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£UNITED STATES OF AMERICA @Developments on the death penalty during 1993

OVERVIEW OF THE DEATH PENALTY IN 1993

At the end of 1993, an unprecedented number of prisoners (over 2,700) were under sentence of death in 36 states, under US federal military law and under US federal civilian law. Thirty-eight prisoners were executed: more than in any previous single year since states revised their death penalty statutes in the mid-1970s. This brings to 226 the total number of prisoners executed since 1977 in the USA.

The state of Washington carried out its first execution for 29 years: this was also the first execution by hanging since the death penalty was resumed in 1977. Texas was responsible for almost half the year's executions (17). Other executions were carried out in Virginia and Missouri (four each); Florida (three); Arizona and Delaware and Georgia (two each); and California and Louisiana (one each). One prisoner, Bobby Shaw in Missouri, was granted clemency shortly before he was due to be executed.

Racial discrimination in the use of the death penalty continues to be a major concern. Of the 38 prisoners executed during 1993, 88 percent had been convicted of the murder of white victims; half of those executed were themselves black or of Latin-American origin.

Curtis Harris, Frederick Lashley, Ruben Cantu and Christopher Burger - all juvenile offenders (under 18 at the time of the crime for which they were sentenced to death) - were executed in 1993. Frederick Lashley and Curtis Harris, both black, were convicted and sentenced to death by all-white juries after prosecutors had removed all black prospective jurors from the panel. Christopher Burger was represented at trial by a court-appointed attorney who failed to present important mitigating evidence relating to his deprived background and history of mental illness to the jury which sentenced him to death. Both Frederick Lashley and Ruben Cantu, (of Latin-American origin) were represented at trial by lawyers who had never handled a capital case before. Frederick Lashley and Christopher Burger were the first juvenile offenders to be executed in Missouri and Georgia under their present death penalty laws.

Several prisoners executed had suffered from mental illness or were mentally retarded. Frequently, information regarding the defendant's mental impairments was not uncovered by defence counsel at the time of the trial, and was not made known to the jury that was responsible for passing the death sentence. In the case of Robert Sawyer, executed in Louisiana in March 1993, one juror later came forward to say that he would not have voted for the death penalty at the original trial in 1980, had he been made aware that Sawyer was mentally retarded and mentally ill, had been three times committed to mental hospitals and had a long history of requiring medical treatment including electroconvulsive therapy and anti-psychotic drugs. Seven prisoners were executed after choosing to abandon their legal appeals and allowing the state to carry out their executions.

Amnesty International was concerned at moves in Congress to extend the scope of the death penalty under federal (civilian) law. At the end of the year a major crime bill had been passed by the Senate which among other things, would extend the death penalty to over 40 new offenses. However, it was encouraging to note that the House of Representatives passed four crime bills on specific issues none of which contained any death penalty measures. This was due to strong opposition to any moves to extend the federal death penalty by mostly black, Latin-American, and new members. At the end of the year the bills were pending reconciliation before a joint committee of the House of Representatives and Senate.

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PRISONERS EXECUTED DURING 1993

Number ⁱ	Date	Name	State	Method ⁱⁱ	Race ⁱⁱⁱ	Victim
1/189/1	05 Jan	Westley DODD	WA	H	W	3W
2/190/18	19 Jan	Charles STAMPER	VA	E	B	3W
3/191/8	27 Jan	Martsay BOLDER	MO	LI	B	B
4/192/2	03 Mar	John BREWER	AZ	LI	W	W
5/193/2	03 Mar	James Allen RED DOG	DE	LI	N	W
6/194/21	05 Mar	Robert SAWYER	LA	LI	W	W
7/195/19	18 Mar	Syvasky POYNER	VA	E	B	4W 1B
8/196/55	23 Mar	Carlos SANTANA	TX	LI	L	L
9/197/56	25 Mar	Ramon MONTOYA	TX	LI	L	W
10/198/3	14 Apr	James D. CLARK	AZ	LI	W	4W
11/199/30	21 Apr	Robert HENDERSON	FL	E	W	3W
12/200/57	04 May	Darryl STEWART	TX	LI	B	W
13/201/31	05 May	Larry Joe JOHNSON	FL	E	W	W
14/202/58	12 May	Leonel HERRERA	TX	LI	L	L
15/203/59	18 May	John SAWYERS	TX	LI	W	W
16/204/20	17 Jun	Andrew CHABROL	VA	E	W	W
17/205/60	29 Jun	Markham DUFF-SMITH	TX	LI	W	W
18/206/16	29 Jun	Thomas Dean STEVENS	GA	E	W	W
19/207/61	01 Jul	Curtis Paul HARRIS	TX	LI	B	W
20/208/9	21 Jul	Walter BLAIR	MO	LI	B	W
21/209/10	28 Jul	Frederick LASHLEY	MO	LI	B	B
22/210/62	30 Jul	Danny HARRIS	TX	LI	B	W
23/211/63	05 Aug	Joseph JERNIGAN	TX	LI	W	W
24/212/64	12 Aug	David HOLLAND	TX	LI	W	W
25/213/65	20 Aug	Carl KELLY	TX	LI	B	W
26/214/66	24 Aug	Ruben CANTU	TX	LI	L	L
27/215/2	24 Aug	David MASON	CA	G	W	5W
28/216/32	25 Aug	Michael DUROCHER	FL	E	W	3W
29/217/67	31 Aug	Richard WILKERSON	TX	LI	B	W
30/218/3	31 Aug	Kenneth DESHIELDS	DE	LI	B	W
31/219/68	03 Sep	Johnny JAMES	TX	LI	W	W
32/220/21	14 Sep	Joe Louis WISE, Sr.	VA	E	B	W

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33/221/69	28 Sep	Antonio BONHAM	TX	LI	B	W
34/222/11	06 Oct	Frank GUINAN	MO	LI	W	W
35/223/70	10 Nov	Anthony COOK	TX	LI	W	W
36/224/17	07 Dec	Christopher BURGER	GA	E	W	W
37/225/71	15 Dec	Clifford PHILLIPS	TX	LI	B	W
38/226/22	07 Dec	David PRUETT	VA	E	W	W

RACE DISCRIMINATION IN THE USE OF THE DEATH PENALTY

Despite the Equal Protection clause of the Fourteenth Amendment to the US Constitution, there remains disturbing evidence of racial discrimination in the application of the death penalty

More than 88 percent of the prisoners executed during 1993 had been sentenced to death for the murder of white victims. Overall, since 1977, 84 percent of those executed had been convicted of white-victim homicide. This is despite the fact that blacks and whites are the victims of homicide in roughly equal numbers. Numerous research studies have shown that murders involving white victims are far more likely to result in death sentences than those involving black victims after other legally relevant factors have been taken into account. Studies have also shown that blacks who kill white victims are also significantly more likely to receive the death penalty than whites who kill whites.

More than half of those executed in 1993 were members of ethnic minorities. Overall, nearly 40 percent of the prisoners on death row in the USA are black, even though they comprise only 12 percent of the population as a whole. The percentage of black prisoners on death rows in some states is far higher.

At least three black prisoners executed during the year were tried before all-white juries after the prosecutor had used peremptory challenges to remove all black prospective jurors (juvenile offenders Curtis Harris in Texas and Frederick Lashley in Missouri, and Walter Blair in Missouri). In 1986 the US Supreme Court ruled in *Batson v. Kentucky* that prosecutors may not exclude jurors solely on the basis of race, but this decision did not apply retroactively to prisoners whose convictions had already been upheld on direct appeal. Other prisoners have been unable to benefit from the *Batson* ruling because their trial lawyers failed to object to the exclusion (thereby "waiving" the right to raise this issue on appeal).

Lawyers working in southern states of the USA have told Amnesty International that it remains common practice for prosecutors in some circuits to systematically exclude prospective black jurors from serving on capital trials, despite the *Batson* ruling. Prosecutors in such circuits now give spurious nonracial reasons for excluding black jurors, which are routinely accepted by the courts.

LEGAL REPRESENTATION OF CAPITAL DEFENDANTS

A growing body of evidence suggests that many defendants in capital cases are deprived of the effective assistance of counsel. In many states where the death penalty is most frequently imposed (including Alabama, Georgia, Louisiana and Texas) there is no state-wide public defender system and indigent defendants are assigned court-appointed private attorneys who are paid extremely low fees and spend little time preparing cases for trial. Many lawyers assigned to take on such cases have no knowledge of capital punishment law and may not even be experienced in criminal law.

At least four of the prisoners executed during 1993 were represented at trial by lawyers who had never handled a capital case before: Joe Wise, executed in Virginia in September 1993, Ruben Cantu, executed in Texas in August, 1993; Frederick Lashley, executed in Missouri in July 1993; and James Clark, executed in Arizona in April 1993. Ruben Cantu and Frederick Lashley were juvenile offenders. Their cases are described in more detail below. Several other prisoners executed in 1993 received seriously deficient legal representation, with lawyers failing to present evidence to the jury regarding important potentially mitigating circumstances. (See, for example, the case of Robert Sawyer, described below).

Joe Wise, executed in Virginia in September, was represented by a court-appointed lawyer whose ignorance of capital law was tantamount to inviting the jury to vote for the death penalty. The trial lawyer failed to present evidence concerning Wise's deprived and violently abusive childhood upbringing and the fact that he was borderline mentally retarded.

The situation in Texas is a cause for special concern. Texas has no state-wide public defender system, provides no state funding for indigent defence past the trial and direct appeal stage (ie. on habeas corpus appeals), and is the only death penalty state to rely almost exclusively on appointed attorneys to handle capital appeals. A two-year comprehensive study of legal representation in capital cases in Texas concluded in 1993 that "The situation in Texas can only be described as desperate" and "We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty."¹

Noting that Texas has more prisoners under sentence of death and has carried out more executions than any other state, the study found grave inadequacies in the system for appointing counsel at trial, on direct appeal and in state *habeas* appeals. It found there were no statewide qualification standards or eligibility guidelines for the appointment of counsel and the rate of compensation provided to court-appointed attorneys in capital cases was "absurdly low."

There is no provision for funding or appointment of counsel for the critical state *habeas* appeal stage and the Spangenberg report noted: "While the results of the study are in many respects very discouraging at trial, direct appeal and certiorari to the US Supreme Court, the problems with representation at state *habeas corpus* are alarming."² At one point during 1993 nearly 50 prisoners on death row in Texas were reported to be without any legal representation. Frequently lawyers are found only weeks or even days before a scheduled execution, leaving little time to review the record and prepare an adequate federal appeal. Sometimes important issues are discovered too late to be considered by the courts.

JUVENILE OFFENDERS EXECUTED

The USA carries out more executions of juvenile offenders (people sentenced to death for a crime they committed when they were under the age of 18) than almost any other country in the world, and it probably has more juvenile offenders on death row (at least 30 in 11 states at the end of 1993). More than 72 countries that retain the death penalty in law have abolished it for juvenile offenders. Most countries with the death penalty have laws exempting the execution of juvenile offenders; the only other countries in which such executions are reported to have been carried out in the 1990s are Saudia Arabia and Yemen.

Four juvenile offenders were executed during 1993, the largest number executed in any one year since the death penalty was reinstated in states in the mid 1970s, bringing the number of juveniles executed since 1985 to nine. Curtis Harris was executed in Texas on 1 July, Frederick Lashley in Missouri on 28 July, Ruben Cantu in Texas on 24 August, and Christopher Burger in Georgia on 7 December.

Frederick Lashley and **Ruben Cantu** were both represented at their trials by lawyers who had never handled a capital case before. Frederick Lashley's lawyer later stated: "At the time I received this case I had very little, if any, murder trial experience...Frederick's case was my first capital murder trial. At that time I had not received any training in death penalty litigation."

Curtis Harris was convicted of the murder of Timothy Merka, a white truck driver. He was 17 at the time of the crime. Curtis Harris, who was black, was sentenced to death by an all-white jury after the prosecutor changed the trial venue to one in which only six percent of the population was black and then used peremptory challenges to exclude three prospective black jurors from the jury panel. Curtis Harris' older brother, Danny, was also convicted and sentenced to death for the crime. He was 18 years old at the time of the crime. Danny Harris was executed 29 days after his brother, on 30 July.

¹"A Study of Representation in Capital Cases in Texas," prepared for the State Bar of Texas by The Spangenberg Group, March 1993.

²Spangenberg Report, page 96.

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Curtis Harris was represented by a court-appointed lawyer who did not present any evidence at the trial regarding Curtis Harris' upbringing or mental health. While on death row, in 1986, Curtis Harris received an extensive neuropsychiatric evaluation which found that he had a fullscale IQ of only 77, had significant brain damage and had suffered serious head injuries as a child. Harris was one of nine children brought up in great poverty by an alcoholic father who beat all the children regularly with electric cords, belts, a bullwhip and fists. On one occasion, Curtis Harris was hit over the head by his father with a wooden board and his cranium was permanently indented by the blow.

Frederick Lashley was the first juvenile offender to be executed in Missouri in 60 years. Lashley, who was black, was convicted and sentenced to death by an all-white jury in 1982 for the murder in April 1981 of his cousin who was also his foster mother. Lashley was 17 years and one month old at the time of the crime and was under the influence of drugs. Abandoned by his mother as a small child, he was brought up by other relatives until he was 15. He returned several times to his father who frequently beat him. He required psychiatric care from an early age and reported he "often had thoughts of suicide." He began drinking alcohol heavily when he was ten and lived in juvenile institutions from the age of 15. Just before the crime he became homeless and lived on the streets.

Ruben Cantu, of Latin-American origin, was the fifth juvenile offender to be executed in Texas since 1985. He was convicted of the murder in November 1984 of Pedro Gomez. Cantu was 17 at the time of the crime. He was, like Frederick Lashley, represented at trial by an inexperienced attorney who had never handled a capital trial defence before. The attorney failed to present evidence concerning Cantu's troubled family upbringing and mental impairments. Cantu was not examined by an expert psychologist in preparation for the trial. While on death row, Cantu's appellate lawyers arranged for him to be examined by a psychiatrist who found him to have an IQ of 70-80 - below the average of 100. The psychiatrist testified in September 1988 that Cantu was of "borderline intellectual functioning," and "not as effective as the average person."

Both Curtis Harris and Ruben Cantu (and most prisoners currently on death row in Texas) were sentenced to death under a state law which severely restricted the jury's opportunity to consider mitigating evidence at the sentencing phase of the trial. In particular, this law did not permit a defendant's youth to be considered as a separate mitigating circumstance. Texas changed its capital sentencing statute in September 1991 and now allows juries to consider any mitigating factors in deciding whether to impose life imprisonment or the death penalty. However, the new law does not apply retroactively to offenders who committed their crimes before this date. Juvenile offenders sentenced under the old statute remain under sentence of death even though the law has been radically changed. In June 1993, the US Supreme Court ruled by five votes to four that the old statute had been constitutionally adequate in permitting juries to decide whether to sentence to death those who committed murder while in their teens (*Johnson v. Texas*). Amnesty International disagrees and believes there are compelling grounds for granting clemency to all the juvenile offenders presently under sentence of death in Texas.

Christopher Burger was the first juvenile offender to be executed in Georgia under its current death penalty law. Christopher Burger, white, was aged 17 at the time of the crime and a soldier in the US army. He was first sentenced to death on 25 January 1978 for the 1977 murder of fellow soldier and part-time taxi-driver, Roger Honeycutt, white. His first death sentence was vacated, but Christopher Burger was again sentenced to death in July 1979. A co-accused, Thomas Stevens, was also sentenced to death and was executed on 29 June 1993. At his trial, Burger was represented by a court-appointed attorney who failed to investigate his client's background or present mitigating evidence at the sentencing hearing. The jury was not told that Burger had a low IQ, well below normal for his age; that he was mentally ill and brain damaged from physical abuse he received as a child, and had suffered a highly disturbed, unstable upbringing, attempting suicide when he was 15. The US Supreme Court denied Burger's appeal by a 5-4

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vote in June 1987. On the failure to present mitigating evidence, the majority opinion acknowledged that the new evidence "would have disclosed that the petitioner had an exceptionally unhappy and unstable childhood" and that "the record at the habeas corpus hearing does not suggest that [the trial lawyer] could well have made a more thorough investigation than he did." In two strong dissenting opinions, four justices found that the trial lawyer had erred in failing to present any evidence at the sentencing hearing. The record indicated that the lawyer's meetings with the defendant had been brief and that Burger would have been unlikely to volunteer many of the facts about his childhood. Burger's mother also testified that she had spoken to the lawyer only after she had approached him and that he did not explain to her the significance of the sentencing hearing or the need for mitigating evidence. The judges found that the actual circumstances of the defendant's childhood (including beatings and being rejected by both estranged parents and two step-fathers) would have been highly relevant at the sentencing hearing.

Another juvenile offender on death row in Texas, **Gary Graham**, came close to being executed during 1993. He was convicted of the murder of Bobby Lambert in 1981. Graham is black and was 17 at the time of the crime; the victim was white. Gary Graham was charged with the murder after being arrested for offences committed during an alleged week-long crime spree. Although he pleaded guilty to a series of offenses during the week in question, including an alleged rape, he denied involvement in the murder of Bobby Lambert. He was convicted mainly on the identification evidence of an eye-witness who picked him out at a police line-up and who had had only a fleeting glance of the assailant. Several other people present at the scene of the murder did not pick out Graham.

It was argued on appeal that Gary Graham was inadequately represented at his trial because his defence counsel failed to explore fully or present alibi evidence. Also that defence counsel failed to order a full range of psychological tests for Graham, relying instead on a simple competency test administered by the state. A later psychiatric examination found Graham to be suffering from possible brain damage caused by a number of childhood head injuries.

At the end of 1993, Gary Graham remained on death row pending the outcome of further court proceedings in the case.

Both Curtis Harris' and Christopher Burger's cases were highlighted in an Amnesty International report, United States of America: The Death Penalty and Juvenile Offenders, published in October 1991. The report presented the organization's findings in the cases of 23 juveniles sentenced to death and suggested that safeguards in US capital punishment law had not been met in many cases. The majority came from acutely deprived backgrounds, many suffered gross physical or sexual abuse as children, were of below average intelligence or suffered mental illness or brain damage. A disturbing number had inadequate legal representation at their trials.

EXECUTION OF THE MENTALLY IMPAIRED

Three more states have passed legislation to exempt the mentally retarded from the death penalty. Eight states in all now have such laws in place: Arkansas, Colorado, Georgia, Kentucky, Maryland, New Mexico, Tennessee and Washington. However, the new Arkansas statute requires that a person has an intelligence quotient (IQ) of 65 or lower. This is far lower than the IQ agreed on in May 1993 by the American Association on Mental Retardation (AAMR) when it promulgated a new definition of mental retardation. Mental retardation is newly defined by the AAMR as measured intellectual functioning of approximately 70 - 75 (or below), with onset before the age of 18, and measured significant disabilities in two or more adaptive skill areas.

A Presidential Commission has recommended abolishing the death penalty for mentally retarded defendants. The President's Committee on Mental Retardation (a standing committee in the Department

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of Health and Human Services) presented its report in 1991 but no action was taken on it by the Bush administration. The report was distributed to federal and state law enforcement agencies and the judiciary early in 1993. The report gives special attention to the need to identify mentally retarded defendants. It stated, "Accused persons with mental retardation who are not identified as having mental retardation are severely disadvantaged in arranging fair and appropriate legal representation...Their legal rights are less likely to be protected and an appropriate and fair disposition of the case may not be made. They are unlikely to be aware of their right to remain silent or to refuse to answer incriminating questions."

At least ten of the prisoners executed during 1993 exhibited symptoms of mental illness or had very low IQ scores. Larry Joe Johnson, executed in Florida in May, was a Vietnam war veteran who suffered from post-traumatic stress disorder as a result of his experiences. Several prisoners executed had suffered serious physical and psychological abuse in their childhood including, in one case, being beaten unconscious. One prisoner had first attempted suicide at the age of five.

Robert Sawyer was executed in Louisiana on 5 March 1993. He was convicted for his role in the rape and murder of Frances Arwood, a white woman aged 23, in September 1979. A co-defendant in the crime received a life sentence. Sawyer was offered the same sentence but, with no assistance from his lawyer, said he wanted to go to trial.

Robert Sawyer suffered from mental retardation, organic brain damage, schizophrenia and had a long history of requiring medication including electroconvulsive therapy and anti-psychotic drugs. He was committed three times to mental institutions. Although Sawyer's crippling mental disabilities were richly documented from his teenage years onwards, his court-appointed trial counsel failed to obtain the evidence or present it to the jury. Sawyer's trial counsel waived closing argument at the guilt phase of the trial and waived opening argument at the penalty phase. He told the jury Sawyer was probably a sociopath: a highly inaccurate and prejudicial diagnosis.

Robert Sawyer grew up in a brutally violent environment. Robert Sawyer's mother was beaten by his father until she finally committed suicide, allegedly to escape his torture. She suffered severe post-natal depression and tried to kill Robert Sawyer and his twin sister when they were a few months old. After his mother's death Sawyer was brought up by his father and was often beaten by him. There is evidence that his early head injuries may have been a consequence of severe physical abuse. He was sent to a school for mentally and physically handicapped people where he was punished for misdemeanours with electric shocks, according to his family. He was never educated and his IQ was estimated at 68. At the age of 14 he was diagnosed as "moderately retarded, chronic brain syndrome and abnormal EEG" and was treated with anti-psychotic medications. In 1966 he was adjudicated "incompetent" and committed to a psychiatric hospital in Tennessee (the first of three such committals).

In November 1991 the Louisiana Board of Pardons and Paroles voted to commute Sawyer's death sentence to life without parole. However, Governor Buddy Roemer, during his last days in office, ruled that Sawyer should be executed. A member of the original trial jury read about the case in the newspapers and came forward to say that if he had known about Sawyer's mental retardation and brain damage during the 1980 trial he would never have voted for the death penalty (in Louisiana if one juror votes for a life sentence, the judge must sentence the defendant accordingly).

Robert Sawyer's petition for federal *habeas corpus* relief was accepted for review by the US Supreme Court. Sawyer argued that his legal representation at trial had been seriously inadequate and had resulted in fact-based errors so significant that, had they not occurred, the jury would probably have concluded that the balance of aggravating and mitigating factors did not warrant the death penalty. Sawyer's petition contended that he was "innocent of the death penalty" because he would very probably not have been so sentenced had the jury not been presented with a grossly inaccurate sentencing profile.

In June 1992 the US Supreme Court dismissed his petition (*Sawyer v. Whitley*); it upheld Sawyer's death

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sentence and emphasized the Court's intention to limit federal *habeas corpus* appeals. The Court completely sidestepped the issue of the appropriateness of the death penalty for defendants with mental retardation.

Robert Sawyer was executed in Louisiana on 3 March 1993 after Governor Edwards' newly appointed Pardon Board reheard the case and this time voted 3-2 against his request for clemency.

CLEMENCY

Few death sentences are commuted on humanitarian grounds. Between 1973 and the end of 1993, only 17 clemencies were granted for humanitarian or other reasons.³ During 1993 only one prisoner was granted clemency: Bobby Shaw in Missouri. Governor Mel Carnahan commuted Shaw's death sentence following a recommendation by the Board of Pardons and Paroles; he found there was "little doubt [Shaw] is mentally retarded and suffers from varying degrees of mental illness." The Board of Pardons had said, "Mr Shaw did not receive the necessary protections he was entitled to and, because of that fact, the sentence of death may be fundamentally unfair. Bobby Shaw, 41, was Missouri's longest-surviving death row inmate. His case had been profiled in *Time* magazine, receiving sympathetic press coverage; and there were national and international calls for clemency.

The power to commute death sentences to life imprisonment is an absolutely necessary safeguard in order to mitigate sentences which have been legally imposed by the courts but are unduly harsh. The US Supreme Court in *Gregg v. Georgia* (1976) reiterated that a system without executive clemency "would be totally alien to our notions of criminal justice." Any criminal justice system is liable to human error, and when the penalty to be imposed is death, the safeguards surrounding the process must be of the highest order.

In *Herrera v. Collins*, decided in January 1993, the US Supreme Court effectively barred prisoners from raising post-conviction claims of innocence based on new evidence. The Court ruled that the proper forum for such claims is the clemency process. "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." The Court called the clemency process a "fail-safe" to ensure that innocent people will not be executed.

This "fail-safe" reasoning by the Court has been widely criticized. In practice the exercise of clemency is deeply influenced by political considerations and mercy has been granted only in the most exceptional cases in recent years. Some states are not conducting proper clemency reviews. In others, favourable clemency recommendations are being ignored by the executive. It is deeply troubling to note that those empowered to commute death sentences do not always appear to understand why clemency powers exist, what clemency means or the criteria by which it should be used. Some prisoners who might well have been granted commutations in an earlier era have been denied clemency in recent years and been executed.

Dissenting from the *Herrera* decision, three US Supreme Court justices stated, "the possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and 14th Amendments. The majority correctly pointed out: 'A pardon is an act of grace.' The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal."

Texas is notable for its failure to comply with the spirit of the law as laid down in *Gregg* (above). The evidence suggests that executive clemency is a dead letter in Texas, with the Board of Pardons and

³Source: Legal Defense and Education Fund. A further 41 death sentences were commuted in Texas "for judicial expediency" following court decisions in the 1980s requiring new sentencing proceedings.

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Paroles simply rubber-stamping the judicial decisions of the courts without examining other factors that might justify reducing a death sentence to imprisonment on humanitarian or other grounds. The Texas Board of Pardons and Paroles has met only very rarely to consider clemency petitions; **it has never recommended clemency in a capital case** under present statutes and, as of the end of December 1993, 71 prisoners had been executed (more than in any other state). Some had presented strong mitigating factors as grounds for consideration for clemency.⁴

The clemency process has sometimes failed even when the prosecutor supports a request for commutation. The district attorney who convicted mentally retarded Herbert Welcome in Louisiana, told the Pardon Board in March 1988, "I don't see how in good conscience I could object [to clemency]." The Board noted that the victim's family also had no objection and it recommended that Welcome's death sentence be reduced to life imprisonment without parole. Governor Edwards refused to sign the commutation, as did his successor. Edwards is now back in office and Welcome is still on death row with his commutation unsigned. It is noteworthy that the Louisiana Board of Pardons had also recommended clemency in the case of black juvenile offender, Dalton Prejean, but this too was ignored by the Governor and Prejean was executed on 18 May 1990.

PUBLIC OPINION

A national opinion poll released in April 1993 suggested that public support for the death penalty is not as strong as it might appear. The poll was conducted jointly by the Democratic polling firm of Greenberg/Lake and the Republican Tarrance Group. They interviewed 1000 registered voters in March 1993. The findings were published in *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, a report by the Death Penalty Information Center, a nonprofit organization that provides information on capital punishment.

The survey found that support for the death penalty dropped to under 50 percent when voters were offered a variety of alternative sentences, and suggested that many people are unaware of the sentencing alternatives now available instead of the death penalty. There is a common misperception that convicted murderers will be released from prison in seven years unless executed. Most disturbingly, the survey suggested that jurors serving in capital cases are also sometimes left uninformed as to the sentencing alternatives open to them. Juries in some states have consistently imposed the death penalty after trial judges refused their requests for information about parole eligibility. In fact, some forty-five states impose life sentences of at least 25 years before parole eligibility, or life imprisonment with no possibility of parole, as alternatives to the death penalty.

Although 77 percent of those interviewed said they favoured capital punishment in the abstract, support for the death penalty dropped to 41 percent when the sentence of life without parole, coupled with a requirement of restitution, was offered as an alternative. Those polled were seen to have doubts about the death penalty: 58 per cent felt there was a danger of executing innocent people; 48 percent believed it could be racially discriminatory; 46 percent were concerned by the high cost of executions and 42 percent doubted whether it had a special deterrent effect.

⁴No death sentences have been commuted on humanitarian grounds in Texas under present laws. To Amnesty International's knowledge the Board have held only one clemency hearing in recent years, and this only after international appeals, including an appeal from His Holiness Pope John Paul II, in the case of Johnny Garrett, a mentally-ill juvenile offender. Johnny Garrett was subsequently executed on 11 February 1992. Talbot D'Alemberte, a past president of the American Bar Association who has represented Texas death row inmates, reported finding the board uncommunicative. "When you send it something, you sometimes get the feeling that you are throwing your papers into a black hole. You may never get an answer except 'We received your papers.' Indeed, you may not learn that clemency has been denied until your client has been executed. There are a number of boards like that in other states." (*Post-Gazette*, Pittsburgh, 20 March 1993).

FEDERAL DEATH PENALTY

Currently the death penalty under federal civilian law is authorized only for murder during aircraft hijacking (under the Air Piracy Act, 1974) and for drug related murders (Anti-Drugs Abuse Act, 1988). At the end of 1993, five prisoners were under sentence of death for drug related murders. No-one has been sentenced to death under the Air Piracy Act. Execution is by lethal injection at Fort Leavenworth Prison, Kansas. The last execution under federal civilian law was in 1963. There have been successive attempts in Congress since 1972 to expand the death penalty under federal law.

On 19 November the US Senate passed a comprehensive "crime bill" which would, among other things, extend the death penalty as a possible penalty to over 40 new offenses including the murder of federal officials; genocide; train wrecking; murder of US nationals abroad and murders using a gun taken across state lines. In an unexpected move, Senator Paul Simon (an Illinois Democrat) proposed an amendment to the bill which would bar states from executing juvenile offenders. However, a decision was made to postpone discussion of the amendment by a vote of 52-41 and it therefore remains undecided. It was encouraging to note that the House of Representatives passed four smaller crime bills on specific issues none of which contained any death penalty measures. This was due to strong opposition to any moves to extend the federal death penalty by mostly black members, members of Latin-American origin, and new members. At the end of the year the bills were pending reconciliation before a joint committee of the House of Representatives and Senate.

Attempts in recent years to reintroduce the death penalty under federal civilian law have failed to complete the necessary approval stages. In past years the two parties have fought over anti-crime legislation with Republicans calling for more executions and longer jail terms while Democrats stressed crime prevention efforts such as gun control, drug treatment programs and rehabilitation for young offenders. However, such is the public concern over crime that the two parties worked together on the 1993 legislation.

Amnesty International believes that expanded federal death penalty legislation would mark a significant retreat from international human rights standards on capital punishment. In a general comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR) the United Nations Human Rights Committee said in 1982 that "...all measures of abolition should be considered as progress in the enjoyment of the right to life." This makes clear that the intent of the article was to encourage abolition, not extension of the death penalty.⁵

RISK OF EXECUTING THE INNOCENT

A Congressional report issued in October 1993⁶ suggested that at least seventeen states repeatedly sentenced innocent people to death and denounced the inadequate legal safeguards to prevent wrongful executions.

The report was produced by the House of Representatives' Subcommittee on Civil and Constitutional Rights. It listed 58 prisoners under sentence of death who have been freed from prison since 1972 and criticized many flaws in death penalty prosecutions and appeals. Among the problems cited were racial

⁵See also United Nations General Assembly Resolution 32/61 of 8 December 1977 which encourages governments to restrict progressively the number of offenses for which the death penalty may be imposed with a view to its ultimate abolition.

⁶Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions, House Subcommittee on Civil and Constitutional Rights, issued 21 October 1993

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prejudice, official misconduct, ineffective legal representation, inadequate court review of innocence claims on appeal and politicization of the clemency process. The report concluded: "Judging by past experience, a substantial number of death row inmates are indeed innocent, and there is a high risk that some of them will be executed."

The report cited 16 cases from Florida, five cases each from Georgia and Texas, four from New Mexico and two each from Illinois, South Carolina, Oklahoma, Arizona and California. Ohio, Pennsylvania, Massachusetts, Maryland, Louisiana, North Carolina, Indiana and Alabama had one case each of death row inmates later acquitted, pardoned or otherwise cleared of murder charges.

In January, the US Supreme Court dismissed the appeal of Leonel Herrera, a Texas death row inmate. The Court held that evidence Herrera had presented in support of a claim of actual innocence did not entitle him to federal habeas relief. The Court severely restricted the possibility that a prisoner sentenced to death in a state court could ever raise such a claim based on newly discovered evidence after the expiry of state time limits for raising such claims (*Herrera v. Collins*). Leonel Herrera was executed in May.

Herrera was convicted and sentenced to death in January 1982 for the murder of Enrique Carrisalez, a police officer. The officer had been fatally shot by the driver of a speeding car which he had tried to stop. Moments earlier, a second police officer was found shot dead on the same stretch of road. Herrera was arrested and charged with both murders. He was sentenced to death for Carrisalez's murder and plead guilty at a separate trial to the murder of the other officer. In 1992, Herrera's appeal lawyers presented new evidence alleging that his brother, Raul Herrera - who died in 1984 - had committed both murders. The evidence included an affidavit from Raul Herrera's son who stated that he had been in the speeding car and had witnessed his father kill the officers. This new evidence was discovered too late to be presented in the Texas courts, as Texas requires a new trial motion based on newly discovered evidence to be made within 30 days of sentencing.

The US Supreme Court ruled by a majority of six votes to three that there was no constitutional right to federal relief based on newly discovered evidence of actual innocence where the original trial had been free from procedural error. In a strongly-worded dissent, three Justices argued that the protection of the Eighth Amendment (prohibiting cruel and unusual punishment) did not end once a defendant had been validly convicted and sentenced, and that "The execution of a person who can show that he is innocent comes perilously close to simple murder." In a letter to Governor Richards of Texas shortly before Herrera's execution, Amnesty International said "...it would be contrary to justice to allow this execution to go ahead without there having been an examination by any court of the merits of Herrera's innocence claim."

At least four prisoners were released from death row in 1993 because of innocence. One of these, Walter McMillan was released from an Alabama prison in March 1993 after spending nearly six years on death row for a crime he did not commit. He was exonerated after all three prosecution witnesses whose testimony provided the core of the evidence against him recanted (all three were themselves criminal suspects). Following his arrest in 1987, McMillan, who is black, was immediately put on death row, even before he was tried for the murder of a white female shopkeeper. His trial over a year later lasted two days, and the judge overruled the jury's sentencing recommendation of life-without-parole and sentenced him to death. Four appeals to the Alabama courts were denied, and it was a CBS television documentary about the case that drew attention to his innocence. The Alabama Court of Criminal Appeals finally threw out the conviction and the County District Attorney joined the defence in seeking to have the charges dismissed.

In October 1993 Robert Nelson Drew came perilously close to being executed in Texas without ever having had the opportunity to present his claim of innocence to the courts. Drew was granted a stay of execution by the Texas Court of Criminal Appeals just hours before he was to die on 14 October 1993.

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The stay of execution was granted not on the merits of his case, but pending legal arguments currently taking place in Texas in another death penalty case, the outcome of which may have repercussions for Robert Drew. Robert Drew was sentenced to death in December 1983 for the murder of Jeffrey Mays in February 1983. He was convicted largely on the testimony of an eye witness who has since recanted his testimony. According to his attorneys, Drew has consistently maintained his innocence. Shortly after Robert Drew was convicted a co-accused who was sentenced to 60 years imprisonment for his part in the crime, boasted to two fellow inmates in the jail in which he was being detained that he alone had killed Mr Mays. He later signed an affidavit to this effect, allegedly stating "...I am the person who murdered Jeffrey Mays and Robert Drew is innocent."

PRISONERS CHOOSING TO DIE

In 1993 seven prisoners were executed after choosing to abandon their legal appeals and allow the state to carry out their execution. These included James Red Dog, a Native American, who was executed in Delaware on 3 March. He was the second native American to be executed in the USA under current death penalty laws.

David Mason was executed in California on 24 August, after being found competent to dismiss his former attorney who was arguing in a US federal appeals court that Mason was incompetent to take such action. According to newspaper reports, David Mason was declared mentally competent despite a psychiatrist's testimony that the extreme abuse he had suffered as a child had traumatized him for life. David Mason was an unwanted child, who was subjected to severe physical abuse by his parents, and suffered extreme sexual abuse at the hands of neighbours and others throughout his childhood and adolescence. He apparently had a long, well documented history of suicide attempts, beginning from the age of five. From information received by Amnesty International, David Mason attempted suicide no less than a dozen times between the ages of five and 25. Much of this evidence was not presented to the jury at trial because his lawyers did not conduct an adequate investigation into his background. David Mason also allegedly suffered from a history of mental disorders, including Post-Traumatic Stress Disorder (PTSD), from which he was apparently suffering at the time of the crime; and which were, in part, a direct result of his tragic background.

The other prisoners who were executed after choosing to give up their appeals were Westley Dodd (executed in Washington on 5 January), John Brewer (executed in Arizona on 3 March), Andrew Chabrol (executed in Virginia on 17 June), Michael Durocher (executed in Florida on 25 August), and Anthony Cook (executed in Texas on 10 November).

US SUPREME COURT JUSTICE THURGOOD MARSHALL

Justice Thurgood Marshall died of heart failure on 24 January 1993 at the age of 84. He had retired from the US Supreme Court in 1991. Throughout his career as a lawyer and Supreme Court Justice his was a powerful voice for the unempowered. He consistently opposed the death penalty on the grounds that it violated the Eighth Amendment's prohibition of cruel and unusual punishments. In a speech to New York University Law School in 1984 he said:

"The accusation that lawyers are 'holding up' executions has always struck me as absurd. In my view, a state has no legitimate interest in killing a man sooner rather than later. If there is any chance that a defendant has a valid objection to his conviction or sentence, elementary principles of justice require that his attorneys be afforded a full opportunity to present that claim to the courts before the issue is rendered

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moot by his death."

STATE LEGISLATIVE DEVELOPMENTS

Georgia, Indiana and Tennessee passed legislation providing for sentences of life without possibility of parole as an alternative to the death penalty. It is anticipated that when juries are offered the life without parole option they will be less likely to impose the death penalty. None of the bills however have yet become law.

According to the National Coalition to Abolish the Death Penalty (NCADP),⁷ nine of the fourteen states which do not currently have the death penalty introduced legislation to reinstate capital punishment.

A bill to reinstate the death penalty in **Iowa** failed in March 1993. The House Judiciary Subcommittee voted 3-3 to deny the bill a debate by the full Judiciary Committee, effectively killing its chances for the legislative session. The bill would have provided for a limited death penalty in cases of murder involving rape, kidnapping or another murder. Iowa abolished the death penalty in 1965.

In **New York**, Governor Cuomo again vetoed legislation which would have restored the use of the death penalty in that state. Attempts are underway by the General Assembly to hold a public referendum on a constitutional amendment to reinstate the death penalty. The proposed referendum bill would not be subject to a gubernatorial veto, and would require a statewide election on the issue.

In its first vote on the issue in 134 years, the **Wisconsin** Senate rejected a bill to restore the death penalty on 19 October 1993. The Senate voted 21-12 to postpone consideration of a bill that would have permitted the death penalty for those who murder a second time, and for those who commit murder during the first-degree sexual assault of a child.

Other reinstatement bills were introduced, but not passed, in **Alaska, Hawaii, Maine, Massachusetts, Michigan, and Rhode Island**.

Arkansas, Colorado and Washington passed laws prohibiting the execution of the mentally retarded, making a total of eight states which now prohibit such executions.

(The others are Georgia, Maryland, Kentucky, Tennessee, and New Mexico).

⁷1993 Survey of State Legislation, published by the National Coalition to Abolish the Death Penalty (NCADP), August 1993. Amnesty International January 1994AI Index: AMR 51/02/94

STATISTICS

UNITED STATES OF AMERICA: EXECUTIONS 1977 TO 1993⁸

Total executions to date since 1976 reinstatement of the death penalty: 226

1976	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93
0	1	0	2	0	1	2	5	21	18	18	25	11	16	23	14	31	38

RACE OF DEFENDANTS EXECUTED TOTAL NUMBER: 226

White 123(55 percent)

Black 87(39 percent)

Latin American Origin 14(6 percent)

Native American 2(1 percent)

RACE OF VICTIM TOTAL NUMBER: 297

White 254(84 percent)

Black 35(12 percent)

Latin American Origin 8(3 percent)

Asian 4(1 percent)

EXECUTIONS BY STATE TOTAL NUMBER: 21 STATES

Texas 71(31 percent)

Florida 32(14 percent)

Louisiana 21(10 percent)

Virginia 22(10 percent)

Georgia 17(7 percent)

Missouri 11(5 percent)

Alabama 10(5 percent)

Nevada 5(2 percent)

North Carolina 5(2 percent)

Mississippi 4(2 percent)

South Carolina 4(2 percent)

Arkansas 4(2 percent)

Utah 4(2 percent)

Oklahoma 3(1 percent)

Arizona 3(1 percent)

Delaware 3(1 percent)

California 2(1 percent)

Indiana 2(1 percent)

Illinois 1(0.5 percent)

Washington 1(0.5 percent)

Wyoming 1(0.5 percent)

EXECUTION BY METHOD USED TOTAL: 226 EXECUTIONS

Lethal Injection 108

Electrocution 108

Gas Chamber 8

Firing Squad 1

⁸Source: Legal Defense and Education Fund, Inc., New York, October 1993

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Hanging¹

JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 36 STATES AND 2 FEDERAL JURISDICTIONS

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, US Government, US Military.

(underlined states have death penalty statutes but no sentences imposed)

JURISDICTIONS WITHOUT CAPITAL PUNISHMENT: 14 STATES AND 1 FEDERAL (DC)

Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

JUVENILE OFFENDERS EXECUTED SINCE 1977 TOTAL NUMBER: 9

Charles Rumbaugh (Texas, 17 at crime) 11 September 1985

James Terry Roach (South Carolina, 17 at crime) 10 January 1986

Jay Pinkerton (Texas, 17 at crime) 15 May 1986

Dalton Prejean (Louisiana, 17 at crime) 18 May 1990

Johnny Frank Garrett (Texas, 17 at crime) 11 February 1992

Curtis Harris (Texas, 17 at crime) 1 July 1993

Frederick Lashley (Missouri, 17 at crime) 28 July 1993

Ruben Cantu (Texas, 17 at crime) 24 August 1993

Christopher Burger (Georgia, 17 at crime) 7 December 1993

Juvenile offenders on death row: Alabama (4); Florida (5); Georgia (2); Kentucky (1); Mississippi (1); Missouri (1); Oklahoma (2); Pennsylvania (1); South Carolina (1); Texas (10); Virginia (2).

iNumber this year / number since 1977 / number in that state

iiE = electrocution; G = gas; H = hanging; LI = lethal injection.

iiiB = black; L = Latin-American origin; N = Native American Indian; W = white.