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UNITED STATES OF AMERICA

Death by discrimination - the continuing role of race in capital cases

“We simply cannot say we live in a country that offers equal justice to all Americans when racial disparities plague the system by which our society imposes the ultimate punishment.” US Senator, January 2003¹

Introduction

The USA will soon carry out its 300th execution of an African American prisoner since resuming judicial killing in 1977. By 10 April 2003, 290 blacks had been put to death, and at least a further 10 were scheduled to be killed by the end of July. African Americans are disproportionately represented among people condemned to death in the USA. While they make up 12 per cent of the national population, they account for more than 40 per cent of the country's current death row inmates, and one in three of those executed since 1977.

While the United States resorts to the death penalty more than most countries – it has carried out well over 700 executions since 1990 – it is also the case that only a small percentage of murders result in execution in the United States. It is relevant, therefore, to ask if the capital justice system selects these defendants for death in a manner that is free from racial bias.

On 18 March 2003, two African American men were executed. The two people for whose murder Louis Jones and Walanzo Robinson were killed – Tracie McBride, white, and Dennis Hill, black – were among some half a million people murdered in the USA since 1977. Blacks and whites were the victims of these murders in almost equal numbers.² Yet 80 per cent of the people executed since 1977 were convicted of murders involving white victims.

Most murders in the USA are intra-racial, that is, the alleged perpetrator and the victim are of the same race, as in Walanzo Robinson's case.³ Yet of the 845 prisoners executed between 17 January 1977 and 10 April 2003, 53 per cent were whites convicted of killing whites and 10 per cent were blacks convicted of killing blacks.⁴

Federal death row inmate Louis Jones became the 183rd African American to be executed in the USA since 1977 for the murder of a white person (22 per cent of all executions). In the same period, 12 whites were put to death for the murder of blacks (1.4 per cent of executions).

¹ Senator Russ Feingold on Civil Rights as a Priority for the 108th Congress, Senate, 9 January 2003.

² Of the 492,852 murders between 1976 and 1999, 51 per cent were of whites and 47 per cent were of blacks. *Homicide trends in the US. Trends by race.* Bureau of Justice Statistics.

³ Between 1976 and 2000, 86 per cent of white murder victims were killed by whites, and 94 per cent of black murder victims were killed by blacks.

⁴ *Death Row USA, Winter 2003.* NAACP Legal Defense and Educational Fund, Inc. Updated by AI.

At least one in five of the African Americans executed since 1977 had been convicted by all-white juries, in cases which displayed a pattern of prosecutors dismissing prospective black jurors during jury selection. Louis Jones and Walanzo Robinson, like yet many other black defendants, were sentenced to death by juries made up of 11 whites and one African American. In both cases, as has happened on other occasions, the solitary black juror later alleged that he or she had been singled out for heavy pressure from their fellow jurors in order to get them to change their vote from life to death.

It is over eight years since the United States ratified the Convention on the Elimination of All Forms of Racial Discrimination, thereby committing itself to work against racial discrimination, including its effects in the criminal justice system. In general, courts and legislatures in the USA have failed to act decisively in the face of evidence that race has an impact on capital sentencing, perhaps out of a collective blind faith that “America will always stand firm for the non-negotiable demands of human dignity”, including “equal justice”, as President Bush has asserted.⁵

This paper, which builds on a 1999 Amnesty International report,⁶ outlines recent studies indicating that race, particularly race of victim, continues to play a role in who is sentenced to death in the USA. Illustrated with cases throughout, it notes under-representation of minority jurors in capital trials, including those where the state appears to have unfairly removed black jurors during jury selection. It outlines recent research into the attitudes of capital jurors suggesting that conscious or unconscious racism can infect juror decision-making. It notes the failure of the federal authorities to offer remedial leadership on the issue of racial bias in the capital justice system, and also discusses the possible links between race and the error-prone nature of the US capital justice system. It points out that executive clemency cannot be depended upon to prevent fatal errors and arbitrariness.

A clear majority of countries have abolished the death penalty in law or practice, leaving the USA out of step on this fundamental human rights issue. The death penalty in the United States remains an act of racial injustice as well as one which extends the suffering of one family – that of the murder victim – to another, the loved ones of the condemned prisoner. Abolition is the only solution to this cruel, inhuman, degrading and irrevocable punishment.

The *McCleskey* obstacle

“To prevail under [the Equal Protection] Clause, petitioner must prove that the decision-makers in his case acted with discriminatory purpose... Because discretion is essential to the criminal justice process, exceptionally clear proof is required before this Court will infer that the discretion has been abused.” US Supreme Court, *McCleskey v Kemp* (1987).

A defining moment on this issue came in 1987, when the US Supreme Court rejected the appeal of Warren McCleskey, an African American man condemned to death in Georgia for the murder of a white police officer. The Justices had been presented with a detailed study

⁵ President George W. Bush. State of the Union address, 29 January 2002.

⁶ *Killing with prejudice: Race and the death penalty in the USA* (AI Index: AMR 51/52/99, May 1999).

showing that defendants who killed whites in Georgia were more than four times more likely to be sentenced to death than those who killed non-whites, a probability that was even higher if the defendant was black and the victim white. A majority of Justices held that “apparent disparities in sentencing are an inevitable part of our criminal justice system”, and that for a defendant to be successful in an appeal, he or she would have to provide “exceptionally clear proof” that the decision-makers in his or her particular case had acted with discriminatory intent.⁷ Warren McCleskey was executed in 1991. There have been nearly 700 more executions in the USA since then, 80 per cent of them for murders involving white victims.

Dissenting from the *McCleskey* majority, Justice Brennan wrote: “[W]e cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey’s evidence confronts us with the subtle and persistent influence of the past... [W]e ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.” Justice Powell, who authored the 5-4 decision, said after he retired from the Court that he wished he had voted differently in the 1987 ruling, and that he had come to think that the death penalty should be abolished.⁸ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, in his 1998 report on the USA, suggested that the *McCleskey* decision may be incompatible with the country’s obligations under the Convention on the Elimination of All Forms of Racial Discrimination, “which requires States parties to take appropriate steps to eliminate both direct and indirect discrimination”.⁹

The *McCleskey* ruling placed a huge obstacle in the way of defendants seeking to challenge their death sentences on the basis of evidence of racial discrimination in sentencing. In 1994, Girvies Davis, a black man convicted by an all-white jury of the murder of a white victim, appealed on the basis of a study indicating that the murder of a white in Illinois was about six times more likely to lead to a death sentence than the murder of a black, and that a black defendant accused of killing a white was 3.75 times more likely to be sentenced to death than a white charged with killing another white person. The federal court wrote that “our analysis begins and ends with *McCleskey v Kemp*”, and rejected the appeal.¹⁰ Davis was executed in 1995. The following year, the Missouri Supreme Court rejected statistical and anecdotal evidence of county-level prosecutorial discrimination, stating that the defendant had failed to show “purposeful discrimination or any effect on his case, specifically”.¹¹ In 1997, the South Carolina Supreme Court ruled that death row inmate Raymond Patterson had “not proven discriminatory purpose by exceptionally clear evidence”. Patterson, an African American convicted of the murder of a white man, raised evidence of bias, including that the county prosecutor had sought the death penalty in 13 of the 128 cases involving white victims and none of the 44 cases involving black victims. He also raised other evidence, including of the exclusion of blacks from juries.¹² In 1999, the Oklahoma Court of Criminal Appeals similarly

⁷ *McCleskey v Kemp*, 481 U.S. 279 (1987).

⁸ John C. Jeffries, *Justice Lewis F. Powell, Jr.: A biography*. (1994).

⁹ E/CN.4/1998/68/Add.3, para 65.

¹⁰ *Davis v Greer*, 13 F. 3d 1134, US Court of Appeals for the Seventh Circuit, 13 January 1994.

¹¹ *State v Taylor*, 929 S.W. 2d 209, Missouri Supreme Court, 1996.

¹² Blume et al. *Post-McCleskey racial discrimination claims in capital cases*. Cornell L. Rev, 1998.

rejected a claim brought by Billy Alverson, a black man convicted by all-white jury, holding that he could not show that he had been the victim of any discrimination specific to his case.¹³

Today, the *McCleskey* ruling remains an obstacle to progress. For example, in October 2001, the US Court of Appeals for the Sixth Circuit acknowledged that the disparities on Ohio's death row were "extremely troubling", but wrote that "*McCleskey* remains controlling law on the ability of statistically-based arguments concerning racial disparity to establish an unconstitutional application of the death penalty. Although the racial imbalance in the State of Ohio's capital sentencing system is glaringly extreme, it is no more so than the statistical disparities considered and rejected by the Supreme Court in *McCleskey*".¹⁴

The *McCleskey* decision had said that the issue of death penalty bias was a matter "best presented to the legislative bodies". In 1994, however, an attempt to introduce a national Racial Justice Act, which would have allowed defendants to challenge their death sentences by producing statistical evidence of racial discrimination in the judicial process, failed. To date, Kentucky is the only state to have enacted a Racial Justice Act, which it did in 1998.

Many legislators are still failing to grasp the nettle. On 18 March 2003, Senators in Maryland rejected legislation to impose a moratorium on executions there in light of research indicating that the race of the murder victim played a significant role in capital sentencing. Opponents of the bill included one Senator who had argued, in words that echoed the *McCleskey* majority, that "the system is as fair as it possibly can be. Unfortunately, there are disparities".¹⁵ All of the African American members of the Senate voted to approve the moratorium. All 14 of the Republican Senators voted against the bill.¹⁶

The evidence of bias continues to mount

"They point to the potentially arbitrary application of the death penalty, adding that the race of the victim and socio-economic factors seem to matter". US Supreme Court Justice, 2002¹⁷

Racial disparities can be seen throughout the criminal justice system in the USA. While African Americans make up 12 per cent of the country's population, they accounted for 48 per cent of all inmates in state or federal prisons and local jails on 30 June 2002. On that day, over 12 per cent of black males between the ages of 25 and 34 were incarcerated compared to 1.6 per cent of white males in that age group. The Justice Department's chief prison demographer described the proportion of young black males in prison or jail as "very dramatic". During a lifetime, the rates are even higher. The Bureau of Justice Statistics has estimated that 28 per cent of black men will be sent to jail or prison during their lives.¹⁸

¹³ *Alverson v State*, OK CR 21 (1999).

¹⁴ *Coleman v Mitchell*, 2001 FED App. 0367P (6th Cir.), 10 October 2001.

¹⁵ *Maryland Senators to Debate, but unlikely to pass, bill.* Washington Post, 7 March 2003.

¹⁶ *Death penalty freeze rejected.* Baltimore Sun, 19 March 2003.

¹⁷ *Ring v Arizona*, 000 US 01-488 (2002), Justice Breyer concurring in the judgment.

¹⁸ *Prison and jail inmates at midyear 2002.* Bureau of Justice Statistics, April 2003. And *Prison rates among blacks reach a peak, report finds.* New York Times, 7 April 2003.

In its report on the USA released on 14 August 2001, the United Nations Committee on the Elimination of Racial Discrimination, the expert body established by the Convention on the Elimination of All Forms of Racial Discrimination to oversee implementation of that treaty, expressed its concern at such disparities in incarceration rates. Noting the socio-economic marginalization of a significant part of the African American and other minority communities, the Committee urged the authorities “to ensure that the high incarceration rate is not a result of the economically, socially and educationally disadvantaged position of these groups.”¹⁹

The Committee also expressed its concern at the “disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty”. It urged the US authorities “to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted persons.”²⁰

African Americans account for 43 per cent of the USA’s current 3,700 death row inmates and about 34 per cent of prisoners executed since 1977.²¹ However, especially since the US Supreme Court outlawed the death penalty for the rape of an adult woman – a combination of crime and punishment with an extraordinary history of discrimination against black men – it is the identity of the murder victim which provides the clearest indication that race remains an ingredient of capital sentencing.²²

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 the result that blacks and whites are the victims of murder in about equal numbers. Yet, 80 per cent of the more than 840 people put to death in the USA since 1976 were convicted of crimes involving white victims, compared to the 13 per cent who were convicted of killing blacks. Less than four per cent of the executions carried out since 1977 in the USA were for crimes involving Hispanic victims. Hispanics represent about 12 per cent of the US population. Between 1993 and 1999, the recorded murder rate for Hispanics was more than 40 per cent higher than the national homicide rate.²³

Such statistics alone do not prove bias in the justice system, and could reflect patterns of offending relating to wider social inequalities. However, studies have consistently indicated that race, particularly the race of the murder victim, influences capital sentencing in the USA,

¹⁹ A/56/18, para 395.

²⁰ *Id.* para 396.

²¹ This execution figure might have shown an even greater disparity but for the phenomenon of “consensual” executions, whereby the prisoner rejects his or her appeals. Around 90 per cent of the approximately 100 prisoners who have done this since 1977 have been white. If they had continued their appeals, given the rate of error in capital cases, some would likely have got relief in the courts.

²² The US Supreme Court outlawed the death penalty for the rape of an adult woman in 1977 in *Coker v Georgia* on the grounds of disproportionality. It did not mention race in its decision, even though five years earlier, in the ruling (*Furman v Georgia*) which overturned all death penalty laws in the USA, Justice Marshall noted that of the 455 executions for rape since 1930, 405 (89%) were of blacks. In the vast majority of cases the rape victim was a white woman.

²³ *Hispanic victims of violent crime, 1993-2000*. Bureau of Justice Statistics, April 2002.

even after other factors have been taken into account. In 1990, the US General Accounting Office reviewed 28 such studies that had been conducted around the country. It concluded that “in 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.”²⁴

In 1994, a US Supreme Court Justice wrote: “Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.”²⁵ Four years later, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions expressed his concern that “the imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death.”²⁶ The evidence has continued to mount since then.

North Carolina

Harvey Green, black, was put to death in North Carolina in 1999 for the murder of two white people in Pitt County in 1983. He became the only person to be executed for a crime committed in the state in 1983, although there were 550 other murders there that year. In Pitt County, there were 11 murders; in nine cases the victims were black. Harvey Green’s was the only case in which the state sought the death penalty. From 1983 to 1992, there were 88 murders in Pitt County. Over two-thirds of the victims were black. Only four murders were inter-racial. The state sought death in all three cases involving white victims and black defendants. It did not do so in the white-on-black killing. In all four cases in which Pitt County juries returned death sentences between 1983 and 1992, the defendants were black.

In 2001, the most comprehensive study on capital sentencing ever conducted in North Carolina found that “racial factors – specifically the race of the homicide victim – played a real, substantial, and statistically significant role in determining who received death sentences in North Carolina during the 1993-1997 period. The odds of receiving a death sentence rose by 3.5 times among those defendants (of whatever race) who murdered white persons”.²⁷ About 40 per cent of murder victims in North Carolina are white, yet since resuming executions in 1984, the state has executed 23 inmates, 21 (91 per cent) of them for the murder of white victims. The population of North Carolina is 72 per cent white, and 21.5 per cent black. Its death row population is 55 per cent black, and 39 per cent white.

The most recent execution in North Carolina was on 10 December 2002, Human Rights Day. Desmond Carter, black, was put to death for the murder of a white woman. He was sentenced

²⁴ *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990).

²⁵ *Callins v Collins*, 1994, Justice Blackmun dissenting.

²⁶ E/CN.4/1998/68/Add.3, para 148.

²⁷ *Race and the death penalty in North Carolina: An empirical analysis: 1993-1997*. The Common Sense Foundation, North Carolina Council of Churches, 16 April 2001.

to death in July 1993 in Rockingham County, where more than half of murder victims are African American. In the county's murder cases which have resulted in death sentences, seven of the eight murder victims were white.

South Carolina

In 2002, South Carolina death row inmate Anthony Green appealed to the Inter-American Commission on Human Rights (IACHR) on the grounds of racial bias in the state's capital justice system. The appeal cited research that indicated that "in black defendant/white victim cases, the death-sentencing rate is 67.8 death sentences per 1000 homicides (50 death sentences per 738 murders). In white defendant/white victim cases, the death sentencing rate is 37.1 death sentences per 1000 homicides (72 death sentences for 2,654 murders)."

The appeal to the IACHR claimed that although "most murder victims in South Carolina are African-Americans, only 0.46% of African-American victim cases result in death sentences, whereas 3.4% of white victim cases result in the death penalty." The claim said that the disparity was even greater in Charleston County, where Anthony Green was tried. There, it was claimed, the state was 20 times more likely to seek the death penalty in a case involving a black defendant and white victim compared to cases where the victim was African American.

Earlier, Earl Matthews, another black South Carolina death row inmate who had been tried in Charleston County for the murder of a white victim, had challenged his death sentence in the US courts on grounds of racial discrimination in the prosecutorial decision-making process. Between 1981 and 1990, the prosecutor had sought the death penalty in 10 out of 25 murder cases in which the defendant was black and the victim white (40 per cent). The death penalty was only sought in two of 70 cases in which the defendant and victim were both black (2.9 per cent). During the same period, the prosecutor had sought the death penalty in 32.3 per cent of cases in which the victim was white, and in only 5.2 per cent of cases where the murder victim was black. Earl Matthews's appeal had also presented non-statistical evidence of racial bias in the prosecutor's office. Relying on the *McCleskey v Kemp* decision, the courts rejected Earl Matthews's claim on the grounds that he had not proved discrimination in his particular case, and he was executed in 1997.

Anthony Green, who was sentenced in 1988, was put to death on 23 August 2002, despite a call by the Inter-American Commission to stay his execution so that it could consider his claim.

New Jersey

In 2000, the New Jersey Supreme Court adopted a monitoring system to determine whether the state's capital justice system suffered from racial bias. The first report, released in June 2001, covering 2000-2001, found "unsettling statistical evidence indicating that cases involving killers of white victims are more likely to progress to a [death] penalty trial than cases involving killers of African-American victims."²⁸ It suggested that the disparities might

²⁸ Report to the Supreme Court Systemic Proportionality Review Project, 2000-2001 term. By Hon. David S. Baime, Special Master, 1 June 2001.

be due to geographical differences, namely that prosecutors in counties with higher proportions of white victims were seeking death sentences more often than counties with larger non-white populations. The report looked at 490 cases that were punishable by the death penalty. Of these cases, 220 involved white victims, 192 involved African American victims, and 61 involved Hispanic victims. Prosecutors sought the death penalty in 48 per cent of white-victim cases, compared with 26 per cent of cases involving African American victims, and 34 per cent of cases with Hispanic victims. While the report did not find significant statistical evidence that race of defendant or race of victim was impacting on actual death sentences ultimately handed down, it was sufficiently disturbed by the race-of-victim disparities in capital charging, that it referred the matter to the state Attorney General for remedial action. However 18 months later, the Attorney General's Office had reportedly not acted. A second annual report, covering 2001-2002, released in February 2003, reportedly found results similar to the first. Prosecutors sought execution in 42 per cent of white-victim cases, compared with 22 per cent of African-American cases, and 29 per cent of cases with Hispanic victims.²⁹

Maryland

A study at the University of Maryland, released on 7 January 2003, analysed 1,311 murders in Maryland between 1978 and 1999 which were held to be punishable by the death penalty under state law. The study found significant racial and geographic bias in the state's capital sentencing. On race, it found that blacks who kill whites are 2.5 times more likely to be sentenced to death than whites who kill whites, and 3.5 times more likely than are blacks who kill blacks. "In sum, offenders who kill white victims, especially if the offender is black, are significantly and substantially more likely to be charged with a capital crime (state's attorney decides to file a notification to seek the death penalty). Those who kill white victims are also significantly more likely to have their death notification "stick" than those who kill non-whites... Moreover, while these effects do not appear at other, later decision-making points in the capital sentencing process, they are generally not corrected".³⁰ This is reflected on the state's death row, where there are 12 inmates, eight black and four white. All were convicted of killing white people. In March 2003, the state Senate rejected moratorium legislation.

Texas

Texas is the main death penalty state in the USA, accounting for more than a third of the country's executions since judicial killing resumed in 1977.³¹ Research in the 1980s concluded that in Texas a murder of a white person was more than five times more likely to result in a death sentence than the murder of an African American.³² Statistics compiled by

²⁹ *Panel Drops Ball on Study of Variances in Death Penalty*. New Jersey Law Journal, February 2003.

³⁰ An empirical analysis of Maryland's death sentencing system with respect to the influence of race and legal jurisdiction. Final Report. University of Maryland.

³¹ *Texas – In a world of its own as 300th execution looms* (AMR 51/010/2003, 23 January 2003).

³² Jonathen R. Sorensen and James Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Ch. 743 (1990-1991). Alan Widmayer & James

the Texas Defender Service (TDS) suggest that racial disparities continued into the late 1990s. The organization found, for example, that while 0.8 per cent of murder victims in Texas were white women, 19.3 per cent of the prisoners arriving on death row between 1 January 1995 and 31 December 1999 had been convicted of killing white women. Eleven per cent of the defendants condemned to death during this period had been convicted of killing black men. Yet black men accounted for 23 per cent of murder victims in Texas.³³

TDS also conducted an initial examination of Montgomery County, a Texas jurisdiction where 85 per cent of the population is white. The group looked at murders in the county between 1 January 1995 and 31 December 1999. Of the 55 cases, 31 per cent involved non-white victims, none of which resulted in a death sentence. The arrest rate varied according to the race of the victim. In white victim cases, the arrest rate was 92 per cent, in non-white victim cases, the rate was 58 per cent. The rate at which the cases went to trial also varied. Ninety per cent of the cases involving white victims went to trial, whereas only two cases involving non-white victims were tried.

All 17 people against whom Montgomery County prosecutors have successfully sought a death sentence since 1977 were convicted of murdering white victims. They include three black defendants. All three – Glen McGinnis, executed in 2000 for a crime committed when he was 17 years old; Marcus Green sentenced to death in July 2002; and Clarence Brandley, released from death row in 1990 after a judge found that racial discrimination had influenced his prosecution and wrongful conviction – were sentenced by all-white juries.

Of the 301 prisoners put to death in Texas between December 1982 and 10 April 2003, 235 (78 per cent) were executed for crimes involving white victims. In 64 cases (21 per cent), the defendant was an African American convicted of killing a white person. At the time of writing, five of the 12 prisoners scheduled for execution in Texas before the end of July 2003 were African Americans convicted of killing white people.³⁴ None of the 301 people executed have been whites convicted of killing blacks. In a highly publicized case in 1999, two white men were sentenced to death for killing an African American man, James Byrd, by chaining him to the back of their pickup truck and dragging him to his death. John King and Lawrence Brewer became the first convicted murderers on death row in Texas who were white and whose victim was black. James Byrd's son has campaigned against their execution, arguing that "all [the death penalty] does is bring more hate into the world".³⁵

Virginia

Virginia lies behind only Texas in the number of executions carried out since 1977. By 10 April 2003, Virginia had executed 88 prisoners. In 81 per cent of cases, the crimes involved white victims. In 35 per cent of cases the executed prisoners were black and the victims

Marquart, *Capital Punishment and Structured Discretion: Arbitrariness and Discrimination after Furman*, *Correctional Theory and Practice* 187 (1992).

³³ *A state of denial: Texas justice and the death penalty*. Texas Defender Service, October 2000.

³⁴ Kenneth Morris, Robert Ladd, Eric Moore, Kia Johnson and Cedric Ransom.

³⁵ *Jasper dragging victim's son fights for killers' lives*. Austin American Statesman, 27 February 2003.

white.³⁶ In a report published in 2000, the American Civil Liberties Union (ACLU) concluded that although Virginia's capital justice system is not as overtly racist as it was in previous times, "race continues to be a significant factor in capital sentencing" in the state. The ACLU noted that between 1978 and 1997, nearly 58 per cent of Virginia's murder victims were black, and 41 per cent of the victims of apparently capital murders were black. It also noted, however, that "of the 131 crimes for which a death sentence was imposed during the same period, only 20 per cent of the victims were black". It concluded that in cases of rape/murder, the probability that the offender will be sentenced to death is about 19 per cent if the victim is black, and about 42 per cent if the victim is white. It further found that blacks who rape and murder white victims in Virginia are over four times more likely to be sentenced to death than blacks who rape and murder black victims. In robbery murders, the ACLU found, a death sentence becomes over three times greater if the victim is white than if the victim is black.³⁷

Pennsylvania

In March 2003, Pennsylvania's Committee on Racial and Gender Bias in the Justice System, appointed by a 1999 state Supreme Court order, recommended a moratorium on executions in the state. It wrote in its final report: "Based on existing data and studies, the Committee concluded that there are strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner" and that "at least in some counties, race plays a major, if not overwhelming, role in the imposition of the death penalty". The report continued: "The ability to prove discrimination where it exists is beyond the resources of most capital defendants and an avenue for redress in the courts remains elusive, particularly because federal constitutional doctrine fails to provide an effective remedy for racial and ethnic discrimination. Legislative initiatives that would allow the showing of a pattern and practice of disparate treatment to stand as proof of discrimination have failed." As well urging a moratorium on executions, the Committee recommended that the Pennsylvania legislature pass a Racial Justice Act "that allows for the admission of evidence of a pattern and practice of disparate treatment in both the prosecutorial decision to seek the death penalty and in sentencing outcomes."³⁸ The Pennsylvania Governor and Attorney General responded that they opposed a moratorium (see also "A glimpse at Pennsylvania", below).

Ohio

There are some 208 people awaiting execution in Ohio, a state with a population that is 85 per cent white and 11 per cent black. Fifty-one per cent of the condemned inmates are black, and 45 per cent are white. In its 1999 report, the Ohio Commission on Racial Fairness, commissioned by the Supreme Court of Ohio, noted that African American males "compose

³⁶ *Death row USA*, Winter 2003. NAACP Legal Defense and Educational Fund, Inc.

³⁷ *Unequal, unfair and irreversible: The death penalty in Virginia*. American Civil Liberties Union of Virginia. Revised and updated, December 2000.

³⁸ Final report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System. March 2003.

approximately five per cent of the Ohio population, yet they compose 50 per cent of death row inmates” (currently 105 of 208 inmates). The Commission wrote: “This issue here is not whether one is a proponent or opponent of capital punishment or whether those on death row deserve to be there. The issue is the integrity of the criminal justice system, whether black males are looked upon as expendable and treated differently than white males resulting in disparate sentencing”.

In around 70 per cent of Ohio’s death penalty cases, the murders involved white victims. In about a quarter of the cases, the defendant was black and the victim white.³⁹ The Commission on Racial Fairness wrote of such race-of-victim disparities: “The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.”⁴⁰ The federal Sixth Circuit Court of Appeals said in 2001 that the racial imbalance in Ohio’s death penalty is “glaringly extreme” and “to say the least, extremely troubling”. It said it was unable to act as it was constrained by the US Supreme Court’s 1987 *McCleskey* decision (see introduction).⁴¹

Ohio carried out its first execution since 1963 in 1999, the year that the Commission on Racial Fairness released its report. Six more executions have been carried out since then. In five of the seven executions, the prisoner was put to death for the murder of a white victim. One of those executed was Alton Coleman, an African American man put to death on 26 April 2002 for the murder of a white woman. During jury selection at his trial, the prosecution had used nine of its 12 peremptory challenges – the right of either side to dismiss prospective jurors without giving a reason – to exclude all but two of the African-American jurors qualified to serve. The issue of whether the prosecutors had acted discriminatorily was defaulted as an appeal issue because Coleman’s original appeal lawyers did not raise it. In an interview shortly before his execution, Alton Coleman said of his life “I think I was doomed. Perhaps I should have died at birth”.⁴² As an infant, he had been abandoned by his mother in a rubbish bin. He was taken in by his grandmother, but subjected to severe physical and sexual abuse. He was reported to be brain damaged. The jury was not told of this and other mitigating evidence by his trial lawyer. At the time of writing, four more men were due to be executed in Ohio by the end of June 2003. Three of them – Jerome Campbell, Ernest Martin and Lewis Williams – were African American, and one, David Brewer, was white. Lewis Williams, convicted of killing an elderly white woman, was scheduled to be become the last of the four to be put to death, with an execution date of 24 June 2003. A federal judge has described the legal representation he received at the sentencing phase of his trial as “wholly inadequate”.⁴³ As outlined below, poor legal representation is a widespread problem.

³⁹ Ohio Public Defender Office.

⁴⁰ The report of the Ohio Commission on Racial Fairness. 1999, page 38.

⁴¹ *Coleman v Mitchell*, 2001 FED App. 0367P (6th Cir.), 10 October 2001.

⁴² ‘84 killer on eve of execution – Even Coleman case stirs debate. Chicago Tribune, 25 April 2002.

⁴³ See Amnesty International EXTRA 19/03 (AI Index: AMR 51/049/2003, 27 March 2003).

Poverty, race, and legal representation

“I never met with him on death row. I never wrote to him. I never consulted with Mr Rojas about his case during my representation of his state habeas petition”. Affidavit of Leonard Rojas’ appeal lawyer

Leonard Rojas, a Hispanic man sentenced to death in 1996, was too poor to afford a lawyer to represent him for his state-level *habeas corpus* appeal⁴⁴, so the Texas Court of Criminal Appeals (TCCA) appointed one for him. The lawyer had never handled such an appeal, had been sanctioned several times for neglecting clients, and was under treatment for serious mental illness. He filed a minimal appeal for Rojas, in which many of the claims were inappropriate. His failure to present appropriate claims in state court meant that his client lost the possibility of federal review of such claims. Leonard Rojas was executed on 4 December 2002. Two months later, three TCCA judges filed a dissenting opinion arguing that the Court should have granted Rojas relief “because it appointed an attorney who should not have been appointed to represent a capital defendant in his one opportunity to raise claims not based solely on the record.”⁴⁵

In an increasingly abolitionist world, the USA’s use of the death penalty does immense damage to its international image. A United States diplomat in Europe wrote in 2000 of his surprise at the level of criticism about the US death penalty that he encountered in his ambassadorial position. Among other things, he wrote that the death penalty in the USA is seen overseas as “both racist and discriminatory, affecting a disproportionate number of minorities who are often represented by attorneys pictured as incompetent or uninterested”.⁴⁶

The link between poverty and race should not be overlooked. Pennsylvania’s Committee on Racial and Gender Bias in the Justice System, for example, pointed out in its March 2003 report that “issues of racial and ethnic bias cannot be divorced from the issue of poverty. Unless the poor, among whom minority communities are overrepresented, are provided adequate legal representation, including ample funds for experts and investigators, there cannot be a lasting solution to the issue of racial and ethnic bias in the capital justice system”.

The sponsor of a bill proposing a commission to conduct a one-year study of New Jersey’s capital justice system, including whether there is any racial discrimination, noted in January 2003 that a “troubling aspect is the state’s history of racial bias in sentencing decisions. Few defendants with private attorneys find themselves on death row, leaving poorer, minority defendants with greater chances of receiving the death penalty.”⁴⁷

⁴⁴ Matters outside of the trial record, such as withholding of evidence by the prosecution or failure of the trial lawyer to investigate or present evidence, are to be presented via the *habeas corpus* appeal.

⁴⁵ *Ex parte Leonard Uresti Rojas*, 12 February 2003. Price, J. statement dissenting to the denial of the Motion to Protect Applicant’s Federal Habeas Review. (Joined by Judges Johnson and Holcomb).

⁴⁶ *The shadow over America. How our use of the death penalty hurts our image abroad.* Felix Rohatyn, US Ambassador to France, Newsweek, 29 May 2000.

⁴⁷ New Jersey Assembly Democrats news release, 23 January 2003.

Many white indigent capital defendants have been denied adequate legal representation over the years. Minority defendants, too, have been appointed lawyers who were incompetent, under-resourced, or operating under a conflict of interest. There are many examples.

Bobby Fields, black, was executed in Oklahoma on 13 February 2003. He was sentenced to death in 1994 for the murder of an elderly white woman. He always maintained that the shooting was accidental. Bobby Fields was assigned an inexperienced lawyer who had never handled a death penalty case before. Despite the lawyer's repeated requests, she was not provided with co-counsel. She admitted to being intimidated by the fact that the lead prosecutor was an experienced official known for pursuing death sentences aggressively. The defence lawyer wanted Bobby Fields to forgo a jury trial and instead to enter a blind plea of guilty (that is a guilty plea with no deal as to what sentence would ensue). She did so believing that the judge, from comments he had made to her, would not pass a death sentence in this case. Bobby Fields did not want to plead guilty, believing that a jury would be persuaded that the shooting was accidental. But the defence lawyer continued to insist, and Fields finally agreed. The judge sentenced him to death. On 6 January 2003, after hearing the original trial lawyer admit to her inadequate representation of Bobby Fields and testimony from an expert in ballistics and crime scene reconstruction in support of Bobby Fields's claim that the gun had gone off accidentally, the state Pardon and Parole Board voted to recommend that the death sentence be commuted to life imprisonment without the possibility of parole. The Governor rejected their recommendation and Bobby Fields was executed.

Walter Mickens, black, was executed in Virginia on 12 June 2002. He was sentenced to death in 1993 for the murder of a white teenager, Timothy Hall. At the time Hall died, he was facing weapons and assault charges. The judge dismissed the charges because of Hall's death. On the next working day, the same judge appointed the lawyer who had been representing Hall to represent Walter Mickens. Neither the judge nor the lawyer disclosed to Mickens that he was being defended by the lawyer of the murder victim. The matter remained undisclosed until it was discovered years later by Walter Mickens's appeal lawyer. However, the conviction and death sentence were allowed to stand.

Four Supreme Court justices dissented in no uncertain terms, arguing that Mickens should get a new trial. Justice Stevens wrote: "Mickens had a constitutional right to the services of an attorney devoted solely to his interests... Setting aside Mickens's conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases... A rule that allows the State to foist a murder victim's lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice".⁴⁸

In effect, Walter Mickens was discriminated against on the grounds of his economic status. Because he could not afford his own attorney, the state appointed one. It did so without ensuring that the lawyer it appointed was not labouring under a conflict of interest, or ensuring that Mickens knew of any such potential conflict, thereby giving the defendant the opportunity to insist upon different representation if he so chose. Such discrimination violated Walter Mickens's right to be "equal before the courts and tribunals", as well as undermining

⁴⁸ *Mickens v Taylor*, 000 US 00-9285 (2002), Justice Stevens dissenting.

his right to defence, both protected under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992.⁴⁹

As in 80 per cent of the more than 840 executions carried out in the USA since 1977, Leonard Rojas, Walter Mickens and Bobby Fields were convicted of killing white people. While killing a white person has consistently been shown to increase the chance of a death sentence, the status of victim has also been shown to be a possible factor in capital sentencing.

A study into the Nebraska death penalty commissioned by the state did not find any significant evidence of disparate treatment of capital defendants on the basis of race of defendant or victim, but it did find significant disparities based on the socio-economic status (SES) of the victim: "Specifically, since 1973 defendants whose victims have high socio-economic status have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence. Defendants with low SES victims have faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death".⁵⁰

Napoleon Beazley, black, was executed in 2002 for the murder of a wealthy white businessman in Tyler, Texas, committed when Beazley was 17 years old. Citing "substantial contact with the family of the victim" (who included a federal judge), the prosecution refused to consider a plea arrangement whereby Beazley would plead guilty in return for a life sentence of 40 years without parole. The same prosecutors soon afterwards accepted just such an arrangement in the case of Todd Rasco, a white man who was sentenced to 45 years in prison, with parole eligibility after half that time, for killing a homeless black man who lived on the streets of Tyler. Todd Rasco testified that when he told his two friends that he was contemplating suicide, they had urged him to "just kill a nigger instead".

The Human Rights Committee is the body established by the ICCPR to oversee implementation of that treaty. Article 6(1) of the ICCPR prohibits the arbitrary deprivation of life. The Committee, regarding the right to liberty, has stated that "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. Bias based on geography, race or economic status injects arbitrariness into the death penalty.

Recent events have placed Illinois at the centre of the death penalty debate in the USA (see further below). On 7 April 2003, the *Chicago Tribune* praised Illinois legislators for passing

⁴⁹ The ICCPR guarantees defendants the right to be represented by a lawyer of their choosing (Article 14.3.d). The state must provide a lawyer for those who cannot afford to pay for one. This particular provision does not expressly guarantee an absolute right of choice. However, the UN Human Rights Committee has said that "legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice". In that decision, involving a death penalty case in which the defendant had a well-founded reason not to want the appointed lawyer to continue to represent him, the Committee said that the accused should have been allowed to choose another lawyer, even if it required adjournment of proceedings (*Pinto v Trinidad*, 1990).

⁵⁰ Baldus, D.C., et al. *The Disposition of Nebraska capital and non-capital homicide cases (1973-1999): A legal and empirical analysis*. 25 July 2001. The study looked at 177 murders in the state between 1973 and 1999 that were punishable by death, and which resulted in 27 death sentences.

a series of criminal justice reforms prompted by the state's now infamous record of wrongful convictions in capital cases. However, the newspaper noted that even with the passage of the bills, the state's death penalty would remain "flawed". Among the flaws, the paper noted, is the "disproportionate way in which capital punishment is sought in different jurisdictions, and according to the victim's race."⁵¹

Race, error, and arbitrariness

"The system has proved itself to be wildly inaccurate, unjust, unable to separate the innocent men from the guilty and, at times, a very racist system." Illinois Governor, 10 January 2003

In recent years, the discovery of more and more innocent people on death rows has caused particular public concern. Since 1973, more than 100 people – 45 per cent blacks, 42 per cent whites, and 11 per cent Latinos – have been released from death rows around the country after evidence of their innocence emerged.⁵²

Two of the first such releases were of Wilbert Lee and Freddie Pitts. These two African American men were beaten by police into confessing, twice tried by all-white juries and twice sentenced to death for the murder of two white men. They were pardoned by the Florida governor in 1975, 12 years after their original convictions. The most recent additions to the growing list of the exonerated include four African Americans pardoned by Governor George Ryan of Illinois in January 2003. The governor believed that the four – Aaron Patterson, Madison Hobley, Leroy Orange, and Stanley Howard – had been tortured into confessing to crimes they did not commit. They had spent between 16 and 19 years on death row.

In January 2000, Governor Ryan had imposed a moratorium on executions in Illinois because of its "shameful" record of wrongful convictions in capital cases. Three years later this once ardently pro-death penalty governor had become one of capital punishment's more outspoken critics and had realized that the problems of the capital justice system went beyond the risk of wrongful conviction, and into the question of arbitrariness. Before leaving office in 2003, he commuted the death sentences of all the condemned inmates in Illinois, saying: "If the system were making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die? What effect was race having? What effect was poverty having?"⁵³

A study of the death penalty in Illinois, published in 2002, concluded that: "Indicators of two extra-legal factors, the race of first-degree murder victims and geographic region, were found statistically related to the imposition of the death sentence in Illinois"⁵⁴ First-degree murders with black victims were the least likely to result in death sentences; first-degree murders with white victims were the most likely to end with such a sentence. The study noted that of the

⁵¹ *A remarkable week for justice*. Chicago Tribune, 7 April 2003.

⁵² See <http://www.deathpenaltyinfo.org/Innocentlist.html>

⁵³ Speech at Northwestern University College of Law, 11 January 2003.

⁵⁴ G.L. Pierce and M.L. Radelet, *Race, region, and death sentencing in Illinois, 1988-1997*. Oregon Law Review, Spring 2002. 81 Or.L. Rev. 39.

12 executions in Illinois since 1977, 11 were for murders involving white victims. During the same period, 13 innocent men had been discovered on death row.

The pressure on police and prosecutors to solve highly publicized violent crimes can lead to mistakes, and race can play into this equation. When the majority community feel threatened by crime, they will be able to lean more heavily on the decision-makers in the justice system than can those in any minority.

The authors of the Illinois study wrote a final note: "In conclusion, the unique character of homicide in general and the death penalty in particular raises the distinct possibility of powerful political and psychological factors intruding on and interfering with the criminal justice and judicial decision process and with the goal of equity in administration of the death penalty. Hence the importance of vigilant monitoring. When a murder occurs, all who hear about it - citizens, prosecutors, jurors - feel a threat and a need to confront, to varying degrees, personal fears of death. One way to deal with the threat is to retreat to the comfort of people who are familiar to us. When the murder victim is among those communities with which we are most familiar (and race and social class are part of the victim's social or human capital that can make them part of that familiar community) and the killer is more of an outsider (in both in social and geographic sense), the fear and outrage grow. In the past thirty years, the potential for death penalty decisions to become more political has grown like never before. One reason for this is media pressure - the media can sensationalize homicides and prioritize them in terms of outrage and threat (not all murders are given equal media coverage), and it can put pressure on decision-makers to accept those priorities."

The large majority of decision-makers in US capital cases are white.⁵⁵ In 2001, Alabama's only black district attorney in the 1990s, said: "I would be dishonest if I said it doesn't matter if you are African American. It matters in this state, and it matters in this country. It matters because you have individuals who are making the decision to pursue the death penalty, and they bring their own biases to that."⁵⁶ He lost his attempt at re-election.

"A Broken System"

Public concern has been fuelled by evidence that errors in capital cases occur not only in relation to guilt and innocence, but also in relation to sentencing. In other words, people are being sentenced to die for crimes that do not "deserve" the death penalty, a punishment supposedly reserved in the USA for the "worst of the worst" crimes and offenders. An illustrative case is that of Johnny Joe Martinez, a young Hispanic man convicted in 1994 of killing a white man in 1993. Martinez was always remorseful for the crime, immediately turned himself into the police, and cooperated fully with them including by giving a confession. He had no history of violence or criminal record. Nevertheless, he was sentenced to death. Four of the nine judges on the conservative Texas Court of Criminal Appeals

⁵⁵ In 1998, for example, of the 1,838 District Attorneys (prosecutors) in states with the death penalty, 22 were black, 22 were Latino, and the rest were white. J. Pokorak, *Probing the capital prosecutor's perspective: race and gender of the discretionary actors*. 83 Cornell L. Rev, 1811, 1816 (1998).

⁵⁶ Barrown Lankster, quoted in *Does race decide who dies?* Birmingham Post-Herald, December 2001.

dissented against the sentence, stating that the case did not qualify for the death penalty under Texas law. The dissenters accused the majority of “contorting” the facts of the case in order to uphold the death sentence and setting a precedent which meant that “there is no longer any assurance that the death penalty will not be wantonly or freakishly imposed”. In addition, the standard of Martinez’s legal representation was shocking.⁵⁷ The murder victim’s mother appealed for clemency, urging the state not to cause “another mother to lose her son to murder, needlessly”, and stating that the execution of Johnny Martinez would compound the “crime against society” that began with the killing of her own son. Nevertheless, Johnny Martinez was executed in May 2002.

In June 2000, a landmark study of the US capital justice system was released. Entitled “A Broken System”, it had examined death penalty cases between 1973 and 1995 and found that the rate of prejudicial error in capital cases was 68 per cent. In other words, courts found serious, reversible error in almost seven of every 10 of the thousands of death sentences that were reviewed on appeal during the 23-year study period. The study, conducted at Columbia University, found that the most common errors were inadequate legal representation and the suppression of evidence by prosecutors or police.⁵⁸ Cases continue to emerge. For example, in 2002 a federal court found that James Carpenter’s trial representation had been constitutionally inadequate. Carpenter, a black man sentenced by an all-white jury in Pennsylvania in 1984, had had to wait on death row for 18 years before he obtained relief. He had almost exhausted his appeals.

The Columbia University study expressed grave concern that the courts may not be reversing all serious errors. Amnesty International believes that this is the case, as the burden of proof for a successful claim of inadequate legal representation or prosecutorial misconduct or, indeed, of racial discrimination, is very heavy.

Robert Tarver, black, was executed in Alabama in April 2000 for the murder of a white man. He was tried in a county whose population was almost 40 per cent black, but faced a jury consisting of one black and 11 whites after the prosecutor peremptorily removed 13 of the 14 blacks during jury selection. His trial lawyer failed to raise this issue, and it was therefore “procedurally defaulted” as an appeal claim. On appeal a court found that the discrimination claim was “well-founded” and would have led to relief but for the procedural bar. Robert

⁵⁷ Unable to afford his own appeal lawyer, Martinez was appointed one who had never handled such an appeal. The lawyer asked on several occasions for permission to withdraw from the case. In 1997, the lawyer filed an appeal, without having once spoken to or visited his client, having refused to accept telephone calls from him, and having sent him only one brief letter. The appeal was five and a half pages long. Two of the four claims raised comprised 17 lines of text with three inches of margin, with no cases cited. Such appeals filed by adequately funded, experienced lawyers routinely run to more than 150 pages because of the number of issues raised and the complexity of the law. The appeal did not challenge the adequacy of Johnny Martinez’s trial representation, even though his trial lawyer had done little investigation or preparation for the sentencing phase. Other lawyers later discovered substantial mitigating factors that had not been presented to the trial jury, but the courts ruled that the evidence was raised too late to be considered, and Martinez was executed.

⁵⁸ Liebman, J.S. et al. *A broken system: Error rates in capital cases, 1973-1995*. Columbia University School of Law. 12 June 2000.

Tarver maintained his innocence of the murder. The state's key witness, Andrew Richardson, Tarver's co-defendant, faced lesser charges in return for his testimony against Tarver. The US Court of Appeals for the 11th Circuit noted that "very little evidence made Tarver a better candidate than Richardson to be found to be the actual killer". At the trial, the jury had voted for a life sentence rather than death, but the judge overrode them and imposed a death sentence. The same judge later concluded in post-conviction proceedings that Tarver's trial lawyers – who had spent four hours preparing for the sentencing phase – had been ineffective for not presenting available mitigating evidence. The judge reversed the death sentence and ordered a life without parole prison term instead. The state appealed, and the Alabama Court of Criminal Appeals reinstated the death sentence.

African American Cornel Cooks was executed in Oklahoma in 1999 for the murder of a white woman in 1982. His lawyer had never handled a capital case before, having only finished law school two years earlier. The US Court of Appeals for the 10th Circuit 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."⁵⁹ 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.⁶⁰ 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. Nevertheless, the Court upheld his death sentence. 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, Cooks did not understand what that meant. The white lawyer told him, "that's what they do to niggers who rape white women."⁶¹

Abu-Ali Abdur'Rahman is scheduled to be executed in Tennessee on 18 June 2003. He was one of seven defendants who came before juries for sentencing in capital cases between 1978 and 1987 in Davidson County, a jurisdiction with a population that was 23 per cent black. All seven defendants were African American. Three of them remained on death row at the time of writing. On appeal, allegations have been raised that the prosecutor in Abu-Ali Abdur'Rahman's case engaged in racist jury selection tactics to achieve a jury of 11 whites and one black (see further below). A judge on the Tennessee Supreme Court noted in 2002 that several allegations of prosecutorial misconduct "have surfaced to plague this case"⁶², and

⁵⁹ *Cooks v Ward*, No 97-6105. 15 December 1998.

⁶⁰ 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 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.

⁶¹ Cooks's white co-defendant was sentenced to life imprisonment.

⁶² Abdur'Rahman does not deny that he was involved in the crime, but has consistently claimed that he cannot remember the stabbing, a possible sign of a post-traumatic stress disorder blackout (he has been diagnosed with PTSD). Forensic testing found no blood on a long wool coat he was wearing, despite

also noted that “none of the judges who have reviewed this case... has seriously disputed that Abdur’Rahman’s trial counsel was woefully incompetent and demonstrably ineffective”.⁶³ At the sentencing phase, the defence presented none of the abundant mitigating evidence available.⁶⁴ In 1998 a US District Judge overturned the death sentence, writing that Abdur’Rahman had been “seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing”. In Tennessee, only a unanimous jury can pass a death sentence. If the trial lawyers had presented the mitigating evidence, the judge wrote, “there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty”.⁶⁵ However, in 2000 a three-judge panel of the Sixth Circuit Court of Appeals overturned the District Judge’s 1998 ruling and reinstated the death sentence. One of the three judges issued a strong dissent, citing the “constitutionally inadequate” defence Abdur’Rahman had received at the sentencing phase.

In February 2002, the second part of the Columbia University study was released. It examined some of the possible reasons behind the high error rate in capital cases.⁶⁶ It found that “heavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur”. “Most disturbing of all”, the researchers wrote, “we find that the conditions evidently pressuring counties and states to overuse the death penalty and thus increase the risk of unreliability and error include race, politics and poorly performing law enforcement systems.”

On the race question, the study made the following two findings:

1. *The closer the homicide risk to whites in a state comes to equalling or surpassing the risk to blacks, the higher the error rate. Other things being equal, reversal rate is twice as high where homicides are most heavily concentrated on whites compared to blacks, than where they are the most heavily concentrated on blacks.*
2. *The higher proportion of African-Americans in a state – and in one analysis, the more welfare recipients in a state – the higher the rate of serious capital error. Because this effect has to do with traits of the population at large, not those of particular trial participants, it appears to be an indicator of crime fears driven by racial and economic conditions.*

Seeking to explain their findings as they related to race, the Columbia researchers suggested that “when whites and other influential citizens feel threatened by homicide, they put pressure

the bloodiness of the crime scene. In an internal memorandum before the trial, the prosecutor noted this forensic report and wrote that “if the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred”. However, he did not make the trial lawyers aware of the report.

⁶³ *Abdur’Rahman v State*, No Mi988-00026-SC-DPE-PD, Justice Birch, dissenting to order denying recall of mandate, 2002.

⁶⁴ For example, as a child, Abdur’Rahman had suffered appalling abuse at the hands of his father. This included being stripped, tied up, and locked in a cupboard; being struck on the penis with a baseball bat; and being made to eat a pack of cigarettes as punishment for smoking, and when he vomited, forced to eat the vomit. The jurors were left unaware that he had suffered serious mental health problems.

⁶⁵ It would seem that he was right. Eight of the nine jurors contacted by the appeal lawyers said that they might or would not have voted for death if they had heard the evidence in question.

⁶⁶ *A broken system, part II: Why there is so much error in capital cases, and what can be done about it.* Columbia University School of Law, 11 February 2002.

on officials to punish as many criminals as severely as possible, with the result that mistakes are made, and a lot of people are initially sentenced to death who are later found to have committed a lesser crime, or no crime at all. The more African Americans there are in a state, the more likely it is that serious mistakes will be made in death penalty trials. This could be because of fears of crime driven by racial stereotypes and economic factors. It is disturbing that race plays a role in the outcome of death penalty cases, whatever the reasons.”⁶⁷

Of the 10 states with the highest death sentencing rates, nine exceeded the national average reversal rate of 68 per cent. They include Alabama (77 per cent), Florida (75 per cent), and Oklahoma (75 per cent).

A glimpse at Oklahoma

Oklahoma ranks 27th among the 50 US states in size of population, but third in the number of executions carried out. Of the 61 executions carried out between 1990 and 9 April 2003, 47 (77 per cent) were for crimes involving white victims. The adult population of Oklahoma is 79 per cent white, seven per cent Native American and seven per cent African American. In January 2003, 53 per cent of its condemned inmates were white, six per cent were Native American and 36 per cent were black. Of the 61 people executed since 1990, 38 (62 per cent) were white, 15 (25 per cent) were black, and six (10 per cent) were Native American.

At least two of the eight African Americans executed for killing white victims were tried by all-white juries. Bobby Ross and Malcolm Johnson were executed in 1999 and 2000 respectively. In Johnson’s case, the Oklahoma County prosecutor had peremptorily dismissed all three blacks during jury selection. In 1999, the 10th Circuit Court of Appeals admitted that evidence that the prosecutor’s dismissals had been racially motivated was “troubling”.

Appeal courts have frequently reprimanded Oklahoma County prosecutors for their misconduct during capital trials.⁶⁸ The Columbia University study found that the county had the fourth highest death sentencing rate in the USA and an error rate in capital cases of 75 per cent. It found that three defendants sent to death row from the county were later exonerated.

Oklahoma lies third among the US death penalty states in the number of condemned prisoners later released after evidence of their innocence emerged. Of seven such cases, three involved black defendants. At least two of these African American men, Charles Giddens and Robert Miller, were sentenced to death by all-white juries. Robert Miller was released in 1998 after being incarcerated for 10 years, seven of them on death row. In 2001, the Governor of Oklahoma granted clemency to Phillip DeWitt Smith, an African American man sentenced to death for the murder of a white man 17 years earlier, because of doubts over his guilt.

It took 18 years before James Fisher, black, was granted a new trial despite the clearly inadequate legal representation he was provided at his 1984 trial for the murder of Terry Neal. Too poor to afford his own lawyer, Fisher was appointed an attorney who had a separate career as a state Senator. In March 2002, the 10th Circuit Court of Appeals found that the

⁶⁷ Questions and answers on the study, The Justice Project.

⁶⁸ *Old Habits Die Hard: The death penalty in Oklahoma* (AMR 51/055/2001, April 2001), pages 47-59.

lawyer had been unprepared for the trial and that his representation of Fisher had been “grossly inept”. The Court noted that the case against Fisher depended on the testimony of the state’s star witness, and that either he or the defendant could have committed the murder.⁶⁹ Fisher’s lawyer had failed to review easily available exculpatory evidence – for example, Fisher had told police that the “Terry” he had met and assaulted was black, whereas Terry Neal was white (and the assault had occurred two months before the murder). At the sentencing phase of the trial, the lawyer spoke only nine words and presented no evidence. The jury was all-white after the Oklahoma County prosecutor preemptively dismissed several African Americans during jury selection. This issue was defaulted as an appeal claim as the trial lawyer had failed to object and it had not been raised on the first (“direct”) appeal.

Also too poor to afford his own lawyer, mentally impaired African American capital defendant Jervaughn Miller was appointed one for his 1998 Oklahoma trial. In 2001, the state Court of Criminal Appeals overturned the conviction and death sentence. It found that Miller had been denied adequate legal representation and it was troubled by “strong evidence in the record that something was just not right between [Miller] and his attorneys”. At a hearing in 2000, the defence investigator who had worked on the case testified that the night before Miller’s relatives were due to appear at the sentencing, 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”. The lead lawyer admitted that he may have called Miller “a stupid nigger”, but only in front of his co-counsel and the investigator and not in front of Miller or his family. Miller’s appeal, however, stated that Miller had overheard the lawyer say “he’s not going to take the deal, let the stupid nigger fry”. The Court of Criminal Appeals said that if Miller had heard the comment, or was aware that such a comment had been made, “it would more than explain why [he] would not want to talk to the attorney”.⁷⁰

Walanzo Robinson, black, was tried by an Oklahoma County jury consisting of 11 whites and one black. The sole African American juror later alleged racism in the jury room (see below). Robinson was executed in March 2003. Paris Powell, black, remains on death row. His 1997 Oklahoma County jury also consisted of 11 whites and one black. Seven African Americans were dismissed during jury selection, including four preemptively rejected by the prosecutor.

A glimpse at Alabama

Alabama’s African American population is 26 per cent of the state’s total. In 2001, it did not have a single elected black district attorney out of 40 such officials; four per cent of its criminal court judges were black, and there were no African American judges on either the state Supreme Court or the Court of Criminal Appeals. In contrast, 46 per cent of Alabama’s death row inmates are black. According to the *Birmingham Post-Herald*, 11 per cent of all murders committed by blacks in Alabama between 1996 and 2001 were of white victims, but

⁶⁹ *Fisher v Gibson*, US Court of Appeals for the 10th Circuit, 12 March 2002.

⁷⁰ *Miller v State*, 2001 OK CR 17, corrected decision, 17 August 2001.

57 per cent of the blacks on death row were convicted of killing whites. The other 43 per cent were sentenced to death for killing other blacks, even though 89 per cent of murders of blacks are committed by other African Americans.⁷¹

Between 1977 and 11 April 2003, Alabama executed 26 prisoners. Twenty of them (77 per cent) were put to death for the murder of white victims. Eleven of them were African Americans convicted of killing whites. Of these 11, at least seven (64 per cent) were tried in front of all-white juries.⁷²

Other African American defendants still on death row in Alabama include Earl McGahee. He was tried in front of an all-white jury after all 16 prospective African American jurors were dismissed during jury selection. Victor Stephens also remains on the state's death row. He was one of two black men convicted in 1987 of the murder of two elderly men, one black, one white, during a robbery of a store in Hale County, a jurisdiction with a majority black population. At Victor Stephens's trial, the prosecution used 21 of its 23 peremptory strikes to dismiss prospective African American jurors. The final jury consisted of seven whites and five blacks. The jurors voted 10-2 to sentence Victor Stephens to life rather than death. However, they were overruled by the elected trial judge, who was white. Fourteen per cent of the white prisoners on Alabama's death row in January 2003 had been sentenced to death by a judge overriding a jury vote for life imprisonment. In the case of black prisoners, the figure was 23 per cent. Since 1981, elected Alabama judges have used override to sentence to death more than 70 defendants for whom the jury had recommended a life prison term.

Walter McMillian, black, was released from Alabama's death row in 1993 after six years there for the murder of a white woman that he did not commit. He was convicted by an almost all-white jury whose recommendation for a life sentence was overridden by the trial judge. James Cochran, an African American accused of killing a white man, was tried three times in front of Alabama juries consisting of one black and 11 whites. One resulted in a mistrial, two resulted in death sentences. His second death sentence was overturned on the basis that the prosecutor had rejected prospective black jurors on the basis of their race.⁷³ At his fourth trial in 1997, in front of a jury of seven blacks and five whites, James Cochran was acquitted.

As will be noted further below, research into juror attitudes has concluded that, for example, the "distinctive perspective of black and white jurors are, no doubt, shaped by their personal experiences and lead black and white jurors to hold fundamentally different assumptions about the causes of crime and about the trustworthiness of the criminal justice process. These perspectives are manifested in black and white jurors' different attributions of levels of dangerousness and remorsefulness to the black defendant, and in their holding different

⁷¹ *Does race decide who dies?* Birmingham Post-Herald, December 2001.

⁷² Horace Dunkins, Cornelius Singleton, Edward Horsley, Victor Kennedy, Brian Baldwin, Freddie Wright, and Pernell Ford.

⁷³ *Cochran v Herring*, US Court of Appeals for the Eleventh Circuit, No. 93-7028 (1995).

degrees of lingering doubt about his guilt.”⁷⁴ In 1992, a US Supreme Court Justice said: “It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”⁷⁵

Freddie Lee Wright, an African American man, was executed in Alabama in March 2000 for the murder of a white couple which he maintained that he did not commit. His case raised serious questions of inadequate defence and prosecutorial withholding of evidence. His first trial had resulted in a mistrial after the mixed race jury voted 11-1 to acquit. At his second trial, which resulted in a death sentence, the jury was all-white after the prosecutor (with no objection from the defence lawyer) dismissed prospective black jurors during jury selection. Freddie Lee Wright was tried in Mobile County, whose population is now about one third African American. The Columbia University study found that Mobile County had a relatively high death sentencing rate and an error rate in capital cases of 51 per cent.

A glimpse at Florida

The Columbia researchers found that “Florida and its counties led the nation in death sentencing and the number of reversals during the study period”. A professor at the University of Miami School of Law responded to the study, saying: “You’re looking at powerful political demands coming from white voters by and large to be tough on criminals, with frequent use of the death penalty in general. That translates down to the level of prosecutors – who are elected in Florida – and to police, who are pressured to push more marginal cases.”⁷⁶

Florida is one of the USA’s leading death penalty states. It has the third largest death row population and is ranked fifth in the number of executions carried out since 1977. Florida’s population at large is 14.5 per cent African American, and 78 per cent white. Its death row population is 56 per cent white and 35 per cent black. Eighty per cent of the executions carried out since 1977 were for crimes involving white victims. As in other states, studies have concluded that race place a role in capital sentencing. One study, for example, found that after taking all variables into account a death sentence was over three times more likely in a case with a white victim than one with a black victim. It also found that a black accused of killing a white woman was 15 times more likely to be sentenced to death than a black suspected of killing a black woman.⁷⁷

Johnny Robinson is an African American man on death row in Florida for the murder of a white woman. He was tried by an all-white jury in 1986. That conviction stood, but he was granted a resentencing because the prosecutor had injected comments into his arguments that could have inflamed racial prejudice among the jurors. He was resented to death in 1989

⁷⁴ William J. Bowers et al., *Sentencing in black and white: An empirical analysis of the role of jurors’ race and jury racial composition*. 3 U. Pa. J. Const. L. 171, February 2001.

⁷⁵ *Georgia v McCollum*, 505 U.S. 42 (1992), Justice O’Connor dissenting.

⁷⁶ *Death penalty study suggests errors*. Miami Herald, 11 February 2002.

⁷⁷ Radelet and Pierce. *Choosing those who will die: Race and the death penalty in Florida*, 43 Fla. L. Rev. 1 (1991).

by a jury of 11 whites and one black. Johnny Robinson was tried in St Johns County. Between 1976 and 1987, 33 white people and 25 black people were murdered in the county. Three people, including Johnny Robinson, received death sentences. All had been convicted of crimes against whites. Robinson's appeal lawyers also raised evidence that in the wider Seventh Judicial Circuit, within which St Johns is one of four counties, murders with white victims were about 13 times more likely to result in a death sentence than in cases where the victim was black, and a black who kills a white is over 35 times more likely to receive a death sentence than a black who kills a black.⁷⁸ Another prisoner on death row from this Circuit is Louis Gaskin, black, tried in front of an all-white jury in 1990 for the murder of a white man.

The most recent execution in Florida was of Amos King. King, black, was executed on 26 February 2003 for the murder of a white woman. He maintained his innocence to the end. He was convicted by an all-white jury. That conviction survived the appeals process, but Amos King received a new sentencing hearing because his lawyer's performance at the original trial had been so poor. King was re-sentenced to death by a jury of 11 whites and one black. The prosecutor had dismissed at least two prospective African American jurors during jury selection. One, a police clerk, was rejected because "she is a young black female [and] the defendant is a young black male", an apparent admission by the prosecutor that the prospective juror was struck on the basis of race.

The Columbia University study found that the 10 counties in the USA with the highest death sentencing rates had an average error rate of 71 per cent, while the 10 counties with the lowest death sentencing rates had an average error rate of 41 per cent. Amos King was tried in Pinellas County, which was one of the top 10 death sentencing counties and which the study found had an error rate of 89 per cent. The Innocence Project (see below) concluded that King's case "remains an extremely troubling one" and that he "may well be an innocent man".

Florida leads the USA in the number of people released from death rows after evidence of their innocence emerged. Of the 107 such cases listed by the Death Penalty Information Center in March 2003, 23 (22 per cent) were from Florida. Of these 23 individuals, 14 were black, four were Latino and five were white. At least three of the exonerated African American prisoners were tried in front of all-white juries for the murder of white victims. Another, Robert Hayes, was released in 1997. This black man had been sentenced to death for the murder of a white woman who had been found clutching hair probably from her attacker. The hair was from a white person.

Some illustrative cases from around the country

Disturbing cases of possible innocence or inconsistent sentencing continue to emerge. In any individual case, it can be impossible to determine whether race played a part or not. Cases where prisoners – capital and non-capital – have been exonerated by DNA testing display recurring themes, as do the larger number of cases where convictions have been overturned without the availability of DNA evidence. The Innocence Project states: "The themes that occur over and over – misidentification, corrupt scientists and police, overzealous prosecutors,

⁷⁸ *Robinson v Moore*, In the Supreme Court of Florida, Petition for Writ of Habeas Corpus, 1999.

inept defense attorneys, poverty, race – must not be ignored.”⁷⁹ The effect of these issues on the sentencing of capital defendants whose guilt may not be in doubt must also not be ignored.

Warren Douglas Manning, an African American man, was sentenced to death in South Carolina in 1989 for the 1988 murder of a white police officer. The conviction was overturned on appeal. In 1993 a Dillon County jury consisting of five whites and seven blacks came within two votes of acquitting him (ie 10-2 for acquittal) before a mistrial was declared. The prosecution moved for a change of venue for jury selection for the retrial. It suggested five possible counties, all of which had proportionately far few black residents than Dillon County. The judge granted the motion, and moved jury selection to Lancaster County, which had proportionately about half as many African American citizens as Dillon County. In 1995, a Lancaster County jury consisting of 10 whites and two blacks convicted Warren Manning and sentenced him to death. In 1997, the South Carolina Supreme Court ordered a new trial on the grounds that the judge had abused his discretion by granting the state’s motion to change the venue for jury selection. In 1999, after less than three hours deliberation, Warren Manning was acquitted by a Dillon County jury of six whites, five blacks, and one Native American, a racial mix that was representative of the county’s population. The state had been seeking a death sentence on the basis of circumstantial evidence.

Eugene Colvin-El, who is black, had been convicted in 1981 by an all-white Maryland jury of the murder of an elderly white woman. That conviction, on circumstantial evidence, survived the appeals process for well over a decade. Colvin-El was granted a new sentencing, which took place in 1992 in front of a jury of 11 whites and one black. In June 2000, Governor Parris Glendening commuted the death sentence shortly before it was due to be carried out because of lingering doubts about Colvin-El’s guilt. Governor Glendening subsequently imposed a moratorium on executions pending the outcome of a study he had commissioned into racial and geographic bias in the state’s death penalty system (see above).

Leroy Drayton, black, was executed in 1999 in South Carolina. He was convicted of the capital murder of Rhonda Smith, white. He maintained that her shooting had been an accident, that he had been drunk, and that she was his girlfriend. The state maintained that Smith was a stranger whom Drayton had abducted and intentionally shot. The trial lawyer failed to present evidence of Drayton’s relationship with Smith, or of his alcoholism and mental impairments, and failed to contest the state’s forensic evidence. On state appeal, Drayton’s lawyers presented numerous black witnesses to back up his claims. For example, six African American witnesses testified that Drayton had an ongoing relationship with Smith and six also testified as to the defendant’s alcoholism and intoxication on the night of Smith’s death. After the white post-conviction judge denied relief, the appeal lawyers appealed to the federal courts that his summary dismissal of the testimony of every black witness and his uncritical acceptance of the testimony of the state’s white witness, as well as of the white trial lawyer’s explanations for his conduct at the trial, betrayed the judge’s alleged racial bias against blacks. The appeal lawyers backed this up with detailed evidence of the judge’s

⁷⁹ For further information on this non-profit legal clinic, created in 1992 to handle cases where postconviction DNA testing can yield proof of innocence, see www.innocenceproject.org. By the end of March 2003, there had been 125 exonerations by DNA testing.

support for racially discriminatory public policies during his life.⁸⁰ The US Court of Appeals for the Fourth Circuit rejected the appeal in January 1999 ruling “it appears to us that Drayton had a full and fair hearing in state court”. Leroy Drayton was put to death 10 months later.

Thomas Nevius, black, was sentenced to death by an all-white jury in Nevada for the murder of a white man and after nearly 20 years on death row faced the possibility of an execution date in 2001. At his trial, the prosecutor had removed all four blacks and both Hispanics during jury selection. The appeal lawyers raised evidence that Thomas Nevius, the only one of four defendants to get the death penalty, may not have been the actual gunman in the crime. An expert in eyewitness testimony later concluded that the prosecution’s key witness, the victim’s wife, may have mistakenly identified Thomas Nevius as the gunman. He noted that eyewitness identification is notoriously unreliable, particularly cross-racial identifications made under traumatic, life-threatening conditions, as was the case here. Thomas Nevius was granted executive clemency in 2002 on the grounds of his mental retardation.⁸¹

The Innocence Project has found that in 60 of the first 82 post-conviction DNA exonerations of prisoners in the USA, “mistaken eyewitness identification played a major role in the wrongful conviction”. In 79 per cent of the 82 cases the victim of the crime was white, and in 55 per cent of cases the defendant was black. The Project has found that the rate of exonerations involving cases of black defendants and white victims is about three times the rate at which such crimes take place.⁸²

Shareef Cousin, a black teenager, was sent to Louisiana’s death row for the murder of a white man committed when Cousin was 16 years old. His conviction hinged on the testimony of a white eyewitness to the crime who repeatedly stated to the jury her absolute certainty that Cousin was the perpetrator. However, the prosecutor had withheld evidence that on the night of the murder, this same eyewitness had told police that she had not got a good look at the gunman and would probably not be able to identify him.⁸³ Shareef Cousin was granted a new trial on appeal in 1998 and the prosecution dropped the charges against him in January 1999.

Four months later, in a neighbouring Louisiana jurisdiction, Ryan Matthews, black, was sentenced to death by a jury of 11 whites and one African American for the murder of a white man committed during a robbery of a shop in 1997 when Matthews was 17 years old. Ryan Matthews has consistently maintained his innocence. No physical evidence linked him to the crime. He was convicted mainly on the basis of the eyewitness testimony of two people. Their identifications were made under severe stress and were cross-racial. One of the witnesses testified at the trial that she saw the gunman’s face through the glass door of the shop when he briefly lifted the face mask he was wearing (DNA testing of blood found on the

⁸⁰ *Drayton v Moore*. Brief of the Appellant, in the US Court of Appeals for the Fourth Circuit, 1998.

⁸¹ USA: Nevada’s planned killing of Thomas Nevius (AI Index: AMR 51/001/2001, March 2001).

⁸² See www.innocenceproject.org and *Actual Innocence* by Barry Scheck, Peter Neufield and Jim Dwyer. Doubleday Books, February 2000. Scheck and Neufield are co-founders of the Innocence Project. Minorities are disproportionately represented among prisoners sentenced to death and later exonerated by DNA testing. Of 12 such inmates, two were Latino, six were black and four were white.

⁸³ Another accusation levelled at the prosecution was that it had acted with discriminatory intent when it had used 13 of its 14 peremptory strikes at jury selection to dismiss prospective black jurors.

robber's mask does not implicate Matthews). She testified that she was about 50 feet away and in a state of panic at the time, having just run from the shop after hearing the gunshots. When shown a photo line-up after the crime, she had said that she was unsure of her identification of Ryan Matthews. At the time of the trial two years later, she claimed that she was certain about her identification. The other eyewitness was in a car outside the store, attempting to avoid getting shot at as the gunman fled and fired his weapon. He identified Ryan Matthews as that gunman he had glimpsed. Matthews remains on death row.

Joseph Amrine is facing execution in Missouri on the basis of testimony that has since been retracted. He is African American and was convicted by an all-white jury. He has always maintained his innocence, and if the case had to go to trial now, it might well result in acquittal due to lack of evidence.⁸⁴ At an appeal hearing on 4 February 2003 before the Missouri Supreme Court, a prosecutor from the state Attorney General's office argued that the Court should block Amrine from having his conviction reopened on the basis of new evidence. One of the Justices asked whether in the absence of the Court finding a constitutional violation, the state was suggesting that "even if we find Mr Amrine is actually innocent, he should be executed?" The assistant attorney general, replied, "That's correct, your honour."⁸⁵

Sixty-six-year-old ElRoy Tillman, a black man convicted in 1983 by an all-white Utah jury of the murder of a white man, was scheduled to be executed in October 2001 after nearly two decades on death row. A key witness for the state had been Tillman's white co-defendant, Carla Sagers, who was granted immunity from prosecution in return for her testimony. A dissenting judge on the Utah Supreme Court wrote in 1993 that "virtually all of the State's case against Tillman came from a person who, herself, could have been prosecuted for capital homicide and yet was given total immunity from prosecution. The criminal law, for wholly pragmatic reasons, appears to have been applied discriminatorily. Furthermore, Carla Sagers' testimony on some points was clearly contrived."⁸⁶ Yet the conviction and death sentence survived intact. Just weeks before ElRoy Tillman's 2001 execution date, the defence received previously undisclosed evidence which further undermined Sagers' credibility. In January 2003, a judge granted Tillman a new sentencing hearing. At the time of writing, ElRoy Tillman, now 67 years old, remained on death row after the state appealed the judge's ruling to the Utah Supreme Court.

Since 1973, no one has been sentenced to death in Connecticut for the murder of a black victim. Of the seven inmates on death row in January 2003 (three black, three white and one Latino), six were sentenced to death for crimes involving white victims, and one for murdering a Hispanic victim.⁸⁷ Sedrick Cobb, one of the African American prisoners, sought to challenge his death sentence by bringing statistical evidence of racial bias in capital sentencing. In 1999, the Connecticut Supreme Court denied his effort. Three Justices dissented: "The significance of the capital felony data brought forward by the defendant may

⁸⁴ USA: Joseph Amrine – Facing execution on tainted testimony (AMR 51/085/2002, June 2002).

⁸⁵ Missouri Supreme Court oral arguments. www.missourinet.com/court

⁸⁶ *Tillman v Cook*, 855 P.2d 211 (1993). Justice Stewart dissenting.

⁸⁷ State of Connecticut Commission on the Death Penalty. Submitted to the Connecticut General Assembly, 8 January 2003.

be summarized as follows. If the defendant is an African-American, he is more likely to receive the death penalty than if he were white. If the victim is white, a defendant also is more likely to receive the death penalty. If the defendant is an African-American and the victim is white, the defendant is highly more likely to receive the death penalty.”

The dissent continued that “the perception of racism becomes evident” if Sedrick Cobb’s case is compared to that of white defendant Christopher Hafford, who received a life sentence for capital murder, and whose case “by no means is an isolated example”. Analysis of the aggravating and mitigating factors in the two cases, the dissent said, leads to the conclusion that the only difference between the two was the race of the defendant – “in Hafford, the white defendant’s life was spared and in this case the African-American defendant has been sentenced to death”. In conclusion, the dissent stated: “The rush to snuff out the life of the defendant will only deepen African-Americans’ perception of racism in this court, in the judicial system and in society. The 237 pages that it takes the majority to confirm the defendant’s sentence of death will not wash the stain of blood that results from the majority’s decision today.”⁸⁸

Federal failure

“The Committee on the Elimination of Racial Discrimination this afternoon concluded its public consideration of an initial report of the United States with a Government delegation saying that the country’s laws imposed strict protection to ensure that race did not affect decisions concerning the death penalty.” United Nations press release, 6 August 2001⁸⁹

The USA committed itself to working against racism, including in the criminal justice system, when it ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1994. Under Article 5 of CERD, “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms”. Article 1 of the Convention makes it clear that the term “racial discrimination” means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights...” (emphasis added).

In the case of William Andrews, executed in 1991 in Utah, the federal government refused to comply with the recommendations of the Inter-American Commission on Human Rights after the Commission found that Andrews had been denied his right to equality before the law. The government’s refusal came three years after it had ratified CERD.

William Andrews was one of two black men convicted by all-white juries of the murder of two white people. The Inter-American Commission would later note, among other cases, that Joseph Franklin, a white racist, was sentenced to life imprisonment in Utah for killing two black men with a sniper’s rifle because they were jogging with white women. In Andrews’

⁸⁸ *Cobb v State*, Supreme Court of Connecticut, 251 Conn. 285; 743 A.2d.1. 7 December 1999, Justice Berdon dissenting (joined by Justices Norcott and Katz).

⁸⁹ *Delegation says United States has no plans to impose moratorium on death penalty*. UN Committee on Elimination of Racial Discrimination, 59th Session.

case the only prospective African American juror had been peremptorily removed by the prosecution during jury selection. Moreover, no hearing was held into the fact that during the trial, a note had been found among the jurors on which was written “Hang the Nigger’s” (sic) above a drawing of a man hanging from a gallows.

Two US Supreme Court Justices dissented from the refusal of the Court to take William Andrews’ appeal “before he is put to death for a series of murders in which he played only a secondary role”. They wrote: “It is conscience shocking that all three levels of the federal judiciary are willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing. Not only is this less process than due; it is no process at all.”⁹⁰

In December 1996, the Inter-American Commission found that the USA had violated its international obligations by denying William Andrews a trial free from racial discrimination.⁹¹ However, in March 1997 the US Government rejected the Inter-American Commission’s findings and its recommendation that William Andrews’s next of kin be provided with adequate compensation for the violations of his rights. Article 6 of CERD requires that states grant individuals the right to seek “just and adequate reparation or satisfaction for any damage suffered as a result of [racial] discrimination”.

The IACHR continues to be ignored by the USA in death penalty cases.⁹² As already noted, for example, Anthony Green was executed in South Carolina in 2002 despite a call by the Inter-American Commission to stay the execution while it considered evidence of racial bias in capital sentencing in the jurisdiction where he was prosecuted. Anthony Green was an African American man convicted of killing a white woman.

In 1996, the US Government told Amnesty International that it was “unalterably opposed to [the death penalty’s] application in an unfair manner, particularly if that unfairness is grounded in racial or other discrimination”.⁹³ Three years later, in response to Amnesty International’s 1999 report into race and the death penalty in the USA, the US Government wrote to the organization that it “cannot be disputed that the circumstances of many of the identified cases...raise concerns”, but essentially washed its hands of the issue by saying that the Justice Department’s powers of intervention in state-level cases were limited by the federal system of government.⁹⁴ This letter was written five years after the government had ratified CERD and committed itself to “undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms” (Article 2).

⁹⁰ *Andrews v Shulsen*, 485 U.S. 919 (1988), Justices Marshall and Brennan dissenting.

⁹¹ Report no. 57/96. Case 11.139. William Andrews. United States, 6 December 1996.

⁹² The US Government executed federal inmate Juan Raul Garza in 2001 despite a call for commutation from the IACHR which had found that his trial had been unfair, confirming that the US authorities are willing to contravene international standards even in federal cases.

⁹³ Letter to Amnesty International Secretary General Pierre Sané from John C. Keeney, Acting Assistant Attorney General, US Department of Justice, 2 October 1996.

⁹⁴ Letter to Amnesty International Secretary General Pierre Sané from Kevin V. Di Gregory, Deputy Assistant Attorney General, US Department of Justice, 11 August 1999.

International law does not allow a state to hide behind a particular system of government to avoid its international treaty obligations.⁹⁵

The federal government has manifestly failed to offer human rights leadership on the issue of race and the death penalty. As well as Congress failing to pass a national Racial Justice Act, the executive has failed to act decisively on racial disparities on its own death row. In September 2000, the US Justice Department released the findings of a review it had conducted into the federal death penalty.⁹⁶ It found widespread racial, ethnic and geographic disparities, although it was not within the scope of the review to seek to explain them.⁹⁷

President Bill Clinton's concern about the disparities led him to stay the execution of federal death row prisoner Juan Raul Garza for six months, "to allow the Justice Department time to gather and properly analyze" further information on its initial findings. On 6 June 2001, less than two weeks before Garza's rescheduled execution date under newly elected President George Bush, the Justice Department released a follow-up report to its September 2000 survey.⁹⁸ The report was not an in-depth analysis, and made some sweeping conclusions without providing hard evidence to back them up.⁹⁹ The Chairman of the Senate Judiciary Committee, for example, said that the follow-up report fell "far short of what this Committee was promised, and far short of what the American people deserve... I do not know if there is bias or prejudice in the application of the federal death penalty. There may be innocent explanations for the disparities identified in the September report. But the latest report makes little effort to determine the reasons for the racial disparities, and dismisses the geographic disparities as if they did not matter".¹⁰⁰ Similarly, one of the USA's leading experts on the subject stated that the supplementary report "utterly fails to convince me that there is no significant risk of racial unfairness and geographic arbitrariness in the administration of the federal death penalty".¹⁰¹

For his part, Attorney General Ashcroft concluded from the Justice Department's June 2001 supplementary report that there was "no racial bias in the way we are administering the death penalty in the federal system".¹⁰² He made no reference to the geographic disparities. At the

⁹⁵ Article 27 of the Vienna Convention on the Law of Treaties states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

⁹⁶ *Study of the federal death penalty system (1988-2000)*, US Department of Justice, 2000.

⁹⁷ *The federal death penalty system: a statistical survey (1988-2000)*, US Department of Justice, September 2000. See USA: *Memorandum to President Clinton. An appeal for human rights leadership as the first federal execution looms*. (AI Index: AMR 51/158/00, November 2000).

⁹⁸ *The federal death penalty system: Supplementary data, analysis and revised protocols for capital case review*. US Department of Justice, 6 June 2001.

⁹⁹ See USA: *Open letter to the US Attorney General concerning the imminent execution of Juan Raul Garza* (AI Index: AMR 51/088/2001, 15 June 2001).

¹⁰⁰ Statement of Senator Patrick Leahy, Chairman, Senate Judiciary Committee. Hearing on Racial and Geographic Disparities in the Federal Death Penalty System, 13 June 2001.

¹⁰¹ David C. Baldus, Distinguished Professor of Law, University of Iowa. Memorandum to Senator Russell Feingold, 11 June 2001.

¹⁰² Testimony of Attorney General John Ashcroft before the Committee on the Judiciary, US House of Representatives, 6 June 2001. As part of his confirmation process to the office of Attorney General,

same time, however, he announced that the National Institute of Justice (NIJ), the research, development and evaluation agency of the Department of Justice, would further study the federal death penalty system,¹⁰³ research that would apparently include issues “relating to the race and ethnicity of defendants and the location of the prosecution”.¹⁰⁴ In September 2002, the NIJ awarded two research grants to examine the federal death penalty system.¹⁰⁵

Juan Raul Garza was executed. Federal executions continued on 18 March 2003, when Louis Jones, an African American man convicted of killing a white woman, was put to death.¹⁰⁶ On the day of the execution, a US Senator said in Congress: “Today, more than two years after the US Department of Justice released a survey showing geographic and racial disparities in the federal death penalty system, we still do not have an explanation of why who lives and who dies in the federal system appears to relate to the colour of the defendant’s skin or the region of the country where the defendant is prosecuted. Attorney General Janet Reno was so disturbed by the results of this survey that she ordered a further, in-depth study of the results. Attorney General John Ashcroft pledged to continue that study, but we still await the results... Today, with the execution of Mr Jones, our federal criminal justice system has taken a step backward. Our goals of fairness and equal justice under law were not met, and the American people’s reason for confidence in our federal criminal justice system was diminished.”¹⁰⁷

In October 2000, a federal district court ruled that lawyers for John Bass, an African American federal defendant against whom the US Government wanted to seek a death sentence, had presented sufficient evidence of racial bias in the federal death penalty decision making process to justify the government providing further materials on that process. The US Government refused to comply, and in January 2001 the district court sanctioned it by saying that it could not seek the death penalty at John Bass’s trial. The government appealed, but the US Court of Appeals for the Sixth Circuit upheld the district court’s ruling, finding that the defence had presented “evidence tending to show that the United States considers the defendant’s race when determining whether to charge him or her with a death-eligible offense”.¹⁰⁸ In a two page unsigned opinion on 28 June 2002, the US Supreme Court

John Ashcroft had stated that he was “deeply troubled” by the evidence of racial disparities in federal capital sentencing raised by the September 2000 Justice Department statistics.

¹⁰³ Id.

¹⁰⁴ Testimony of Deputy Attorney General Larry Thompson before the Subcommittee on Constitution, Federalism, and Property Rights. Committee on the Judiciary, United States Senate. Concerning the enforcement of the federal death penalty, 13 June 2001.

¹⁰⁵ Justice Studies Inc. (Virginia) was awarded \$643,349 to study the manner in which federal and state prosecutors decide where to bring a capital case and when to seek the federal death penalty. RAND Corporation (California) was awarded \$1,332,979 to examine federal cases in which the federal death penalty could have been sought in order to identify the factors that contributed to the prosecutorial decision made in those cases.

¹⁰⁶ *Another planned killing by the US Government – The imminent federal execution of Louis Jones* (AI Index: AMR 51/020/2003, February 2003).

¹⁰⁷ Senator Russell Feingold, Statement on the federal execution of Louis Jones, US Senate.

¹⁰⁸ *USA v Bass*, 2001 FED App. 0304P (6th Cir.), 25 September 2001.

reversed the district court's decision, freeing up the government to seek John Bass's execution.¹⁰⁹

There is evidence that the racial disparities in the federal death penalty system are continuing under the current Attorney General. According to the Federal Death Penalty Resource Counsel Project in February 2003, of the 28 cases in which Attorney General Ashcroft ordered prosecutors to seek the federal death penalty, two of the defendants are white, 19 are African American, five are Hispanic, one is Native American, and one is Asian.¹¹⁰

Race and juvenile injustice

“Americans do not seem to think about the concrete, visceral impact that executions have on the African American community in cases like Napoleon's, where there seem to be many indications that race was a factor in his sentencing... I beg you to think of the degrading effect of Napoleon's sentence, under such circumstances, on the African American community in general and the Grapeland community and his family in particular.” Archbishop Desmond Tutu, appeal for clemency for child offender Napoleon Beazley, May 2002¹¹¹

Evidence of discrimination may be coupled with other injustices. For example, the USA is today almost alone in the world in the execution of child offenders, defendants who were under 18 years old at the time of the crime.¹¹² It has carried out 19 of the 33 such executions reported to have been carried out worldwide since 1990 (to 3 April 2003). Six of these 19 internationally illegal executions were of African Americans sentenced to death by all-white juries.¹¹³ Another, Gary Graham, was sentenced by a jury of 11 whites and one black. He was executed in 2000 despite serious doubts about his guilt. Seventy-seven per cent (17/22) of the child offenders executed in the USA since 1977, including Gary Graham, were convicted of killing white victims. At the time of writing, Kevin Stanford was facing a possible execution date in Kentucky for the murder of a white woman committed when he was 17 years old. He is black and was convicted by an all-white jury.

Napoleon Beazley, an African American child offender sentenced to death by 12 white jurors in 1995 for the murder of a white man when Beazley was 17, was executed in 2002. Challenged about the state's dismissal of a number of prospective black jurors, the prosecutor explained that he had rejected one because a dozen years earlier he had been charged with

¹⁰⁹ The Court cited its 1996 decision *US v Armstrong* which concerned disparities in prosecutions for drugs offences, and in which the Court held that “for a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races.”

¹¹⁰ *Death Penalty Cases Raise Race Questions*. New York Times, 14 February 2003.

¹¹¹ Letter to Gerald Garrett, Chairperson of the Texas Board of Pardons and Paroles, 16 May 2002. For full text of letter, see <http://www.abanet.org/crimjust/juvjus/beazleytututext02.html>. (Grapeland is the Beazley family's home town in Texas).

¹¹² *USA: Indecent and internationally illegal: The death penalty against child offenders* (AI Index: AMR 51/143/2002, September 2002).

¹¹³ Dalton Prejean, Curtis Harris, Frederick Lashley, Glen McGinnis, Gerald Mitchell and Napoleon Beazley.

driving while intoxicated (DWI). Although the man had been acquitted, the prosecutor believed that his experience would make him biased against the state. Notwithstanding this, a white juror was selected who had actually been convicted of DWI, and had also been fined within the previous three years for public drunkenness.

It emerged after Napoleon Beazley's 1995 trial that one of the 12 whites on his jury harboured profound prejudice against African Americans, allegedly saying that in Beazley's case "the nigger got what he deserved".¹¹⁴ It was also revealed that another of the jurors was a woman who was president of the local branch of the United Daughters of the Confederacy, a heritage organization dedicated to the memory of the South. She flew the confederate flag at her house, and featured on a website beside a confederate flag. This does not prove racial bias, but raises concern; many in the USA view the confederate flag as a symbol of racial separation and oppression, as a senior federal judge has acknowledged in another case.¹¹⁵

A glimpse at Louisiana

Nearly two thirds of the 80 plus child offenders on death row in the USA are from ethnic or racial minorities. Among them is Ryan Matthews, a black teenager sentenced to death for killing a white man. Matthews, 17 at the time of the crime, was convicted in 1999 by a jury of 11 whites and one black in a Louisiana jurisdiction that is about 23 per cent African American. There are seven child offenders on death row in Louisiana, six of them are black. Of the 38 death penalty states, Louisiana has the highest percentage of African Americans on its death row. In January 2003, 69 per cent of its condemned population was black. The state's population at large is 32.5 per cent black and 64 per cent white. Eighty-two per cent of the prisoners executed in Louisiana since 1977 (22 out of 27) were put to death for the murder of white victims. One of them was a child offender, Dalton Prejean, executed in 1990 for the murder of a white police officer. Prejean was sentenced to death by an all-white jury, as were at least six of the other 12 African Americans put to death in the state since 1977. The phenomenon continues. Allen Snyder, black, was sentenced to death by an all-white jury in 1996 after the prosecutor peremptorily dismissed all five African Americans during jury selection in a Louisiana jurisdiction, Jefferson Parish, with a population that is 23 per cent black. Urging the jury to vote for a death sentence, the prosecutor commented that O.J. Simpson, a black man acquitted of the murder of a white woman at a trial in California shortly before Allen Snyder's trial, had "got away with it". The Simpson verdict – the prosecutor's reference to which was described by a Louisiana Supreme Court judge as "totally irrelevant" and "highly prejudicial" to Snyder's case – had been overwhelmingly unpopular with white citizens, according to opinion polls.¹¹⁶ Allen Snyder remains on death row.

Every child offender executed in Louisiana since slavery is reported to have been black and tried in front of an all-white jury for a crime involving a white victim.¹¹⁷ The phenomenon

¹¹⁴ See *Too young to vote, old enough to be executed – Texas set to execute another child offender* (AI Index: AMR 51/105/2001, July 2001).

¹¹⁵ See *USA: Hypocrisy or human rights? Time to choose* (AI Index: AMR 51/075/2002, 15 May 2002).

¹¹⁶ *State v Snyder*, No 98-KA-1078, Judge Lemmon dissenting.

¹¹⁷ *Chattahoochee Judicial District: Buckle of the Death Belt*. Death Penalty Information Center, 1991.

continues. In 1998, Roy Bridgewater and Lawrence Jacobs, both black, were sentenced to death for killing two white people when Bridgewater was 17 and Jacobs was 16. Their two Jefferson Parish juries consisted of 23 whites and one African American. Lawrence Jacobs's conviction and death sentence were overturned by the Louisiana Supreme Court in 2001 on the grounds that he had been denied his right to an impartial jury by the inclusion of jurors who displayed a strong predisposition to imposing death sentences. The Court also noted that "the prosecutor's alleged racial discrimination in the selection of jurors... also appears to raise serious questions regarding the propriety of the jury selection process in the case". The prosecution had peremptorily dismissed four of the five African-American jurors in the jury pool. The prosecution had also tried to dismiss the fifth African-American juror, but had been prevented from doing so by the trial judge. The prosecution is intending to seek a new death sentence against Lawrence Jacobs at his July 2003 retrial. In a pre-trial hearing in the case in March 2002, one of the prosecutors wore a tie which bore the image of an executioner's noose, an image which carried echoes from Jefferson Parish's history of racist lynching.¹¹⁸

"A skunk in the jury box"

"Racial prejudice can sneak into the jury box". Judge, Texas Court of Criminal Appeals, March 2002

A US national is arrested abroad. He is not informed of his right to contact his embassy. He is charged with capital murder and brought to trial. The prosecution seeks to bolster its case for a death sentence by introducing an expert witness who testifies that the defendant's nationality is a reason to fear that he will commit further acts of criminal violence if allowed to live. The witness bases his theory on the fact that US nationals are disproportionately represented among the world's prison population, pointing to the two million people incarcerated in the USA. The accused is sentenced to death.

The US Government is rightly outraged. Not only was its citizen denied his consular rights in violation of international law, but the jury was encouraged to vote for execution on the basis of the defendant's nationality, a clear violation of the international prohibition on discrimination, whether it be on the grounds of racial, ethnic or national origin. The US Government demands that the death sentence be overturned.

The above case is invented. The case of Victor Saldaño is not. Furthermore it gives an insight into the tenacity of some local prosecutors in the USA in clinging to death sentences, and the willingness of some courts to uphold such sentences, even in the face of evidence that racial discrimination tainted trial proceedings.

Victor Saldaño, an Argentine national, was arrested in 1995 in Texas. He was not informed of his rights upon arrest to contact his consulate. He was charged with capital murder. At the

¹¹⁸ New Orleans Picayune, 30 September 1897. "Lynchings in Jefferson parish have been numerous; they have drilled the young minds into the belief that every offense committed by a black must be avenged with either the rope or the firearm...". Cited in "...the already scarlet record of Jefferson parish": *Analysis of a lynching syndrome, 1892-1897*. Michael J. Pfeifer. <http://academic.evergreen.edu/p.pfeifer/jefferson.html>

trial, the state obtained a conviction, and the proceedings moved into a separate sentencing phase. In Texas, a death sentence can only be passed if the jury finds that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” – so-called “future dangerousness”. At Victor Saldaño’s sentencing, the prosecution presented a psychologist who testified that “because [Saldaño] is Hispanic, this is a factor weighing in favour of future dangerousness”. This expert witness said that he based his theory on the fact that “Hispanics are over-represented in prison compared with their percentage of the general population”. In his closing argument for execution, the prosecutor also added a xenophobic note when he referred to Victor Saldaño as having “invaded our country”. The jury voted for death. The Texas Court of Criminal Appeals (TCCA) affirmed the verdict in 1999.

The Attorney General of Texas took a principled stand. In 2000, he “confessed error” in the US Supreme Court; that is, he admitted that the introduction of race as a factor for determining future dangerousness violated Victor Saldaño’s right to equal treatment before the law. On 5 June 2000, the Supreme Court sent the case back to the TCCA in order for the state court to give the case “further consideration in light of the confession of error”.

In the TCCA, the state Attorney General again confessed error. However, the Collin County District Attorney, the local prosecutor’s office which had obtained the death sentence against Saldaño in the first place, argued that the sentence should stand. On 13 March 2002, the Court of Criminal Appeals agreed. Two judges dissented. One wrote: “The analogy of a skunk in the jury box is instructive. Racial prejudice can sneak into the jury box...”. He said that it did not matter that the prosecution had not specifically emphasized the psychologist’s prejudicial testimony in its closing argument: “A skunk whether hurled or merely tossed into the jury box still fouls the air... If a skunk is allowed into the jury box, nothing will remove its stench. I cannot condone a decision to impose the death penalty when I am uncertain whether racial prejudice was a component of that decision”.¹¹⁹

At the time of writing, the case was in the federal courts. In May 2002, Texas Attorney General John Cornyn once again confessed error, acknowledging that “the infusion of race as a factor for the jury to weigh in making its determination...seriously undermined the fairness, integrity, or public reputation of the judicial process”. He asked the federal District Court either to require the trial court to impose a life sentence, or to conduct a new sentencing hearing. For his part, the Collin County District Attorney sought to intervene to have the death sentence upheld. On 16 July 2002, the District Court held that political questions prevented it from considering the merits of the District Attorney’s application to intervene. The District Attorney appealed to the US Court of Appeals for the Fifth Circuit which reversed the District Court’s decision on 18 February 2003 and sent it back to the lower court for reconsideration. Meanwhile, Victor Saldaño remains on death row, where he was sent eight years ago, in the words of the state Attorney General of Texas, in violation of his right “to be sentenced without regard to the color of his skin”.

¹¹⁹ *Saldano v Texas*, No. 72,556, Texas Court of Criminal Appeals, Judge Price dissenting.

In the majority of cases of more than 100 foreign nationals on death row in the USA, and the 20 already executed, the authorities failed to inform the suspect upon arrest of their right to contact their consulate for assistance, as provided by the Vienna Convention on Consular Relations. In January 2003, Mexico initiated proceedings against the USA in the International Court of Justice on this issue. There are more than 50 Mexican nationals on death row in the USA.

Asked whether the USA was practicing a form of racism by ignoring its treaty obligations in respect to arrested Mexican nationals, the legal advisor for the Mexican foreign ministry replied: "I would not say officially it's racism. But there is a consistent pattern of discrimination from juries, from courts and from prosecutors who are generally biased against Hispanics. And that of course makes [Mexicans] all the more vulnerable than they already are as foreigners."¹²⁰

Discrimination on the basis of national as well as ethnic origin is a violation of international law. Did such discrimination play a part, for example, in the cases of Mexican nationals Irineo Tristán Montoya or Mario Murphy, executed in 1997 in Texas and Virginia respectively? After his arrest, Irineo Tristán Montoya was subjected to a lengthy interrogation without a lawyer and signed a confession in English, a language he did not read, speak or understand. He was charged as an accessory to murder; the actual killer received a prison sentence. In the other case, Mario Murphy was the only one of six people involved in a 1991 murder in Virginia to receive a death sentence. The others, all US citizens, were offered plea bargains and received prison terms.

In the Constitutional Court decision striking down the death penalty in South Africa, one of the judges wrote: "For one person to receive the death sentence, where a similarly placed person does not, is, in my assessment of values, cruel to the person receiving it. To allow chance, in this way, to determine the life or death of a person is to reduce the person to a cipher in a sophisticated judicial lottery. This is to treat the sentenced person as inhuman."¹²¹

Juror race as a potential factor in capital cases

"Black jurors have doubts about the defendant's responsibility for the killing and believe he is remorseful despite his impassive demeanor. White jurors see him as dangerous and use this to persuade blacks to vote for death. Black jurors feel that the white jurors do not understand black defendants' background and the environment in which they live; they believe their white counterparts therefore render judgments on the basis of racial misconceptions or stereotypes." Research based on interviews with capital jurors¹²²

In 1992, a US Supreme Court Justice wrote: "The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press

¹²⁰ *A deadly serious border dispute*. Los Angeles Times, 8 April 2003.

¹²¹ *The State v Makwanyane*, Constitutional Court of the Republic of South Africa, 6 June 1995, Ackermann J, concurring.

¹²² William J. Bowers et al., *Sentencing in black and white: An empirical analysis of the role of jurors' race and jury racial composition*. 3 U. Pa. J. Const. L. 171, February 2001.

reports criminal trials. Major newspapers regularly note the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.”¹²³

At the sentencing phase of a US capital trial, the jury is required to make an individualized judgment regarding the punishment that it believes the defendant deserves. The jurors will hear aggravating evidence in favour of execution and mitigating evidence in favour of leniency presented, respectively, by the prosecution and the defence.

In 1986, in the case of a black defendant accused of the capital murder of a white victim in Virginia, the US Supreme Court recognized that: “Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.”

The Supreme Court also noted that “the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence”, and that the “risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence”. It stated that “the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination”. The Supreme Court therefore held that “a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim’s race and questioned on the issue of racial bias”.¹²⁴ The rule does not extend to intra-racial crimes, leaving the issue of juror questioning in such cases to the discretion of the individual trial judge. So, for example, affirming the death sentence against Larry Roy, a black man still on death row in Louisiana after being convicted by an all-white jury in 1994 of the murder of two African Americans, the state Supreme Court held that the trial court did not err when it prohibited Larry Roy’s trial lawyers from questioning prospective jurors on their attitudes to race.¹²⁵ Nevertheless, it has been alleged – for example in the case of Walanzo Robinson, a black man tried by an almost all-white jury and executed in Oklahoma in March 2003 for the murder of a fellow African American (see further below) – that racist attitudes can taint juror deliberations even in the context of a trial involving an intra-racial crime.

¹²³ *Georgia v McCollum*, 505 US 42 (1992), Justice Thomas, concurring in the judgment. Justice Thomas noted that a computer search revealed that the phrase “all white jury” had appeared over 200 times in the previous five years in the New York Times, Chicago Tribune, and Los Angeles Times.

¹²⁴ *Turner v Murray*, 476 U.S. 28 (1986).

¹²⁵ *State v Roy*, No 95-KA-0638.

That stereotypes about race and crime, conscious or unconscious, can infect a capital sentencing has been given weight by research published in 2001 on the behaviour of capital jurors in the USA.¹²⁶ The research, stemming from the Capital Jury Project which had interviewed 1,155 capital jurors from 340 trials in 14 states¹²⁷, also supports the contention that the divergent experiences and perspectives of blacks and whites in the United States have an impact when they are called to serve as jurors. Awareness or experience of discrimination at the hands of police or other authorities, for example, may leave an African American juror better able than his or her white counterpart to identify or sympathize with the background or experience of a black defendant when presented with mitigating evidence.

Among the study's findings was that a death sentence becomes three times more likely for a black defendant accused of killing a white victim where the jury has five or more white male jurors on it than for a black defendant who draws fewer such jurors. Conversely, a life sentence becomes twice as likely for a black defendant who has a jury with one black male juror on it, than for such a defendant who does not.

Earlier research by the Capital Jury Project has shown that perceptions of a defendant's lack of remorse or future dangerousness are highly aggravating in a capital juror's mind. In addition, lingering doubts about guilt are highly mitigating.¹²⁸ In the race study, the researchers gleaned that "whites more often than blacks see the [black] defendant as likely to be dangerous to society in the future and as likely to get back on the streets if not sentenced to death. Blacks in these cases more often see the defendant as remorseful and therefore deserving of mercy, and even wonder whether the defendant was the actual killer or at least whether the killing was a capital murder." Furthermore, the interviews revealed "a lack of receptivity to mitigating evidence among white jurors when the defendant is black. White jurors often appear unable or unwilling to consider the defendant's background and upbringing in context."¹²⁹ One of the black jurors described how the white jurors "were not considering what background this kid came out of. They were looking at him from a white middle-class point of view".

The study concluded that the system's reliance on the questioning of jurors during jury selection in order to detect deeply ingrained and often unconscious racist attitudes was "wishful thinking".

¹²⁶ William J. Bowers et al., *Sentencing in black and white: An empirical analysis of the role of jurors' race and jury racial composition*. 3 U. Pa. J. Const. L. 171, February 2001.

¹²⁷ The 340 capital cases included 165 white defendant/white victim cases, 74 black defendant/white victim cases, and 60 black defendant/black victim cases.

¹²⁸ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors think?* 98 Colum. L. Rev. 1538, 1563 (1998). In the case of Texas, a finding of "future dangerousness" by the jury is a prerequisite for a death sentence. Texas accounts for more than a third of the USA's executions.

¹²⁹ This presupposes that the jury is presented with mitigating evidence. The all-white jury who sentenced African American Calvin Swann to death in Virginia in 1993, for example, were told little about the defendant's serious mental illness, including paranoid schizophrenia, which he had suffered for the previous two decades. In 1999, the Governor of Virginia commuted Calvin Swann's death sentence a few hours before he was due to be executed.

In affirming the death sentence against Feltus Taylor, a black man convicted of the murder of a white woman in 1991, the Louisiana Supreme Court rejected the appeal claim that the all-white jury “could not be expected to deliver a verdict free from bias”. The Court noted that during jury selection for the trial, which took place in a jurisdiction where a third of the population was African American, each juror had declared that they would not allow race to influence their decision. The appeal had asked the Court to consider the prosecutor’s alleged inflammatory comments in the context of this claim. For example, arguing for execution, the prosecutor had told the 12 white jurors that if they returned a verdict less than the death penalty it would be “a shame and a disgrace”, and an insult to the memory of the victim. Although the Court said that such argument “treads dangerously close to reversible error”, it held that it was in fact “harmless”. Feltus Taylor was executed in June 2000.¹³⁰

Also in 2000, the Colorado Supreme Court upheld the death sentence of Robert Harlan, an African American man sentenced to death in Colorado in 1995 for the rape and murder of a white woman. The Court expressed its concern that “racial bias may have been a factor in the imposition of a death sentence”, and said that it was “troubled” by the “racial dimensions” of the case. These included the fact that there were no blacks on the jury and that several white women had testified for the prosecution during the sentencing phase concerning the defendant’s “prior sexual misconduct”. “Such testimony”, the Court wrote, “may have echoed a subconscious and pernicious racist image of African-American males as sexual predators preying on Caucasian women”. However, the Court was confident that racial prejudice had not undermined the fairness of the proceedings because the trial court had taken precautions “to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire” and had allowed the lawyers “to question jurors in detail concerning their racial views.”¹³¹ One prospective juror had been removed from the jury pool because of his prejudice against African Americans. Is it wishful thinking to believe that none of those selected to sit on the jury harboured any racial bias, unconscious or conscious, against the black defendant?

Bias in jury selection

“I would have more confidence in the fairmindedness of this jury and the jury’s pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant”. Judge, Supreme Court of Louisiana, 1999¹³²

In his announcement in January 2003 that he was commuting all the death sentences in Illinois, Governor George Ryan pointed not only to the fact that more than two thirds of death row inmates in the state were African American, but also that at least 35 black defendants had been sent to the state’s death row by all-white juries. The *Chicago Tribune* had found in 1999 that “of 65 death penalty cases in Illinois with a black defendant and white victim, the

¹³⁰ *State v Taylor*, No 93-KA-2201, 1993.

¹³¹ *People v Harlan*, No 95SA298, 27 March 2000.

¹³² *Louisiana v Snyder*, No 98-KA-1078, Johnson, J. dissenting.

jury was all white in 21 of them, or nearly a third".¹³³ At least two African American men sentenced to death by all-white juries, Girvies Davis and Hernando Williams, were executed, both in 1995. In Hernando Williams' case, the prosecutor had peremptorily dismissed 11 African Americans during jury selection. Discriminatory jury selection has also been alleged in cases of capital defendants later exonerated. Dennis Williams, an African American sentenced to death in Chicago along with three co-defendants for the murder of a white couple, was released in 1996 after 18 years in prison. His original death sentence was handed down by an all-white jury in a jurisdiction with a population that was a quarter African American. Verneal Jimerson, the other of the four men to be sentenced to death, was tried in front of a jury with only one African American on it despite blacks having made up about a third of the original jury pool. Jimerson was also released in 1996.

Illinois is not alone. A study by the *Tennessean* newspaper, for example, revealed in 2001 that of 52 African Americans sentenced to death in Tennessee since 1977, 15 (29 per cent) had been condemned by all-white juries. Two of the 28 black men tried in Shelby County were tried in front of all-white juries at a time when the population in the county was 42 per cent black. Fifty-four per cent (13 of 24) of the African Americans tried outside Shelby County were convicted by all-white juries in counties whose African American populations ranged between three per cent and 32 per cent.¹³⁴

At least one in five of the nearly 300 African Americans executed in the USA since 1977 were tried in front of all-white juries. Around 90 per cent of these more than 55 individuals – executed in 15 states – were convicted of killing white people.¹³⁵ In other words, at least a

¹³³ *Death Row justice derailed*. Chicago Tribune, 14 November 1999.

¹³⁴ *1 in 4 blacks condemned by all-white juries*. The Tennessean, 27 July 2001.

¹³⁵ Robert Williams (Louisiana, 1983)*, John Taylor (Louisiana, 1984), James Adams (Florida, 1984), Ernest Knighton (Louisiana, 1984), Alpha Stephens (Georgia, 1984), Jerome Bowden (Georgia, 1986), Larry Smith (Texas, 1986), Joseph Mulligan (Georgia, 1987)*, Dale Selby (Utah, 1987), Alvin Moore (Louisiana, 1987), Willie Darden (Florida, 1988), Henry Willis (Georgia, 1989), Leo Edwards (Mississippi, 1989)*, Horace Dunkins (Alabama, 1989), Winfred Stokes (Missouri, 1990), Dalton Prejean (Louisiana, 1990), Maurice Byrd (Missouri, 1991), Andrew Jones (Louisiana, 1991)*, James Russell (Texas, 1991), Ricky Rector (Arkansas, 1992), William Andrews (Utah, 1992), Cornelius Singleton (Alabama, 1992), Curtis Harris (Texas, 1993), Richard Wilkerson (Texas, 1993), Frederick Lashley (Missouri, 1993)*, Walter Blair (Missouri, 1993), Clifford Phillips (Texas, 1993), Antonio Bonham (Texas, 1993), Johnny Watkins (Virginia, 1994), Paul Rougeau (Texas, 1994)*, Girvies Davis (Illinois, 1995), Hernando Williams (Illinois, 1995), Emmett Foster (Missouri, 1995)*, John Fearance (Texas, 1995), Edward Horsley (Alabama, 1996), Richard Townes (Virginia, 1996), John Mills (Florida, 1996), Coleman Gray (Virginia, 1997), Dwight Adanandus (Texas, 1997), Larry Gilbert (South Carolina, 1998), J.D. Gleaton (South Carolina, 1998), Kelvin Malone (Missouri, 1999), Manny Babbitt (California, 1999), Victor Kennedy (Alabama, 1999), Brian Baldwin (Alabama, 1999), David Brown (North Carolina, 1999), Bobby Ross (Oklahoma, 1999), Malcolm Johnson (Oklahoma, 2000), Glen McGinnis (Texas, 2000), Freddie Wright (Alabama, 2000), Pernell Ford (Alabama, 2000), Feltus Taylor (Louisiana, 2000), Caruthers Alexander (Texas, 2001), Jerome Mallett (Missouri, 2001), Gerald Mitchell (Texas, 2001), Napoleon Beazley (Texas, 2002), Linroy Bottoson (Florida, 2002)*, Amos King (Florida, 2003). The men marked with an asterisk were executed for crimes involving black victims. The rest were executed for crimes involving whites. This list does not claim to be exhaustive.

quarter of the African Americans who have been executed for killing white victims were convicted by all-white juries. It is not a statistic that instils confidence in the fairness of the system, particularly in a country whose history of the death penalty has been one of racist use.

These executed prisoners were sentenced to death in the 1970s, 1980s and into the mid-1990s. Some from this period remain on death row. They include, for example, Johnny Lee Gates, a black man convicted by an all-white Georgia jury in 1977. The phenomenon continues to the present day, however. James Chappell, black, was sentenced to death in Nevada in 1996 for the murder of a white woman. His jury was all-white after the prosecutor peremptorily dismissed two prospective black jurors during jury selection. Farris Morris, black, was sentenced to death by an all-white jury in 1997 in a Tennessee county where the population is 32 per cent African American. Jessie Hoffman, black, was sentenced to death in Louisiana in 1998 for the murder of a white woman. Three African Americans were dismissed by the state during jury selection in a jurisdiction where 10 per cent of the population is African American. Eric Perkinson, black, was sentenced to death in Georgia in 1999 by an all-white jury. Johnny Bennett, black, described by the prosecutor as "King Kong", was sentenced to death by 12 white jurors in July 2000 in Lexington County, South Carolina.¹³⁶ The county's population is around 13 per cent African American. Also in 2000, Nicholson McCoy, black, was sentenced to death by an all-white New York jury for the murder of a white woman. The defence alleged that the Suffolk County prosecution had deliberately excluded prospective black jurors during jury selection. Lamar Brooks, black, was sentenced to death by an all-white jury in February 2002 in Okaloosa County, Florida, where African Americans account for nine per cent of the population. Marcus Green was sentenced to death in Texas in July 2002. He is African American, and was tried in front of an all-white jury for the murder of a white girl.

Jerome Mallett, an African American man sentenced to death by an all-white rural Missouri jury, was executed on 11 July 2001 for the murder of State Highway Patrol Trooper James Froemsdorf, white. The officer was shot with his own revolver on 2 March 1985 after he had stopped Jerome Mallett for speeding in Perry County, in eastern Missouri. The officer discovered that Mallett was wanted in Texas for parole violations and robbery. After his arrest, Mallett claimed that the shooting had occurred during a struggle after the officer struck him and accused him of lying about his identity. The state claimed that it was a premeditated killing in order to avoid arrest.

The defence requested a change of trial venue due to prejudicial pretrial publicity in Perry County. The defence and prosecution suggested possible locations. The defence asked that the county chosen be one in which there were African American residents, so that there would be a possibility that blacks would serve on the jury. All the proposed counties had some African American residents.

The judge selected Schuyler County in the north of the state, which neither side had suggested, and which had no black residents at the time (compared to about seven per cent in Perry County and around 10 per cent statewide). The trial took place in Lancaster, a rural

¹³⁶ *Swansea-area man sentenced to death a second time*. The State, 17 July 2000.

community with a population of less than 1,000. The all-white jury convicted Jerome Mallett of first-degree murder and sentenced him to death.

During post-conviction proceedings, another judge assigned to examine the trial judge's actions said that Mallett must receive a new trial. He ruled that the transfer decision, by denying the defendant any chance to have members of his own race on the jury, had given rise to the appearance of having been racially motivated. However, the Missouri Supreme Court set aside his ruling, and this was upheld by the US Supreme Court, over the dissent of three Justices.

In subsequent appeals against the conviction and sentence, three of the seven Missouri Supreme Court judges dissented from the court's decision to uphold the death sentence. Given the circumstances of the case, they said that Mallett's sentence was disproportionate and should be reduced to life imprisonment. The dissent pointed to the "impulsive" nature of the Froemsdorf murder and compared it to the case of David Tate, a white supremacist involved in preparing an armed rebellion against the US and Missouri governments, who was convicted of killing a Missouri trooper in April 1985. After he was stopped in a van transporting a number of automatic weapons and hand grenades, Tate shot the trooper 11 times and also seriously injured another officer. He received a life sentence.

Under-representation of blacks in jury pools

In Oklahoma in August 2000, jury selection was due to begin for the criminal trial of an African American woman facing drugs charges. Her defence lawyer lodged an objection, on the grounds that there was only one African American in the jury pool. In addition, the state was planning on dismissing that solitary black juror because of his prior contact with the criminal justice system. Over the state's objections, the trial judge agreed that it was "fundamentally unfair" that the defendant would not have the opportunity to have any African Americans on her jury, and dismissed the jury pool. However, the state appealed to the state Court of Criminal Appeals which found that the judge had exceeded her authority and that the racial make-up of the jury pool was to be attributed to chance in the absence of proof that it was the result of a discriminatory process in Oklahoma County's selection of jury pools.¹³⁷

The under-representation of minorities in jury pools is a subject of continuing concern in the USA. A Pittsburgh (Pennsylvania) attorney recently testified in a public hearing that he had represented more than 20 African American clients in civil jury trials in the past five years on issues ranging from personal injury claims, employment discrimination, and fair housing. He recalled that "in all of the cases which I have tried on behalf of African American plaintiffs in the past five years, a grand total of one African American was involved in the deliberations that determined the outcome of the case. Indeed, in most of the cases, the only African American in the courtroom was my client".¹³⁸ In its 2003 report, Pennsylvania's Committee on Racial and Gender Bias in the Justice System noted that in the 1990s state task forces in

¹³⁷ *State ex rel. Macy v. Bragg*. 2000 OK CR 21, 27 October 2000.

¹³⁸ Testimony of Timothy O'Brien, quoted in Final report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System. March 2003. Page 74.

California, Oregon, Ohio, New York, and New Jersey had variously found that ethnic and racial minorities were underrepresented in jury pools.

Similarly, minorities may be underrepresented in jury pools in capital cases. Arthur Copeland, black, was sentenced to death by an all-white jury in Tennessee in 2000. He was tried in Blount County where African Americans account for three per cent of the population. The jury pool from which his jury was selected was only one per cent black (four out of 400).¹³⁹ Todd Wessinger, black, is on death row in Louisiana. He was sentenced to death in 1997 by an all-white jury for the murder of two white victims. The jury pool consisted of 64 people, of whom 13 (20 per cent) were African American. The trial took place in a Louisiana jurisdiction, East Baton Rouge parish, where 40 per cent of the population is black. At the 1997 Oklahoma trial of Billy Alverson, black, of the 75 people in the Tulsa County jury pool there were only five African Americans (6.7 per cent of the pool), none of whom sat on the eventual jury. African Americans made up 10 per cent of Tulsa County's adult population. At the 1998 Oklahoma County trial of Danny Hooks, also black, there were four African Americans 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 adult population of Oklahoma County. 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. Danny Hooks and Billy Alverson both remain on Oklahoma's death row. Ramon Sanchez, a 21-year-old Hispanic man, was sent to Pennsylvania's death row in April 2003. His lawyers said that issues to be raised on appeal would likely include the under-representation of Hispanics in jury pools in Lehigh County.

Glen McGinnis, black, was executed in Texas in January 2000 for the murder of a white woman, committed when McGinnis was 17 years old. The pool from which his jurors were selected at his 1992 trial initially consisted of 102 individuals, three African American and the rest white. Although this was approximately representative of the Montgomery County population at the time, all three blacks were dismissed by the judge after they asked to be excused for personal reasons. The judge also excused 19 of the 33 white jurors who asked to pull out of jury duty. Glen McGinnis was therefore given no opportunity to have African Americans serving on his jury, as his defence lawyer was faced by a pool of 80 whites from which he and the prosecutor would select 12 jurors.

At the time of writing, lawyers for Lee Malvo, a black Jamaican teenager facing capital trial in Virginia in November 2003, looked set to challenge an anticipated underrepresentation in prospective minority jurors in the jury pool. The venue for the trial, Fairfax County, had recently dropped motor vehicle records as a means by which individuals were called to jury service, leaving voter registration lists as the sole source. The county claimed to have taken this step in a bid for increased efficiency, but Lee Malvo's defence claimed that the electoral rolls were unrepresentative of the county's ethnic and racial diversity.¹⁴⁰ In violation of international law, local prosecutors are intending to seek a death sentence against Malvo, who

¹³⁹ *1 in 4 blacks condemned by all-white juries.* Tennessean, 27 July 2001.

¹⁴⁰ *Malvo challenges change in jury pool— Sniper suspect's trial set for November 10.* AP, 13 March 2003.

was 17 years old at the time of the crime of which he is accused (see race and juvenile injustice, below). Another indication of the federal government's complicity in such state-level violations was the fact that Lee Malvo was transferred from federal custody to Fairfax County. The US Attorney General explained that this was in order to allow the "best range of available penalties", adding that it was "imperative" that "the ultimate sanction" be available in this case.¹⁴¹ Federal law does not allow the execution of people who were under 18 at the time of the crime. Virginia state law does.

Meryl McDonald and Robert Gordon are black Jamaican nationals on death row in Florida. They were sentenced to death in 1995 by an all-white jury. The jury was selected from a pool of 50 people, all of whom were white, in a county with a population that was eight per cent African American at the time. When the defence attorneys objected, the judge replied that there was nothing he could do because the juror pool was randomly selected by computer. The judge also said: "I wish there were blacks on the panel, but that's the best we can do".

Zolo Agona Azania, an African American man convicted and sentenced to death in Indiana by an all-white jury in 1982 for killing a white police officer, was re-sentenced to death in 1996 by a jury consisting of 11 whites and one Hispanic (the original death sentence was reversed on appeal in 1993). Since 1980 a flawed computer program used to select county residents for jury service had been excluding thousands of African Americans from this process. In November 2002, the Indiana Supreme Court overturned his death sentence, noting that "computer failures can have serious consequences, and this is an example of that. Because of the heightened need for public confidence in the integrity of the death penalty... the jury selection process was fundamentally flawed."¹⁴² It is disturbing that two of the five judges would have upheld the death sentence despite this "computer glitch". They believed that denying African Americans the possibility of sitting on Zolo Agona Azania's jury had been "harmless".¹⁴³ Disturbing, but perhaps not surprising, given that courts have upheld the death sentences of African Americans condemned by juries from which, evidence suggests, blacks had been excluded by more deliberate means.

The courts upheld Delma Banks's death sentence for two decades. Then, 10 minutes before he was scheduled to be executed in Texas on 12 March 2003, the US Supreme Court granted a stay of execution to consider whether to take his case. At the time of writing, the Court had not yet said whether it would take the case, and was expected to announce its decision on 21 April. Delma Banks, a black man convicted in 1980 of killing a white teenager, was tried in front of an all-white jury after the Bowie County prosecution peremptorily dismissed the only four African Americans from the jury pool. According to a former prosecutor, this "was simply the way things were done in the criminal justice system in Bowie County, and was accepted practice at that time". Between 1 January 1975 and 30 September 1980, the county's prosecutors had used peremptory strikes to exclude 94 per cent of blacks eligible to sit on juries. As a result, 1.8 per cent of eligible blacks served on the 37 cases tried in that period despite the fact that African Americans accounted for 21 per cent of the population of

¹⁴¹ Remarks of Attorney General John Ashcroft, Press Conference, 7 November 2002.

¹⁴² *Zolo Agona Azania v State.* Supreme Court of Indiana, 778 N.E. 2d 1253, 22 November 2002.

¹⁴³ *Id.* Chief Justice Shepard and Justice Dickson dissenting.

Bowie County. The prosecutors used race-coding markers against juror names – for example, “C”, “B” or “N” – to identify individuals who were black. No such coding was used in the case of prospective white jurors. Delma Banks’s trial lawyer, a former county prosecutor, made no objection to the dismissal of the four African Americans from the jury pool. One leading newspaper said that the Banks case “from the police investigation through his trial – has the stench of a lynching”.¹⁴⁴

The limits of Batson protection

At the 1995 capital murder trial of Willie McCray, an African American defendant charged with killing a white man during a robbery in Dothan, Alabama, the prosecutor peremptorily dismissed seven blacks during jury selection. Unusually, the final jury consisted of nine blacks and three whites. The defence challenged the prosecutor’s strikes on the grounds that they appeared to have been motivated by race and therefore unconstitutional. The prosecutor explained that he had struck blacks in order to avoid an all-black jury and to allow whites to sit on the jury. Despite this, the trial court denied the defence motion and the trial proceeded. Willie McCray was granted a new trial on appeal in 1998 because the prosecutor’s explanation had clearly indicated that race was a factor in his removal of blacks.¹⁴⁵

Not all such appeals have been so successful. As already shown, many African American capital defendants have been tried in front of all-white or almost all-white juries after prosecutors dismissed African Americans during jury selection. More than 55 have been executed. In his 1998 report on the USA, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions expressed his concern that the dismissal by prosecutors of prospective black jurors along racial lines appeared to be tolerated even though it was unconstitutional. “As a result”, he wrote, “it has not been uncommon that black defendants are tried before a totally or almost all-white jury”.¹⁴⁶

One such defendant was Harvey Green, who was executed in North Carolina in 1999 for the murder of two white people. Prior to his 1984 sentencing (he had pleaded guilty), the defence asked the court to prevent the prosecutor from systematically removing blacks during jury selection, which the defence argued was his tendency. The court denied the request. At the subsequent jury selection, the prosecutor peremptorily excluded five of the six prospective black jurors, but only one of 26 white jurors. At a hearing in 1989 an expert testified that the statistical probability that race was not a factor in the prosecutor’s actions in Green’s case was one in 10,000. At his 1992 re-sentencing (his original sentence was overturned because of an erroneous jury instruction at the 1984 trial), Harvey Green faced the same prosecutor and a jury selection process which again result in one black and 11 white jurors.

Under the 1986 Supreme Court decision *Batson v Kentucky*, prospective jurors can only be removed for “race neutral” reasons. However, as one Supreme Court Justice subsequently

¹⁴⁴ *High Court Last Hope For Possibly Innocent Man*. Austin-American Statesman, 8 March 2003.

¹⁴⁵ *McCray v State*, 738 So. 2d 911, August 1998. The state unsuccessfully sought to have this decision overturned.

¹⁴⁶ E/CN.4/1998/68/Add.3, para. 86.

wrote: “*Batson*’s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors... This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice”.¹⁴⁷ Prosecutors simply have to come up with a vaguely plausible non-racial reason for dismissing a minority juror. A study of peremptory challenges in Philadelphia concluded that a possible explanation for the infrequent claims made of discrimination during jury selection, “in spite of evidence that the discrimination is widespread”, is that lawyers “have little expectation that the courts will sustain a claim of discrimination even if it is based on solid evidence”. Among the 24 capital cases reviewed by the researchers in which such claims appear to have been made, relief did not appear to have been granted by the appeal courts in a single case.¹⁴⁸ Another scholar has written: “Only the most overtly discriminatory or impolitic lawyer can be caught in *Batson*’s toothless bite and, even then, the wound will only be superficial.”¹⁴⁹

Kelvin Malone, black, was executed in Missouri in 1999 for the murder of a white man. He was sentenced to death by an all-white jury after the prosecutor peremptorily dismissed four blacks during jury selection. Challenged by the defence, the prosecutor explained that he had struck one of the African Americans because she had been the victim of an armed robbery for which no one had been charged. However, he did not strike several whites who had also been victims of robberies or burglaries for which no one had been charged. The prosecutor said that he had struck another of the black jurors because he looked familiar and because he was the son of a pastor. A judge on a federal court, dissenting against the death sentence, found that the prosecutor had “little or no basis for his claim of familiarity”, and noted that the he had not challenged a white juror who had spent seven years “in the ministry”.¹⁵⁰ This white juror became the foreman of Malone’s jury.

Michael Sexton, black, was executed in North Carolina on 9 November 2000 for the 1991 murder of Kimberly Crews, white. He was condemned to death by a jury of 11 whites and one black, after the prosecution peremptorily dismissed the only other four African Americans in the jury pool. Asked to explain his actions, the prosecutor said that one of the blacks had not maintained eye contact and “was not forthcoming”; another was “not mature” because of “the way he was dressed”, including an earring; and another was rejected as “litigious”, having witnessed an accident that resulted in a lawsuit.

¹⁴⁷ *Wilkerson v Texas*, 493, U.S. 924 (1990), Justice Marshall dissenting from denial of *certiorari*.

Another federal judge also wrote that he had been troubled by a series of cases “where the *Batson* issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted. I fear that *Batson* is fast coming to offer a theoretical right without an effective remedy”. *US v Clemmons*, 892 F.2d 1153, US Court of Appeals for the Third Circuit (1989), Judge Higginbotham, concurring.

¹⁴⁸ David C. Baldus et al. *Use of peremptory challenges in capital murder trials: a legal and empirical analysis*. 3 U.Pa.J. Const. L. 3, February 2001.

¹⁴⁹ Leonard L. Cavise, *The Batson doctrine: The Supreme Court’s utter failure to meet the challenge of discrimination in jury selection*. 1999 Wis. L. Rev. 501.

¹⁵⁰ *Malone v Vasquez*, Eighth Circuit Court of Appeals, No 96-1613, (1998), Judge Heaney dissenting.

Willie Fisher, black, was tried for a 1992 murder before a North Carolina jury also consisting of 11 whites and one black person. At the jury selection, the prosecutor peremptorily removed three African American men from the jury pool. When the defence objected, the prosecutor explained his reasons, which included: one juror was a painter (decorator) and people in his profession frequently have criminal records; one was inattentive during jury selection; and one had studied psychology and sociology at college, and displayed a "liberal attitude". The prosecutor was looking for "conservative" jurors. Willie Fisher was executed in March 2001.

When Brian Roberson was 10 years old, his father was stabbed to death in a grocery store by a white man who was high on drugs. The man turned himself in to the police, was subsequently sentenced to 13 years in prison, and reportedly released after three. In August 2000, at the age of 36, Brian Roberson was executed for stabbing to death his elderly white neighbours in their home in 1986. After his arrest, the 22-year-old African American admitted to killing the couple which he said was committed while he was high on PCP and alcohol. At jury selection for Roberson's Texas trial, the Dallas County prosecutor, who was trained at a time when the county used a manual encouraging new prosecutors to remove "minority races" during jury selection (see Miller-El case below), peremptorily dismissed all but one of the blacks in the jury pool. Challenged about his apparently discriminatory use of peremptory strikes, the prosecutor had suggested that blacks who answered a question in a certain way did not meet the standard of intelligence required to sit on a jury, and referred to poorer education standards for blacks.

Abu-Ali Abdur'Rahman is scheduled to be executed in Tennessee on 18 June 2003. As has already been noted above, many black defendants have been sentenced to death by all-white juries in Tennessee. Abu-Ali Abdur'Rahman, also African American, was sentenced to death by a jury consisting of 11 whites and one black, in a county whose population at the time was approximately 23 per cent African American. His appeal lawyers have claimed that the prosecution peremptorily dismissed black jurors on the basis of their race. The prosecution's notes from the jury selection ranked prospective jurors, on a scale of 1 to 4, according to their perceived likelihood to favour the state. The race of the individual was also noted by the prosecution. One of the black jurors was dismissed despite being ranked as equally pro-prosecution as five of the whites who were selected for the jury and more pro-prosecution than five other white jurors chosen. Upon being challenged, the "race-neutral" reason given by the prosecution was that the prospective black juror had given the "appearance that he was an uneducated, not very communicative individual". The prosecution had made no notes to this effect about this juror. It had done so in the case of one of the white jurors, who was noted as "dumb" and "not real smart". He was selected to sit on the jury.

One of the reasons for the prosecution's dismissal of another black juror was that she gave "short cryptic answers" and "avoided eye contact" with the prosecution. At least two white jurors whom the prosecution had noted were non-communicative or had difficulty answering questions were selected. A judge on the Tennessee Supreme Court wrote in 2002 that "the nature of [the black juror's] answers were understandable... in the light of the lengthy, complex leading questions, some stretching for a paragraph or more in the record, asked by the State." The judge questioned, given the state's apparently different treatment of different

jurors, whether the reasons given by the state for dismissing this black juror were “honest, or whether they were merely pretextual”. However, the majority dismissed the appeal.¹⁵¹

Exclusion of minority jurors for non-black defendants

Defendants from other minority groups have been tried by all-white juries. Randolph Reeves, Native American, was tried in front of 12 white jurors in Nebraska and sentenced to death. He was resentenced to life imprisonment in 2001 after two decades on death row and after coming close to execution in 1999. Latino Ramon Mata died on death row in Texas in July 2000 after 15 years under a death sentence imposed by an all-white jury selected after the prosecution and defence agreed to remove all eight prospective black jurors. Rudy Esquivel, also Latino, was sentenced to death by an all-white jury and executed in Texas in 1986. On 19 March 2003, Hispanic Noel Montalvo was sentenced to death by an all-white jury in York County, Pennsylvania.¹⁵²

Tuan Anh Nguyen, a mentally ill former Vietnamese refugee, was executed in Oklahoma on Human Rights Day in 1998. At his trial, the prosecutor had peremptorily removed three African Americans during jury selection. Challenged on this, the prosecutor alleged that one had been inattentive during questioning of other prospective jurors, the second was not a good communicator, and the third had once been falsely accused of a crime and therefore might be biased against the state. On appeal these were accepted as race neutral reasons.

Pakistan national Mir Aimal Kasi was executed in Virginia on 14 November 2002. After being forcibly abducted from Pakistan by US agents, he was tried in front of an all-white jury in 1997 for the murder of a CIA agent in 1993.¹⁵³ It seems that the only non-white person on the jury pool was dismissed by the state during jury selection, because, in the words of the prosecutor, “she was the only member of the entire panel who never read anything about the case or heard anything about the case. My fear is that somebody like that is kind of detached from the real world, and that’s why I struck her”. The Virginia Supreme Court accepted that “striking a juror because she had not even read or heard anything about a well-publicized case clearly is a race-neutral reason.” Earlier, the defence had unsuccessfully sought a change of venue on the grounds that “inflammatory and inaccurate” reports in the local media before the trial would have prejudiced the jurors.¹⁵⁴

White defendants may also find themselves facing all-white juries after minorities have been dismissed during jury selection. Larry Moon, white, was executed in Georgia on 25 March 2003. On appeal, a Georgia judge found that the prosecutor had acted with discriminatory intent by removing the only prospective African American juror during jury selection. However, this was overturned by the Georgia Supreme Court.

¹⁵¹ *Abdur’Rahman v State*, No Mi988-00026-SC-DPE-PD, Justice Birch, dissenting to order denying recall of mandate, 2002.

¹⁵² *Killer gets death*. The York Dispatch, 20 March 2003.

¹⁵³ *No return to execution: The US death penalty as a barrier to extradition* (AI Index: AMR 51/171/2001, 29 November 2001).

¹⁵⁴ *Kasi v Commonwealth*, Virginia Supreme Court, 6 November 1998.

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, white, was executed in December 2002. He was sentenced to death 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.

Jay Wesley Neill, a gay man, was subjected to another form of discrimination at his trial. Arguing for his execution, the prosecutor told the jury: “I want you to think briefly about the man you’re sitting in judgment on and determining what the appropriate punishment should be... I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you’re sitting in judgment on - disregard Jay Neill. You’re deciding life or death on a person that’s a vowed [sic] homosexual... But these are areas you consider whenever you determine the type of person you’re sitting in judgment on...The individual’s homosexual.” The jury returned a death verdict.¹⁵⁵

A glimpse at Pennsylvania

Even when there is substantial evidence that racial discrimination may have occurred during jury selection, the state will seek to have the conviction and death sentence upheld. William Basemore was sentenced to death in Pennsylvania by an all-white jury after the prosecutor

¹⁵⁵ In 2001, the 10th Circuit Court of Appeals upheld the death sentence. One of the three judges, Judge Carlos Lucero, dissented, arguing that “the prosecutor’s blatant homophobic hatemongering at sentencing has no place in the courtrooms of a civilized society”. The 10th Circuit panel agreed to reconsider its decision, but again upheld the death sentence by 2 votes to 1. This time the majority acknowledged that the prosecutor’s comments had been “improper” and without “any legitimate justification”, but decided that the trial’s outcome had not been affected. Judge Lucero again dissented, asking “what is it that makes the comments more than merely improper? As prosecutors know, gays and lesbians are routinely subject to invidious bias in all corners of society...The openly gay defendant thus finds himself at a disadvantage from the outset of his prosecution. When a prosecutor directs the jury to make its guilt-innocence or life-death determination on the basis of anti-homosexual bias, that disadvantage is magnified exponentially and raises constitutional concerns. This is so because prosecutors occupy a position of trust, and their exhortations carry significant weight with juries... Justification for these remarks was unquestionably illegitimate”.

peremptorily dismissed 19 African Americans from the jury pool. In the year of William Basemore's trial, 1987, the same prosecutor had made a videotape of a training session on jury selection that he had conducted. The recording includes the use of racist jury selection tactics. In the tape, for example, the prosecutor denigrates the purpose of jury selection – to obtain a competent, fair and impartial jury – as “ridiculous”. He advised that “blacks from the low-income areas are less likely to convict” and so “you don't want those people on your jury”. He added that “black women, young black women, are very bad... I guess maybe because they're downtrodden on two respects, they got two minorities, they're women and they're blacks...”.

In William Basemore's appeals in 1999, the state acknowledged the existence of the training videotape and that it had only become public in 1997, but argued that its contents did not prove discrimination in Basemore's particular case and that his conviction and death sentence should stand. However, in December 2001, 14 years after being sentenced to death, William Basemore was granted a new trial.

William Basemore was tried in Philadelphia County. Pennsylvania's Committee on Racial and Gender Bias in the Justice System pointed out in its March 2003 report that there has been extensive research on Philadelphia County: “After controlling for the seriousness of the offense and other non-racial factors, researchers there found that African American defendants were sentenced to death at a significantly higher rate than similarly situated non-African Americans; researchers further concluded that one third of African Americans on death row in Philadelphia County would have received life sentences if they were not African American. Race was also shown to be a major factor in capital jury selection, with the prosecution striking African American from the jury twice as often as non-African Americans, and with the defense doing just the opposite...”. A study published in 1998 concluded that the findings from Philadelphia, as well as on New Jersey, “indicate that the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions”.¹⁵⁶

A study of the use of peremptory strikes in 317 capital murder cases in Philadelphia between 1981 and 1997 concluded that the *Batson* decision had not been particularly successful in stopping the discriminatory use of peremptory challenges and that “corrective judicial action [is] likely in only the most extreme circumstances”. In the case of Philadelphia trials, the study found, the prosecution's comparative advantage in influencing the composition of juries led to “an under-representation of black jurors, who, on average, were more life sentence prone than their non-black counterparts”. This appears to be a contributing factor to “enhanced death-sentencing rates, particularly in cases involving black defendants”.¹⁵⁷

Mumia Abu-Jamal, black, was sentenced to death in Philadelphia in 1982 for the murder of a white police officer in 1981. At his trial, the prosecution used 11 of its 15 peremptory strikes

¹⁵⁶ David C. Baldus et al. *Racial discrimination and the death penalty in the post-Furman era: An empirical and legal overview, with recent findings from Philadelphia*. Cornell L. Rev, Vol 83, 1998.

¹⁵⁷ David C. Baldus et al. *Use of peremptory challenges in capital murder trials: a legal and empirical analysis*. 3 U.Pa.J. Const. L. 3, February 2001.

to remove African Americans from the jury. Including four alternate (reserve jurors), Mumia Abu-Jamal's jury consisted of 14 whites and two blacks in a county whose population at the time was 40 per cent African American.¹⁵⁸ As of 2 March 2003, Mumia Abu-Jamal was one of 133 people on Pennsylvania's death row who were tried in Philadelphia County. Eighty-five per cent of them were African American. The population of the county is now 45 per cent white, and 43 per cent black. In Pennsylvania as a whole, there were 242 people on death row in March 2003, of whom 151 (62 per cent) were African American. The population of the state is approximately 85 per cent white, and 10 per cent black.

Alleged racial coercion in the jury room

"The white majority on a jury sometimes takes extraordinary steps to "encourage" black pro-life sentence jurors to vote for death. In some cases such persuasion includes manipulation and intimidation." Research based on interviews with capital jurors¹⁵⁹

Many defendants, including African Americans, have been tried by juries consisting of 11 whites and one black. Anecdotal evidence suggests that racial tension can taint jury room deliberations in such circumstances. David Jay Brown, a white man, had been scheduled to be executed in Oklahoma on 27 March 2003, but received a stay. He was tried by a jury of 11 whites and one black. The African American juror later came forward to sign an affidavit that, in a racially charged environment, he had only voted for death in order to appease the white jurors and to get along in the community.

Walanzo Robinson, black, was executed in Oklahoma on 18 March 2003 for a crime committed when he was 18 years old. Again, his jury consisted of 11 whites and one African American. Post-conviction investigations by the defence revealed that the sole black juror had not wanted to vote for the death penalty. This juror told an investigator that she had been subjected to mental and physical intimidation by fellow jurors because she was the only person to fail to vote for death. She said that fellow jurors had said that she was just "one nigger helping out another" and that the "jury was not leaving the room without a death sentence". After eight hours of such pressure, she said that she relented and voted for death because she was "tired of the hostility and cruelty of the other jurors". Another defence investigator signed an affidavit that he had spoken to the jury foreman. The latter allegedly confirmed to the investigator that the African American woman had been the only juror not wanting to vote for death, and that he, the foreman, had been among those pressurizing her until she changed her mind.

This is not the first time that racist coercion of a black juror by white jurors has been alleged in the USA. William Hance, black, was executed in Georgia in 1994. The only African American juror on his jury later came forward to say that she had not voted for the death penalty, but that the rest of the jury had decided to tell the judge that they had reached a unanimous verdict for execution. The black juror said that she had been too intimidated by the

¹⁵⁸ See *A life in the balance: The case of Mumia Abu-Jamal* (AI Index: AMR 51/01/00, February 2000).

¹⁵⁹ William J. Bowers et al., *Sentencing in black and white: An empirical analysis of the role of jurors' race and jury racial composition*. 3 U. Pa. J. Const. L. 171, February 2001.

misconduct and racism in the jury room to object. African American Louis Truesdale was executed in South Carolina in 1998. The only black juror later came forward to say that she had wanted to vote for life imprisonment, but had been intimidated by the racism prevailing in the jury room into changing her vote to death.

Federal death row prisoner Louis Jones, an African American man convicted of the murder of a white woman, was executed on 18 March 2003. After his 1995 trial, two women jurors came forward to allege that there had been confusion in the jury room because of an erroneous instruction by the judge. The two women had wanted to vote for a life sentence. One of the two, the sole African American juror, was singled out by the majority for particular pressure. She finally changed her vote, and the other woman followed. When Louis Jones's death sentence was upheld by the US Supreme Court in 1999, four of the nine Justices dissented. They said that the jury had been misinformed by the trial judge's instruction, and that there was at least a reasonable likelihood that this had tainted the jury's deliberations. Had race tainted the process too?

Capital jurors – voice of the community?

In an opinion in 2002 concerning judge versus jury sentencing in capital cases, a US Supreme Court Justice wrote of the problems with the USA's retention of capital punishment, including the death penalty's failure as a deterrent, the risk that it posed to the innocent, the influence of race and socio-economic factors on sentencing, the suffering of the prisoner held on death row for many years, the inadequacy of legal representation in capital cases, and world trends against the death penalty. He wrote that "the danger of unwarranted imposition of the penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than a single governmental official".¹⁶⁰ In other words, a jury, rather than a judge was best placed to reflect community opinion as to the perceived problems with the death penalty.

In the USA, prospective jurors who indicate that they would automatically return a death sentence or those whose absolute opposition to the death penalty means that they could not vote for execution will be dismissed "for cause" during jury selection. For example, at the 1998 Louisiana trial of Jessie Hoffman, a black man charged with the murder of a white woman, the prosecutor dismissed one of the prospective black jurors "for cause" because he voiced unequivocal opposition to the death penalty. The prosecutor also peremptorily dismissed the only other two African Americans, and an all-white jury was seated. Challenged on these two dismissals, the prosecutor explained that one of the two blacks had been hesitant about the death penalty. Asked if he could vote for a death sentence, the male juror had said "I think I could, yes", but only after he had "heard the facts" of the case. The final prospective black juror was dismissed, the prosecutor explained, because her body language "was inappropriate for someone who is a decisive individual". These were accepted as "race-neutral" reasons.

To the extent that certain members of the community are kept off the jury, either as a result of the law excluding death penalty opponents from capital juries, deliberate prosecutorial tactics,

¹⁶⁰ *Ring v Arizona*, 000 US 01-488 (2002), Justice Breyer concurring in the judgment

or the under-representation of minorities in juror pools, the jury cannot be said to represent the community. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote in 1998 of US capital trials: "Those who are opposed to the death penalty are likely to be taken off the panel of prospective jurors. Many members of minority groups are opposed to the death penalty because it has been disproportionately used against members of their respective communities... The community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors".¹⁶¹

Emmett Taylor, an African American man, was sentenced to death in 1998 by a Louisiana jury of 11 whites and one black in a jurisdiction whose population was 23 per cent African American. The state had peremptorily dismissed four blacks during jury selection. Challenged on these dismissals, the prosecutor explained that he had rejected one black man because he was a Reverend, saying: "I think that somebody that is a Reverend is going to be more forgiving when it comes to the penalty phase." The Supreme Court of Louisiana found that the state had validly chosen to dismiss this juror because of his religious beliefs.

A glimmer of hope in a race case

"One of the principal objections to the operation of the death penalty in this country is that it is applied unevenly, particularly against poor black defendants." Federal judge, 2001¹⁶²

The 1996 Anti-Terrorism and Effective Death Penalty Act placed unprecedented restrictions on the review of state criminal convictions by the federal courts. Death row prisoners have thereby faced greater obstacles in arguing in federal court that their constitutional rights were violated at state level. On 25 February 2003, the US Supreme Court handed down a welcome decision that warned the lower courts that "[e]ven in the context of federal habeas, deference [to state courts] does not imply abandonment or abdication of judicial review".¹⁶³ The case involved a claim of racial discrimination brought by Thomas Miller-El, an African American man sentenced to death in Texas for the murder of a white man in 1985.

There is substantial evidence that at the time of Miller-El's trial, Dallas County prosecutors were engaging in racist jury selection tactics to exclude around 90 percent of prospective minority jurors in order to obtain all-white or almost all-white juries. At a hearing before the 1986 trial, various Dallas lawyers and judges testified that the county's prosecutors routinely excluded African Americans during jury selection. A study conducted by the *Dallas Morning News* in 1986 revealed that Miller-El was one of 15 men sentenced to death in Dallas County between 1980 and 1986. Of the 180 jurors at their trials, only five were African American.

¹⁶¹ E/CN.4/1998/68/Add.3, para. 89.

¹⁶² *Riley v Taylor*, No 98-9009, US Court of Appeals for the Third Circuit, Judge Sloviter dissenting. Judge Sloviter objected to the decision of her two colleagues to reject the appeal of James Riley, an African American sent to Delaware's death row by an all-white jury for killing a white man during a robbery. The case was later heard by the full Court which granted Riley a new trial, including on evidence that the prosecutor had dismissed prospective black jurors on the basis of their race.

¹⁶³ *Miller-El v Cockrell*, 537 U.S. ____ (2003).

Using peremptory strikes, prosecutors dismissed 56 of the 57 other blacks qualified to serve. Of the 15 cases, five involved black defendants. All except Miller-El were tried by all-white juries. One black man was allowed onto Miller-El's jury, after the prosecution peremptorily excluded 10 of the 11 African Americans qualified to serve. The only black accepted onto the jury was a man who said of execution: "It's too quick. They don't feel the pain...Pour some honey on them and stake them out over an ant bed...That's what I call punishment."

A jury-selection treatise prepared by a senior prosecutor, circulated in Dallas County in the 1960s, instructed prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury". A training manual for prosecutors written by a Dallas County Assistant District Attorney in 1969 and actively used in the county into the 1980s warned against selecting jurors from minority races, people with "physical afflictions" and Jews, on the grounds that they "usually empathize with the accused". The prosecutor in charge of jury selection at Thomas Miller-El's trial, who labelled himself a "jury selection specialist", joined the Dallas County District Attorney's Office in 1973 and learned his skills at a time when this manual was routinely used as a training aid for new prosecutors.

Despite such evidence, Thomas Miller-El's death sentence survived through more than 15 years of appeals. In its 8-1 decision on 25 February 2003, the US Supreme Court did not go to the merits of his claim of discrimination. Instead it said that Miller-El had presented enough evidence to warrant a hearing and that the US Court of Appeals for the Fifth Circuit had been wrong to deny his appeal. For example, the Supreme Court noted that "disparate questioning" of potential jurors along racial lines "did occur" at Miller-El's trial (it criticized the lower courts' "strained and dismissive interpretation" of the evidence of this); that the prosecution's pursuit of "jury shuffles" raised "a suspicion that the State sought to exclude African-Americans from the jury"¹⁶⁴; and that the "culture of the [Dallas County] District Attorney's Office in the past was suffused with bias against African-Americans in jury selection". The Justices continued: "Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests that they were not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards."

Although Thomas Miller-El could yet lose his appeal even with a hearing, and thereby once again face execution, it is to be hoped the Supreme Court's words will influence a positive outcome in his case and lead to a new trial seen to be free from racial discrimination.

¹⁶⁴ Under "jury shuffling" in Texas, the prosecution or defence could seek to rearrange the order in which the panel of potential jurors were seated and therefore questioned. This affects jury composition because at the end of the week, anyone who has not been questioned would be dismissed and a new panel of potential jurors would be seated the following week. On at least two occasions at Miller-El's trial, the prosecutors requested shuffles when there were a predominate number of African Americans who seated at the front of the panel and were therefore to be questioned next.

Executive clemency – not a fail-safe

“Executive clemency has provided the ‘fail-safe’ in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”
US Supreme Court¹⁶⁵

One of the prisoners closest to execution in California at the time of writing was Stanley “Tookie” Williams, an African American man sentenced to death in 1981 for four robbery-related murders. This co-founder of the Los Angeles Crips street gang was tried by an all-white jury after the only African Americans in the jury pool were dismissed by the prosecutor, who also likened Williams to a “tiger in a zoo” in closing arguments to the jury. The prosecutor had been previously censured by courts for engaging in racially discriminatory jury selection tactics and racially inflammatory language.¹⁶⁶ The US Court of Appeals for the Ninth Circuit upheld the death sentence in September 2002, although it noted “Williams’s 2001 Nobel Peace Prize nomination for his laudable efforts opposing gang violence from his prison cell” and that his “good works and accomplishments may make him a worthy candidate” for an act of executive clemency from the California governor.¹⁶⁷

The power of executive clemency is not restricted by rules of evidence that may limit the reach of the courts. It exists precisely to compensate for the inability or unwillingness of the judiciary to take certain evidence into account.

On 2 October 2001, North Carolina Governor Mike Easley commuted the death sentence of Robert Bacon three days before he was due to be executed. His lawyers had raised serious allegations of race bias. Robert Bacon was sentenced to death by an all-white jury in 1987. In 1990, the state Supreme Court overturned the sentence. At a 1991 re-sentencing, Bacon was again condemned by an all-white jury, in a county whose population was about 20 per cent African American. Before Bacon’s 1987 trial, his lawyer had unsuccessfully sought to prohibit the state from dismissing African Americans from the jury, citing the prosecutor’s “pattern of discrimination” in capital jury selections. Bacon’s appeal lawyer interviewed jurors from the 1991 sentencing and an alternate juror from 1987. In an affidavit, she stated that two of the 1991 jurors said that during their deliberations, reference was made to Bacon’s race and his involvement in an interracial relationship with a white woman. The alternate juror recalled jurors making racial “jokes” during the 1987 trial. In May 2001, one of the jurors from the 1991 re-sentencing came forward to sign an affidavit supporting clemency. She recalls that “some jurors felt that it was wrong for a black man to date a white woman.

¹⁶⁵ *Herrera v Collins*, 506 U.S. 390 (1993).

¹⁶⁶ Amicus Brief of American Civil Liberties Union of Northern California et al, at www.aclunc.org

¹⁶⁷ *Williams v Woodford*, US Court of Appeals for the Ninth Circuit, 10 September 2002. Of the 10 people executed in California since 1977, eight were convicted of killing whites. None was convicted of killing an African American. The one African American executed since resumption of judicial killing was Manuel Babbitt, who was convicted of the murder of a white woman and sentenced to death by an all-white jury. His white trial lawyer allegedly harboured racial prejudice against blacks, and failed to interview African American witnesses or to protest when the prosecutor peremptorily dismissed prospective black jurors during jury selection. Manuel Babbitt was put to death in 1999.

Jurors also felt that black people commit more crime and that it is typical of blacks to be involved in crime... some jurors were adamant in their feeling that Bacon was a black man and “he deserved what he got”. Robert Bacon’s death sentence had survived the appeals process nonetheless, and he relied on an act of executive clemency.

However, as has already been shown throughout this report, clemency has been rejected in the cases of numerous prisoners who have presented strong claims for commutation. For example, Abdullah Hameen, black, was executed in Delaware in May 2001 despite the Board of Pardons finding that his remorse was genuine and that his efforts in prison to turn at-risk youths away from crime, guns and drugs were laudable. Oliver Cruz was executed in Texas on 9 August 2000 despite evidence that he had mental retardation. Cruz was a Hispanic man who was convicted of the rape and murder of a white woman. His white co-defendant was charged with the same crime, but pleaded guilty and testified against Cruz. In return he avoided the death penalty and received a life prison term. Ernest Carter, black, was executed in Oklahoma in December 2002 despite a unanimous recommendation from the Pardon and Parole Board to the Governor that Carter’s sentence should be commuted because his guilt was in doubt and because the state had not sought a death sentence against his co-defendant.

An example where “tough on crime” politics appears to have interfered with a clemency decision is the case of Brian Baldwin. He was executed in Alabama in June 1999. Twenty-six members of the Congressional Black Caucus in Washington DC appealed to Governor Siegelman of Alabama to stop the execution of Brian Baldwin, “in light of the clear pattern of racial discrimination evident in his case”. Former US President Jimmy Carter wrote to the governor urging that the sentence be commuted on the basis that “there were clear reasons to question his culpability in the murder” and that “there is no doubt that racial prejudice was a significant factor both in his trial and in his death sentencing.” Brian Baldwin, black, was convicted in 1977 of the murder of a white girl when he was 18. His confession to the crime, allegedly extracted under police torture and death threats, was admitted as evidence. The trial, in front of an all-white jury and a white judge after the white prosecutor had removed all black jurors during jury selection, lasted a day and a half.

On 16 June 1999, Coretta Scott King, wife of the late Martin Luther King Jr., and founder of the Center for Nonviolent Social Change in Georgia, appealed to Governor Siegelman to stop the execution “for the sake of justice and human decency”: “I fear that without your intervention, this case will become a textbook example of racial injustice. Mr Baldwin, who was called ‘boy’ and ‘savage’ in court, was convicted by an all-white jury in a county in which nearly half the residents are African American... It would be a terrible tragedy, an outrage and a setback for equal justice if the state of Alabama rushes to execute Mr Baldwin amid growing evidence of his innocence and abuse of his legal and civil rights.” Nevertheless, Governor Siegelman denied clemency despite stating that he was “deeply troubled” by some aspects of the case.

Don Siegelman, who took office in January 1999, had joined the angry public criticism of the decision taken by his predecessor, Fob James, to commute a death sentence of inmate as one of his final acts of office. However, Governor Siegelman opposed a legislative proposal to strip Alabama governors of the power to commute death sentences, stating that no such

change was necessary as he would never do what Governor James had done. The clemency decision on Brian Baldwin's case was the first of Don Siegelman's governorship.

The clemency system, like the human beings who administer it, is fallible. It is time to end the death penalty altogether.

Two steps for human rights – Moratorium, abolition

“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 standards and with the prevailing tendency, which is towards the abolition of capital punishment”. UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, February 2000¹⁶⁸

In 1995, the Constitutional Court of South Africa ruled the death penalty unconstitutional in that country. The landmark opinion said that “race and class are factors that run deep in our society” and it could not be denied that “poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die”.¹⁶⁹

The history of the US death penalty is also one of racist use, and race continues to play a role in who lives and who dies under the capital justice system. Yet, on the whole, the courts, the legislatures and the executives in the individual US states and at the federal level have failed to act decisively, and have continued instead to tinker with the machinery of death.

A US Supreme Court Justice said in 1989 that “the battle against pernicious racial discrimination or its effects is nowhere near won.”¹⁷⁰ In its comments on the USA's report of its compliance with the International Covenant on Civil and Political Rights, the UN Human Rights Committee in 1995 noted that, “despite the existence of laws outlawing discrimination, there persist within society discriminatory attitudes and prejudices based on race or gender. Furthermore, the effects of past discriminations in society have not yet been fully eradicated.” The Committee stressed “the need for the Government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups”.¹⁷¹

In its initial report to the UN Committee on the Elimination of Racial Discrimination, in September 2000, the US Government wrote: “The United States has struggled to overcome the legacies of racism, ethnic intolerance and destructive Native American policies, and has made much progress in the past half century. Nevertheless, issues relating to race, ethnicity and national origin continue to play a negative role in American society”. Has the capital justice system somehow been miraculously spared from this negative influence? The overwhelming evidence suggests not.

¹⁶⁸ E/CN.4/2000/16.

¹⁶⁹ *State v. Makwanyane*, 6 June 1995.

¹⁷⁰ *Richmond v J.A. Croson Co.*, 488 US 469 (1989). Justice Marshall dissenting.

¹⁷¹ CCPR/C/79/Add.50, 7 April 1995.

President George Bush has said that “equal justice” is one of the “non-negotiable demands of human dignity” for which the USA will “always stand firm”. In his speech to the United Nations General Assembly on 12 September 2002, he also asserted that the USA wants the United Nations to be “effective, and respected, and successful”. He should therefore note that the UN Committee on the Elimination of Racial Discrimination has expressed its concern at the “disturbing correlation” between race and the imposition of the death penalty in the USA, and has suggested a moratorium on executions as a way forward. In its resolution on the death penalty in April 2002, the UN Commission on Human Rights noted that, “in some countries, the death penalty is often imposed after trials which do not conform to international standards of fairness and that persons belonging to national or ethnic, religious and linguistic minorities appear to be disproportionately subject to the death penalty”. In repeated resolutions since 1997, the Commission has urged all retentionist countries to impose a moratorium on executions with a view to abolition.

One would hope that a moratorium is the very minimum response to studies that indicate that race, including race of victim, is a factor in capital sentencing. Such studies suggest that the justice system places greater value on white lives than on black. Some death penalty proponents might suggest that the way to rectify this would be to execute more people who kill blacks. Given that most murders in the USA are intra-racial, this would also mean that more African Americans would be taken to the death chamber. However, as pointed out in the Columbia University study, *A Broken System*, more resort to judicial killing means more errors in capital cases. It also means more costs to society, in financial, social and psychological terms. In any event, under international human rights standards, countries should progressively reduce the scope of the death penalty with a view to its abolition.

Abolition of this irrevocable punishment is the only appropriate response to human fallibility. As one US death penalty expert told Maryland legislators recently in reference to research showing that murders of white victims were more likely to lead to death sentences: “I assume that this bias is unintentional. But that doesn’t make it any less repugnant. The only certain way to make sure that our system of determining who lives and who dies is *not* influenced by race is to stop deciding who lives and who dies. This won’t eliminate racial bias, but at least people’s lives will not be in the balance with race tipping the scales.”¹⁷²

Prior to the US Supreme Court’s 1987 *McCleskey* decision, one of the Justices in the majority had circulated a memorandum to his colleagues, in which he wrote that “the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable.”¹⁷³ Even if racism is ineradicable, however, the death penalty is not.

President Bush should impose a moratorium on federal executions, and the individual states should follow suit, as first steps towards the USA joining the clear majority of countries that have abolished this cruel, arbitrary and discriminatory punishment.

¹⁷² R. Dieter. Senate Proceedings Committee. Maryland General Assembly, 20 February 2003.

¹⁷³ Justice Antonin Scalia, 6 January 1987. Thurgood Marshall papers, cited in *The death penalty: An American history*. Stuart Banner. Harvard University Press (2002), page 290.

Appendix 1: Selected international standards

Universal Declaration of Human Rights

Article 7 – “All are equal before the law and are entitled without any discrimination to equal protection of the law”

International Covenant on Civil and Political Rights

Article 14 – “All persons shall be equal before the courts and tribunals”

Article 26 – “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all person equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Convention on the Elimination of All Forms of Racial Discrimination

Article 2 – “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms...”.

Article 5 – “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law...”.

Article 6 – “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination”.

United Nations Guidelines on the Role of Prosecutors

12. “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”.

13. “In the performance of their duties, prosecutors shall.. carry out their functions impartially and avoid all political, social, religious, cultural, sexual or any other kind of discrimination”.

Appendix 2: Campaigning for abolition in the USA

This is one of a series of papers on the death penalty in the USA issued by the International Secretariat of Amnesty International as part of its worldwide campaign against capital punishment. Others include:

Fatal Flaws: Innocence and the Death Penalty in the USA (AMR 51/69/98, November 1998)

Killing with Prejudice: Race and the Death Penalty in the USA (AMR 51/52/99, May 1999)

Speaking out: Voices against Death (AMR 51/128/99, October 1999)

Shame in the 21st Century: Three Child Offenders Scheduled for Execution in January 2000 (AMR 51/189/99, December 1999)

Beyond Reason: The Imminent Execution of John Paul Penry (AMR 51/195/99, December 1999)

Worlds Apart: Violations of the Rights of Foreign Nationals on Death Row - Cases of Europeans (AMR 51/101/00, July 2000)

Memorandum to President Clinton: An Appeal for Human Rights Leadership as the First Federal Execution Looms (AMR 51/158/00, November 2000)

The Illusion of Control: "Consensual" Executions, the Impending Death of Timothy McVeigh, and the Brutalizing Futility of Capital Punishment (AMR 51/053/2001, April 2001)

Old Habits Die Hard: The Death Penalty in Oklahoma (AMR 51/055/2001, April 2001)

Too Young to Vote, Old Enough to be Executed - Texas Set to Kill another Child Offender (AMR 51/105/2001, July 2001)

A Time for Action: Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty (AMR 51/106/2001, August 2001)

No return to execution: The US death penalty as a barrier to extradition (AMR 51/171/2001, November 2001)

Arbitrary, discriminatory, and cruel: An aide-mémoire to 25 years of judicial killing (AMR 51/003/2002, 17 January 2002)

Joseph Amrine: Facing execution on tainted testimony (AMR 51/085/2002, June 2002)

Indecent and internationally illegal: The death penalty against child offenders (AMR 51/143/2002, September 2002)

Texas: In a world of its own as 300th execution looms (AMR 51/010/2003, 23 January 2003)

Another planned killing by the US Government: The imminent federal execution of Louis Jones (AMR 51/020/2003, February 2003).