffer... I have flashbacks. Sometimes I feel like I'm in prison for hours at a time. I know I'm not, but I can't help feeling like I'm in prison.*" Ronald Keith Williamson, Oklahoma death row survivor[129]

Since 1973, some 95 people have been released from US death rows after evidence of their innocence emerged. Oklahoma accounts for seven of the 95, behind only Florida (20) and Illinois (13). The governor of Illinois reacted to his state's record by imposing a moratorium on executions. At the time of writing, no other governor had followed his example.

Although Florida accounts for three times as many innocence cases as Oklahoma, the two states have made such errors at the same rate: one wrongful conviction for about every 40 death sentences passed since 1973. Oklahoma's seven cases display all the hallmarks of the wider problems plaguing capital justice in the USA: prosecutorial misconduct, inadequate

[129] *Life after death row.* New York Times, 10 December 2000.

legal representation, and the use of unreliable evidence and testimony. These seven cases alone are reason enough for Oklahoma to abandon the death penalty.

❶ Charles Ray Giddens, 18, was convicted on 27 March 1978. The main evidence against him came from an accomplice who was never charged. The Oklahoma Court of Criminal Appeals overturned the conviction on the ground of insufficient evidence, and describing the accomplice's testimony as "replete with conflicts". In 1982 the Court ruled that he could not be retried and he was released. He had spent just over four years on death row.

❷ Clifford Henry Bowen was convicted of killing Ray Peters, Marvin Nowlin and Lawrence Evans in a motel in Oklahoma City in 1980. The case against him rested on the testimony of two women who had seen a man in the area of the crime. There was no physical evidence linking Bowen to the crime. At the trial, Bowen produced 12 alibi witnesses who said he was in Texas, 300 miles from the crime scene, just one hour before the murder. The state theorized that he could have flown by jet and reached the motel in 45 minutes, but provided no evidence that he had done so. In 1986, the 10th Circuit court overturned the conviction, holding that the prosecution had failed to disclose information about another suspect, a South Carolina police officer, who resembled Bowen, had greater motive, no alibi, and carried the same type of gun and unusual ammunition used in the murders. Bowen was released after five years on death row and the charges against him were dropped in 1987.

❸ Richard Neal Jones and three other defendants were sentenced to death for the 1983 murder of Charles Keene. One of the defendants, who admitted his own involvement in the killing, testified that Jones had passed out from heavy drinking at the time of the crime. In 1987, the Court of Criminal Appeals granted Jones a new trial on the basis of prosecutorial misconduct, as well as the improper admission of hearsay testimony and inflammatory photographs of the victim's body which had been submerged in a river for almost a month. Jones was acquitted at a retrial in 1988.

❹ Gregory Ralph Wilhoit was sentenced to death in 1987 for the 1985 murder of his estranged wife, Kathryn Wilhoit. The Oklahoma Bar Association found that his lawyer's ability during the proceedings was markedly impaired by alcohol, and in 1991, the Court of Criminal Appeals found that the lawyer had been ineffective, in particular by not investigating bite-mark evidence on the victim. After the trial, 11 forensic odontologists provided affidavits that the bite mark did not match Gregory Wilhoit's teeth. The appeal court wrote that: "[W]hen a person is represented by counsel only in theory, but not also in substance, the situation is the equivalent of not being represented by counsel at all... It is the opinion of this Court, that it would be a fundamental miscarriage of justice to deny Gregory Ralph Wilhoit a new trial with competent counsel". Wilhoit was acquitted at a retrial in 1993.

❺ Adolph Honel Munson was sentenced to death for the murder of Alma Hall in 1984. Ten years later, the Court of Criminal Appeals granted a new trial following an evidentiary hearing the year before. The hearing had concluded that the state had failed to reveal that one of its witnesses had undergone hypnosis with law enforcement officials prior to his testimony; failed to turn over to the defence some 165 photographs containing evidence favourable to Munson's claim of innocence; and withheld 300 to 500 pages of police reports regarding other suspects in the case. The appeal court ruled that "given the wealth of exculpatory evidence suppressed by the State, we are left with the inescapable conclusion that Munson was deprived of his right to a fair trial and due process." Adolph Munson was acquitted at a retrial in 1995.

❻ Robert Lee Miller was sentenced to death for the rape and murder of two elderly women, Zelma Cutler and Anna Fowler, in Oklahoma City in 1986 and 1987. Miller, 27, was one of over 150 black men questioned. During 12 hours in custody, he gave police a "vision statement" about the crime, in which he purportedly envisaged details of the crime from the attacker's viewpoint. This "confession", together with hair evidence, and the fact that semen from the victims had Miller's blood-type, was used against him. After Miller had been taken into custody, two elderly women were raped in crimes very similar to the attacks on Cutler and Fowler. Ronald Lott was arrested, pleaded guilty and was sentenced to 40 years in prison for these rapes. Yet, the jury at Miller's trial never heard about Lott, or the fact that he had the same blood-type as Miller. Miller remained on death row from 1988 to 1995. He was moved to the county jail pending retrial after DNA evidence cleared him of being responsible for the rape of Cutler and Fowler. The state maintained that his confession meant that he was involved in the crime, and offered Ronald Lott leniency if he would testify against Miller. Lott refused. Meanwhile analysis of the "confession" showed it to be the result of police prompting and manipulation of Miller, and that it contained many errors of fact. All charges against Robert Miller were dropped and he was released on 22 January 1998. A few months later the prosecutor in the case was elected to the position of trial judge in Oklahoma County. Ronald Lott was reportedly due to face trial in 2001 for the murders of Zelma Cutler and Anna Fowler. Anna Fowler's son, Jim Fowler, has said that he will testify against the use of the death penalty if Lott is convicted. Jim Fowler's son was executed on 23 January 2001 (see page 80).

❼ Ronald Keith Williamson and Dennis Fritz were released in April 1999. They had been sentenced in 1987 to death and life imprisonment without parole, respectively, for the rape and murder of Debra Sue Carter in Ada, Pontotoc County, in 1982. Ron Williamson spent nine years on death row and came within five days of execution in 1994. He has a history of serious mental illness and yet his lawyer failed to investigate this and did not even seek a competency hearing. Neither did the lawyer challenge a "confession" Williamson gave to police describing a dream in which he had committed the murder. He also neglected to inform the jury that another man, who also had mental problems, had confessed to the murder of Debra Carter. Moreover, the lawyer failed to question the

motive of a jailhouse informant who alleged that Williamson had confessed to Carter's murder in jail. In 1995, a federal judge found that the lawyer's performance had been constitutionally inadequate. The judge also said that the state's introduction of expert hair-comparison testimony at Williamson's trial was "irrelevant, imprecise and speculative, and its probative value was outweighed by its prejudicial effect." DNA testing later matched one of the state's witnesses, Glen Gore, who in the meantime had been sentenced to 40 years in prison for kidnapping and assaulting a woman in 1987. The DNA testing matched neither Williamson nor Fritz. They were freed 12 years after their arrest.[130] In a lawsuit filed in 2000, Dennis Fritz and Ronald Williamson have accused the authorities of "deliberately engineer[ing] a false case that consisted almost entirely of faulty forensic evidence, the self-serving lies of the actual murderer, and fictitious confessions reported by jailhouse snitches with overwhelming motives to lie." They are suing for damages for the "reckless, intentional and conspiratorial actions that deprived them of twelve years of freedom and inflicted enormous suffering on them and their families."

DNA testing: Modern technology contrasts with age-old brutality

Since the Governor of Illinois stopped executions in his state because of its "shameful" record of wrongful convictions, the US death penalty has come under increasing scrutiny. The debate within the USA has focused on the risk of executing the innocent, with particular attention on the potential for DNA testing techniques to exonerate or incriminate. This was reflected in Oklahoma when, on 1 June 2000, Governor Keating signed into law a measure to allow DNA testing in the cases of certain capital and non-capital prisoners on appeal. Announcing the new law, the Governor noted that five Oklahoma inmates had been freed as a result of DNA testing.

DNA evidence may make the public and politicians feel more secure in their support for executions, but provides no guarantee that fatal errors will be eliminated in death penalty cases. Firstly, only a relatively small number of murder cases produce any DNA evidence. Of the 95 wrongfully convicted prisoners discovered since 1973, only 10 were found to be innocent on the basis of DNA evidence. Furthermore, like any forensic evidence, DNA testing is vulnerable to human fallibility or misconduct. Samples may become contaminated by poor collecting or storage techniques, or may be planted at a crime scene by unscrupulous investigators._ The potential also exists for laboratories to make mistakes or falsify test results.[131]

[130] For more information on the cases of Robert Miller, Ron Williamson, Dennis Fritz, and others, see *Actual Innocence*, by Barry Scheck, Peter Neufeld and Jim Dwyer. Doubleday, New York, 2000.

[131] A recent US case illustrates the limitations of DNA testing as an absolute indicator of guilt or innocence. Odell Barnes was executed in Texas on 1 March 2000, still proclaiming his innocence._ Among the most incriminating evidence against him was small blood spots found on his clothing, later identified by DNA testing as coming from the victim. Post-conviction investigation by defense experts found that the bloodstains contained a preservative using in the storing of blood._ An expert concluded from the level of preservative in the stain that the blood did not come directly from the victim, but was spilled on the clothing after the crime.

In 1999, a federal judge was highly critical of "misleading" and "untrue" testimony given by Joyce Gilchrist, Oklahoma City's then top forensic chemist, at the 1992 capital trial of Alfred Brian Mitchell.[132] US District Judge Ralph Thompson noted that Gilchrist had knowledge of DNA test results that would have indicated Mitchell's innocence on two of the charges he was facing, that of rape and forcible sodomy. That information had not been divulged to the defence. Judge Thompson wrote that Joyce Gilchrist's trial testimony, that DNA tests were "inconclusive", was " without question, untrue". In fact the DNA tests showed that Mitchell's DNA was not present on samples that were tested. Judge Thompson also noted other criticisms of the same chemist by the Oklahoma Court of Criminal Appeals in various cases.[133] He overturned the rape and sodomy convictions, but upheld Mitchell's death sentence for the murder, ruling that the aggravating circumstances still applied. In March 2001, it was reported that the FBI was investigating Joyce Gilchrist's work in an attempt to determine if anyone might have been wrongfully convicted on the basis of her scientific conclusions.[134]

Robert Clayton was due to be executed on 4 January 2001. On 3 January, Oklahoma's Lieutenant Governor granted him a 30-day reprieve in order that tests could be conducted on newly-found physical evidence. The evidence, which the appeal lawyers had been requesting without success for years, was apparently found in the Tulsa County District Attorney's office 24 hours before the execution was due to be carried out. Robert Clayton was executed on 1 March after the testing failed to exonerate him. Can the state guarantee that under such poor standards of storage, the evidence had not been compromised? The potential for physical evidence to be compromised was also raised last year, when an Oklahoma City police freezer broke down, raising the temperature of frozen biological samples from up to 1,000 criminal cases to room temperature over a nine-day period between 25 September and 4 October.[135]

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[132] *Mitchell v Ward*, 27 August 1999. US District Court for the Western District of Oklahoma.

[133] The cases cited by Judge Thompson were: *McCarty v State*, 1988 (Gilchrist's delay in disclosing hair evidence to the defence was "inexcusable" and deprived defendant of a fair trial. Gilchrist's report regarding her examination of evidence was "at best incomplete, and at worst inaccurate and misleading". The significant omission, "whether intentional or inadvertent, resulted in trial by ambush". Gilchrist gave improper opinion which she was unquestionably unqualified to give and which was not supported by the state of the art of forensic science; court noted conclusion of Southwestern Association of Forensic Scientists, Inc. that Gilchrist had violated ethical code). *Fox v State*, 1989 (Gilchrist testified to a conclusion which was not scientifically supported). *Pierce v State*, 1990 (Gilchrist violated trial court's order to forward evidence to laboratory designated by defense). *Miller v State*, 1991 (Gilchrist did not transmit evidence to defense expert until two weeks after court-ordered deadline and six and one-half days before trial. Gilchrist's report omitted crucial conclusion. The significant omission, together with State's extreme tardiness in complying with discovery order, "resulted in trial by ambush on a very critical piece of evidence".)

[134] *City police chemist faces investigation.* The Oklahoman, 30 March 2001.

[135] *Malfunction taints police evidence - Broken freezer ruins materials in hundreds of criminal cases.* The Oklahoman, 22 November 2000.

DNA testing is undoubtedly an important forensic tool, and the re-examination of any potentially exonerating evidence is to be supported. However, DNA can also be used by the state as part of the tool kit it uses to pursue judicial killing. For example, the stabbing murder of five women in an Oklahoma City drug house in 1992 remained unsolved until 1997, when DNA testing identified Danny Keith Hooks as the donor of foreign blood found in the house (ie. in addition to the blood of the victims). He was sentenced to death for the murders in 1998. Even in such a case, DNA evidence does not necessarily prove a defendant's guilt. In the drug house killings, all it proved was that Hooks was in the house at some point, which is undisputed. In his trial testimony, Hooks stated that he had gone to the house on the night in question to purchase crack cocaine. He said that he left after a while, but returned later to find the women dead.

Hooks claimed that he had cut his finger on a bicycle that he rode back to the house, and that it was bleeding when he entered. All the foreign blood found in the house was from 90 degree droplets[136], that is, they had fallen directly from the source, rather than being projected by any sort of movement. This is at least as consistent with Hooks' claims, as it is with the state's theory that he had cut himself on the murder weapon during the attack. Amnesty International has no position on the guilt or innocence of Danny Hooks, but notes that he was convicted on circumstantial evidence and that his appeal lawyers have raised serious questions about his conviction and sentence.

Danny Hooks's trial was marked by doubts about the fairness of the jury selection process, instances of prosecutorial misconduct, and possible juror coercion. In such cases, the advances in science and technology represented by the development of DNA evidence as a forensic tool simply contrast with the age-old flaws and brutality of this outdated punishment.

Beyond a reasonable doubt? Some current cases

"*Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.*" UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

Amnesty International is concerned by the willingness of the authorities to use unreliable evidence in their pursuit of this irreversible punishment. When challenged that capital proceedings demand higher standards, the state seeks to maintain the status quo.

Rocky Eugene Dodd was convicted in 1996, on wholly circumstantial evidence, of a double murder (see page 76). He was sentenced to death. A key witness for the state was a serial jailhouse informant, Kenneth Bryant, who told the jury that Dodd had confessed to the

[136] Apart from on a blouse found by the front door which Hooks says he used to bandage his finger.

crime while they were in jail together. The jury were left unaware of letters written by Bryant relating to another capital murder case. The defence had attempted to make the jurors aware of this evidence, but the prosecutor objected and the court upheld the objection. In one of the letters, to an Assistant District Attorney, Bryant wrote of his long history of testifying in first degree murder trials in Oklahoma County, and stated that he "no longer [had] to lie... for anyone in the world – especially the Oklahoma County District Attorney's Office". He also wrote: "The testimony from me in this case about a confession that you both asked and wanted from me – you'll not get – because as you very well know – there wasn't one".

In 1999, the Oklahoma Court of Criminal Appeals overturned Dodd's conviction and sentence saying that the jury should have been told of the letters because they undermined the credibility of the state's key witness, particularly in a case in which there were residual doubts about the defendant's guilt. The Court wrote: "Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony". In a step believed to be unprecedented in the USA, the Court ruled that when a case involves such testimony, a trial court should first conduct a "reliability hearing" to determine the credibility of a jailhouse informant before the jury hears the testimony.

The state reacted strongly against the decision and appealed for a rehearing. This was granted by the Court of Criminal Appeals, and its original decision was vacated and withdrawn. In January 2000, the Court handed down its revised opinion. It still granted Dodd a new trial, at the time of writing scheduled for 2002, but this time the majority opinion did not include reference to the proposed reliability hearings.

Other cases further illustrate how the state is prepared to use questionable evidence to achieve the execution of a defendant. Aspects of the cases of Dewey George Moore, Rocky Dale Snow, Richard Norman Rojem and Phillip DeWitt Smith are outlined below – not because Amnesty International has any view on their innocence or guilt, but because their cases illustrate a wider problem of the use of unreliable evidence to obtain capital convictions.

Dewey George Moore

Dewey George Moore, now aged 64, was sentenced to death in 1985 for the murder of 12-year-old Jenipher Gilbert, who was abducted from outside her school in Midwest City, Oklahoma County, on 27 September 1984. Her body was found the next day. Three people, two adults and one teenager, claimed to have seen the abduction. All three said that the abductor's car was yellow or lime green. Dewey Moore owned a yellow car. The two adults were unable to positively identify Moore as the abductor. The teenage witness initially picked another man from the police photo line-up, but at the trial he identified Moore as the abductor. However, he qualified this by noting that "it was kind of dark" and "I

couldn't really tell", and also admitted that by the time of the trial, he had seen Moore about a dozen times on the television news. In 1991, he signed an affidavit: "I was a fifteen year old ninth grade student when I made my statement; and I was very nervous, uncertain and impressionable regarding my eyewitness recollection." He continued: "The 'positive' identification that I made... was incorrect... I could not then nor can I now say with certainty that the man I saw... was in fact Dewey George Moore."

At the trial, the prosecution presented the testimony of a forensic chemist, Janice Davis, who testified with absolute certainty that hair and fibres taken from Moore's home, car, and the victim identified him as the perpetrator. The jury found him guilty, and after hearing evidence of previous violent acts by the defendant, including against children, sentenced him to death.

In one of a series of articles in 1999 analysing the Illinois capital justice system's propensity for error, the *Chicago Tribune* noted that "over the last decade or so, hair-comparison evidence has been exposed as notoriously untrustworthy. Some courts outside Illinois have begun restricting or even forbidding its use, saying that visual hair comparisons are scientifically suspect and have little value as proof".[137] The federal judge who overturned Ronald Williamson's death sentence (above) was highly critical of the use of the hair comparison method used to convict him.

The expertise and testimony of Janice Davis has been called into question since the trial. Another expert who has reviewed the case has stated that she is "shocked" by the poor quality and apparent lack of objectivity of the testimony. "I am convinced that Ms Davis was not objective in either conducting her examinations or drawing her conclusions. I am convinced that her conclusions are questionable, unprofessional and in urgent need of verification.[138]

In addition, David Bruce Hawkins, an undertaker who prepared Jenipher Gilbert's body for burial, has made disturbing claims about the conduct of the police investigation of the murder. He has stated that police officers came to the funeral home on three separate occasions to obtain samples of the victim's hair. He then asserts that John Boeing, another employee at the funeral home, followed the police after they left the second time. Hawkins states that the employee told him that the officers went directly to Dewey Moore's home, where one of them climbed through an open window, and then unlocked the door from the inside. Hawkins claims that the police had with them a red jumper, of the type the victim was wearing at the time of her abduction (but which was never recovered), and the hair samples they had retrieved from the funeral home. The officers, Hawkins, claims stayed in Moore's home for some time, and later "appeared to be doing things" to his car.

[137] *Convicted by a hair*. Chicago Tribune, 18 November 1999.

[138] Janice Davis cannot be challenged on her testimony. She is dead, having committed suicide.

The police had conducted an initial search of Moore's home on 29 September 1984. The record confirms that key hair evidence and the red fibres were not discovered until a second search on 4 October, after the time that Hawkins claims police went to the home with the jumper and hair. In 1995, the Oklahoma Court of Criminal Appeals noted that this evidence "certainly suggests that Midwest City police followed a somewhat unusual investigative procedure in this case", but denied the request for an evidentiary hearing. In September 1999, the 10th Circuit Court of Appeals remanded the case back to federal district court for the defence to pursue the possibility that police planted evidence.

Rocky Dale Snow

Rocky Dale Snow was sentenced to death in 1989 for the murder of Betty Jo Bush. The crime took place at a flea market in Ada, Pontotoc County, on 8 December 1988. The police prepared a composite drawing of the assailant, in collaboration with two eyewitnesses, Richard Newland and Wayne Russell. Rocky Snow was arrested and appeared in a police line-up. Both Russell and Newland picked the same man (not a suspect), who was not Rocky Snow.[139] The police told at least one of the men, Richard Newland, that he had picked the wrong man, and one of the two was "browbeaten and berated" for failing to identify Snow, according to his then lawyer.

A local newspaper ran a series of articles stating that the two men had not identified Rocky Snow. Appearing in one article was Snow's photograph and the composite picture. The article stated that Snow remained the suspect, that prosecutors were claiming that he had disguised his identity in the line-up, and that the police were seeking the public's help in identifying Rocky Snow.[140] Wayne Russell later admitted that he had seen the newspaper article.

After the "failed" line-up, police charged Rocky Snow with the unauthorized use of the truck allegedly used by the attacker, which Snow had driven to another town later in the day. At an initial hearing on this charge three months after the murder, the only witness called was Richard Newland despite the fact that he never claimed to have seen the vehicle. He identified Snow – who was in court in prison clothing – as the attacker, and the state charged Snow with the murder. Meanwhile, Wayne Russell, who had been subpoenaed but

[139] Both had seen the attacker from close-up. Both said that he did not have any scars. Snow had a distinctive scar over his left eye from a serious car accident six months earlier. In 2000, an expert in eyewitness identification testified that the fact that neither man had picked out Rocky Dale Snow at this line-up supports his claim of innocence.

[140] *Police ask public's help in solving slaying.* Ada Evening News, 20 December 1988.

not called, saw Rocky Snow being brought into the courtroom in handcuffs and prison uniform.

At the June 1989 trial, both Russell and Newland identified Snow as the attacker. Snow's lawyer, the same man found to have inadequately represented Ronald Williamson (above), did not seek to have the identifications suppressed, even though they had clearly been tainted between the original line-up and the trial.

A woman, Sondra Campbell, testified at the trial that two days after the murder Rocky Snow had told her in a nightclub that he had killed Betty Bush. She has since recanted her testimony, saying that she lied under police threats and coercion. The owner of the nightclub, and one of his employees, have said that Rocky Snow was not in the club on the night in question.

The defence lawyer failed to investigate alleged evidence implicating Rocky Snow's brother, Allen Snow, who worked at the company which owned the truck allegedly used in the crime. There is evidence that it was he who first suggested that the police arrest Rocky; that he tried to implicate a cousin in the murder; that he was seen with a knife he claimed was the murder weapon; and that he told various people that he had killed Betty Bush. It is also alleged that the state withheld a police report that Allen Snow was seen by his neighbour in the truck around the time of the murder.

Furthermore, the defence lawyer failed to investigate and present psychological evidence that Rocky Snow, who has been assessed as borderline mentally retarded, is easily manipulated and led by others. Such evidence could have raised questions in the jurors' minds as to whether he had been tricked into driving the truck on the day of the murder. At the sentencing phase of the trial, the lawyer made no opening statement or closing argument, and did not investigate important mitigating evidence, particularly related to his client's mental impairment. The Court of Criminal Appeals said that while "counsel's performance was not what we might like to see", it had not affected the outcome.

Richard Norman Rojem

Richard Norman Rojem was sentenced to death in Washita County in 1985 for the 1984 murder of his seven-year-old former stepdaughter, Layla Dawn Cummings. He was also sentenced to 1,000 years in prison for kidnapping the girl, and another 1,000 years for rape.

Richard Rojem was connected to the crime by circumstantial evidence. A plastic beer cup with his fingerprint was found outside the Cummings home; on the night of the abduction he had been in a local bar which used such cups. Tyre tracks in the field where the girl's body was found were consistent, although not positively matched, with Rojem's car. Part of a condom wrapper found at the crime scene was of the same brand as found at Rojem's home, and as sold in the toilets at the local bar visited by Rojem.

The authorities appear to have focussed on Rojem to the exclusion of other suspects or possible suspects. For example, Carl Bounds, arrested three days after the murder on a charge of indecent exposure, had blood in his car and work boots which an officer believed were similar to prints found in the field in the Cummings case. The blood was not tested, and the car, which had the same wheel base measurements as Rojem's, was never analysed for possible matches to the tyre marks or soil from the field. The police report on Bounds was discovered, after Rojem's conviction, amongst the evidence withheld in the Adolph Munson case (see page 60).

The child's biological father, Donald Cummings, apparently believed that Layla's maternal uncle murdered her. He told police that he was going to Michigan to collect proof. However, shortly after his arrival in Michigan he was shot dead. The defence was not provided with the investigators or resources to follow up on this or other suspects.

A police report has also been discovered since Rojem's conviction which suggests that someone other than Rojem was in the field where the girl's body was found after the time that the state alleged the crime occurred. A woman who lived near the field told police that when she got up to feed her baby in the early hours of that morning, she noticed a car at the field. It was there 30 minutes later when she returned to bed; this was at least three hours after the murder was supposed to have been committed. A federal District Court has agreed that "this evidence should have been turned over" to the defence as it "could have had exculpatory value". However, the ruled that disclosure would have made no difference to the trial's outcome.

In a dissenting opinion in 1988, a judge on the Oklahoma Court of Criminal appeals said that Rojem's right to a fair trial had been denied by the antics of an "overzealous" prosecutor. The judge cited instances of the prosecutor making faces during the closing arguments of the defence, and of his accusations that the defence were engaged in setting up a "smoke screen" to divert the jury's attention. The judge wrote: "Such discourteous, disrespectful, and disgraceful conduct on the part of District Attorney Suttle is degrading to our system of justice and is totally inexcusable".[141]

In his final argument at the first stage of the trial, the District Attorney said: "There has not been . . . a more horrible crime committed in this county . . . or . . . Oklahoma . . . And when you find the defendant guilty of murder and when you find the defendant guilty of kidnapping and when you find the defendant guilty of rape, those of us who, in our own small way, who never knew this child, but have lived it, can bury this child."

[141] *Rojem v State*, 16 March 1988, Judge Parks dissenting.

The dissenting judge wrote that "this Court cannot tolerate arguments calculated solely to inflame the passions and prejudices of the jury." Nevertheless, the majority on the Court did tolerate such arguments, and upheld the conviction and death sentence.

In 1999, a federal district judge ruled that Richard Rojem should receive a new sentencing hearing because of an error in the instructions given to the jury by the trial judge. The 10th Circuit upheld this decision, and Rojem's conviction, on 30 March 2001.

Phillip DeWitt Smith

Phillip Smith was sentenced to death in 1984 for the murder of Matthew Dean Taylor in Muskogee County in 1983. In his report of the trial to the Oklahoma Court of Criminal Appeals, provided in all capital cases, the trial judge responded "No" to the standard question: "Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt?"

Matthew Taylor was killed in his apartment during the early hours of 4 November 1983. He had been bludgeoned on the head with a blunt instrument. There were no eyewitnesses. No physical evidence linked Phillip Smith to the crime scene, and he maintained his innocence of the murder. Smith admitted to being at a party in Taylor's apartment on the evening of 3 November, and that Taylor gave him $20 to go and buy some marijuana. The state alleged that Smith returned later in the night to rob Taylor.

The murder weapon was never found. The prosecution's theory was that it was a hammer, and produced evidence that Smith had borrowed a hammer shortly before the crime. At the autopsy, the medical examiner had removed loose hair from Taylor's hands, but the hair had been inexplicably lost after it was mailed to the Oklahoma State Bureau of Investigation. At the trial, the medical examiner theorized that the hair belonged to Taylor and that he had pulled it from his head after being hit. The state also presented the jury with graphic autopsy photographs, including one in which the skin surrounding the victim's skull had been peeled back to reveal mucous and brain tissue. When the Court of Criminal Appeals affirmed the death sentence in 1987, one of the judges dissented. He wrote that Smith should receive a new trial because the autopsy photographs had been "extremely inflammatory" and their probative value "substantially outweighed by the danger of unfair prejudice", particularly given that the evidence against Smith was "entirely circumstantial".

The state produced two key witnesses against Phillip Smith. Victor Hickman testified that he had given Phillip Smith a ride to Taylor's apartment on the night of the murder. He said that he waited in the car for about 10 or 15 minutes, and that when Smith returned, he had a small blood stain on his shirt. A jailhouse informant, Billy Joe Dixon, testified that Smith had confessed the crime to him when they were held in jail together. Dixon denied that he had any deal for leniency for the charges he was facing in return for his testimony against Smith.

Ten days after Smith sentenced to death, part of the charge against Billy Joe Dixon was dropped. He pleaded guilty to the remaining charge and was released on time served. Dixon told Smith's post-conviction defence investigators that Smith had never confessed to him, and that he had fabricated the evidence in exchange for leniency on his own charges. However, at a post-conviction hearing, Dixon returned to his trial testimony. He had not wanted to testify at the hearing, fearing that he might face charges of perjury. The prosecutor had spoken to Dixon prior to the hearing. At the hearing, the prosecutor denied that the state had made any deal with Dixon for his trial testimony, but admitted that his office had a policy of encouraging "snitch" testimony through favourable treatment of jailhouse informants.

In a 1999 affidavit, Victor Hickman recanted his testimony, saying that he had initially told the prosecutor's investigator that he had not been to the apartment on the night of the murder, but fearful of facing charges in the case he had eventually told the investigator "what he wanted to hear". "The truth is, though, I never took Phillip over to the victim's apartment. I never saw a stain on Phillip's shirt... At the end of our conversation [the prosecutor's investigator] told me to keep my mouth shut – not to say anything to anyone else."

Smith's trial lawyer has stated that he was never informed that Hickman had at first told the state's investigator a different version of events, information which he could have used to undermine the credibility of the prosecution's most important witness.

An evidentiary hearing was held in 2000 into the new evidence. Hickman's testimony was reported to be hesitant and apparently fearful, and marked by long pauses, particularly during cross-examination by the state. Under direct examination he affirmed that the affidavit was accurate to the best of his recollection. Under cross-examination by the state, his testimony was less beneficial to Smith, although he maintained that he did not recall taking Smith to the victim's apartment, and said that he gave his trial testimony "out of being scared".

Following the hearing, the Muskogee County District Court ruled that Hickman had not recanted his trial testimony and that the prosecution had not withheld exculpatory information from the trial lawyer. On 9 January 2001, Attorney General Drew Edmondson, who prosecuted this case when he was District Attorney of Muskogee County, announced that he was asking the Court of Criminal Appeals to set an execution date for Smith. On 1 March 2001, a week before his scheduled execution, Philip Smith became the first condemned prisoner in 35 years to win a recommendation of clemency from Oklahoma's parole board (see page 91). At the time of writing, Governor Keating had not made his decision on whether to commute the sentence or allow the execution to go ahead.

Undeterred: The death penalty as part of the problem

"*The death penalty is a mirage that distracts society from more fruitful, less facile answers. It exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives.*" Robert Morgenthau, Manhattan District Attorney, New York[142]

At about eight o'clock on the morning of 17 October 1997, Ronald Fluke walked into a Tulsa police station and confessed that he had killed his wife and two young daughters earlier that morning. He had been unable to kill himself. At his 1998 trial he pleaded guilty, waived his right to present mitigating evidence, and asked the judge to sentence him to death. He got his wish and then dropped his appeals. Ronald Fluke was executed on 27 March 2001.

[142] *Death penalty is ruled out by Morgenthau in slayings*. New York Times, 29 February 1996.

It seems that history has repeated itself. George Wallace was executed on 11 August 2000. At his 1991 trial, he pleaded guilty to the murder of two teenage boys, waived his right to present mitigating evidence and asked to be sentenced to death. He waived his appeals and said he wished to be executed as soon as possible.[143] Thomas Grasso was executed in Oklahoma on 20 March 1995 after waiving his right to appeal. At his 1992 trial, he had pleaded guilty to the murder of Hilda Johnson in her Tulsa home, waived his right to present mitigating evidence, and asked the judge to sentence him to death.[144]

In voting to uphold Grasso's death sentence, a judge on the Court of Criminal Appeals recalled the case of James French, executed in Oklahoma in 1966 for the murder of a fellow prisoner. The judge noted evidence that French had murdered his cell mate in order to force the state to execute him, when he realised that he could not commit suicide. While such cases may be unusual, there are other indications that, far from having any special deterrent effect, the death penalty may actually have a unique capacity to increase violence.

James French was the last person executed under Oklahoma's old capital laws. Research published in 1994 and 1998 concluded that Oklahoma's return to executions in 1990 after a 24-year moratorium was followed by a significant increase in the number of murders committed by strangers.[145] The researchers studied homicide counts between 1989 and 1991 and after taking other factors into account, concluded that the execution of Charles Coleman in 1990 had a brutalizing rather than a deterrent effect. University of Oklahoma sociology professor John Cochran said at the time of the publication of his 1994 research, "What this means is, in Oklahoma, because we killed Charles Troy Coleman, we also killed a random sample of 17 other Oklahoma citizens. We know by the technique we employed, the Coleman execution caused this level of increase." In March 2001, Professor Cochran, now at the University of South Florida, told Amnesty International that: "Our findings for Oklahoma have now been replicated for Arizona and California.[146] We have a multi-state analysis of the effects of executions currently underway and preliminary findings seem to indicate a similar pattern."

[143] A month before he was due to be executed in 1995, George Wallace took up his appeals.

[144] For more information on condemned prisoners who give up their appeals, see *USA: The illusion of control: "Consensual" executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment* (AI Index: AMR 51/053/2001, April 2001).

[145] Cochran, J.K., M.B. Chamlin, and M. Seth. *Deterrence or brutalization? An impact assessment of Oklahoma's return to capital punishment.* Criminology 32, 1: 107-134. (1994). Bailey, W.C. *Deterrence, brutalization, and the death penalty: Another examination of Oklahoma's return to capital punishment*. 36 Criminology 711-733 (1998).

[146] Ernie Thompson. 1997. *Deterrence versus Brutalization: The Case of Arizona*. Homicide Studies 1:110-128. and John K. Cochran and Mitchell B. Chamlin. 2000. *Deterrence and Brutalization: The Dual Effects of Executions*. Justice Quarterly 17:685-706 respectively.

The *New York Times* recently examined murder rates in the 12 US states without the death penalty and the 36 states which reintroduced the death penalty before 1983.[147] It found that murder rates had not declined any more in the death penalty states than in the states which had not reintroduced capital punishment. It found that 10 of the 12 non-death penalty states had murder rates below the national average, while half of the states with the death penalty had rates above the national average – Oklahoma's rate was about equal to the national average. The study found that during the past 20 years, the murder rate in states with the death penalty was 48 per cent to 101 per cent higher than in the states without capital punishment.

In an opinion poll conducted in Oklahoma in December 2000 for the *Tulsa World* newspaper, 63 per cent of those surveyed said that they "somewhat" (26 per cent) or "strongly" (37 per cent) agreed with the statement "Disregarding those already on death row, the death penalty is an effective deterrent to other criminals".[148] There is a gap between the public and officialdom on this issue. In January 2000, for example, US Attorney General Janet Reno said: "I have inquired for most of my adult life, about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point".[149] A recent standard reply sent out from Governor Keating's office to those sending in appeals for clemency in death penalty cases refers only to the incapacitation effect of the death penalty: "Please understand that we take no pleasure in enforcing capital punishment, but no one who was executed ever killed again".

A symptom of a culture of violence, not a solution to it

There was a spate of shootings in north Tulsa in February 2001 which police said were linked. At a press conference at the end of the month, the mother of one of the people killed joined city officials and community leaders in calling for an end to the violence. A city councillor said that retaliation was the wrong response and urged those involved to let the police handle matters. The Mayor was reported as saying that the shootings were "just a reminder that if we don't find other ways for young people and older people to solve problems than through violence, then we all suffer as a society."[150]

At the same time the state, through its policy of judicial execution, is promoting the message that violence is an effective response to a problem, and that killing is an appropriate response to killing.

[147] *States with no death penalty share lower homicide rates*. New York Times, 22 September 2000.

[148] *Sooners back death penalty still.* Tulsa World, 9 January 2001. The poll also found that 66 per cent responded 'yes' to the question: "Regardless of whether the death penalty is a deterrent to crime, is it the right thing to do?"

[149] Weekly media briefing, US Justice Department, 20 January 2000.

[150] *Victim's mom wants unity.* Tulsa World, 28 February 2001.

The Oklahoma Department of Mental Health and Substance Abuse Services recently released the findings of a report which concluded that the rate of domestic violence among teenage couples in the state was more than double the national rate.[151] Oklahoma is reported to have the seventh highest rate of domestic violence in the country.

In 2000, about one in four of the prisoners on Oklahoma's death row were there for the murder of a relative or someone with whom they had a current or former family relationship. As such the cases fall broadly under a heading of domestic violence, particularly against women and children. At the same time, a number of the condemned were themselves the subject of childhood abuse. Such as Gary Walker, executed on 13 January 2000, whose life history the 10th Circuit described as "lamentable and grievous...It is undisputed that Mr Walker was brutalized physically, emotionally, and sexually by his parents."[152] Or Jervaughn Miller, sent to death row in 1999, who at the age of two was taken to hospital by his mother with a suspected skull fracture after being beaten by his stepfather. Or Marilyn Plantz, whose jury was left unaware of her childhood abuse and a rape she had suffered as a 15-year-old. With an IQ assessed at 76 in 1995, Plantz was due to be executed on 1 May 2001.

There is no doubt that violence, domestic and non-domestic, is a substantial social problem facing Oklahoman society, as elsewhere.[153] In 1995 alone, there were more aggravated assaults – 16,102 – reported in the state than in the three years from 1974 combined. In the five years from 1977, annual violent crime rate averaged 379 violent crimes per 100,000 of the population. In the five years from 1990, the rate rose by 60 per

[151] *Prevention works! Examining high-risk behavior among Oklahoma youth*. Among the questions asked in the survey was: "During the past 12 months, did your boyfriend or girlfriend ever hit, slap, or physically hurt you on purpose?" Of the nearly 5,000 answers from high school students, 19 per cent replied "yes", compared to a figure of 8.8 per cent nationwide.

[152] *Walker v Ward*, 1999. Gary Walker was repeatedly beaten by his stepfather and sexually abused by his mother. At the age of 13 his school referred him to a children's hospital, where he was diagnosed with a personality disorder, and poor control over his behaviour, impulses and emotions. From the age of 19, he was hospitalized for lengthy periods and diagnosed with serious schizophrenia-type mental illness. He was treated with anti-psychotic medications and electro-convulsive therapy, and ultimately diagnosed with bipolar disorder.

[153] In the context of crime in Oklahoma, Amnesty International is also concerned by issues other than the death penalty. For example, in a January 2001 letter, it questioned the Oklahoma City police authorities about the use of lethal force in several fatal shootings by police in the city in late 2000. In March 2001, the Civil Rights Division of the US Justice Department was reported to be conducting a review of the Tulsa Police Department. The *Tulsa World* reported that its review of police records showed that the city's police used pepper spray and other types of force more often against blacks than whites. It noted that in 1996, blacks were three times more likely to be arrested than whites, and that this figure had risen to four times more likely in 1999.

cent to 607 violent crimes per 100,000 population, and averaged 573 per 100,000 between 1995 and 1999.[154]

Could not the huge resources expended on enforcing the death penalty in Oklahoma be used for better purposes? Do executions make Oklahoma a better, safer, place?

– Robert Miller spent seven years on Oklahoma's death row and another three years in jail for the murder of 92-year-old Zelma Cutler and 83-year-old Anna Fowler in 1986 and 1987 that he did not commit. At the time, the authorities had knowledge of another suspect and yet pursued the execution of Miller (see page 61). It appears that securing a death sentence was a higher priority for them than securing the safety of their vulnerable citizens.

– In addition to Zelma Cutler and Anna Fowler, among the 2,637 people who were murdered in Oklahoma in the 1980s were 87-year old Jennie Ridling, 76-year-old Ura Alma Thompson, and 80-year-old Lula Mae Brooks. All three elderly women were killed in their homes.

– The official response to these three particular crimes was further killing. In a 10-week period from 2 December 1999, the three men found guilty of the murders – Cornel Cooks, Malcolm Johnson and Michael Roberts – were put to death in Oklahoma State Penitentiary.

[154] Source: Oklahoma State Bureau of Investigation (OSBI). The categories of violent crime are: robbery, rape, aggravated assault, and murder.

– In the midst of this spate of state killing, another elderly woman was murdered in Claremore, near Tulsa. On 2 January 2000, 88-year-old Erie Anderson Raybon was beaten to death in her home. Two teenagers were arrested and charged with first-degree murder. Rogers County District Attorney's Office announced that it would seek a death sentence against one of them, 19-year-old Dallas Hastings.[155]

– On 8 May 2000, an Oklahoma jury voted that James Ryder should be executed for the 1999 murder of 70-year-old Daisy Hallum at her home in Pittsburg County. A month later, on 16 June 2000, a McIntosh County jury handed down two death sentences against Harold McElmurry, a man with a history of mental illness and a childhood of abuse, for the 1999 murder of 75-year-old Vivian Pendley and her husband Robert Pendley, 84, at their home.

– On 3 November 2000, 84-year-old Bertha Pippen was found dead in her home in Muskogee. She had been beaten to death. A 17-year-old girl was charged with murder. This was reported to be the 12th murder in Muskogee County in 2000, and followed six in 1999. On 8 January 2001, 72-year-old Morris Dewey Fowler was charged with the murder of his wife Lora Jean Fowler, aged 71, at their home in Haskell County.

– On 9 January 2001, the State of Oklahoma executed Eddie Trice for the 1987 murder of 84-year-old Earnestine Jones in her home. On 18 January, Dion Smallwood was executed for the 1992 murder of his girlfriend's 68-year-old mother, Lois Frederick. Loyd LaFevers was executed two weeks later, on 30 January, for the murder of 84-year-old Addie Hawley in 1985.

– On 2 February 2001, 77-year-old Jack Cornwell was shot multiple times at a rural residence in Mayes County in northeast Oklahoma. On 5 February, his son was charged with first-degree murder in the shooting. On 12 February, a 74-year-old man was severely beaten during a burglary of his home in Okmulgee County. He died a week later.

– Robert Leroy Bryan awaits execution for the murder of his 69-year-old aunt at her Beckham County home in 1993. Bobby Joe Fields is nearing the end of his appeals against his death sentence for the murder of 77-year-old Louise Schem during a burglary at her home in Oklahoma County in the same year. So too is Jerald Wayne Harjo for the 1988 murder of 64-year-old Ruth Porter at her Seminole County home.

And so the cycle of violence continues.

[155] On 2 February 2001, the prosecutors agreed to drop their pursuit of the death penalty against Hastings in return for a guilty plea and a sentence of life imprisonment without the possibility of parole.

More than half the countries of the world have turned their backs on the death penalty. In some cases, it was recognized that the inescapable risk of executing the wrongfully convicted was too great a burden for society to bear. In others, it was the realization that the death penalty is a cruel and brutalizing punishment that does nothing constructive towards solving the problem of violent crime. All such countries are in line with international standards which seek an end to this outdated and failed punishment. All of them face the challenge of protecting their citizens from violent crime, and bringing to account those who perpetrate such crimes. They have found that there are viable alternatives to capital punishment.[156]

Why is Oklahoma lagging so far behind?

Justice or revenge? The death penalty and victims' rights

"*Keri and Shane are gone and have had their final judgement with God, even though it wasn't their time. I hope you find it in your hearts and minds to let justice be done rightfully and quickly and let Rocky go and have his final judgement with God.*" Parental victim impact testimony presented to jury at Rocky Dodd's trial for capital murder, 1996.

[156] Canada, for example, where both the murder rate and public support for the death penalty have dropped markedly since capital punishment was abolished in 1976. A recent survey, showed 52 per cent support for capital punishment in Canada - down from 69 per cent in 1995 and 73 per cent in 1987. *Support for death penalty plunging.* Toronto Globe and Mail, 16 February 2001. Canada's murder rate was 2.8 murders per 100,000 of population in the year before abolition (1975), and by 1999 had declined to 1.76, a drop of 40 per cent. (Source: Statistics Canada).

Emotions ran high at the 1996 trial of Rocky Eugene Dodd for the murder of his neighbours Keri Sloniker and Shane McInturff. When the jury announced its verdict of guilty, the victims' family members and their supporters cheered in the courtroom. After the jurors returned a death sentence, "they were swarmed by the family and friends of the victims, each wanting to personally thank them for the verdict and sentence".[157] In her report of the trial to the Court of Criminal Appeals, the trial judge noted that the victim impact statements presented to the jury by relatives had been "very prejudicial and inflammatory", and that in her opinion "the jury was influenced by passion or prejudice or other arbitrary factors in imposing the death sentence".[158] The trial judge also noted that there was residual doubt about Dodd's guilt.

Since Dodd's conviction, the prosecutor in the case, Assistant District Attorney Susan Caswell, has herself become an Oklahoma County trial judge. She was elected to the judiciary in 1998 on a platform of victims' rights. In her campaign literature, she wrote: "Too often crime victims are not treated fairly in the courtroom... I believe it's time to redress the balance." The literature noted that she was endorsed by local police and victims' rights advocates, as well as District Attorney Bob Macy, in whose office she worked for 14 years. The parents of Shane McInturff were also quoted on the campaign material: "As the prosecutor, Susan was dedicated to making sure that the man who so brutally took our child was brought to justice. During the long court process, Susan showed us compassion and understanding that we will never forget. We need judges like Susan." When Rocky Dodd's conviction was overturned in 1999 by the Court of Criminal Appeals (see page 64), murder victims' family members were among those who called for a reversal of the decision.

On 8 February 2001, Judge Susan Caswell sentenced Emily Michelle Dowdy following her conviction by jury the previous month of causing a death while driving under the influence of alcohol. At the sentencing, the mother of the victim presented the judge with two framed photographs of her son before she made an emotional statement about the pain and suffering that his death has caused the family. At the end of the statement, many people in the courtroom were crying. The mother also read out an e-mail that had been sent to her by one of the jurors: "Emily may not care, but I want to tell you that there was 12 people that cared very much, and I still do and always will".[159] The family asked the judge to follow the jury's recommended sentence of 25 years imprisonment. The judge, who had the choice of handing down a suspended or reduced sentence, opted for the full punishment.

[157] *Rocky Dodd given death sentence*. Edmond Sun, 10 December 1996.

[158] *Dodd v State*, 6 January 2000.

[159] *Woman gets 25 years in fatal car wreck.* The Oklahoman, 9 February 2001.

As the above illustrates, "victims' rights" are playing a central role in the Oklahoma justice system. Amnesty International has the utmost sympathy for the victims of violent crime and their relatives. As an organization that works on a daily basis with and on behalf of victims of human violence, it would never seek to belittle their terrible suffering. Nevertheless, the organization is concerned with certain aspects of the involvement of murder victims' relatives in the capital justice system.

In his 1998 report on the death penalty in the USA, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote of his concern about the current approach to victims' rights in the United States. Citing the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[160], the Special Rapporteur wrote: "While victims are entitled to respect and compassion, access to justice and prompt redress, these rights should not be implemented at the expense of those of the accused. Courts should not become a forum for retaliation. The duty of the State to provide justice should not be privatized and brought back to victims, as it was before the emergence of modern States."

The death penalty – Pain-killer or just plain killer?

Elected officials in the USA often speak of the "closure" or relief that an execution will bring to the family of a murder victim. For example, in October 2000, Oklahoma Attorney General Drew Edmondson announced that he was requesting execution dates for six prisoners. In his statement he said: "Our thoughts are with the family members of the victims of these horrible crimes. This will be a difficult time for them, but I hope they will experience at least a sense of relief that the appeals are over and it appears that the sentences are finally to be carried out."[161] Such comments from politicians are problematic, given the absence of evidence that an execution can guarantee any enduring relief, the huge resources that the death penalty diverts from alternatives and consumes for no measurable return, and the brutalizing absurdity of a punishment that creates more victims in the name of victims' rights.

[160] Adopted by General Assembly resolution 40/34 of 29 November 1985.

[161] *Six Execution Dates Requested, Including Female*. News release, 2 October 2000.

Can an execution ever be enough to act as an emotional balm for the anger and pain of the murder victim's family members kept raw during the years of appeals necessary in capital cases? That the promise of "closure" is a false promise is suggested by the reaction of a relative who expressed his frustration at the decision of the man who killed his father not to appeal against his death sentence: "To me, the punishment is being in prison knowing that you might be executed soon. Once he's actually executed, it's over for him."[162] After Dion Smallwood was executed in Oklahoma in 2001 nine years after the murder, the victim's daughter said, "I am sad at the way he went, because it was very easy".[163] Similarly, after Roget Berget was lethally injected in 2000 for a murder committed 15 years earlier, a relative of the victim complained that the execution "was easy - way too easy" for Berget. Earlier the victim's family members had said that their hoped-for "closure" could not be total because Berget's co-defendant had received a life sentence.[164] Does this mean that the family members of the 98 per cent of victims whose murders result in a sentence of less than death are being denied "closure" by the state?

Officials regularly echo the complaints of victims' rights advocates about the years of "delay" between crime and execution. Yet it has often been official misconduct or error which has caused relatives to relive their loss at new proceedings ordered by the appeal courts. The family of 18-year-old Pam Willis lost her to murder in 1982 and are still waiting for a conclusion nearly 20 years later. In 1988, the Court of Criminal Appeals overturned Curtis McCarty's conviction and death sentence for the murder because of "highly improper" conduct by the Oklahoma County prosecutor, including his asking the jury to vote for execution out of "love for the victims... and his future victims". McCarty was sentenced to death at a retrial. In 1995, his sentence was overturned because the jury had not been properly advised of its sentencing options. He was sentenced to death again in 1996. The Court of Criminal Appeals upheld this third sentence in 1998. It decided to reject the claim that the right to a fair trial had been jeopardized by a hostile judge. It ruled that it was difficult to adjudicate on this issue and simply noted that it "is regrettable when a trial judge's human imperfections in the course of a trial might raise the specter of a lack of impartiality...". It remains to be seen if McCarty's conviction and death sentence survive federal appeals.

The politicians who promote the concept of emotional peace-through-execution also ignore evidence from those murder victims' relatives who say an execution only makes matters worse. They argue that an execution is an appalling memorial for their lost family member, that it perpetuates a culture of violence, and creates more grieving relatives.

[162] *Survivor: Death isn't punishment.* Tulsa World, 7 May 1997.

[163] *Oklahoma City killer is put to death after apology.* Tulsa World, 19 January 2001.

[164] *Teacher's murderer executed*. The Shawnee News-Star Online, 9 June 2000.

The State of Oklahoma intends to kill Robert Wesley Knighton for the murder of Virginia Denney and her husband Richard Denney in their farmhouse in Noble County in 1990. Richard Denney's daughter, Sue Norton, does not want Knighton to be killed. She says she has forgiven him, and in the 10 years that he has been on death row the two have been in regular communication. It is not that she believes he should not be punished or that he should be released. She just does not want him executed. Sue Norton has become an active campaigner against the death penalty.

The death penalty is divisive. Floyd Medlock, sentenced to death for the murder of seven-year-old Katherine Ann Busch in 1990, was executed in Oklahoma on 16 January 2001. Katherine Busch's two grandmothers had very different responses to Medlock's crime and punishment. One became an outspoken proponent of victims' rights and executions. She founded the Survivors of Homicide Support Group, whose members have regularly stood in pro-death penalty vigils outside Oklahoma State Penitentiary when an execution is carried out there. She has actively opposed a moratorium on executions.

Katherine Busch's other grandmother is currently chairperson of the Oklahoma Coalition Against the Death Penalty which is campaigning for a moratorium on executions in the state. She says that despite her anger and grief at the killing of her granddaughter, she came to oppose the execution of Floyd Medlock: "I've forgiven him and I've gone on, but I don't condone what he did... There'll never be closure, because Kathy's not here. Executing him is not going to close this thing. What does it accomplish? All you're doing is making another family suffer grief."[165]

Just like murder victims, death row inmates have loved ones too. They become victim to the government's calculated bid to kill their relative.[166] Such as Richard Hammon's mother, who recently told Amnesty International that she often feels that she "just can't go on no more". She expressed the pain of having a son on death row, and also that she cannot understand why he is facing execution when the man who actually shot the victim is serving a life sentence (see page 15). Or Loyd LaFevers's sister, who had made funeral arrangements for her brother, and prepared herself to watch him be killed by the state in March 2000. He received a stay of execution a few hours before he was due to die. The Oklahoma Attorney General's concern was again narrowly drawn: "I am disappointed on behalf of the family members of the victim... I am not in anyway discouraged about our ultimate success."[167] That "success" was achieved on 30 January 2001, when LaFevers was put to death. His sister witnessed his killing.

[165] *Granddaughter's murder divides two women on death penalty issue.* Dallas Morning News, 15 January 2001.

[166] "You'll never hear another sound like a mother wailing whenever she's watching her son being executed. There's no other sound like it. It is just this horrendous wail. You can't get away from it. That wail surrounds the room. It's definitely something you won't ever forget". Leigh-Anne Gideon, reporter who witnessed 52 executions in Texas. *Witness to an execution*, National Public Radio, 12 October 2000.

[167] *High court upholds stay of execution.* Daily Oklahoman, 9 March 2000.

At Mark Fowler's clemency hearing in January 2001, his uncle said to the parole board: "We do not ask you to return him to the streets or set him free. Our hearts do not simply go out to the victims' families, but we weep and agonize with them. But another death is not the solution. Another death leads to further anguish". Mark Fowler's father, Jim Fowler, pleaded for his son's life to be spared. He has experienced the culture of violence from both sides. In 1986, three months after his son Mark was sentenced to death, Jim Fowler's mother, Anna Laura Fowler, was raped and murdered in her home. The State of Oklahoma sent Robert Miller to death row for the crime. He was released 12 years later after he was shown to be innocent, another victim of the state's commitment to execution (see page 61). Mark Fowler was put to death on 23 January; his co-defendant Billy Fox was killed 48 hours later.

Victims' rights as a source of arbitrariness

As elsewhere in the USA, it has become common in Oklahoma for prosecutors to consult with the relatives of the victim following a capital crime. Such an approach carries with it the potential to contribute to arbitrary or unfair outcomes.[168] In the case of Scott Carpenter, executed in 1997, the McIntosh County prosecutor consulted with the victim's family, who told him that a plea bargain of life imprisonment was unacceptable. In contrast, the Rogers County District Attorney's Office agreed in February 2001 to drop its pursuit of a death sentence against Dallas Hastings for the murder a year earlier, in return for a guilty plea and a sentence of life imprisonment without the possibility of parole. The District Attorney said that the victim's family members had been consulted and agreed with the plea agreement.[169] Both Carpenter and Hastings were 19 at the time of the crimes of which they were accused.

Amnesty International is also concerned about the use of victim impact testimony at the sentencing phase of capital trials. Such testimony has become routine since the US Supreme Court ruled in 1991, in *Payne v Tennessee*, that it was admissible evidence. For example:

[168] In his report, the UN Special Rapporteur wrote that "the selection of which families the prosecutor approaches has often been alleged to be influenced by race and class. The Special Rapporteur met with victims' families who had been approached by the local prosecutor, but once they informed the prosecutor that they did not wish the death penalty to be sought, the prosecutor stopped cooperating with them. The discretion in selecting which families the office of the prosecutor approaches may indeed increase the risk of arbitrariness in imposing a sentence of death." E/CN.4/1998/68/Add.3, para 81.

[169] *Guilty plea entered in Claremore death.* The Oklahoman, 3 February 2001.

- At the Oklahoma County trial of Larry Jackson, the victim's mother made a victim impact statement about the loss of her daughter. Her grief was visible. During her testimony she began to cry and sob, and continued crying in front of the jury for at least two minutes.

- At the trial of Michael Hooper in Canadian County, the grandmother of one of the victims made an emotional plea that Hooper be sentenced to death. The grandmother said that she could visualize the five-year-old running through the woods, being chased and caught, and saw the murderer looking into the child's "big, beautiful brown eyes" before shooting her.

- At the Ottawa County trials of Gary Welch and Claudie Conover for the same murder, several of the victim's family testified. Their testimony included statements such as: "It's not justice that my son lies in a cold grave and these men should live"; and: "...there is no doubt that they're the ones that killed him... they sit in our courtroom smug, uncaring... I would beg this court and this jury to see that justice be done. And justice to us is no less than the death penalty"; and: "In this instance I tend to cry for revenge or vengeance... Justice in this case would be for the jury to find the defendant worthy of the death penalty."

All four men were sentenced to death, and all but Claudie Conover, who was sentenced to life imprisonment without parole at a resentencing, remain on death row. Amnesty International does not seek to belittle the very obvious suffering of the murder victims' families in these cases, but has serious concerns about the relevance of their impact testimony to a jury deciding between life and death. As one expert on the death penalty recently pointed out: "Inevitably, this process is raw with emotion; antagonistic to the defendant – explicitly a demand for the death penalty – and not subject to cross-examination by the defence. Hardly the ideal environment to tease fact from fiction, relevance from irrelevance, or to ensure objectivity in sentencing...".[170]

Indeed, only four years before the *Payne* decision, in *Booth v Maryland*, the Supreme Court had ruled victim impact testimony unconstitutional: "Such information is irrelevant to a capital sentencing decision, and its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner". The Court noted that in the Booth case, "the family members were articulate and persuasive in expressing their grief and the extent of their loss. But in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe. The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information... One can understand the grief and anger of the family... [b]ut the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."

[170] *Beyond capital punishment: respecting the needs of victims and establishing effective alternatives to the death penalty.* Peter Hodgkinson, Director, Centre for Capital Punishment Studies, School of Law, University of Westminster, London, UK. In: *The death penalty: Condemned.* International Commission of Jurists, September 2000.

A year after the *Payne* decision overturned *Booth*, the Oklahoma legislature enacted a law providing for the admission of victim impact evidence. The law defines victim impact statements as "information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's [sic] opinion of a recommended sentence." The legislation was written by Senator Brooks Douglass, who lost his own parents to murder.

At the sentencing phase of Marcus Cargle's 1994 Oklahoma County trial, family members of the two murder victims made statements about the impact of the loss of their relatives. For example, one relative read a 12-page statement in which she recalled anecdotes from her brother's life from the age of four (he was 33 when he was killed). In December 1995, the Court of Criminal Appeals noted that her entire statement went to the emotional, rather than any other effects of her brother's death, and that its probative value was "substantially outweighed by its prejudicial effect". The Court also said that it had been wrong of the trial court to allow photographs of the victims while they were alive to be admitted as part of the victim impact evidence. Nevertheless, the Court upheld the death sentence saying that the admission of the victim impact evidence had been harmless.

In the *Cargle* ruling, one of the judges, Judge Lane, wrote a special opinion. He said that he "reluctantly" concurred that victim impact testimony was allowed under Supreme Court precedent. However, he wrote: " I believe that the purposes of sentencing should be to tailor a punishment to fit the defendant. Simply put, we should be limited to determining if under the law the defendant deserves to die for his actions. With this decision, we are shifting some of the emphasis to the victim. I believe that this will introduce an arbitrary factor into the sentencing that has nothing to do with the defendant... Sentencing is not a matter of balancing or comparing lives...It is not a contest to determine who has the better right to live and who most deserves to die." [171] Judge Lane has since retired from the Court.

Amnesty International is concerned that victim impact testimony has the potential to act as a "superaggravator" in death penalty cases. The Oklahoma Court of Criminal Appeals has repeatedly rejected this notion. In its *Cargle* decision, the Court wrote: "The answer lies in the obvious differences between victim impact evidence and aggravating circumstances. Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived. Even if victim impact evidence is present in every case, this does not relieve the prosecution of its burden to prove beyond a reasonable doubt the aggravating circumstance it has alleged."

[171] *Cargle v State*, 22 December 1995, Judge Lane, specially concurring.

This reasoning would appear to conflict with the Court's position in another case in which it acknowledged the possible creation of a superaggravator through the state's attempt to generate juror sympathy for the murder victim or a sense of revenge against the defendant. The court stated that for the prosecution to argue for execution on the grounds that it is unfair for the defendant to live while the victim is dead "creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence."[172] Why is it not possible that victim impact testimony could result in the same? Moreover, victim impact testimony could be used by the prosecution to bolster the evidence of a statutory aggravator (see Miller, page 11).

[172] *Le v State*, 1997.

In February 1997, the Court of Criminal Appeals said that when victim impact statements made a recommendation as to the sentence, this was acceptable so long as it was "concise" and stated "without amplification".[173] Eight months later the Court upheld the death sentence of Jackie Lee Willingham, despite victim impact testimony that went beyond the commonly understood definition of those terms. At the 1995 trial, the husband and three daughters of the victim had urged that Willingham be executed. One of the daughters referred to the defendant as a "piece of trash" and told the jury what she felt he deserved: "I think the only fair punishment for him is that he should be confined in a small area, someone three or four times his size should come into that confined area and beat him, cause him pain. I think he should have to beg for his life. I think he should have to choke on his own blood. I think he should have to crawl, try to get away from his attacker. I think he should suffer, suffer, suffer, but you know, even if he's put to death, he won't suffer, you know he will have a painless death. We can't do anything to him that will cause him the kind of pain that has been caused to our mother and to us... Mom has raised us to be kind and forgiving, but we can't forgive this and we want him killed." The Court of Criminal Appeals said that although such testimony was "the kind that can tip the balance too far" against the defendant, it had not prejudiced Willingham. He remains on death row.

Significantly, on the rare occasions when victim impact testimony could conceivably favour the accused, the courts are not as ready to allow such scope for the victim's family members to recommend the punishment. At the 1998 trial of Kevin Young for the murder of Joseph Sutton, the trial lawyer sought to recall a victim impact witness in mitigation after discovering that she was not asking for the death penalty. The trial court denied the lawyer's motion, stating that it was not "relevant whether they want the death penalty or they want him to go free [sic]. I just don't think it's appropriate and it goes beyond what I think the victim impact statement should state." The Oklahoma Court of Criminal Appeals upheld Young's death sentence, ruling that it was within the discretion of the trial court to decide whether to allow the defence to recall the witness in question.

Involvement of murder victims' relatives in clemency and execution

Victims' family members also can, and regularly do, appear before the Oklahoma Pardon and Parole Board along with a representative of the state Attorney General's Office to urge the Board members not to grant clemency to the condemned man or woman. For example, at

[173] *Ledbetter v State*, 1997. At Andrew Ledbetter's trial for the murder of his estranged wife, the victim's brother read a victim impact statement and urged the jurors to impose a death sentence, which they did. It was subsequently revealed that the brother had gone to a library and copied down passages of the victim impact statement used against John Booth in his trial for the 1983 murder of an elderly couple in Maryland, which culminated in the US Supreme Court's 1987 *Booth v Maryland* decision. In 1997, the Oklahoma Court of Criminal Appeals noted the "profoundly disturbing similarities" between the testimony in the two cases and overturned Ledbetter's death sentence. He was sentenced to life imprisonment without parole in 1998 after the Tulsa County prosecutors dropped their pursuit of another death sentence.

the clemency hearing for Sean Sellers on 27 January 1999, his relatives were among those at the hearing urging that no mercy be shown. Sellers' three victims included his mother and stepfather, shot 13 years earlier when he was 16, so his relatives were also the murder victims' relatives. When Sean Sellers tried to express his remorse at the hearing to the relatives of his victims, his uncle interrupted: "Stop begging. Take your punishment". The Board unanimously rejected clemency and the internationally illegal execution of Sean Sellers went ahead a few days later.

One of the current board members has reportedly stated that if the family of the murder victim opposed the execution, that would carry a lot of weight with him. The head of the Criminal Appeals Unit of the Attorney General's Office, has said that "it might be important to let the board members know the family supports the death penalty" in cases where relatives of the murder victim do not appear at the clemency hearing.[174]

For many victims' family members, their final involvement in the process is in the decision to witness the execution of the person convicted of killing their loved one.[175] Senator Brooks Douglass, who wrote Oklahoma's law allowing victim impact testimony (above), also authored a law to allow the relatives of murder victims to witness executions. On 9 August 1996, soon after that law was enacted, Senator Douglass witnessed the execution of Steven Keith Hatch. Hatch had participated in the crime in which Brooks Douglass's parents were killed, but had not actually been present when the couple were shot (see page 16).

In May 1997, Senator Douglass wrote an amendment to the law which allowed additional members of the victim's family, including in-laws and grandchildren, to witness executions. Thirty-nine murder victims' family members came to witness the execution of Gregg Braun at Oklahoma State Penitentiary on 20 July 2000. Twelve of them witnessed it in the execution chamber; the other 27 watched from a nearby room on closed-circuit television. Gregg Braun was sentenced to death for the 1989 murder of Gwendolyn Miller. He was also serving life sentences for four other murders in Kansas, Texas and New Mexico. Braun was not being put to death for those murders, but the relatives of the victims were among those who came to witness the execution.

[174] *Clemency in the balance*. Tulsa World, 8 January 2001.

[175] In 2000, the Oklahoma authorities changed the time of execution from the traditional midnight to earlier in the evening, to make it more convenient for murder victims' relatives to attend.

Loyd LaFevers was scheduled to be executed in Oklahoma in March 2000. He and Randall Cannon were sentenced to death for the rape and murder of 84-year-old Addie Hawley in 1985. Addie Hawley's nephew, Ken Chlouber, is a Colorado state Senator. Earlier in the week he had publicly announced to his colleagues in the Colorado legislative chamber that he would be flying down to Oklahoma's death chamber to witness the execution. In the event, Loyd LaFevers' execution was stopped by the courts a few hours before it was due because of new DNA evidence that cast doubt on the extent of his involvement in the crime. Senator Chlouber voiced outrage at the stay: "It's beyond me what's happening to the justice system and the courts when we let a convicted killer foul Oklahoma air for 15 years. And then right at the moment of execution, some court... grants more time. It's outrageous."[176]

In January 2001, with Loyd LaFevers once again scheduled to be executed, Senator Chlouber prepared to return to Oklahoma to witness the execution. "[The murder] was almost 16 years ago. And this guy has continued to live – and live very well – at taxpayers' expense. I mean, this guy should have been exterminated the next day. I would have been glad to do it for them, without hesitation. I think this trip should be dedicated to seeing this vicious murderer fly through the gates of hell, and I want to be there when he does."[177]

At LaFevers' clemency hearing on 29 January, Senator Chlouber urged the Oklahoma Pardon and Parole Board to "put this vicious, vile killer to death". The following day, clemency denied, the Senator witnessed the execution of Loyd LaFevers. Referring to the fact that LaFevers' co-defendant, Randall Cannon, remained on death row for the murder of Addie Hawley, Senator Chlouber said: "We take comfort in getting half way. I will – and I know the family will – not rest until the other half has earned that same extinction".[178]

Amnesty International is troubled by the Senator's comments, given his role as a government official.[179] Reference to Loyd LaFevers having lived at "taxpayers' expense" must be countered with the fact that it cost taxpayers far more to take Loyd LaFevers from the crime to the execution chamber than it would have to have sentenced him to life imprisonment. Moreover, reference to the prisoner having continued to live in comfort and

[176] *High court upholds stay of execution.* The Oklahoman, 9 March 2000.

[177] *Chlouber to see aunt's killer die*. Denver Post, 25 January 2001.

[178] *LaFevers shows no remorse.* McAlester News-Capital and Democrat, 31 January 2001.

[179] In his role as Senator, he has supported death penalty legislation in Colorado. See: *Failing the Future: Death penalty developments, March 1998 - March 2000*, page 10 (AMR 51/03/00, April 2000). He recently sponsored a bid to replace Colorado's three-judge sentencing panels with the trial judge in frustration at the panels' decision in some cases not to impose a death sentence. When the proposal was voted out by a Senate committee, Senator Chlouber's anger apparently led to a physical altercation with a fellow Senator who had voted against the measure. *Chlouber flares as death-sentence changes killed. Denver Post*, 20 March 2001.

to breathe Oklahoma air was inaccurate. For in Oklahoma, male death row inmates are housed in H-Unit of the State Penitentiary. There they breathe air-conditioned air laden with concrete dust, and live in conditions that violate the international prohibition on cruel, inhuman and degrading treatment.

Buried alive: Conditions for Oklahoma's condemned

"In McAlester, Oklahoma, they bury you before they kill you."[180]

John Wayne Duvall was executed in Oklahoma on 17 December 1998. His clemency petition noted: "Since November 1991, Mr Duvall has lived in the underground tomb known as H-Unit at Oklahoma State Penitentiary at McAlester. Except for a trip to court in 1992 and a trip to the hospital in 1996, John has not seen a blade of grass, a bird, a tree or anything of nature in these seven years. Except for those brief trips, John has not breathed real air in these seven years."

H-Unit, where Oklahoma's male death row population is housed, is constructed entirely of concrete with the living accommodation sited effectively underground. It is an electronically controlled facility designed to minimize contact between inmates and prison staff. Prisoners are confined for 23 or 24 hours a day in cells measuring 7' 7" (2.31m) wide by 15' 5" (4.70m) long by 8' 4" (2.54m) high. The walls, floors and ceilings are of unpainted concrete. Each cell has two concrete beds on either side of an uncovered toilet and sink. There is no other furniture in the cells apart from two concrete shelves on the back wall which serve as a "table" and two similar shelves above these. The cell doors are solid metal, except for the upper part which has a plexiglass window with thick bars on the outside. There are no windows to the outside world. There is no natural fresh air ventilation to the cells, which are air-conditioned through a pipe system in which air is passed in and out of two vents in the back of each cell.

About 95 per cent of the death row population in H-Unit are reported to be "double-celled", that is, two inmates are kept to a cell. Prisoners who are kept alone in cells are those who are considered to be a physical threat to other inmates, or unstable. For example, Tuan Anh Nguyen, who was executed on 10 December 1998, is one of the few prisoners to have been kept single-celled in recent years. His mentally disturbed state, which caused him to scream for prolonged periods, made cell sharing an impossibility.

[180] *Buried Alive.* SPIN magazine, October 1998

After visiting the unit in 1994, Amnesty International concluded that the conditions under which death row inmates were being held in H-Unit constituted cruel, inhuman and degrading treatment in violation of international standards.[181] This conclusion was based on a combination of factors, including the physical conditions inside the cells as well as the length of time prisoners are confined to them; the inadequate exercise yards; the isolation and lack of educational or other programs; and the fact that death row prisoners may be confined in such conditions for years, without regard to their individual behaviour. At the time, psychiatric and medical care in H-Unit was reported to be inadequate. A report released in March 1999 reportedly concluded that medical care in Oklahoma State Penitentiary "was so shoddy that paramedics and licenced practical nurses routinely – and illegally – acted as doctors", violating policy and endangering inmates.[182]

Thomas Hays, a 61-year-old severely mentally ill man, died in 1997 after 20 years on death row. He was the first person sentenced to death under Oklahoma's current laws, but in the mid-1980s he was found to be incompetent for execution. After death row transferred to H-Unit he was single-celled because of the severity of his illness. In December 1997, another inmate reportedly noticed that Hays's legs were very swollen, but realized that his mental condition prevented him from seeking assistance. After repeated requests, Thomas Hays was taken to the prison infirmary and thence transferred to hospital. He died two weeks later. His mother reportedly only learned of his illness after his death.

In a lawsuit filed on behalf of Ronald Williamson, a mentally ill man who was released in 1999 after he was proved to be innocent, the state is accused of "malicious and sadistic action" towards Williamson during his incarceration in H-Unit. The lawsuit charges that on occasion, Williamson was placed in one of the double-doored solitary confinement punishment cells (see below), "not because of any discipline problem, but as an alternative to providing any meaningful treatment for Ron Williamson's mental disorder." It alleges that prison employees "instituted restrictions and took actions calculated to sadistically cause Ron Williamson even more mental anguish than he already was experiencing". It accuses officials of acting "with deliberate indifference" to Williamson's mental illness, and of operating "a regular practice of employing unreliable and/or underqualified persons in mental health positions and maintained a staffing level – particularly in relation to death row – that was clearly inadequate to meet the mental health needs." In Williamson's case, the lawsuit alleges, this denial of adequate care resulted in "the extreme mental and physical suffering of Ron Williamson, to the point that on many occasions he screamed in agony practically all day, and became painfully emaciated."

[181] *Conditions for Death Row Prisoners in H-Unit, Oklahoma State Penitentiary.* AMR 51/34/94.

[182] *State penitentiary gave illegal care, report says.* Daily Oklahoman, 24 March 1999.

A Human Rights Watch delegate visited H-Unit in 1999. In a letter to Oklahoma's Director of Corrections, dated 19 June 2000, the organization wrote: "Human Rights Watch concurs with and fully endorses the findings of Amnesty International in its 1994 report... We find it deeply troubling that Amnesty's findings are as valid today as several years ago when the report was written; that is, there have been no significant changes in the conditions under which prisoners in the H-Unit live". The only improvement in recent months is reported to be in the area of better medical and psychiatric services.

The Human Right Watch letter stated that the cells "are too dark and too small. They would be inadequate for regular confinement, but are nothing short of cruel when prisoners must live in them, double celled, almost twenty-four hours a day for years. The cells are small, barren, unpainted and windowless concrete boxes sealed with solid steel doors... The two bare 60 watt light bulbs in the cell do not compensate for the absence of adequate natural light – and barely provide enough light for reading." The letter noted that there were said to be severely mentally ill inmates among H-Unit's population, and expressed concern that the conditions of confinement "can exacerbate their symptoms and cause further psychological deterioration."

Amnesty International is concerned by the response of the Director of the Department of Corrections to Human Rights Watch's letter. In it he says that the Department "has no intentions of responding to any concerns that you have with H-Unit.... I am not intending to be impolite, but your correctional philosophy and the correctional philosophy in the state of Oklahoma differs substantially, and there is no reason to initiate any further dialogue or correspondence."[183]

As of March 2001, there were about 120 men held on death row in H-Unit[184]. More than 40 of them had been housed there since the unit opened in November 1991, held in its cruel, inhuman and degrading conditions for nearly a decade.

Turning the screw: The pre-execution lockdown policy

Hours before Robert Brecheen was due to be put to death in August 1995, he overdosed on drugs. Prison officials rushed him to hospital to have his stomach pumped. He was then brought back to H-Unit, taken to the execution chamber and given a lethal injection. At that time, H-Unit policy was to strip-search and then transfer a prisoner to a holding cell next to the death chamber the day before his scheduled execution. Robert Brecheen's apparent suicide attempt, followed by the overdose suicide in early 1996 of another death row inmate,

[183] Letter from James L. Saffle, Director, Oklahoma Department of Corrections, 26 September 2000.

[184] Women under sentence of death in Oklahoma are held in Mabel Bassett Correctional Center in Oklahoma City. After the execution of Wanda Jean Allen on 11 January 2001, two women remained on death row there, 60-year-old Lois Nadean Smith and Marilyn Kay Plantz, aged 40. At the time of writing, Marilyn Plantz was scheduled for execution on 1 May 2001.

Russell Stiles, led to a change in the policy under which the state carried out its judicial killing.

In 1998 and 1999, when a prisoner received an execution date, he was moved to a special double-doored "high-max" punishment cell where he spent the final 60 days of his life in solitary confinement. Guards constantly checked on the prisoner to ensure that he remained unharmed until the day of execution. For example, John Wayne Duvall reported that during the first seven nights in the high-max cell, guards woke him up about 21 times per night. After that it was two to four times a night.

Duvall also reported that although it is only 10 feet (3m) between the exercise yard and the punishment cell, and the area is cleared of other inmates, he was handcuffed and shackled while moving to and from the yard. He would have to get onto the floor of his cell, extend his hands behind him through the food tray hole at the bottom of the cell door so that a guard on the other side of the door could handcuff his hands. His legs would then be shackled. The process was repeated on return from the yard.

In his seven years on death row there, Duvall was an exemplary prisoner who never had a single disciplinary action taken against him for a breach of prison rules. In his final 60 days he was punished for having an execution date.

Given the limited number of punishment cells and the growing number of prisoners receiving execution dates, it became impossible for the prison authorities to continue this shameful policy. Sixty days was reduced to 30 days, and now prisoners are reportedly put in the punishment cells seven days before their execution date. They are transferred to the "execution cell", directly outside the lethal injection chamber, 24 hours before their execution.

At death's door: The final safeguard of executive clemency

"*We are not unmoved by the Petitioner's dilemma... He is not completely without recourse, however, because he apparently still has access to Executive Clemency*". 10th Circuit Court of Appeals, 4 February 1998[185]

One year to the day after a federal court expressed considerable misgivings about Sean Sellers' death sentence, but said that it was beyond its reach to provide a remedy, the execution went ahead in violation of international law. The executive clemency which the court indicated the case merited was not forthcoming. The power to commute a death sentence in Oklahoma lies with the Governor, but only if the state Pardon and Parole Board

[185] *Sellers v Ward*, 4 February 1998. In upholding Sean Sellers' death sentence, the court stated that "even though his [mental] illness is such that he may be able to prove his factual innocence of those crimes, we believe he must be left to the avenue of executive clemency to pursue that claim."

recommends clemency.[186] The Governor can ignore such a recommendation, and can also issue a reprieve of up to 60 days.

[186] Three members of the Board are appointed by the Governor, one by the Chief Justice of the state Supreme Court and one by the Presiding Judge of the state Court of Criminal Appeals.

Amnesty International has long been concerned by evidence that the Oklahoma clemency process is heavily stacked against the prisoner. In a letter sent to the Pardon and Parole Board on 14 November 1991, the organization welcomed the Board's decision to hold its first clemency hearing, but expressed concern at remarks made by some board members. These comments suggested that the Board had voted to convene the hearing largely in order to expedite the prisoner's execution by avoiding a legal challenge based on the failure of the Board to hold such a hearing. Two of the Board members had voted not to hold a hearing at all.[187]

When the 10th Circuit court suggested in 1998 that the case of Sean Sellers merited a remedy from the executive branch of government that the judiciary had failed to provide, Governor Keating was reported to have responded that he would never give Sellers clemency. He had earlier reportedly indicated that he would not grant clemency to any prisoner convicted of murder.[188]

An insight into Governor Keating's current position was provided in 2000, when, in the first case of its kind in Oklahoma, he rejected the parole board's recommendation in a murder case that had resulted in life imprisonment without the possibility of parole. In a letter to the governor in 1998, the former LeFlore County District Attorney who prosecuted Cathy Sue Lamb for the 1991 shooting, had said that he did not believe justice had been served by Lamb's sentence which he said was "too harsh". At the clemency hearing in September 2000, the board recommended by three votes to two that the sentence be commuted to life with the possibility of parole. Relatives of the murder victim, backed by victims' rights groups, expressed their anger at the board's decision and campaigned against it, including by filing a lawsuit against the board. On 12 October, Governor Keating announced his rejection of the Board's recommendation. In a statement, it was clear that his decision had turned on a narrow question, namely "was Cathy Sue Lamb innocent of the crime for which she had been convicted?" He decided that the answer to this question was "absolutely not" and that therefore the jury's decision "must stand".[189] He also reportedly suggested that the Board may have made its recommendation because Cathy Lamb has been a model prisoner, commenting that "exemplary behaviour is not relevant. Every prisoner should be a model prisoner".[190]

[187] For a copy of Amnesty International's letter, see *USA: Death penalty developments in 1991* (AMR 51/01/92, February 1992). The case was that of Robyn Leroy Parks, who was executed on 10 March 1992.

[188] For example: "Keating has said several times that no murderer will receive clemency while he is in office..." (Daily Oklahoman, 24 July 1996); "the parole is subject to approval by Gov. Frank Keating, who has said that he will not approve clemency for people convicted of a violent crime in the past 10 years or anyone convicted of murder." (Tulsa World, 16 November 1995).

[189] *Governor Keating's statement on the Cathy Sue Lamb case*. News release, 12 October 2000.

[190] *Keating rejects lesser sentence for Lamb*. Tulsa World, 12 October 2000.

Then, in a landmark decision on 1 March 2001, the Pardon and Parole Board voted 4-1 to recommend clemency for Phillip Smith, scheduled for execution the following week. This was the first time since 1966 that it had made a favourable recommendation in a death penalty case.[191] Smith's lawyers had raised serious doubts about his guilt (see page 69). Governor Keating issued a 30-day stay of execution while he considered whether to accept the recommendation or not. On 2 April, he issued a second 30-day reprieve to give him more time to make his decision, which had not been announced at the time of writing.

Prisoners without a strong claim of innocence appear to remain unlikely to receive a vote for clemency from the Board. Those who petition for clemency receive a hearing before the Board at which witnesses testify for and against commutation. Voices against usually consist of a member of the Attorney General's office together with one or more members of the murder victim's family. Condemned prisoners may also plead for their life to be spared. They will appear in prison uniform with leg shackles, chains and handcuffs. Some choose not to subject themselves to what they see as a humiliating exercise with only one possible outcome.

The dehumanization of the person whom the state wishes to kill is crucial to maintaining support for the death penalty, and the state will need to continue this demonization for many years between trial and clemency hearing. For example, at the 1987 trial of Eddie Trice, who was executed on 9 January 2001, the prosecutor argued to the jury to return a death sentence: "This man is unique because he is without compassion; he is without human feelings; he is without love for his fellow human beings. Thank God he is different. Because he is different, he sits where he sits." Thirteen years later on 2 November 2000, an Assistant Attorney General urged the Pardon and Parole Board not to spare Eddie Trice's life. He described Eddie Trice as "evil" and said "Mr Trice is someone who has demonstrated over and over again he is someone who has an inability to comply with the rules of society, but that inability is a moral defect, not a mental one." The state needed to ensure that the Board members would not be swayed by the prisoner's expressions of remorse, expert psychological testimony about his childhood abuse and mental impairment (see page 59), and his appeal lawyer's exhortation to the Board members not to limit their consideration to Eddie Trice's crime, but to consider "what Eddie has become and what he could be".[192] The Board rejected clemency.

A year earlier, at the clemency hearing for Cornel Cooks, the prisoner spoke of his long-held remorse, about which he had not been allowed to tell his trial jury (see page 45).

[191] In 1966, the Board recommended clemency for Dallas Quinton Sharp, convicted of killing his wife in 1963. Governor Henry Bellmon accepted the recommendation. Sharp was released in 1988.

[192] In over 13 years on death row, Eddie Trice had a single disciplinary write-up. This occurred because on one occasion he refused to go back into his cell after he complained that the food portions were too small. After speaking to a higher official, however, he returned to his cell.

His appeal lawyer presented the Board members with reasons why her client should be allowed to live. For the state, Assistant Attorney General Bill Humes responded: "This morning you have heard from Mr Cooks' representatives. They have presented a myriad of reasons why they believe clemency should be recommended. Among those reasons offered: Mr Cooks' low intellectual functioning; the fact that he had a less than ideal childhood; the fact that he made the decision to use alcohol and drugs. It is plain that he is remorseful and that he received ineffective assistance of counsel at his trial. But let me tell you here and now, that if you believe these are adequate reasons for clemency, you should be prepared in the next year or so to grant or at least recommend clemency over and over and over. We estimate within the next year 15 to 20 people will come before you with death sentences, asking for clemency. I guarantee you, you will hear stories much like Cornel Cooks' from each and every one of them."

Plainly, as well as displaying a shocking tolerance for the inadequate legal representation of capital defendants, prosecutor Humes wanted the Board to view Cornel Cooks not as an individual with claims to clemency that were uniquely his own – which the Board could accept or reject on their own merits – but as one of a group defined only by their death sentences.[193] Amnesty International believes that his argument violated the spirit of the internationally-agreed right of a condemned prisoner to seek commutation of his or her death sentence, as stated in Article 6(4) of the International Covenant on Civil and Political Rights. It is self-evident that for this right to have any meaning, the clemency process must provide for a genuinely individualized approach for those who choose to make use of it. The Board duly steered clear of what Bill Humes had portrayed as a slippery slope of clemency, and voted 5-0 against sparing Cornel Cooks' life.

Three days later, the Board voted in the same vein, unanimously rejecting clemency for Bobby Lynn Ross. The Board had heard evidence that Ross was mentally disabled, and that his IQ had tested as low as 57 and no higher than 76, and that he functioned at the intellectual level of an eight to 13-year-old. His lawyer told the Board of Ross's long-held remorse, and the prisoner himself asked for forgiveness for his crime, the shooting of a police officer during a robbery. Seventeen years earlier he had confessed to the police, telling them that he "couldn't live no longer with it on my mind – taking another man's life just for some money." Ross was executed on 9 December 1999, a week after Cornell Cooks was put to death in the same lethal injection chamber. Between them, they had spent over 32 years on death row.

[193] See *Open Letter to Assistant Attorney General Humes, Oklahoma* (AMR 51/193/99, 2 December 1999). At the hearing, he also attacked appeals for clemency sent in to the Board by members of Amnesty International. He repeated his attack at the hearing for Dion Smallwood. He labelled the appeals as "political".

At Wanda Jean Allen's clemency hearing on 15 December 2000, the Board was asked to consider evidence of her learning disability. However, Assistant Attorney General Sandy Howard responded by arguing that Allen could not be mentally impaired because she had graduated from high school and had attended college for two years, earning a "degree or certificate". This was not true: Wanda Jean Allen dropped out of school at the age of 15. The clemency board voted 3-1 to reject clemency. After the hearing one of the Board members who had voted against clemency, reportedly referred to Allen's purported educational achievements, saying "I don't think institutions are handing out certificates to people who can't function".

The defence lawyers appealed to the courts, arguing that Allen had been denied a fair hearing because the board had been deceived into not giving full consideration to the mental disability evidence. The Attorney General's Office countered that it had been Allen who had claimed at her trial that she had completed school and earned the college certificate. This represented a U-turn in official attitude to Allen's trial testimony. At the trial, the state had depicted her as a remorseless liar in its efforts to persuade the jury to return a first-degree murder conviction.[194] Eleven years later, in order to ensure Allen's execution, it had decided that the parole board should take her words at face value. The appeal courts rejected the challenge to the clemency proceeding, and Wanda Jean Allen was executed on 11 January 2001.

Dorsie Jones was executed on 1 February 2001. He had killed Stanley Buck and injured two others in a shooting in a bar in Lawton on 14 August 1979. At his clemency hearing, the Board heard evidence that the prosecutor at Jones' trial, Robert Perrine, had not believed that the case warranted the death penalty**.** According to another prosecutor who worked with him during the 1980s, Perrine had intended to ask the Board to recommend clemency for Jones. However, Perrine died in 2000 from a heart condition.

Dorsie Jones himself suffered from heart disease and had been diagnosed with prostate cancer. He was 61 years old, having been on death row longer than any other Oklahoma inmate. He was said to be a model prisoner, with two disciplinary write-ups in 20 years, neither involving violent incidents. Nevertheless, arguing against commutation of his death sentence, an Assistant Attorney General suggested to the Board that there was always the possibility that a prisoner serving life imprisonment without parole could escape. And, referring to Jones's prison pastime of making wooden ship models, the official

[194] Evidence that Leathers had a history of violent conduct, and that she had stabbed a woman to death in Tulsa in 1979, was central to Allen's self-defence claim. Allen testified that she feared Leathers because she had boasted to her about the killing. The defence sought to corroborate this claim with testimony from Leathers' mother, whom Leathers had told about the stabbing. However, the prosecution objected, and the court prohibited the introduction of any such testimony. Although the state knew about the Tulsa stabbing, the prosecutor told the jury: "Regardless of how many times [the defence] tells you that Gloria Leathers... killed someone... that's just from the defendant's mouth alone that you heard that testimony. Please remember that, from the defendant's mouth alone that you heard that testimony." The prosecutor had already depicted Allen as a remorseless liar.

countered: "Yes, he's a wonderful ship builder", but even if he made "a whole fleet of ships", it would still not erase his crime.

The power to commute death sentences has long been regarded as an important function of the executive prerogative of mercy. By its very nature, executive clemency has a role in mitigating sentences which have been legally imposed by the courts but are unduly harsh. In exercising its discretion, the executive is not bound by the rules of the courts, but may take a wider range of factors into account. Furthermore, where state laws fall short of international standards relating to the death penalty, the executive authorities cannot disclaim all responsibility for meeting these standards.

Since 1990, when Oklahoma resumed executions after 24 years, there have been executive commutations of death sentences in Alabama, Arkansas, Georgia, Idaho, Illinois, Maryland, Missouri, North Carolina, Ohio, Texas and Virginia. The reasons for clemency have been varied and have included: possible innocence, the defendant's mental impairment, inadequate legal representation, rehabilitation of the prisoner, juror coercion during sentencing, the defendant's possible lesser role in the crime, and the personal convictions of the governor.[195]

In the past 10 years the Oklahoma Pardon and Parole Board has not been persuaded by petitions for clemency based on remorse, rehabilitation, mental impairment, arbitrariness, international law, morality or inadequate legal representation. Given the Board's recent decision in the Phillip Smith case, itself perhaps a reflection of the current heightened concern in the USA about the potential for wrongful capital convictions, it seems that in Oklahoma clemency is only a possibility for someone who has a strong claim of innocence. At the time of writing, it was still not known if Governor Keating shared the Board's view of the Smith case. In any event, it is surely time for the Oklahoma clemency authorities to broaden their view of justice and to begin to consider questions of culpability, fairness, and human dignity, and to reflect upon their involvement in a policy that takes to refined, calculated heights what it seeks to condemn – the deliberate taking of human life.

Conclusion: Time to reject the habit of a lifetime

"*Oklahoma is positioned to capitalize on an economy that is global in nature, and changing quickly due to the evolution of technology. Come change with us - Oklahoma offers a superior business climate, low business costs, and our quality of life is exceptional. It's a business decision that just makes sense*." Governor Frank Keating[196]

[195] For a list of prisoners granted clemency since 1977, see www.deathpenaltyinfo.org/clemency

[196] Oklahoma Department of Commerce website. Message from the Governor.

The State of Oklahoma seems to want it both ways. It wants to reap the benefits of economic globalization, but at the same time be allowed to ignore global human rights standards. It wants to take advantage of modern technology to improve its quality of life, but also to modernize its machinery of death. It stakes a claim for itself as a 21st century state, and yet clings doggedly to a punishment that belongs to centuries now past.

Old habits die hard. In 1972 the US Supreme Court presented the country's politicians with the opportunity to lead their citizens away from the death penalty. Oklahoma's leaders were among those who barely drew breath before rewriting a new set of capital laws. From there, they have continued to lead Oklahoma further away from evolving international standards of justice and decency. In his *State of the State* address of 5 February 2001, Governor Keating said of Oklahoma: "We have Pulitzer Prize winners. And we have scholars and we have athletes and we have entertainers and we have the greatest number of astronauts of any state in the union." He failed to mention that Oklahoma's executioners were among the most active in the USA, were currently executing at a greater per capita rate than most countries, or that in the four weeks leading up to his speech, they had killed more prisoners than in any equivalent period in the state's history.

Oklahoma's commitment to judicial execution is mirrored by the begrudging audience it offers to the condemned's pleas for clemency. It manages to compound the cruelty of the death penalty by warehousing condemned prisoners in the international standard-breaking conditions of H-Unit of the State Penitentiary. Its prosecutors seem keen to push the boundaries of professional behaviour, from posturing about pursuing the death penalty against 15-year-olds, to encouraging juries to pass death sentences out of vengeance. Their conduct comes with a high price, not just in terms of the financial and emotional cost of repeated proceedings needed to remedy their errors, but also in the risk it poses to the rule of law and respect for human rights.

In 1999, Judge Chapel of the Court of Criminal Appeals wrote of his concern about the Court's rejection of an appeal by a Mexican national, Jose Flores. One of the issues was that Flores was not informed of his right, under the Vienna Convention on Consular Relations, to contact his consulate for assistance after arrest. "In my judgement", Judge Chapel wrote, "the decision of this Court in this case, and the decision of the United States Supreme Court, puts US citizens travelling abroad at risk of being detained without notice to US consular officials. Why should Mexico, or any other signatory country, honor the Treaty if the US will not enforce it? The next time we see a *60 Minutes* piece on a US citizen locked up in a Mexican jail without notice to any US governmental official we ought to remember these cases."[197]

[197] *Flores v State*, 1999. Jose Flores, convicted of first-degree murder, is serving a sentence of life imprisonment without parole. Tulsa County had pursued the death penalty in the case, but later dropped it.

While the USA's failure to respect treaty safeguards in the area of foreign nationals facing death sentences causes particular diplomatic friction, the repeated flouting of international standards and world trends on the death penalty more generally continues to cause the USA's image abroad to deteriorate. Oklahoma's use of the death penalty – including against the mentally impaired, children, the inadequately represented – displays all the characteristics of a punishment undermining the international reputation of the USA in this way. As such, Oklahoma remains a part of the problem. It could choose to be part of the solution.

One possibility is that the State of Oklahoma will react to Amnesty International's charge that it is behind the times by saying that the death penalty is a domestic matter for the people of Oklahoma to decide through the ballot box. At the same time the majority of those in positions of power will offer little or nothing in the way of public education about world trends, international human rights standards, or the huge costs of the death penalty. The state may claim that it has improved its system of legal representation for capital defendants, while at the same time opposing judicial remedies for those whose legal representation fell below international standards. It may claim that instances of prosecutorial misconduct are the exception rather than the rule, and that its officials are simply carrying out their jobs with vigour. It may submit that it is constitutional to execute people with mental illness, mental retardation, or those who commit crimes when still children, while leaving unanswered why so much of the rest of the world adheres to higher standards of justice. It may assert that the release of wrongly condemned individuals and the high rate of reversal in capital cases is a sign of the system working rather than further evidence of a broken system. It will likely refuse to acknowledge the ever-present risk of irreversible error, while continuing to voice support for a swifter appeals process. Perhaps the authorities might even accuse Amnesty International of making excuses for violent crime and belittling the suffering of those who have lost relatives and friends to murder, while denying that the state itself is participating in a cycle of violence and creating more victims.

There is a second possibility. The State of Oklahoma could choose to reject the habit of a lifetime. It could declare a moratorium on executions and begin to work towards abolition.

Amnesty International urges it to embrace this second option and join the modern world.

Recommendations

Amnesty International opposes the death penalty in all cases, and campaigns worldwide for the total abolition of this ultimate cruel, inhuman and degrading punishment wherever it is retained. The organization believes that no amount of tampering with the machinery of death

can cure capital punishment of its inherent cruelty, its tendency to be applied in an arbitrary and discriminatory manner, and the inescapable risk of its imposition on the innocent.

Pending abolition, Amnesty International seeks full adherence to the internationally-agreed safeguards and restrictions that govern the use of the death penalty. The organization believes that all political leaders should take every opportunity to use their power and influence to further the goal of worldwide abolition, as envisioned in the Universal Declaration of Human Rights and subsequent international human rights instruments, and in keeping with the stated goals of the United Nations General Assembly.

This report is directed primarily at the Oklahoma governor and the state legislature. Amnesty International recognizes that there is currently little support within Oklahoma's leadership for a moratorium on executions, but it is the organization's hope that this report will contribute to officialdom's deliberations on this fundamental human rights issue. For his part, Governor Keating has said that, "lacking any evidence that Oklahoma's capital punishment statutes are applied unfairly in any way, I will not seek or order a moratorium". Amnesty International also therefore hopes that this report will contribute to the governor's ongoing consideration of the fairness of the application of the death penalty in his state.

Amnesty International calls on the State of Oklahoma to impose a moratorium on executions with a view to abolition. Pending abolition, it urges the state:

- to ensure that the death penalty is not imposed or carried out on a defendant who was under 18 years old at the time of the crime, and to legislate to remove life imprisonment without the possibility of parole as a sentencing option against this group of defendants;
- to ensure that the death penalty is not imposed or carried out on a defendant who is assessed as having mental retardation;
- to ensure that the death penalty is not imposed or carried out on a defendant who suffers from mental illness, including schizophrenia and bipolar disorder;
- to strengthen competency procedures, as well as the training of judges, prosecutors and defence lawyers, to ensure that all mentally impaired defendants are recognized as such as early as possible, and exempted from the death penalty;
- to ensure that all defendants have adequate legal representation at all stages of proceedings, above and beyond the protection afforded in non-capital cases;
- to request the Attorney General not to challenge appeal court decisions finding inadequate legal representation for capital defendants;
- to ensure that the death penalty is not carried out in any case where there is any doubt at all about the defendant's guilt, in line with international safeguards;
- to ensure that all arresting authorities are made aware of their duty to inform foreign nationals promptly upon arrest of their right to seek consular assistance, in line with US treaty obligations, and to ensure that this duty is enforced;

- to ensure that all judges, prosecutors and defence lawyers in Oklahoma are aware of and kept informed about all international standards relating to the death penalty;
- to request the members of the Pardon and Parole Board to broaden their criteria for recommending clemency in capital cases, so that circumstances beyond the facts of the crime and the correctness of the legal proceedings are taken into account, including international human rights standards;
- to set up a program of public education on the death penalty, which includes information about alternatives, world trends, international standards, the death penalty's costs to society, its failure as a deterrent, and its brutalizing effect;
- to urgently review the custody arrangements for prisoners in H-Unit of Oklahoma State Penitentiary in order to eliminate those conditions which violate international standards, in line with the recommendations made by Amnesty International in 1994.

Appendix 1: Oklahoma executions, from 1977 to 31 March 2001

Defendant	Race	Crime	Ex'd	Victims whose murder led to execution	Race
Charles Coleman	W	1979	1990	John Seward	W
Robyn Parks	B	1978	1992	Abdullah Ibrahim	A
Olan Robison	W	1980	1992	Sheila Lovejoy, Robert Swinford, Averil Bourque	WWW
Thomas Grasso*	W	1990	1995	Hilda Johnson	B
Roger Stafford	W	1978	1995	Melvin, Linda and Richard Lorenz	WWW
Robert Brecheen	W	1983	1995	Marie Stubbs	W
Benjamin Brewer	W	1978	1996	Karen Stapleton	W
Steven Hatch	W	1979	1996	Richard and Marilyn Douglass	WW
Scott Carpenter*	N	1994	1997	A.J. Kelley	W
Michael Long*	W	1987	1998	Sheryl and Andrew Graber	WW
Stephen Wood*	W	1994	1998	Robert Brigden	W
Tuan Ahn Nguyen	A	1982	1998	Joseph and Amanda White	WW
John Duvall	W	1986	1998	Karla Duvall	W
John Castro	N	1983	1999	Beulah Cox	W
Sean Sellers	W	1985	1999	Paul and Vonda Bellofatto, Robert Bower	WWW
Scotty Moore	W	1983	1999	Alex Fernandez	A
Norman Newsted	W	1984	1999	Larry Buckley	W
Cornel Cooks	B	1982	1999	Jennie Ridling	W
Bobby Ross	B	1983	1999	Steven Mahan	W
Malcolm Johnson	B	1981	2000	Ura Alma Thompson	W
Gary Walker	W	1984	2000	Eddie Cash	W
Michael Roberts	B	1988	2000	Lula Mae Brooks	B
Kelly Rogers	B	1990	2000	Karen Lauffenburger	W
Ronald Boyd	B	1986	2000	Richard Riggs	W
Charles Foster	B	1983	2000	Claude Wiley	B
James Robedeaux	N	1985	2000	Nancy Lee McKinney	W
Roger Berget	W	1985	2000	Rick Patterson	W
William Bryson	B	1988	2000	James Plantz	W
Gregg Braun	W	1989	2000	Gwendolyn Sue Miller	W
George Wallace	W	1990	2000	William Domer, Mark McLaughlin	WW
Eddie Trice	B	1987	2001	Earnestine Jones	B
Wanda Jean Allen	B	1988	2001	Gloria Leathers	B
Floyd Medlock	W	1990	2001	Katherine Ann Busch	W
Dion Smallwood	H/N	1992	2001	Lois Frederick	W
Mark Fowler	W	1985	2001	Rick Cast, John Barrier, Chumpon Chaowasin	WWA
Billy Ray Fox	N/W	1985	2001	Rick Cast, John Barrier, Chumpon Chaowasin	WWA
Loyd LaFevers	W	1985	2001	Addie Hawley	W
Dorsie Jones	W	1979	2001	Stanley Buck	W
Robert Clayton	N	1985	2001	Rhonda Timmons	W
Ronald Fluke*	W	1997	2001	Ginger Fluke, Kathryn Fluke, Susanne Fluke	WWW

* Dropped appeals against death sentence
A = Asian / B = Black / H = Hispanic / N = Native American / W = White

Scheduled for execution at time of writing

1 May 2001 - Marilyn Plantz
22 May 2001 - Terrance James
29 May 2001 - Vincent Johnson

Appendix 2. Death penalty statistics for states which have executed since 1977

State	1995 Population (million)	Year death penalty (DP) reintro'd	Murders (M) from DP reintro to end of 1999	Death Sentences (DS) to end of 1999	Executions (EX) from 1977 to 31/03/2001	Ratio of DS to M	National ranking		
							DS:M	per capita	
								DS	EX
Alabama	4.25	1976	10635	314	23	1 in 34	6=	3	9
Arizona	4.22	1973	7539	223	22	1 in 34	6=	8	11
Arkansas	2.48	1973	6533	94	23	1 in 70	21	13	5
California	31.6	1973	78203	722	9	1 in 108	27=	21	27
Colorado	3.75	1975	4714	17	1	1 in 277	34	33	28
Delaware	0.72	1974	858	40	11	1 in 22	1=	7	1
Florida	14.17	1973	32112	821	51	1 in 39	8	6	12
Georgia	7.2	1973	19286	289	23	1 in 67	20	12	13
Idaho	1.16	1973	953	37	1	1 in 26	3	15	22
Illinois	11.83	1974	29553	273	12	1 in 108	27=	19	21
Indiana	5.8	1973	10566	92	8	1 in 115	29	25	20
Kentucky	3.86	1975	6957	71	2	1 in 98	26	23	26
Louisiana	4.34	1973	17176	196	26	1 in 88	23	9	7
Maryland	5.04	1975	11609	48	3	1 in 242	33	30	24
Mississippi	2.7	1974	8034	163	4	1 in 49	10	5	19
Missouri	5.32	1975	11645	158	48	1 in 74	22	17	6
Montana	0.87	1974	831	15	2	1 in 55	14	24	16
Nebraska	1.64	1973	1435	24	3	1 in 60	16	28	18
Nevada	1.53	1973	3400	127	8	1 in 27	4	2	10
North Carolina	7.2	1977	14002	468	17	1 in 30	5	4	15
Ohio	11.15	1974	17572	351	1	1 in 50	11	16	31
Oklahoma	**3.3**	**1973**	**6557**	**294**	**40**	**1 in 22**	**1=**	**1**	**4**
Oregon	3.14	1978	2818	46	2	1 in 61	17	27	23
Pennsylvania	12.07	1974	18238	323	3	1 in 57	15	18	29
South Carolina	3.67	1974	8851	163	25	1 in 54	12=	10	7
Tennessee	5.26	1974	12217	192	1	1 in 64	19	14	30
Texas	18.72	1974	51148	829	244	1 in 62	18	11	2
Utah	2	1973	1401	26	6	1 in 54	12=	29	14
Virginia	6.62	1975	11862	123	82	1 in 96	24=	22	3
Washington	5.43	1975	5535	34	3	1 in 163	32	31	25

Wyoming	**0.48**	**1977**	**497**	**11**	**1**	**1 in 45**	**9**	**20**	**17**

Appendix 3: States which allow for the death penalty, but have not carried out any executions since 1977

State	1995 Population (million)	Year death penalty (DP) reintro'd	Murders (M) from DP reintro to end 1999	Death Sentences (DS) to end of 1999	Ratio of DS to M	National ranking	
						DS:M	DS percapita
Connecticut	**3.28**	**1973**	**3943**	**7**	**1 in 563**	**36**	**35**
Kansas	**2.57**	**1994**	**968**	**3**	**1 in 323**	**35**	**36**
New Hampshire	**1.15**	**1991**	**190**	**0**	**----------**	**38**	**38**
New Jersey	**8**	**1982**	**6987**	**48**	**1 in 146**	**31**	**32**
New Mexico	**1.7**	**1979**	**3261**	**26**	**1 in 125**	**30**	**26**
New York	**18.14**	**1995**	**5823**	**8**	**1 in 728**	**37**	**37**
South Dakota	**0.73**	**1979**	**287**	**3**	**1 in 96**	**24=**	**34**

Source for tables: Death sentencing totals from US Department of Justice. Murder totals compiled from Federal Bureau of Investigation statistics.

Appendix 4: Abolitionist states/jurisdictions

Jurisdiction	Last execution
Alaska	**1950**
Hawaii	**None since statehood**
Iowa	**1962**
Maine	**1887**
Massachusetts	**1947**
Michigan	**None since statehood (1836)**
Minnesota	**Unknown. Death penalty abolished 1911**
North Dakota	**1930, at least**
Rhode Island	**1930, at least**
Vermont	**1954**
West Virginia	**early 1950s**
Wisconsin	**1851**
District of Columbia	**1957**

Source: Death Penalty Information Center