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# Judge finds racism in three more death penalty cases

## Death sentences overturned under North Carolina's Racial Justice Act

> *Although they have committed heinous crimes, they were sentenced to death in a process that was focused more on obtaining death sentences than it was in ensuring the process was fair*
>
> Judge Gregory Weeks, Fayetteville, North Carolina, 13 December 2012

On 13 December 2012, as he done had eight months earlier in the case of African American death row prisoner Marcus Robinson,[1] a North Carolina judge overturned three more death sentences after scrutinizing them under the state's Racial Justice Act (RJA). Having conducted evidentiary hearings, Cumberland County Superior Court Judge Gregory Weeks found that race had been a "significant" and "intentionally-employed" factor in the prosecution's use of "peremptory strikes" to dismiss African Americans during jury selection at the capital murder trials of Tilmon Golphin, Quintel Augustine and Christina Walters. The two male prisoners are African American, while Christina Walters is Native American.

Amnesty International applauds the ruling and urges officials across the USA to reflect upon it in all its detail.

Judge Weeks reviewed the history of racial discrimination in jury selection, statistical studies, social science research and other expert evidence put before him, but said that his conclusion was based "primarily" on the "words and deeds" of the prosecutors involved in the three cases. He pointed to "long buried case files", which had come to light for the first time in the proceedings before him, and which contained "powerful evidence of race consciousness and race-based decision making". Indeed, he found that the evidence put before him at the hearings by the state, including the testimony of prosecutors, had actually served to bolster the evidence of racial discrimination presented on behalf of the three prisoners rather than to undermine it. His 210-page ruling concluded that the death sentences could not stand and he commuted them to life imprisonment without the possibility of parole, the limit of judicial relief under the RJA.

The Racial Justice Act was North Carolina's response to the 1987 US Supreme Court ruling, *McCleskey v. Kemp*. The court had been presented with compelling statistical evidence of systemic racial discrimination in capital cases in Georgia. A majority of the Justices, however, 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. Absent such evidence of intentional discrimination, statistical evidence of racial disparities in death penalty cases could not be used to prove a violation of the constitution, the Court said. It said that the kind of evidence put forward in the *McCleskey* case was "best presented to the legislative bodies".

The North Carolina legislature passed its Racial Justice Act in 2009. Except for Kentucky which had enacted an RJA in 1998, limited to pre-trial challenges, there have been no other such laws passed in the USA in the 25 years since *McCleskey*. This inaction brings to mind what the then most senior Justice on the US Supreme Court said in 2008, namely that the retention of the death penalty in the USA is "the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits". Among other things,

[1] See USA: Another brick from the wall, 27 April 2012, http://www.amnesty.org/en/library/info/AMR51/028/2012/en

Justice John Paul Stevens pointed in this opinion to the "unacceptable role" that race continued to play in US capital justice.

In a state capital trial in the USA, 12 citizens from the county in which the trial is held are selected to sit as a "death qualified" jury. At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). The question before Judge Weeks was whether race had been a significant factor in the prosecution's use of peremptory challenges to exclude African Americans from serving as jurors at the trials of Christina Walters, Quintel Augustine or Tilmon Golphin. He found that it had been in all three.

Under a 1986 Supreme Court decision, *Batson v Kentucky*, prospective jurors can only be removed for "race neutral" reasons. This failed to stop racially motivated jury selection tactics by prosecutors, as Judge Weeks had pointed out in his ruling in the Robinson case earlier in 2012. Prosecutors simply have to come up with vaguely plausible non-racial reasons if challenged with *prima facie* evidence of race-based dismissals from the jury pool (the "*venire*").

Further evidence of how prosecutors have sought to evade *Batson* was provided in the three cases before Judge Weeks. For example, in relation to one of the prosecutors, who had been involved in all three trials, Judge Weeks wrote:

> "Despite her testimony to the contrary, the evidence was overwhelming that this prosecutor relied upon a 'cheat sheet' of pat explanations to defeat *Batson* challenges in numerous cases when her disproportionate and discriminatory strikes against African-American venire members were called into question. Her testimony overall – rife with inconsistencies, frequently contradicted by other evidence, and often facially unbelievable – constituted additional evidence that Cumberland County prosecutors relied upon race in [their] jury selection practices.
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> The State overwhelmingly struck African-American venire members in capital cases from Cumberland County, removing African-American venire members purportedly for reasons such as reservations about the death penalty or connections to the criminal justice system, while accepting comparable white venire members."

In another example, Judge Weeks pointed to a meeting between another prosecutor and law enforcement officers in Quintel Augustine's case, at which the prosecutor took notes about the jury pool:

> "These notes described the relative merits of North Carolina citizens and prospective jurors in racially-charged terms and constitute unmistakeable evidence of the prominent role race played in the State's jury selection strategy".

Judge Weeks said that he could not "overstate the gravity and somber nature" of his findings or the harm done to African Americans and the integrity of the criminal justice system by the racially discriminatory jury selection practices. He pointed to the "painful" history of racial discrimination in the USA, and asserted that the North Carolina legislature, by passing the RJA, had charged the judiciary with "the challenge of continuing our progress away" from this history. This is not to say that the cases before him were from some dim and distant past. The trials of Tilmon Golphin, Christina Walters and Quintel Augustine took place in 1998, 2000 and 2002 respectively.

In his earlier ruling on the Robinson case, Judge Weeks noted that "Post-*Batson* studies of jury selection in the United States show that discrimination against African-Americans remains a significant problem that will not be corrected without a conscious and overt commitment to change". He suggested that "the RJA is North Carolina's commitment to change." In his latest ruling, then, Judge Weeks had to address the fact that such commitment on the part of the legislature had apparently slipped in the wake of, indeed as a direct reaction to, his *Robinson* ruling of 20 April 2012. The legislature – lobbied by North Carolina prosecutors to repeal the act – amended the RJA after the *Robinson* ruling, narrowing the scope of the legislation. The amended RJA was passed into law in July 2012, after the legislature overrode the state governor's veto.

Judge Weeks decided that the amended RJA did not apply retroactively:

> "In enacting the original RJA, the legislature recognized that statewide, system-wide discrimination against African-American venire members in capital cases is intolerable. In Robinson, this Court found precisely this insidious form of discrimination in cases throughout North Carolina between 1990 and 2010. Instead of confronting these findings with concern

> however, in July 2012, the legislature attempted to ignore them by enacting the amended RJA, which extinguishes at least some capital defendants' ability to pursue statewide claims.
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> Thus, having provided an opportunity for defendants to present evidence of the systemic use of race in capital jury selection, and having been presented with just such a determination by this Court, the legislature turned away."

This development, Judge Weeks found, threatened to introduce an element of arbitrariness. If the amendment was applied retroactively, he said, such prisoners as those now before him could be denied the relief that Marcus Robinson obtained under the original RJA. Even applying the amended law prospectively did not eradicate arbitrariness "to the extent that future death row inmates whose juries are selected in a discriminatory system could be executed, while pre-amendment, similarly-situated inmates could not be executed".

Despite noting that the legislature had "turned away" from the state racism he had found in the Robinson case, Judge Weeks still expressed the hope that "acknowledgment of the ugly truth of race discrimination" revealed in his latest ruling would be "the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law". A fundamental problem here is that the politics of the death penalty – under the mantra of giving the electorate what it wants – conspire against open and straightforward acknowledgment of the reality of this punishment and all its flaws.

When the Supreme Court in *McCleskey* invited the state legislatures to act on the question of racial discrimination in capital justice, it said:

> "It is not the responsibility – or indeed even the right – of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people."

As Amnesty International has pointed out, this democracy-in-action justification remains to this day the common response of US authorities to international critics of the USA's death penalty in an increasingly abolitionist world.[2] Yet democracy is no guarantor of respect for human rights principles without the necessary political will to prioritize such principles. The death penalty – a policy that implicates fundamental international human rights and yet is seen largely in the USA as a domestic question to be determined by the popular will within constitutional constraints – is particularly vulnerable to a failure of political will in the face of certain violent crimes and public concerns about them. The North Carolina legislature's retreat from its original RJA with an amendment blocking claims based on evidence of statewide racial discrimination, evidence based on race of victims (one of the clearest indicators of discrimination according to research), as well as narrowing the time period on which claims can be based, illustrates the problem.

It is now more than a decade since the UN Committee on the Elimination of Racial Discrimination (CERD), the treaty body monitoring compliance with the Convention on the Elimination of All Forms of Racial Discrimination, noted evidence of the role of race in US capital justice after scrutinizing the USA's initial report to the Committee. It urged the USA, which had ratified the Convention in 1994, "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." In 2008, the Committee repeated this recommendation, given the absence of the necessary action taken in the USA in the intervening seven years. In between these two CERD reports on the USA, the UN Human Rights Committee – scrutinizing the USA's second and third periodic reports under the International Covenant on Civil and Political Rights, ratified by the USA in 1992 – had expressed concern that the US administration seemed unwilling to fully acknowledge the issue of discrimination in capital justice. It called on the USA to evaluate the full extent of the problem and in the meantime to "place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty."

In the latest report to the Human Rights Committee, yet to be reviewed by the Committee, the Obama administration has glossed over the death penalty with the familiar line that this punishment "continues to be an issue of extensive debate and controversy in the United States". The issue of racial

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[2] See USA: Deadly formula. An international perspective on the 40th anniversary of *Furman v. Georgia*, 28 June 2012, http://www.amnesty.org/en/library/info/AMR51/050/2012/en

discrimination in the death penalty system outside of federal death row was relegated to a bare acknowledgment that "concerns include the overrepresentation of minority persons, particularly Blacks/African Americans, in the death row population". As research has consistently shown, and Judge Weeks has amply illustrated, the problem goes far deeper than this.

In those states in the USA that have abolished the death penalty in the past few years, officials have recognized why the death penalty is *and always will be* the wrong policy, and not just because of discrimination. These officials include the state governors who signed such abolitionist legislation into law. In Illinois in 2010, Governor Pat Quinn said that "our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment". He referred to the "inherent" flaws of the death penalty and the "impossibility" of devising a system that is "consistent, free of discrimination on the basis of race, geography or economic circumstance" and that "always gets it right".

In 2009 in New Mexico, Governor Bill Richardson said that to carry out an irrevocable punishment, "we must have ultimate confidence – I would say certitude – that the system is without flaw or prejudice." This, he added, "is demonstrably not the case". In New Jersey in 2007, Governor Jon Corzine said that "government cannot provide a foolproof death penalty", and in Connecticut in April 2012 Governor Dannel Malloy said of the justice system that, "like most of human experience, it is subject to the fallibility of those who participate in it". He said that as a former prosecutor he had seen defendants "who were poorly served by their counsel" or "wrongly accused or mistakenly identified", and that he had witnessed discrimination. The end result was that he had come to believe that eradicating the death penalty was "the only way to ensure it would not be unfairly imposed".

In November 2012, a US federal Court of Appeals noted that "accounting for human fallibility is an important part of the design of a legal system". Accounting for human fallibility must surely mean eradicating the death penalty. While getting rid of this cruel and brutalizing punishment will not end discrimination or error in the criminal justice system, it will mean an end to cementing such injustices into permanence by execution.

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