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THE DEATH PENALTY IN GEORGIA: Racist, Arbitrary and Unfair

Introduction

Since 1977 the United States of America (USA) has escalated its use of the death penalty. As of April 1996, 328 prisoners have been executed and over 3,000 remain under sentence of death in 34 states. Twenty-six states have carried out executions. In 1995, 56 prisoners were executed: a higher total than any previous year since use of the death penalty resumed in 1977.

Georgia has carried out the fifth highest number of executions in the US since 1977. As of 31 January 1996, 20 prisoners had been executed and 103 prisoners remained under sentence of death. The method of execution is electrocution.

The death penalty in Georgia continues to be used in a manner that is racist, arbitrary and unfair. Research has shown that in many cases the ethnic origin of the victim or defendant was a key factor in the prosecutors' decision to seek the death penalty. Many of those sentenced to death in the state received poor legal representation. The racist use of the death penalty continues despite the 1972 US Supreme Court ruling in *Furman v. Georgia* that the "arbitrary and capricious" use of the death penalty was unconstitutional under the Eighth and Fourteenth Amendments (see page 4).

The federal government has consistently refused to become involved with the application of the death penalty at state level. In January 1994, Amnesty International wrote an open letter[1] to President Clinton calling for a presidential commission to be set up to examine the use of capital punishment. The letter detailed 12 areas of concern and concluded that "the procedural safeguards are not working and the same injustices which led the Supreme Court in *Furman v. Georgia* to overturn all the state death penalty statutes as unconstitutional are still occurring today." Amnesty International renewed its call for a presidential commission in 1995.[2]

To date the organization has not received any substantive reply from the federal authorities. In a reply from the office of the US Attorney General, the federal government refused to intervene in individual states' administration of the death penalty, simply stating:

> "The Administration and this Department support the death penalty in appropriate cases. By the same token, **we are unalterably opposed to its application in an unfair manner, particularly if that unfairness is grounded in racial or other discrimination."** (emphasis added)

The federal authorities' comments indicate that they believe that the death penalty is not currently used in an "unfair manner". However, this would be in direct contradiction to previous federal investigations into the use of the death penalty. The General Accounting Office[3] analysis of

[1] *USA: Open letter to the President on the death penalty* (AI publication AMR 51/01/94)

[2] *USA: Follow up to Amnesty International's open letter to the President on the death penalty* (AI publication AMR 51/07/95)

[3] The General Accounting Office is an independent agency of the federal government. The report, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, was published in February 1990.

28 studies of the death penalty found that "in 82% of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, 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."

The federal government may itself be guilty of racial bias in its use of the death penalty. As of 31 January 1996, eight prisoners were sentenced to death under federal law; six belong to ethnic minorities.

Amnesty International is appalled that the federal government is willing to ignore the realities in the use of the death penalty. There are numerous examples of the federal authorities intervening in the affairs of individual states. Had the administrations of John F. Kennedy and Lyndon Johnson taken the same stance, the legislation outlawing racial discrimination in the registering of voters - such as the Voting Rights Act[4] - may not have been passed. In the past, the federal authorities have been prepared to enact laws to ensure that a citizen is not denied their right to vote because of their race but is currently prepared to ignore the racially biased use of capital punishment.

Although the federal government does not have a direct role in state law enforcement, Amnesty International believes that it retains a responsibility to ensure that all the laws within its territorial jurisdiction conform to minimum international standards set out in international instruments and to promote respect for human rights.

Under Section 5 of the Fourteenth Amendment of the Constitution of the USA, the Congress is given explicit power "to enforce, by appropriate legislation" the rights of all citizens to due process of law and the equal protection of the laws. The evidence suggests that this power has not been effectively exercised as regards the application of the death penalty.

Amnesty International opposes the death penalty in all cases as a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment as proclaimed in the Universal Declaration of Human Rights.

Historical perspective

Prior to the American civil war, the law in Georgia prescribed different punishments for certain crimes based on the race of the defendant or victim. For example, the rape of a white women by a black man was a capital offence but carried a sentence of between two and 20 years imprisonment if committed by a white man. The rape of a black woman was punishable by "fine and imprisonment, at the discretion of the court."

[4]The US Voting Rights Act, passed on 6 August 1965, suspended literacy tests and other voter tests and authorised federal supervision of voter registration in states and individual voting districts where tests had been used and where fewer than half of voting age residents were registered or had voted. The Act dramatically increased the black vote in elections. In 1964 687,000 (28.6%) of blacks voted in the southern US; this increased to 1,150,000 (47.5%) in 1966.

Georgia has a long history of racist violence against its ethnic minorities. Between 1880 and 1930, 3,220 blacks were lynched by mobs in the southern states of the USA, 460 of them in Georgia; this compares with 723 whites during the same period (49 of them in Georgia)[5]. The lynching of blacks - without any investigation of the alleged crime - was socially acceptable in Georgia. In 1897, Rebecca Felton - a journalist for the *Atlanta Constitution* - when addressing the State Agricultural Society of Georgia stated: "If it takes lynching to protect women's dearest possession [a reference to the fear of the rape of white women by black men]...then I say lynch a thousand a week if it becomes necessary." Lynch mobs were often led by "the best citizens" of the community. The mob that lynched a black man in Macon, Georgia, in 1922 followed the lead of the manager of a local hotel, the president of an insurance company and a local merchant.

The use of the death penalty in the early part of the 20th century became closely related to the issue of lynching. As lynching became socially unacceptable to the authorities of Georgia, public demand for the execution of the alleged criminal would be satisfied by the guarantee of the use of the death penalty. For example, an official addressing a lynch mob in 1909 stated: "I wouldn't lift my little finger to save this nigger but it would be the greatest shame on this county and the greatest setback to law and order...if we let this fellow be lynched...I'll give my word of honour...that if some shyster lawyer gets him off...I'll lead the lynching party myself and we'll hang the Negro and the shyster to the same branch of one tree."

Between 1924 and 1972, Georgia executed 337 blacks and 78 whites. Sixty-six men were executed for the crime of rape (no longer a capital offence), of whom 63 were black. According to the 1990 census of Georgia, blacks comprise 27% of the population. Of the 20 inmates executed in Georgia since 1983, 19 had been convicted of murdering a white.

Amnesty International believes that the current racist use of the death penalty in Georgia stems from the state's history of violence towards its ethnic minorities. The idea that racial prejudice ceased to exist following the US Supreme Court ruling in *Furman v. Georgia* is clearly refuted by both statistical and anecdotal evidence on the use of the death penalty.

US Supreme Court rulings on the death penalty in Georgia

The US Supreme Court's three most important rulings on the death penalty have been on cases from the State of Georgia. In 1972, in *Furman v. Georgia*, the Court declared the death penalty unconstitutional. In 1976, in *Gregg v. Georgia*, revised state death penalty statutes were declared constitutional, thereby allowing for executions to resume. In 1987, *McCleskey v. Kemp*, the Court rejected a comprehensive statistical study pointing to racial discrimination in the application of the death penalty in Georgia.

In *Furman v. Georgia* the US Supreme Court ruled by five votes to four that the death penalty, as imposed under the country's existing laws, constituted "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments of the US Constitution. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments". Under the Fourteenth

[5]Source: *Lynching in the New South*, W Fitzhugh Brundage

Amendment, the state may not deprive a person of "life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law". Furman, black, had been convicted and sentenced to death for the murder of a white man while trying to break into the man's house.

The ruling responded primarily to what the judges considered to be the "arbitrary and capricious" application of the death penalty, due to the unlimited discretion afforded to the sentencing authorities (juries or judges) in capital trials. Of the nine Supreme Court judges, only two of the five who upheld the appeal ruled that the death penalty was inherently "cruel and unusual". The other three based their opinions on the uneven manner in which it was applied, together with the infrequency of its imposition at the time. Several also found that the death penalty was discriminatorily imposed. Justice Douglas stated:

> "...the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who, by social position, may be in a more protected position."

Although the decision referred specifically to Furman and two companion cases, it effectively invalidated all existing death penalty laws, most of which contained provisions similar to Georgia's statute. The ruling led to the commutation of death sentences in the cases of over 600 prisoners then on death row in states throughout the USA. After the *Furman* decision, states began revising their statutes to modify the discretion given to judges or juries in capital trials. By 1975, 33 states had introduced revised death penalty statutes. However, because the *Furman* decision had not ruled that the death penalty was unconstitutional *per se*, and each of the judges had differing views, the situation remained uncertain until the new laws could be tested in the US Supreme Court.

The first major test case involved appeals by prisoners sentenced to death under new laws enacted in Georgia, Texas and Florida; the lead case was *Gregg v. Georgia.* Troy Gregg was sentenced to death for the 1973 murder and robbery of Fred Simmons and Bob Moore. The US Supreme Court ruled by seven votes to two that the death penalty was constitutional, as imposed under the revised statutes in the three states. The statutes stipulated that: in trials for offences for which the death penalty may be authorized, the determination of guilt or innocence must be decided separately from the sentence; if a defendant is found guilty of a capital offence, the trial court must then conduct a separate hearing to determine whether he defendant should be sentenced to death or life imprisonment. In deciding the appropriate sentence, the court must consider aggravating and mitigating circumstances in relation to both the crime and the offender.

The statutes also provided for automatic review of death sentences by the highest state court of appeal, to ensure that the death penalty was imposed proportionately to the gravity of the offence and in an even-handed manner under state law.

In a landmark decision in 1987, the US Supreme Court voted by five votes to four to deny the appeal of death row inmate Warren McCleskey (*McCleskey v. Kemp).* McCleskey had argued

that the death penalty in Georgia was unconstitutional because it was applied in a racially discriminatory manner. The claim was based on a comprehensive academic study by Professor David Baldus, of Iowa State University. The study looked at every murder conviction in Georgia between 1973 and 1978 - more than 600 cases. It showed that black defendants and defendants who kill white victims were between four and 11 times more likely to receive the death penalty than other defendants. The study also found that these disparities are due more to prosecutorial decisions to seek the death penalty by holding a capital trial rather than to jury decisions to impose a death sentence given the opportunity. McCleskey, who was black, had been convicted of the murder of a white police officer. The Court accepted most of the findings of the study but asserted that "at most the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system." McCleskey's appeal was denied because the Court said he had failed to prove that the decision-makers in his particular case had discriminated against him (an almost impossible burden of proof).

Had the Court ruled in McCleskey's favour and concluded that the death penalty was tainted by racism, it may have struck down all capital statutes in the USA, as it did in the *Furman* ruling in 1972.

The four judges who voted to uphold the appeal spoke out strongly against the majority in their dissenting opinions. Associate Justice William Brennan wrote: "The statistical evidence in this case...relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. The way in which we choose who will die reveals the depth of moral commitment among the living."

In a biography published in 1994, former US Supreme Court Justice Lewis Powell who was one of the five who voted to deny McCleskey's appeal and wrote the majority opinion, was asked if there was any case in which he wished he had voted differently. Justice Powell replied "Yes, *McCleskey v. Kemp*." He conceded that he did not know what to make of the Baldus study's findings: "My understanding of statistical analysis ranges from limited to zero." Justice Powell also expressed the opinion that the death penalty should be abolished and that, were he still a member of the Court, he would always vote against it.

Warren McCleskey was executed on 25 September 1991. However, the ramifications of the ruling on his case continue. In 1995, the Georgia Supreme Court ruled that there was a *prima facie*[6] case that gross racial disparities existed in sentencing for some drug offences. The Court first held by a four votes to three vote that a case of racial discrimination was established by evidence that 98.4% of those serving life sentences for certain drug offences were black. All the discretion in pursuing life sentences for the offences was entrusted to district attorneys. Following the Court's ruling, the Attorney General of Georgia, joined by all of the 46 district attorneys - all of whom are white - filed a petition for a re-hearing with the Court arguing that the Court's decision took a "substantial step towards invalidating" the state's death penalty law and would "paralyse the criminal justice system." In response, one member of the Court switched his vote and the Court adopted the position that the proper governing standard was *McCleskey v. Kemp* and, therefore, no *prima facie* case had been established.

[6] A legal term meaning "at first sight".

Racism and the death penalty

As of 31 January 1996, 44 out of 103 of the prisoners on Georgia's death row were black**.**
The three main manifestations of racism in the use of the death penalty are: the removal of potential black jurors during the jury selection; the far greater likelihood of the death penalty being sought for a homicide involving a white victim; and the far greater likelihood of the death penalty being sought against black defendants.

No white person has been executed in Georgia for the murder of a black victim.

The case of Wilburn Dobbs

Wilburn Dobbs, black, was sentenced to death in 1974 after a trial contaminated by racism. He was tried and found guilty of the murder of Roy Sizemore, white, during a robbery in December 1973. The offence occurred in the small, racially segregated community of Walker County, Georgia, which has a 96% white population. The trial started 12 days after Dobbs was indicted and only three days after the state announced it would seek the death penalty. At the trial, Dobbs was represented by a state-appointed attorney, who, on the morning of the trial, sought a delay stating that he was "not prepared to go to trial" and was "in a better position to prosecute the case than defend it." The motion was denied and the trial went ahead.

During the trial Dobbs was referred to as "coloured" and "coloured boy" by the judge and defence attorney, and called by his first name by the prosecutor. Two of the jurors who sentenced Dobbs to death for the murder admitted after the trial to using the racial slur "nigger". Two female members of the jury stated that they feared blacks and found them to be "scarier than whites." Another juror stated: "I would fear one [a black man] on the street...I think all white women would have that fear."

The trial judge, Judge Coker, formerly served in the Georgia House of Representatives and Georgia Senate from 1953 to 1963. During that time he participated with other members of the legislature in an effort to prevent racial integration. Judge Coker presided over four cases in which the death penalty was sought. All of the victims were white, with two of the cases involving white defendants and two black defendants. Both cases involving white defendants resulted in life sentences and both cases involving black defendants received death sentences.

At the penalty phase[7] of the trial, the defence attorney presented no mitigating evidence as to why Dobbs should be spared the death penalty. His only argument was to indirectly suggest that a death sentence would not be carried out. At no time did he refer to Dobbs by name or even request that the jury return a verdict of life imprisonment. His final words to the jury were "I only ask that in considering the punishment, that you inflict one that you feel you can live with." The jury were

[7] A capital trial is divided into two phases. If the defendants is found guilty the trial continues into the "penalty phase". During the penalty phase the defence attorney can present mitigating evidence as to why the jury should not recommend a sentence of death to the judge.

left unaware of the many mitigating factors in Dobbs' life. For example, Dobbs' mother was 12-years-old when she gave birth to him and he never knew his father, who died shortly afterwards. Dobbs started life in a home environment which included alcohol consumption, prostitution and association with a criminal element. Dobbs was eventually removed from his home by his grandmother and placed with a relative. Members of the black community Dobbs grew up in were denied the opportunity to speak for a sentence of life imprisonment by the defence attorney's lack of investigation into possible mitigating evidence.

After 25 minutes of deliberation over the sentence, the jury asked the judge a question concerning Dobbs' eligibility for parole. The judge refused to answer the question. In less than an hour the jury returned a death sentence.

When describing the attitude of the defence lawyer towards blacks, the Federal District Court stated:

"Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighbourhoods and schools and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in the classroom...

The attorney stated that he uses the word "nigger" jokingly."

The federal court determined that the racial prejudice of the judge, prosecutor, defence lawyer and jurors in the case did not require that the death sentence be set aside. The Court of Appeals found that "although certain of jurors' statements revealed racial prejudice, no juror stated that [he or she] viewed blacks as more prone to violence than whites." Since neither the trial judge nor defence lawyer decided the penalty, the Court held that "apart from the trial judge's and defence lawyer's references to Dobbs as "coloured" or "coloured boy", it cannot be said that the judge's or the defence lawyer's racial attitudes affected the jurors' sentencing determination." After a reprimand from the US Supreme Court, the Federal District Court again held that Dobbs did not receive incompetent representation despite his lawyer's racism.

Wilburn Dobbs remains on death row. In at least five capital cases in Georgia the accused were referred to with racial slurs by their own lawyers at some time during the court proceedings. A court-appointed lawyer's only reference to his client during the penalty phase of a Georgia capital case was: "You have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer...He is ignorant. I will venture to say he has an IQ of not over 80." The defendant was sentenced to death.

Eddie Lee Ross, black, was legally defended by an avowed racist. Ross's attorney, an elderly white man, had been an Imperial Wizard of the Klu Klux Klan for over 50 years. The attorney filed no pre-trial motions, fell asleep during another part of the trial process and missed court dates. For years this lawyer had made speeches and published pamphlets urging white

America "to rise up because blacks were responsible for most of the rapes and murders of whites, and were getting away with it in the courts."

Racial bias in the selection of jurors

The jury selection process, known as the *voir dire*, is commonly used in a racially biased manner in Georgia. In 1986, in the case of *Batson v. Kentucky*[8], the US Supreme Court ruled that it was unconstitutional for prosecutors to remove potential jurors from the jury on grounds of race. However, on numerous occasions defendants in capital cases have been tried by juries not composed of a cross-section of the community.

Six of the 12 blacks executed in Georgia since 1983 were convicted and sentenced by all-white juries after prosecutors had removed all potential black jurors.

An attorney researching an unrelated civil case, came across a memorandum from the then District Attorney of Ocmulgee judicial district, Joseph Briley, asking the Putnam County jury commissioners precisely how many blacks and women they should add to the list of potential jurors. The purpose of the memorandum appeared to be to make the jury lists representative enough to avoid challenges from defence lawyers but not fully representative of the population. Briley admitted giving the jury commissioners the number of names needed to make the lists acceptable but denied there was any intention to discriminate. In the capital cases tried by Briley in which the defendant was black and the victim white, Briley used 94% - 96 out of 103 - of his jury challenges to remove black jurors. On 13 July 1995 Joseph Briley was quoted in the *Macon Telegraph* as stating: "...I recognize the fact that it [the death penalty] cannot be equally applied in our system. That's not to say it's unfair."

Racial bias in seeking the death penalty

Georgia's death penalty statutes were rewritten following the 1972 US Supreme Court *Furman* decision. For the death penalty to be constitutional, states had to specify criteria for when district attorneys should seek a death sentence. Georgia's death penalty statute specifies 10 aggravating factors that would allow a district attorney to class a murder as capital. The 10 aggravating factors included in the statute would allow for most murders to be classed as capital. For example, if the murder could be described as "wantonly vile, horrible or inhuman" or that the murder was committed "for the purpose of receiving money". This leaves a district attorney with almost unlimited discretion to decide whether to class a murder as capital. There are wide numerical discrepancies between how often different judicial circuits seek the death penalty; the most death sentences were sought by the judicial circuit of Stone Mountain - 86 between 1973 and 1995. During the same period the Appalachian judicial circuit only sought the death penalty twice.

The arbitrary manner in which death sentences are sought and imposed led a member of the Georgia Board of Pardons and Paroles to comment in 1987 that if the files of 100 cases of murder

[8]The court ruled that prosecutors were not permitted to exercise peremptory challenges to strike blacks from the jury on grounds of their race. Peremptory strikes must be used for "race neutral" reasons.

punished by death and 100 punished by life were shuffled, it would be impossible to sort them out by sentence based upon information in the files about the crime and the offender.

The death penalty in Georgia is primarily sought against those accused of murdering people deemed more valuable by society; this may be by virtue of their social and economic standing, or their race. A study of capital cases brought before the courts in the judicial district of Chattahoochee, Georgia between 1973 and 1990 showed that 85% of defendants were accused of the murder of a white; in the same district blacks made up 65% of murder victims during the same period. Six percent of the capital trials involved a black-on-black murder. The death penalty was never sought for the murder of a black by a white during the 27 years covered by the study.

A statistical study of the use of the death penalty in the judicial district of Flint, Georgia[9], showed that the death penalty is sought six times more often if the victim is white. The death penalty had been sought in six of the 13 cases involving the murder of a white woman but had never been sought in the 11 cases involving the murder of a black woman.

The legal authorities continue to deny that the death penalty is used in a racially discriminating manner in Georgia. In July 1995, an Assistant Attorney General stated: "I don't think we have a racist problem statewide. We're all human. People are not perfect, but we have **too many** checks and balances in the system that help reduce bias"[10] (emphasis added).

On occasion, legal officials have refused to recognise that racial bias could interfere with the judicial process. During a 1990 legal hearing for William Brooks, black, on whether racial bias affected his original trial, defence attorneys questioned the district attorney on the lack of participation by ethnic minorities in the legal process: "...these five black men were all tried by all-white juries and defended by white lawyers, prosecuted by white lawyers, and tried by white judges. Does that offend your sense of justice?" After further discussion on the issue the judge asked "What does his **sense of justice** have to do with it?" (emphasis added)[11].

District attorneys often take into account the views of the relatives of white victims on whether to seek the death penalty against the defendant. The relatives of black victims may not be so privileged. The families of the victims of William Hance were not consulted on the possible sentences available. The district attorney who prosecuted Hance testified: "I talked with, in most [death penalty] cases, the families of the victims...I'm sure that I talked to them in all...except for Hance...There was really no family to talk with..." The district attorney's file on the victims told a different story; it contained the phone number and address of the mother of one of the victims. Had he contacted the victim's relatives he would have found them opposed to the execution of William Hance. Several family members of the victims submitted affidavits to the Georgia Board of Pardons and Paroles requesting that Hance not to be executed.

[9]Complied by Professor Mike Radelet, Florida University, for use in the appeals of death row inmate Carzell Moore.

[10]Quoted in *The Macon Telegraph* 13 July 1995.

[11]Source: transcript of pre-trial hearings in *State v. William Anthony Brooks*

The district attorney responsible for seeking the death penalty against William Hance tried seven other capital cases during his tenure. The Hance case was the only one involving black victims; it was also the only one in which the views of the victims' relatives were not sought.

The family of Brooks' victim were consulted and informed about legal proceedings. After a retrial was ordered by an appeal court, the district attorney called a press conference where he announced that, after consultation with the victim's family, he would again be seeking the death penalty. In 1982 Brooks' father was murdered; the district attorney's office had no contact with the Brooks family. At a legal hearing held before Brooks' retrial, relatives of three black murder victims (a husband, wife and father) gave testimony about their experiences with the district attorney's office after the murder of their loved-one; none of the three had been consulted by the district attorney's office or been informed about the progress of the case against those accused of the murder of their relatives.

Inadequate legal representation for those facing the death penalty

Like many of the states that impose death sentences, Georgia often fails to provide defence attorneys well versed in capital law. The Vice President of the Georgia Trial Lawyers' Association described the state's determination of whether a defendant has received adequate assistance of legal counsel as "the mirror test. You put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, that's adequate counsel."

A defence lawyer's knowledge of capital law can mean the difference between life and death. John Eldon Smith and Rebecca Machetti - co-defendants tried within a few weeks of each other in Bibb County, Georgia - were sentenced to death by juries deemed to be unconstitutionally composed due to a gender bias towards men. Machetti's lawyers challenged the jury composition in state court on the grounds that it was unconstitutional under a US Supreme Court ruling prohibiting gender discrimination in juries. Smith's lawyers did not issue a challenge to the jury composition because they were unaware of the ruling. A new trial was ordered for Machetti by the federal court of appeals at which a jury, which fairly represented the community, imposed a sentence of life imprisonment. The federal court refused to consider the identical issue in Smith's case because his lawyers had not preserved it[12]. Smith became the first prisoner to be executed in Georgia in the post-*Furman* era on 15 December 1983. Had Machetti been represented by Smith's lawyers in state court and Smith by Machetti's lawyers, Machetti would have been executed and Smith would have obtained federal *habeas corpus* relief.

James Messer was represented at trial by an attorney who, during the guilt phase of the trial, gave no opening statement, presented no defence case, conducted cursory cross-examinations, made no legal objections, and then emphasized the horror of the crime in some brief closing remarks. Even though severe mental impairment was important at both the guilt and penalty phases of the trial, the lawyer was unable to present any evidence of it because he failed to make an adequate showing to the judge that he needed a mental health expert. He also failed to introduce Messer's steady employment record, military record, church attendance and cooperation with the police. In

[12]To preserve a legal issue for future appeals the defence counsel must raise an objection.

closing, the lawyer repeatedly hinted that death was the most appropriate punishment for his own client. James Messer was executed on 28 July 1988.

Attempts to improve the quality of legal representation afforded to those accused of capital crimes have been strongly opposed by the prosecuting authorities. A bill introduced in the US Congress in 1993[13] would have required only a "certifying" authority to identify lawyers to defend capital cases, allowing judges to continue to appoint counsel, and setting only minimal standards measured in terms of years of practice and number of cases, with no inquiry into quality of work. One letter circulated among Senators criticized the bill's "expansive and costly appointment of counsel provisions" and quoted the Attorney General of Georgia as saying that, if enacted, the bill would "effectively repeal the death penalty."

The legal appeals of death row inmates are often written by inexperienced legal counsel. However, opposing them in court are lawyers who may have been working for many years on capital cases. The head of the unit that handles capital litigation for the Attorney General in Georgia has been involved in the work since 1976. She brings a wealth of expertise developed over a long period in all the state and federal courts involved in Georgia cases. She and her staff are often called upon by district attorneys around the state for consultation on pending briefs and, on occasion, will assist in trial work.

The low standard of legal representation afforded capital defendants is further exacerbated by the poor financial reimbursement offered to defence attorneys in death penalty cases. A capital case in Georgia was resolved with a guilty plea only after the defence attorneys agreed not to seek attorneys fees as part of the bargain in which the state withdrew its request for the death penalty.

In 1990, experienced lawyers working on a civil rights case involving prison conditions were paid at rates of between $90 and $150 per hour. Attorneys appointed to death penalty cases in state courts can never expect compensation at such rates.

A lawyer in her fifth day of practice in Columbus, Georgia, was surprised to be appointed to handle the appeal of a capital case. Two days earlier she had met the judge who appointed her when she accompanied her employer to a court hearing in a divorce case. Only after she asked for help was a second attorney brought onto the case. Another lawyer appointed to a capital case in the same court submitted his first billing to the judge for approval but was told he was spending too much time on the case. He was summarily replaced by another lawyer and the defendant was ultimately sentenced to death.

In the annual state of the judiciary address in 1993, Georgia Chief Justice Harold Clarke described Georgia's response to the need for adequate legal defence for poor defendants: "We set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."

[13]The Habeas Corpus Reform Act of 1993. The bill also contained a statute of limitations and other restrictions on *habeas corpus.* The bill failed to become law.

The case of John Young

John Young, black, was executed in Georgia on 20 March 1985 for the murder of three elderly white people during a robbery at their home on 7 December 1974, when he was 18 years old.

At Young's trial, in Macon, Georgia, in January 1976, his case was assigned to a state-appointed attorney, Charles Marchman Jr who, by his own admission (in an affidavit dated 16 March 1985) "spent hardly any time preparing for the John Young case". He also admits that he "never at any time obtained any social history from [John Young] to determine anything of his background nor did I interview any family members or other friends of Mr Young".

Marchman further states in his affidavit that he was emotionally and physically exhausted during the period of Young's trial because his marriage had broken down; he was having a homosexual love affair, and his father's illness had obliged him to take over the family business in addition to running his own legal practice. To alleviate the stress caused by this "myriad of problems", he was taking drugs (marijuana and amphetamines) prior to and during Young's trial.

Only one defence witness was called during the trial. Dr Miguel Bosch, a psychologist who examined Young and led Marchman to believe that he would testify that Young was severely unstable and anti-social, with a drug history, but that he could be rehabilitated. In the event, Bosch testified that Young could not be rehabilitated under any circumstances. The jury sentenced Young to death. Afterwards the foreman of the jury told Mr Marchman that Dr Bosch's testimony had been the decisive factor in persuading the jury to return a death sentence, and that "if that evidence had not been presented to them the jury - in all likelihood - would have returned a sentence of life imprisonment".

In fact, strong mitigating evidence was available, which might well have persuaded the jury to spare John Young's life. John Young's mother was shot dead by her lover whilst John, aged three, and his brother lay in bed with her. Young was then placed in the care of an alcoholic relative who turned him out on the streets at an early age where he became involved in petty crime, child prostitution and drug abuse. Marchman admits he did not present this mitigating evidence: "I did not know how to handle that particular fact, so I basically did nothing and took no further action and let the evidence simply drop at that time".

Marchman was arrested on 2 February 1976, just after Young's trial, and convicted of possession of marijuana with intent to distribute it. He was sentenced to 30 days in prison and five years' probation and was also debarred from legal practice. On his release from prison Marchman moved to Atlanta and avoided all contact with attorneys and colleagues in Macon. He came forward to discuss his handling of Young's case, and to offer his affidavit, only four days before Young's scheduled execution, claiming that he was unaware that the execution was about to take place.

John Young appealed to the Georgia Board of Pardons and Paroles for clemency. The clemency submission offered information on Young's character and background that had not been made known to the jury that sentenced him to death. This included a statement from a child psychologist describing the traumatic response that is likely in a child who witnesses his mother's

brutal killing at the age of three. The clemency submission based its request on three main points: firstly, that the jury knew very little about Young when they made their decision and instead of hearing from long-term friends and acquaintances, the jury heard only from a state psychiatrist who had met Young only briefly and had incomplete and erroneous information upon which to base his testimony; secondly, although the jury were aware that Young's mother had died when he was a small child, they were unaware of the circumstances; thirdly, the jury never knew that Young's trial attorney had a serious drug dependency which, along with other traumatic problems in his life, prevented him from adequately representing Young. Subsequent legal appeals failed to address the problem of Young's inadequate defence. The Georgia Board of Pardons and Paroles rejected the clemency appeal.

Amnesty International believes that the lack of adequate legal representation in many cases contravenes United Nations Economic and Social Council (ECOSOC) *Safeguards guaranteeing protection of the rights of those facing the death penalty.*[14] Safeguard 5 states that capital punishment may only be carried out after a legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights[15] (ICCPR), including the right of defendants to adequate legal assistance at all stages of the proceedings.

Legal attempts to speed the appeal process for death row inmates

On 10 April 1995, Governor Zell Miller signed into law Georgia's Death Penalty Habeas Corpus Reform Act of 1995. The Act is designed to speed the appeals process for death row inmates, thereby allowing for more executions to take place. The General Assembly of Georgia determined that *habeas* proceedings should not be used by persons sentenced to death "solely as a delaying tactic under the guise of asserting rights" and that strict compliance with *habeas corpus* procedures "will prevent the waste of limited resources and will eliminate unnecessary delays in carrying out death sentences...".

The Act sets down time limits for the filing and processing of appeals. Although the Act was pushed through the General Assembly by advocates of the death penalty in an attempt to speed up executions, it is questionable whether the complicated Act will have that effect, as the new legislation will be subject to legal challenges.

The attempt to restrict the time limits for *habeas* appeals follows the removal of funding by the US Congress[16] for the Georgia Resource Center. The Georgia Resource Center, a collection of attorneys who specialized in capital law, provided legal representation for many of the state's death row inmates. The Center has now been reduced from eight to two staff attorneys.

[14] Adopted on 25 May 1984.

[15] Ratified by the US Government on 8 June 1992.

[16] For further information see AI publication *Developments on the death penalty in 1995* (AI Index AMR 51/01/96).

The imposition of a speedier appeals process and the removal of a pool of attorneys specialized in death penalty law increases the risk of the execution of an innocent person - a problem admitted by proponents of the death penalty. Michael Bowers, the Attorney General of Georgia stated: "I tell folks that if they want appeals limited to two or three years, some time we'll execute the wrong person. Of course we will. We're human. But it's a question of will."[17] However, in a separate interview for a Georgia newspaper, Bowers was quoted as describing two to three years for the appeals process as "plenty of time"[18]. In a survey quoted in the same newspaper, 67% of the Georgia population felt that 2 years or less was an adequate time for the appeals process.

Execution of juvenile offenders

There are currently two juvenile offenders under sentence of death in Georgia. José Martinez High, black, sentenced in 1978 and Alexander Edmund Williams, black, sentenced in 1986. Both were aged 17 at the time of the offence.

In February 1996 the Georgia House Judiciary Committee passed a bill that would lower the age defendants can be sentenced to death in Georgia to 16 years. The bill is unlikely to be passed by both houses of the state legislature.

Georgia's laws currently allow for a death sentence to be imposed on anyone over the age of 17 at the time they committed a capital offence.

Since 1990 only four countries worldwide are reported to have executed juvenile offenders: one was executed in Saudi Arabia and one in Pakistan in 1992; one in Yemen in 1993; and six in the USA. A total of nine juvenile offenders have been executed in the USA since 1985 and over 35 remain under sentence of death.

The case of Christopher Burger

Christopher Burger was executed on 7 December 1993. He was the first juvenile offender to be executed in Georgia since 1957 and is, to-date only, juvenile offender to be executed in Georgia under its current death penalty laws. 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, also white. His death sentence was vacated on appeal, but he was again sentenced to death in July 1979. The 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 the normal for his age; that he was mentally ill and brain damaged as a result of physical abuse he received as a child; that he suffered a highly disturbed, unstable upbringing; and that he had attempted suicide when he was 15 years old.

[17] Quoted in *Newsweek* 7 August 1995.

[18] Quoted in *The Macon Telegraph* 16 July 1995.

Christopher Burger

The US Supreme Court denied Burger's appeal by five votes to four 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 childhood" and that "the record at the *habeas* 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 erred in failing to present any evidence at the sentencing hearing. The record indicated that the lawyer's meeting 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 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 would have been highly relevant at the sentencing hearing.

Christopher Burger suffered a deprived, unstable and abused childhood; he was often beaten by his mother who herself suffered chronic mental illness. According to her testimony at an appeal hearing, she sometimes had to lock her son in a room to keep herself from harming him. Burger's parents divorced when he was nine and he was placed in the custody of his father who used to hit and punch him. He was unwanted by his father's new family and sometimes shut out of the home. He was shuttled backwards and forwards between both sets of parents and used to beg to be allowed to stay with his mother. At one stage he was left in the care of his mother's boyfriend for several months, during which time he was severely ill-treated. He was also beaten by one of his two step-fathers. At the age of 11 or 12 Christopher Burger began to inhale organic solvents and smoke marijuana. When he was in his mid-teens he presented clear signs and symptoms of serious psychiatric disorders. He attempted suicide at 15.

The sentencing of death and the execution of juvenile offenders is in violation of Article 6 (5) of the ICCPR, Article 37 (a) of the *UN Convention on the Rights of the Child*[19], and the UN

[19]Signed by the US government in 1995.

ECOSOC *Safeguards guaranteeing the protection of the rights of those facing the death penalty*, adopted by Resolution 1984/50 on 25 May 1984.

Although the USA has entered a reservation to Article 6 on the basis of state laws permitting the execution of juvenile offenders, Amnesty International believes that such a reservation to a non-derogable right should be considered null and void. No other government has entered a similar reservation to Article 6 of the ICCPR. The UN Human Rights Committee in its General Comment 24 (52) of 2 November 1994 has stated that the prohibition under Article 6 of the arbitrary deprivation of life cannot be reserved and that in particular "a State may not reserve the right...to execute...children."[20] During the consideration of the initial report on the USA at its 53rd session in April 1995, the Committee commented that it was "particularly concerned at reservations to Article 6, paragraph 5 and Article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant"[21] and requested the US Government to withdraw them.

Execution of the mentally retarded

The case of Jerome Bowden

Jerome Bowden, a 33-year-old mentally retarded black man, was executed in Georgia on 24 June 1986 for the murder of a white woman 10 years earlier during a robbery.

His execution came a day after a state-hired psychologist had concluded a three-hour intelligence quota (IQ) test on him in prison and had effectively found that his average score of 65 was not low enough for him to be spared electrocution. Defence lawyers had no opportunity to challenge the psychologist's findings.

Jerome Bowden

Jerome Bowden was convicted partly on the evidence of his alleged confession that he had participated in the crime and partly on the testimony of a co-defendant. It was not established which of the two had been the actual killer. The co-defendant was sentenced to life imprisonment at a separate trial.

A request by Jerome Bowden for psychiatric help in testing his mental competence to stand trial was refused by the trial judge. His lawyer then withdrew an insanity claim on his behalf. This meant that not only was the jury never shown that Jerome Bowden was mentally retarded but that he waived the right to raise the issue afterwards. His case would otherwise have been reviewed in the light of a February 1985 US Supreme Court ruling that states must provide indigent

[20] UN document CCPR/C/21/Rev/Add.6

[21] UN document CCPR/C/79/Add.50

defendants with psychiatric assistance in preparing an insanity defence if they show that their sanity at the time of the offence was a significant factor at trial.

Jerome Bowden was reported to have the mental age of a 12-year old. His appeal lawyers said he had no comprehension of his conviction or of death as a punishment. One of them stated: "He cannot imagine his non-existence. Carrying out a sentence of execution against such a person would be a meaningless act of vengeance."

Jerome Bowden's execution was originally scheduled for 18 June 1986 but, eight hours before he was due to die, Georgia's Board of Pardons and Paroles granted a stay of up to 90 days pending an evaluation of his mental capacity. Six days later the stay was lifted - the day after the Board had received the report of a psychologist who examined the prisoner on its behalf. The psychologist found his IQ to be 65. A member of the Board is reported to have indicated later that Jerome Bowden would only have been institutionalized if his IQ rating had been lower than 45.

Observers have questioned the validity of the Board's psychological evaluation, which was reached on the basis of a single test.

A spokesperson for the local branch of the American Civil Liberties Union said the prisoner's IQ of 65 would have entitled him to a full disability pension from the US Social Security. "If your IQ is 65 or lower you're non-functioning in our 20th century society - but you're smart enough to be killed," she said.

The protests following the execution of Jerome Bowden led to Georgia passing legislation to prohibit the imposition of the death penalty on defendants found to be "guilty but mentally retarded." The law came into effect on 1 July 1988. Before being allowed to enter a plea of "guilty but mentally retarded" the defendant would be required to undergo a psychological examination and satisfy the court that he was retarded. The definition of whether the defendant is mentally retarded is left to the jury, or to the judge in cases where a jury trial has been waived. Prisoners found to be "guilty but mentally retarded" can be sentenced to life imprisonment.

Despite the passing of this law, the District Attorney responsible for the prosecution of Jerome Bowden stated in an appeal hearing related to a mental health issue in 1991 that he would seek the death penalty for Jerome Bowden if the same crime occurred today.

The state of Georgia continues to execute prisoners who are mentally retarded. William Hance, executed on 31 March 1994, had been diagnosed as suffering from organic brain damage and mental retardation. Social and environmental factors had played a key role in limiting Hance's intellectual development. These included his exposure to severe physical and psychological abuse throughout his childhood.

In an interview with ABC's News Nightline in June 1989, Georgia's Attorney General, Michael Bowers, stated: "...We in Georgia have prohibited the application of the death penalty with respect to someone with sub-average intelligence...The mere fact that Georgia has a statute which prohibits the execution of the mentally retarded is pretty good proof that legislatures can act

responsibly." William Hance's execution was proof that the passing of legislation forbidding the execution of the mentally retarded has failed.

The execution of mentally retarded prisoners is contrary to the *Safeguards guaranteeing protection of the rights of those facing the death penalty*, adopted by ECOSOC in May 1989 (Resolution 1989/64), which recommends "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." ECOSOC Resolution 1984/50, adopted in May 1984, also states "nor shall the death sentence be carried out...on persons who have become insane."

Innocent men sentenced to death

Four men have been released from Georgia's death row after their innocence was established.

Earl Charles was convicted on two charges of murder and sentenced to death in 1975. Charles was released in 1980 when evidence was found that substantiated his alibi. After an investigation, the District Attorney announced that he would not re-try the case. Charles went on to win a substantial settlement from city officials for misconduct in the original investigation.

Henry Drake was sentenced to death in 1977. His original conviction was overturned on appeal and he was sentenced to life imprisonment at the second trial. Six months later, in 1987, the Georgia Board of Pardons and Paroles freed him, convinced he was exonerated by his alleged accomplice and by testimony from the state medical examiner.

Gary Nelson was sentenced to death in 1980. He was released from death row in 1991 after a review of the prosecutor's files revealed that material information had been improperly withheld from the defence attorneys. The District Attorney acknowledged: "There is no material element of the state's case in the original trial which has not subsequently been determined to be impeached or contradicted."

The case of Jerry Banks

The most shocking case of an innocent black man convicted and sentenced to death in Georgia is that of Jerry Banks. Banks' case illustrates many of the factors contributing to the often appalling standards of jurisprudence in capital cases. He was represented by an attorney who did little investigation into his case and may have been originally accused of the crime because he was black.

On 7 November 1974, Jerry Banks, then 23 years old, was rabbit hunting when he discovered the bodies of Marvin King and Melanie Hartsfield. Both victims had been shot to death with a shotgun and police found two red shotgun shells at the scene of the crime; Banks was hunting with a shotgun. Banks rushed back to the main road and alerted a passing motorist who in turn alerted the police.

Banks was asked to hand over his weapon to the police. The police also learned of Banks' 1970 conviction for manslaughter and he started to become a suspect in the case. A month later police again obtained Banks' shotgun and ran tests on it. Although the tests could not prove that his

shotgun was the murder weapon, it was determined that the red shells found near the bodies definitely came from Banks' gun. When questioned by the police, Banks insisted that he had not fired the shotgun on the day of the murders and he had not thrown out any shells in the area. Hence their presence at the murder scene was a mystery unless Banks was lying. After a third shell from Banks' gun was found at the murder scene at a later date, and a friend failed to confirm that he had the shotgun on the day in question, Banks admitted lying to the police to "get the officers off his back." He was arrested for the murders on 10 December 1974. Six and a half weeks later Banks was convicted and sentenced to death for the murders. No motive for the murder was ever established.

At the trial the jury refused to believe Banks' brother's testimony that he had been using the shotgun in the area the previous week, or the testimony of Banks' employer that he was at work at the time the murders occurred. The motorist flagged down by Banks was not called to testify at the trial and the police testified that they did not know this man's name. The prosecution suggested that Banks had reported the murders himself and made up the story of the passing motorist. Shortly after the trial the motorist, Andrew Eberhardt, contacted the trial judge and insisted he had identified himself to the police. If this was true, the information should have been made available to the defence attorney. Therefore a motion demanding a new trial was filed but denied by the trial judge. However, in September 1975 the Georgia Supreme Court unanimously ordered a new trial.

The Banks family after Jerry had finally been released from Georgia's death row

The District Attorney offered Banks a life sentence in exchange for a guilty plea but Banks refused, insisting on his innocence. At the second trial the defence attorney failed to offer even the minimal defence offered at the first. Banks' brother and employer were not called as witnesses; the only defence witness was Andrew Eberhardt, the passing motorist. The trial lasted two days and Banks was convicted and sentenced to death. The jury found that the murder "was outrageously and wantonly vile, horrible and inhuman in that it involved torture to [one of] the victim[s]." This opinion was based on the fact that Banks' shotgun was a single-barrel weapon that would have required reloading after each shot. Therefore the second murder victim was essentially tortured with the knowledge that his or her death was imminent. The conviction and sentence were affirmed by the Georgia Supreme Court.

Through a chance meeting Banks was lucky enough to acquire a new legal team who agreed to represent him for free. His original lawyer was disbarred because of his handling of another case. Despite the fact that they had now ruled that his original lawyer was unfit to appear in front of them, the Georgia courts ruled that Banks had received effective assistance of legal counsel.

Banks' new defence team started to learn of other witnesses who were not called at either trial. A local chief of police and his son (also a police officer) had been near the murder scene and heard the shots at 2.30pm, when Banks had a witness saying he was at work. The police chief also visited the murder site with the local mayor and found two green shotgun cases that could not have been fired by Banks' gun as they were the wrong type.

The attorneys also found a former detective who had interviewed four workmen who were near the scene on the day of the murders. The four had heard the shots and corroborated the statement by the police chief and his son: that the four shots came in quick succession over no more than five seconds. Banks' gun was single-barrelled and would have needed reloading after each shot taking at least five seconds per round of ammunition. A memo summarizing this information had been circulated among detectives working on the case, but had disappeared from the file.

The attorneys located another person who had heard the shots. This man, a farmer, had seen a white man holding an automatic shotgun leaning on a van. The man claimed he had reported this to the sheriff but had heard nothing more. Another witness was located who claimed he saw a car similar to the one owned by King pulled over to the side of a road on the day of the murders. A woman was sitting in the car and two white men were outside arguing loudly. Newspaper articles published just after the murders reported that the police were looking for two white men who were suspected as the killers.

Armed with the new evidence, Banks' attorneys appealed to the original trial judge for a new trial but this was rejected. However the Georgia Supreme Court did order a third trial for Banks.

At this point the District Attorney could have dropped the charges but instead chose to prepare for the trial; Banks remained on death row. During preparations for the trial, defence attorneys discovered that the former sheriff's detective, who had been the lead investigator in the case, had mishandled evidence in other cases. The attorneys found discrepancies in the detective's accounts of the tests on Banks' shotgun and the version offered by a former county commissioner.

On 16 December 1980, just after the District Attorney had announced that he would seek a death sentence for the third time, the defence attorneys revealed what they now knew about the sheriff's detective. Three days later the District Attorney announced that he would not re-prosecute the case, and admitted that evidence from the shotgun shells - the only real evidence against Banks - "lacks sufficient legal credibility to be believed." On 22 December 1980 Banks was freed.

In May 1981, the three defence attorneys were awarded an "Indigent Defence Award" from the Georgia Association of Criminal Defence Lawyers. They received no payment for their work on Banks' case.

Jerry Banks was unable to return to his previous life. Shortly after his release his wife filed for divorce. On 29 March 1981, three days before the divorce was to become official, Banks, having failed to persuade his wife to change her mind, killed both his wife and himself. His suicide note simply said "everything I have in this world has been taken away." Guardians of the couple's three children, the oldest of whom was 11, filed a $12 million suit against the former sheriff of Henry

County and five of his deputy sheriffs, citing their mishandling of the case "motivated by racial prejudice." In March 1983 the guardians agreed an out-of-court settlement of $150,000.

Some members of the legal authorities in Georgia appear prepared to accept the execution of innocent defendants. Ed Lukemire, District Attorney for Houston County, Georgia, was quoted as stating: "Once in a while an innocent person may be punished [by execution]. It would be a tragedy in that one case, but it's not an argument for scrapping the death penalty. No [justice] system will be perfect in its administration..."[22].

The use of clemency

The power to grant clemency to death row inmates facing execution rests solely with the Georgia Board of Pardons and Paroles. The Board consists of five members appointed by the Governor and approved by the Georgia Senate. The Board needs a majority vote to commute a death sentence to life imprisonment. The Board is required to call forth all relevant information concerning the applicant. The hearings are held in public.

The Georgia Board of Pardons and Paroles has commuted four death sentences in the post-*Furman* era. They are:

Charles Hill, 1977. This was the first case decided by the Board after the *Furman* decision. The commutation was granted in order to rectify the disparity between his sentence and the life sentence received by his co-defendant, who shot the victim.

Fred Davis, 1988. Davis' co-defendant testified against him. Initially, both were sentenced to death. However, under appeal, the co-defendant was re-sentenced to life imprisonment, despite having admitted full responsibility for the killing. The Board cited the disparity between the two co-defendants in its decision to grant clemency.

William Moore, 1991. The Board cited Moore's exemplary prison record, remorse, religious conversion and pleas for clemency from the victim's family as grounds for granting clemency.

Harold Glenn Williams, 1991. The Board stated that the reason for clemency was the disproportional sentences received by Williams and his co-defendant, who received a prison sentence but later took full responsibility for the murder.

The granting of clemency to prisoners facing imminent execution is random in the extreme. While the Board cited discrepancies in the sentencing of co-defendants in three of the above cases, three prisoners, Ivon Stanley, Roosevelt Green and Van Solomon, were denied clemency despite only being accessories to the murder rather than the actual trigger-men. All three were executed. John Young was executed despite evidence that he was denied adequate assistance of legal counsel and other strong mitigating circumstances (see page 13). Alpha Stephens was denied clemency even

[22]Quoted in *The Macon Telegraph*, 16 July 1995

though appeals relating to racial discrimination were pending before an appeal court in other cases that could have been of direct relevance to his case. His application to the courts for a stay of execution was denied on technical grounds; he had submitted the appeal too late. The Board could have remedied this by issuing a stay of execution as an alternative to commutation but declined to do so. He was executed in 12 December 1984 (see page 31).

In a bizarre and macabre move, the Board chose to interview Nicholas Ingram on the eve of his execution. Insisting that they needed to meet him "eyeball to eyeball" the Board travelled to Georgia's death row after Ingram's lawyers had presented mitigating evidence at the clemency hearing. The Board cited international support for Ingram's case as the reason for further consideration. The Board's chairman, Wayne Garner, stated: "Before this board's going to make a decision, I have some questions to ask the young man." Having interviewed Ingram for his very life, the Board denied clemency. Ingram was executed on 7 April 1995 (see page 30).

The case of William Hance

William Hance, black, was sentenced to death in 1984 for the murder of a black prostitute. Hance was allowed to legally represent himself as co-counsel at trial, despite the view of a clinical psychologist that he was not capable of assisting "in an appropriate, rational way" in his own defence. During the jury selection the prosecution used nine of its 10 peremptory strikes (the right to exclude jurors without giving reasons) against blacks, leaving one black member of the jury. Hance's first death sentence was set aside by an appeal court on the grounds of prosecutorial misconduct. The appeals court described the prosecutor's comments to the jury during the sentencing phase of the trial as a "dramatic appeal to gut emotion" that "has no place in a court room."

At the new sentencing hearing the jury were inclined to give a life sentence. Some jurors were concerned that this would lead to Hance becoming eligible for parole in the future. A note was sent to the judge asking what a "life sentence" meant. The judge declined to answer. Fearing Hance's eventual release the jury then started to move towards a sentence of death. Eventually the jurors voted 11 to one for a death sentence; the only vote for life was that of Ms Daniels, the black juror. The 11 jurors attempted to pressure Ms Daniels into voting for a death sentence (a vote for a death sentence must be unanimous in Georgia); one of the jurors stated that: "we need to get it over because tomorrow is mother's day." Other jurors commented that Ms Daniels was the same race as the defendant. The white jurors made repeated racist comments about Hance, including "The nigger admitted he did it, he should fry."[23] Ms Daniels continued to hold out for a life sentence stating: "You do what you have to do, but I won't vote for a death sentence." She then refused to participate in any further votes.

According to a sworn affidavit by Ms Daniels, the jurors then decided to tell the judge that they had voted for a death sentence. Ms Daniels, frightened that she could be charged with perjury for having said that she could vote for a death sentence during the jury selection, agreed that she had voted for death when the jury was polled.

[23]Source: sworn affidavit by juror Patricia LeMay.

Despite Ms Daniels affidavits stating that she opposed the execution of William Hance, the Georgia Board of Pardons and Paroles refused to grant clemency. Hance was executed on 31 March 1994 (see page 11).

The politically motivated use of the death penalty

The state of Georgia, like many other states in the USA, elects many of its key judicial figures. Seventy-one percent of the population of Georgia favour the use of capital punishment.[24] Therefore the death penalty continues to be electorally popular and to be used in a politically partisan manner. Many of the state's judges were previously district attorneys. While seeking re-election as district attorneys, it would not be unusual for them to state the number of trials at which they had successfully sought the death penalty.

Judges elected at the ballot box are under great political pressure in some of the many decisions they make. For example, voters elect two superior court judges in Flint judicial circuit which comprises four rural counties. The Georgia Diagnostic and Classification Center, the prison that houses Georgia's death row, is a major employer in the circuit. State post-conviction actions must be brought in the county of the prison in which the inmate is incarcerated, therefore local judges preside over a large number of those actions. In the last 10 years, the two local judges - both former prosecutors - have never once granted *habeas corpus* relief to an inmate sentenced to death. In reviewing the cases, the federal courts have found constitutional violations requiring that either the convictions or sentences be vacated in almost two-thirds of the cases.

In 1993, a Georgia Supreme Court justice acknowledged that the elected justices of that court may have overlooked errors, leaving federal courts to remedy them via *habeas corpus*, because "[federal judges] have lifetime appointments. Let them make the hard decisions."[25] Georgia's Attorney General has previously criticized the Georgia Supreme Court asserting that it was "the most liberal in the country." He went on to claim that the Court, which for the first time has a black chief justice, was on a path to abolish the death penalty in the state.

The largest contributor to the election fund of the then District Attorney of Chattahoochee judicial circuit, Bill Smith, was the father of a murder victim. In 1985 John Davis was sentenced to death for the murder of Susan Isham. Prior to Davis' trial, Bill Smith had contacted the victims' father and asked if he wanted the death penalty for Davis. When the father replied yes, Smith replied "that's all I need to know." In 1988 the father contributed $5,000 to Smith's fund to be elected as a judge and $3,000 to Assistant District Attorney Doug Pullen's election fund to become the new district attorney. The father was quoted as saying of the two men "...they helped me out and went to bat for me, now I'm helping them out."[26] Both men were successful in their election campaigns.

[24] Source: Opinion poll published in *The Macon Telegraph*, 13 July 1995.

[25] Quoted in *Fulton Daily Reporter*, 25 January 1993.

[26] Source: *Columbus Ledger-Enquirer*, 14 December 1989.

Many of Georgia's judges are former district attorneys. Three of the four superior court judges of the Chattahoochee judicial circuit are former prosecutors. Mullins Whisnant, who now serves as the chief superior court judge, became a judge after serving as the elected district attorney. His last capital case as prosecutor involved a highly publicized rape, robbery, kidnapping and murder of a white Methodist Church organist by a black man. The trial was one of the first to be televised in the region. Whisnant made a highly emotional plea to jurors to join a "war on crime" and "send a message" by sentencing the defendant to death. The conviction was later overturned on the grounds that the prejudicial pre-trial publicity may have denied the defendant a fair trial.

Former District Attorney Doug Pullen admitted to the practice of assigning cases to the judges in Columbus, a function that by law is to be performed by the clerk of the Superior Court. Pullen's office assigned the capital cases and most serious drug cases to the two judges who were former prosecutors and Pullen's former superiors. When challenged about this practice Pullen described it as "not a major legal issue. It's a wad of chewing gum on the legal shoe of life."[27] In 1995 Doug Pullen was elected as a judge.

The Chattahoochee judicial circuit is responsible for more death sentences than any other judicial circuit in Georgia.

Defence attorneys are often held in contempt by the prosecuting authorities. Stephen B. Bright, a respected capital defence attorney and director of the Southern Center for Human Rights, criticised the inclusion of District Attorney Doug Pullen on a short list for a judgeship. Rather than answer the criticism, Georgia Attorney General Mike Bowers, simply stated publicly that Bright's criticism indicated to him that it was "an excellent list."[28]

The contempt of the prosecuting authorities is not only limited to defence attorneys but also extends to appeal courts. After an appeal court had set aside a death sentence because of a "lynch-mob-type" appeal for the death penalty by the district attorney, which the court described as having "no place in a courtroom", the district attorney called a press conference where he claimed he had done nothing wrong and announced that he would seek a death sentence again in the case. When a federal court set aside the second death sentence for similar reasons, the district attorney called another press conference and accused the reviewing court of "sensationalism" and "emotionalism" and suggested that the judges had "personal feelings against the death penalty." He also vowed to seek a third death sentence.

Victim impact statements

In 1991, in its ruling in the case of *Payne v. Tennessee*, the US Supreme Court held that the US Constitution permits evidence about the murder victim and the impact of the victim's death to be introduced in the sentencing phase of a capital trial. In the Court's ruling, Justice Rehnquist wrote:

[27] Quoted in *Fulton County Daily Report*, 26 April 1995.

[28] Quoted in *Fulton County Daily Report*, 18 August 1995.

"A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."

Georgia enacted a law allowing for victim impact statements in 1993. The Georgia Victim Impact Statute permits "evidence from the family of the victim, or such other witnesses having personal knowledge of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community. Such evidence shall be given in the presence of the defendant and of the jury...The admissibility of such evidence shall be in the sole discretion of the judge...".

One of the first uses of victim impact statements in Georgia was in the trial of George Henry, black, in November 1994. During the penalty phase of the trial, the wife of the victim testified that her husband's death had left a void in her life and that she "wondered if I'll ever feel normal again." The victim's father testified that one year after his son's death "I look at Robbie's pictures at home on the wall...and all I can do is cry." The jury recommended a sentence of death and George Henry remains on Georgia's death row.

Amnesty International fears that the use of victim impact statements results in the death penalty being used in an even more arbitrary manner. By allowing evidence on "the victim's personal characteristics" the justice system is placing different values on victim's lives. A victim from an articulate, well educated family is more likely to persuade the jury (should they so wish) to impose a death sentence. Amnesty International is sympathetic to the victims of violent crimes but believes that the emotional nature of victim impact statements increase the likelihood of the death penalty being used in an arbitrary manner.

Legal officials in the US have previously admitted they put different value on the lives of victims of crimes. A Texas state district judge sentenced the murderer of two homosexuals to 30 years' imprisonment. As an explanation of the sentence he stated: "I put prostitutes and gays at about the same level. And I'd be hard pushed to give someone life for killing a prostitute."

The cost of the death penalty

Administration of the death penalty, as opposed to the punishment of non-capital murderers, is enormously expensive. Capital trials usually last much longer than non-capital trials due to the added complication in the selection of the jury, who are "death qualified"[29], and, assuming a guilty verdict, the penalty phase.

According to the Georgia Department of Corrections, the cost of keeping an inmate on death row is $29,000 per year, compared to $18,000 for a maximum-security inmate in the general prison population. The increased costs reflect the higher security of the death row.

[29]During the jury selection process, jurors are questioned about their attitudes towards the death penalty. Should a prospective juror indicate that they would automatically vote against a death sentence or that their attitude to capital punishment would prevent them making an impartial decision as to the defendant's guilt, the prosecution may remove them from the jury.

According to studies carried out in Florida, North Carolina and Texas, the estimated average cost of executing an inmate - including the costs of trials and appeals and the cost of incarcerating the inmate during that lengthy process - is $2.5 million.

Many counties have had to increase taxes in order to pay for capital trials. Residents in Dawson County in north-west Georgia started paying higher property taxes in 1994 to fund capital trials. They will continue to pay extra money until the appeals in those cases have been resolved. Seminole County needed financial assistance from the State of Georgia when the appeal courts ordered new trials for three death row inmates. In Dougherty County, Georgia, the cost of death penalty cases has risen from $8,643 in 1992 to $293,926 in 1995. At the start of 1996, the county had seven capital trials pending, the second highest number in Georgia.

The number of capital cases varies widely from county to county. The decision on whether or not to seek a death sentence is at the discretion of the county's district attorney (see page 9). Joe Briley, a former prosecutor, stated: "I think it's immoral to consider cost. It's evading the issue, which is whether or not we should have the death penalty. If we should have it, the cost should not be considered." Briley tried 37 death penalty cases in 20 years. Five of those sentenced to death remain on death row and none have been executed. Some defendants were tried several times; Andrew Legare's death sentence was overturned three times by appeal courts before his last jury sentenced him to life imprisonment.

The cruelty of executions

Nicholas Ingram, executed in Georgia on 7 April 1995, was one of the many death row inmates to suffer the strain of last-minute stays of execution. Ingram received a stay of execution 65 minutes before his execution was originally scheduled on 6 April. However, according to a sworn affidavit, preparations for the execution continued for over 30 minutes after the stay had been issued. Ingram described the preparations in the affidavit:

"At around 5.30pm last night I was taken from my cell in the hospital section to H-5, the cell by the chair. I had to walk by the chair which was covered by a sheet. I was sweating it, because walking by really brought it home.

"Apparently, at 5.55pm my case was stayed but nobody told me. Indeed, at 6.20pm - the time I know because the guards told me - they began to seriously prepare me for execution. It was devoid of humanity, a bunch of sick people who apparently volunteered for the job, acting like I was a lamb for the slaughter.

"They shaved my head with electric shears...They treated me like an animal, and said it was just a job. They had me put on some pants with a cut up leg for where they would attach the electrodes.

"They asked me what I wanted for a last meal. I said I did not want food, but I did want some cigarettes. They said the new policies forbid smoking. The chaplains were there most of the time - even before, when they put a finger up my anus in the strip naked 'physical'

exam...They have told me it all starts again at 4pm today with the 'physical' once more, and I am to die tonight."

The stay was granted for three days. However, the prosecution successfully appealed against the stay and Ingram's execution went ahead the following evening.

Warren McCleskey, executed on 25 September 1991 (see page 5), also suffered the agony of a prolonged execution process. The following is a chronology of McCleskey's last 12 hours:

PM
4.00 McCleskey is moved into a holding cell adjacent to the execution chamber
4.30 He is given a complete medical examination including a check on his dental records to confirm that he is Warren McCleskey
5.00 The prison warden brings McCleskey's "last meal" but he refuses to eat
6.00 Defence attorneys file last-minute appeals in federal court
6.45 A stay of execution is granted from 7 to 7.30 (the execution was scheduled for 7.00)
7.20 A second stay of execution is granted and the execution is re-scheduled for 10.00
9.30 A third stay of execution, to 12.00, is issued
11.20 The federal judge rejects the appeal but issues a further stay of execution until 2.00am to allow for a higher court to hold a hearing on the legal issues

AM
1.50 The court of appeals lifts the stay of execution. Prison officials set the execution for 2.15
2.19 McCleskey is strapped into the electric chair. He is three minutes into his final statement when the warden interrupts to announce another stay of execution by the US Supreme Court. He is taken back to the holding cell.
2.42 The US Supreme Court extend the stay of execution by 10 minutes
2.52 The US Supreme Court rejects McCleskey's appeal and he is taken back into the execution chamber and strapped into the electric chair
2.54 McCleskey repeats his final statement. The prison chaplain gives the final prayer
3.02 The warden reads the death warrant
3.03 Guards attach electrodes to McCleskey's head and leg and place a mask over his face
3.06 Three unidentified state employees push red buttons, one of which sends the electric current into McCleskey's body
3.13 Doctors pronounce Warren McCleskey dead

Alpha Otis Stephens was executed in Georgia on 12 December 1984. The first charge of 2,080 volts was applied for two minutes at 12.18am. However Stephens' body showed signs of life but doctors were unable to examine him because his body was too hot to be touched. Witnesses described seeing his fingers move and his head roll. One reporter stated: "It was almost like he was trying to wake himself up - like you do when you're groggy."

Alpha Otis Stephens

After six minutes doctors examined Stephens and informed the warden that he was still alive. The warden ordered another two-minute charge of electricity. Stephens was eventually pronounced dead at 12.37am.

The process has changed since the execution of Stephens. Three charges of electricity are applied: 2,000 volts for four seconds, 1,000 volts for seven seconds and 208 volts for two minutes. Three prison employees push buttons to start the execution; only one button is actually connected to the electrical source.

Conclusions

In 1995 the Supreme Court of Georgia produced a report on the justice system of the state entitled *Let Justice Be Done: Equally, Fairly and Impartially*. The report dealt with the racial and ethnic bias in the court system and made recommendations to address the disparities. However, on the question of the death penalty the court concluded that "the large number of factors involved in a death penalty decision...are beyond the resources of the Commission to adequately assess" and went on to state that "the other recommendations throughout this report should help to achieve these goals [of reducing bias]."

Amnesty International believes that the political nature of the death penalty means, in many cases, that it stands outside the normal practices of the legal system in the USA. Therefore the proposals of the Georgia Supreme Court's report may fail to address the racist and arbitrary use of the death penalty. The violence committed against ethnic minorities in Georgia's racist past continue to be present in the state's use of the death penalty. Amnesty International opposes the death penalty **in all cases** but the organisation also believes that the racist and arbitrary use of the death penalty in the USA must be addressed.

Amnesty International is calling upon the Georgia authorities to implement a full and impartial review of all the stages of the use of the death penalty in the state and to implement a moratorium on new death sentences and executions until the review has been completed. As well as dealing with the inherent racism and the arbitrary nature of its use, the recommendations of the review should also address the political nature of the use of the death penalty and ensure that the appeals process is free from political interference.

In their successful bid to host the 1996 Olympic games, the Georgian authorities claimed that the state capital, Atlanta, "embodies the values of human liberty and equality, as well as any city on earth. As the birthplace of the Civil Rights Movement and for many the modern capital for

human rights, Atlanta reflects the high ideals of Olympism."[30] These claims are in contradiction to the support and use of the death penalty by the government and population of Georgia.

The federal authorities must also address the poor jurisprudence in the use of capital punishment. The Federal government cannot be allowed to wash their hands of its obligations under international law by stating that the death penalty is a matter for the individual states concerned.

Amnesty International is concerned that the federal authorities have taken steps that can only worsen the situation. In 1995, the US Congress removed funding for the Post Conviction Defender Organisations (PCDOs).[31] The PCDOs, more commonly known as Resource Centers, were federally funded centers offering legal defence on appeal to almost half of the death row population in the US. The Centers also advised and assisted outside defence attorneys in capital cases at both the pre-conviction and appeal levels.

The US Congress has also passed laws that limit the number of federal appeals allowed by death row inmates. Death row prisoners can currently appeal their convictions and sentences on the grounds that they were unconstitutional. Many politicians have portrayed the appeals to the public as frivolous and designed solely to delay the inmates' execution. However, as many as 40% of appeals by death row inmates are upheld by the federal courts. Amnesty International believes that the limiting of the appeals process will lead to the execution of more prisoners whose convictions or sentences were racially motivated, who were poorly legally defended and who may have credible claims of innocence. The US Congress should instead implement legislation to ensure that those facing a possible death sentence are not doing so because of their race or the race of their alleged victim, and that they receive adequate legal assistance.

The 1972 US Supreme Court ruling in *Furman v. Georgia* declared the death penalty unconstitutional due to its use in an "arbitrary and capricious" manner. Twenty-four years later - with executions running at their highest level since the ruling - the use of the death penalty remains racist, arbitrary and unfair.

[30]Quoted from the Atlanta Committee for the Olympic Games - 5 Volume Application to the International Olympic Committee for the 1996 Olympic Games.

[31]See *USA: Developments on the death penalty during 1995*, (AI publication AMR 51/01/96).