FATAL FLAWS: INNOCENCE AND THE DEATH PENALTY IN THE USA

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Cover photo: Walter McMillian walks free from an Alabama court in 1993 after five years on death row for a crime he did not commit. McMillian was freed after lawyers from the Alabama Capital Representation Resource Center produced evidence of his innocence. The Center recently closed after the Federal government withdrew its funding.

UNITED STATES OF AMERICA
Fatal Flaws: Innocence and the Death Penalty

Introduction

"We have enormous protections, the best by far, but we're never going to have a system that will never execute an innocent person."

Statement of Chairperson of the US House of Representatives Judiciary Committee made while *supporting* the death penalty in 1997.

The likelihood that innocent people will be condemned to death and executed is inherent in all jurisdictions which resort to capital punishment. Few mistakes made by government officials can equal the horror of executing an innocent person. But all systems of justice are fallible; even the extensive legal safeguards within the criminal justice system of the United States of America (USA) have manifestly failed to prevent wrongful death sentences in many cases. Furthermore, many of these basic safeguards have been seriously undermined in recent years, increasing the risk of lethal and irreversible error.

Amnesty International unconditionally opposes the death penalty under all circumstances. Every death sentence is an affront to human dignity: the ultimate form of cruel, inhuman and degrading punishment. Each execution is a violation of the most fundamental human right: the right to life itself. The undeniable fact that the death penalty is sometimes inflicted upon those innocent of the crime for which they were condemned only reinforces the other conclusive arguments against its use.

The execution of the innocent: a worldwide problem

The execution of innocent defendants is an ever-present risk wherever the death penalty is inflicted. In February 1998, an appeal court in the United Kingdom (UK) posthumously overturned the conviction of Mahmood Hussein Mattan, a Somali national who was executed in September 1952 after a trial strongly tainted by racism. The court determined that witnesses at the original trial were unreliable and that prosecutors had

withheld evidence that a man similar in appearance to Mattan was more likely the actual murderer. The case demonstrated that "capital punishment was not a prudent culmination for the criminal justice system which is human and therefore fallible", the judge concluded.

In February 1994, authorities in Russia executed serial killer Andrei Chikatilo for the highly-publicised murders of 52 people. The authorities acknowledged that they had previously executed the "wrong man", Alexander Kravchenko, for one of the murders in their desire "to stop the killings quickly". Another innocent man suspected by the authorities of the killings committed suicide.

On 21 April 1998, the Supreme Court of Uzbekistan posthumously quashed the conviction of a former Uzbek government minister, Vakhobzhan Usmanov, who was executed in 1986 on charges of corruption.

A number of countries which retain the death penalty have recently released condemned prisoners who were mistakenly convicted. They include the Philippines, Malaysia, Belize, China, Pakistan, Trinidad and Tobago, Malawi, Turkey and Japan.[1] Numerous other nations, including the USA, have proceeded with executions despite strong doubts concerning the guilt of the prisoners.

Authorities in the USA have never directly admitted to executing an innocent person in this century. A classic instance is the famous case of Nicola Sacco and Bartolomeo Vanzetti, executed by the state of Massachusetts in 1927 despite worldwide protest. In 1977, on the 50th anniversary of the executions, Massachusetts Governor Michael Dukakis directed that their names be cleared, after an investigation concluded the prosecutor in the case had "knowingly" used "unfair and misleading evidence", that the trial had taken place in an atmosphere of prejudice against foreigners (both defendants were Italian immigrants) and that the judge had presided over the case in a prejudicial manner. However, the Governor stopped short of conceding that the innocence of Sacco and Vanzetti had been established.

The probability of executing an innocent person has alone prompted some politicians to abandon their support for the death penalty. In the UK, then-Secretary of State for Home Affairs Michael Howard (the government minister responsible for law and order) voted against the reinstatement of the death penalty in 1994, after previously supporting its reintroduction as a deterrent to violent crime. Citing several miscarriages of justice in the UK as the reason for changing his mind, the Minister stated:

[1]Two innocent prisoners in Japan were released after each spent 34 years under sentence of death: Akahori Masao in 1989 and Menda Sakae in 1983. For further information see: *Japan: The Death Penalty: Cruel, Inhuman and Arbitrary Punishment*, AI publication index: ASA 22/03/95.

> "Miscarriages of justice are a blot on a civilized society. For someone to spend years in prison for a crime he or she did not commit is both a terrible thing and one for which release from prison and financial recompense cannot make amends. But even that injustice cannot be compared with the icy comfort of a posthumous pardon. When we consider the plight of those who have been wrongly convicted, we cannot but be relieved that the death penalty was not available. We should not fail to consider the irreparable damage that would have been inflicted on the criminal justice system had innocent people been executed."[2]

No one knows how many of the approximately 7,000 people put to death in the USA during this century were innocent. Since the resumption of US executions in 1977, Amnesty International has documented numerous cases where serious doubts concerning the prisoner's guilt still existed immediately prior to the execution. According to one prominent study, at least 23 innocent people had been executed in the USA this century prior to 1984. [3] Significantly, the authors of the report do not claim that the numbers represent the total of all innocent victims of the US death penalty, but merely those cases which their own research uncovered.

It is unconscionable to inflict the punishment of death without the most stringent safeguards protecting the innocent. Fatal miscarriages of justice serve only to undermine public confidence in the fairness and efficacy of the entire legal system. Yet, by its own

[2]Parliamentary Debates (Hansard), House of Commons Official Report, 21 February 1994, column 45.

[3]*Miscarriages of Justice in Potentially Capital Cases*, Hugo Adam Bedau and Michael L. Radelet, Stanford Law Review 1987. Also see: *In Spite of Innocence*, Northeastern University Press. The authors' further studies have identified 416 people erroneously convicted of potentially capital crimes (approximately one-third of whom were sentenced to death).

admission, the USA has failed to maintain the safeguards required to minimize the risk of wrongful death sentences and executions.

In 1993, the Subcommittee on Civil and Constitutional Rights of the US Congress issued a report examining innocence and the death penalty.[4] After reviewing the cases of 48 individuals recently released from death row in the United States on grounds of actual innocence, the report concluded:

> "Americans are justifiably concerned about the possibility that an innocent person may be executed. Capital punishment in the United States today provides no reliable safeguards against this danger. Errors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply the presentation of erroneous evidence. Once convicted, a death row inmate faces serious obstacles in convincing any tribunal that he is innocent."

Amnesty International's research over many years confirms these findings. However, far from acting to rectify the fatal flaws uncovered by its own subcommittee, the US Congress has recently taken steps which further erode the protections for innocent defendants facing the penalty of death.

Cruel and incredible: the case of Roger Coleman

...his case history illustrates many of the structural flaws which can result in mistaken executions. Its troubling outcome establishes beyond doubt that the authorities in the USA are prepared to execute prisoners even when confronted with substantial questions about their actual guilt.

All too frequently, compelling new claims of innocence are never addressed during the appeal process because of procedural barriers intended to prevent undue delay in carrying out death sentences. This judicial vacuum can lead to bizarre events immediately prior to an execution, where substantial doubt over the prisoner's guilt remains but all legal avenues of appeal have been exhausted.

On 22 May 1992, Roger Coleman was put to death by the state of Virginia. Years after his conviction, new evidence was uncovered which implicated a different suspect and which challenged the prosecution’s theory of the crime. So troubling were the lingering uncertainties concerning his guilt that Governor Douglas Wilder offered Coleman a polygraph test (also known as a 'lie detector'). The offer inferred that if

[4] *Innocence and the Death Penalty: Assessing The Danger of Mistaken Executions*, staff report of the Congressional Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, October 21, 1993 (Comm. Print 1994).

Coleman passed the test, the Governor might reconsider his decision not to commute the death sentence. The test monitors the assumed rise in the heart rate and blood pressure caused by the stress of lying to determine truthfulness. It was carried out on the day of Coleman's scheduled execution.

Strapped and wired for the test in a manner not unlike that used for the death by electrocution he would face later that same day, Coleman not surprisingly 'failed' the polygraph and was executed within hours. Governor Wilder later told the press: "If he had passed...it could have affected what the ultimate result would have been".[5]

Roger Coleman was charged with the 1981 rape and murder of his sister-in-law, Wanda McCoy. Too poor to afford a private attorney, he was represented at trial by court-appointed lawyers who had never handled a murder or rape case before and who neglected to fully investigate many significant points of evidence. At trial, the defence failed to challenge crucial aspects of the prosecution's case, severely limiting the scope of Coleman's post-conviction appeals.

Although the case against him was entirely circumstantial, Roger Coleman was sentenced to death. The only direct evidence came from the testimony of Roger Matney, a jail-house informant who claimed that Coleman had confessed to the crime. A month before the trial, all four sentences which Matney was serving were suspended and he was released from custody on the urging of Coleman's prosecutor. Matney has since recanted his testimony.

On initial appeal, Coleman was represented by attorneys who failed to file a timely notice of appeal with the Virginia Supreme Court. The necessary paperwork was inadvertently filed just after the 30-day deadline had expired. Prosecutors requested that the Court dismiss the appeal without addressing its merits because it was "procedurally defaulted"; the Court wrote a one-paragraph order summarily denying Coleman's petition without review.

[5]Because of questions over their general reliability, US courts prohibit the use of polygraph tests as implicating evidence in criminal proceedings. A test administered under the enormously stressful circumstances of imminent execution (where no accurate base rate of blood pressure and cardiac activity can be established) casts grave doubt on the validity of the results.

The federal courts ruled that Coleman could not appeal on constitutional issues because he had "waived" his state review by filing after the deadline. The US Supreme Court agreed, citing the need to show adequate respect for the findings of state courts and the obligation to protect state officials from having to endure uncertainty and undue delay in the resolution of criminal cases. The Supreme Court's decision in *Coleman v. Thompson* created a new rule under which almost any failure of an inmate to meet the procedural requirements of the state courts results in forfeiture of the right to file a *habeas corpus* petition in federal court.[6]

According to the Supreme Court decision, "Coleman must bear the risk of attorney error that results in procedural default". The Court further ruled that Coleman had no right to challenge mistakes made by his appellate attorneys, since he was not constitutionally entitled to a lawyer at that point in the proceedings.

Before his arrest, Roger Coleman was a coal miner in rural Virginia. It defies all reason to presume that he was fully versed in Virginia capital trial procedures and the complexities of Federal *habeas corpus* appeals. For the US Supreme Court to conclude that the defendant must bear the fatal consequences of mistakes made by his lawyers is to render meaningless the most basic legal protections afforded by the US Constitution.

Once a prisoner is executed in the USA, the case is considered legally closed. The US criminal justice system offers no legal mechanism to review posthumous claims and uncover lethal error. It will likely never be known with absolute certainty if Roger Coleman was guilty or innocent of the crime for which he was put to death. Nonetheless, his case history illustrates many of the structural flaws which can result in mistaken executions. Its troubling outcome establishes beyond doubt that the authorities in the USA are prepared to execute prisoners even when confronted with substantial questions about their actual guilt.

A lethal lottery

More than 75 men and women have been released from US death rows since 1972, after suffering the horror of being sentenced to death and incarcerated for a crime they did not commit.[7] Remedying these hideous mistakes took anywhere from two to 22 years; many of these innocent people came within hours of execution.

[6] *Habeas corpus* is a fundamental judicial procedure whereby any detained person may appear before a judge to challenge the legality of their confinement.

[7] Figures according to the Death Penalty Information Center, Washington DC.

"There is rarely any question about the guilt of these people, virtually none. That is a myth...these guys on death row are the pits..." Attorney General of Georgia, 1996

The true number of innocent people condemned and then released is undoubtedly higher. When a capital conviction is overturned, prosecutors will frequently offer a sentence of 'time served' in return for a guilty plea. The defendant thus "admits" their guilt as the price of their freedom, rather than face further incarceration, another trial and the possibility of a new death sentence. It is likely that a large number of defendants who enter guilty pleas following reversal were not guilty of the crime for which they were originally convicted.

Even setting aside this category of cases, the recognized number of innocent people sentenced to death represents more than one per cent of all US death sentences imposed in the modern era.[8] This figure is more alarming when placed in the context of the total number of executions. For every six prisoners executed since the reinstatement of the US death penalty, one innocent person was condemned to die and later exonerated. How many equally blameless but less fortunate prisoners still await execution - or have already gone to their deaths - may never be known.

Innocent and on death row: how does it happen?

While there are a multitude of factors contributing to mistaken death sentences in the USA, a deadly pattern emerges from the cases of individuals who were later exonerated. These recurring factors include the inadequate performance of defence attorneys and misconduct by prosecuting authorities eager to gain a conviction at any cost. Juries often rely on false evidence, including the perjured testimony of jail-house informants who bargain for leniency in return for their incriminating statements.

It is standard practice for US prosecutors to offer various forms of leniency to suspects and co-defendants in exchange for testimony used to incriminate other individuals. In many capital trials, prosecutors have built entire cases around the testimony of inmates claiming that the defendant "confessed" to the crime in their presence while they were imprisoned together.

The dubious value of induced testimony has been regularly exposed, but its use continues unabated. In 1989, repeat offender Leslie White demonstrated to California authorities how he could gather enough information on a case (from newspaper reports

[8] As of 1 July 1998, 5,822 death sentences had been imposed since 1972, according to *Death Row USA*, NAACP Legal Defense Fund.

and by posing as a police officer on the telephone) to concoct confessions from fellow-inmates he had never met. White admitted to committing perjury in at least one case and to receiving an $1,800 reward, furloughs from prison, a recommendation for parole and bail reduction in exchange for his frequent - and totally false - testimony.

It has been said that the death penalty in the USA is the "privilege of the poor"; virtually all prisoners released from death row on grounds of innocence were indigent defendants unable to afford competent legal representation. Time and time again, appointed counsel in capital cases have failed to provide even minimally adequate defence to clients on trial for their very lives. The ultimate responsibility for this failure rests less with the attorneys themselves (many of whom were inexperienced and underfunded) and more with judicial officials and politicians who allow such shockingly low standards of legal representation.

The understandable public outrage over particularly brutal crimes can place enormous pressures on public officials to secure a speedy arrest and conviction. The resulting trial may take place in a community so inflamed against the defendant that impartiality is impossible.

Far too often, police officers have fabricated evidence and coerced confessions in their zeal to solve a high-profile case. Gary Nelson was falsely condemned for the rape and murder of a six-year-old girl in Georgia. After nearly a decade of diligent investigation, his volunteer lawyers proved that the district attorney had suppressed evidence of Nelson's innocence, that a forensic expert had presented false testimony and that investigators had lied under oath in a deliberate effort to conceal the weakness of their case against Nelson.

Other legal officials then often compound these types of injustices by refusing to acknowledge the possibility of an innocent defendant being condemned. Georgia Attorney General Michael Bowers has gone on record to state that there are no innocent prisoners on death row. "There is rarely any question about the guilt of these people, virtually none. That is a myth...these guys on death row are the pits," Bowers said in a newspaper interview. When asked specifically about Ellis Wayne Felker, a Georgia death row inmate with a credible claim of innocence who faced imminent execution, Bowers replied, "I've talked to the cops who investigated him, and I asked them: 'Guys, is there any doubt about his guilt?' And they told me, 'Bullshit'." Since 1976, four prisoners have been released from Georgia's death row following their complete exoneration.

Some elements within US society appear to be particularly vulnerable to wrongful prosecution. Overt racial prejudice has undeniably factored in the erroneous convictions of defendants from minority groups. Suspects with mental disabilities have

been known to falsely confess to crimes in order to placate their interrogators; those same disabilities then preclude meaningful participation in their trial defence.

Other defendants are the victims of guilt by association, falsely accused because of their prior criminal record or wrongly implicated by the actual perpetrator of the crime. In several cases, the police appear to have knowingly targeted an innocent person simply because of their inability to find any valid suspect to arrest.

The myth of infallibility

There is a widespread public perception that the lengthy appeals process which many US death sentences are subject to will somehow eliminate all risk of error. This confidence is completely unwarranted, since the purpose of post-conviction review is only to ensure that all rules and judicial safeguards were observed. Contrary to popular belief, US appeal courts are rarely allowed to reconsider the guilt or innocence of condemned prisoners.

Whatever the reasons for the erroneous conviction, it is an overwhelmingly difficult task to persuade the legal authorities that a mistake has been made. The presumption of innocence vanishes after conviction. As one prominent defence attorney has pointed out:

> "Appellate courts have only one function, and that is to correct legal mistakes of a serious nature made by a judge at a lower level. Should a jury have erred by believing a lying witness, or by drawing an attractive but misleading inference, there is nothing to appeal."[9]

Freeing the innocent has taken place more as a matter of luck and private initiative than the result of careful judicial scrutiny, prompting the conclusion that inmates are exonerated not because of the system, but in spite of it.

[9]F. Lee Bailey, quoted in *Convicting the Innocent*, by James McCloskey, Criminal Justice Ethics, Vol. 8 No. 1, 1989.

On numerous occasions, innocent death row inmates were spared only because of the tireless work of a few dedicated individuals willing to donate large amounts of their time, energy and private resources. For example, Verneal Jimerson and Dennis Williams were released from Illinois' death row in 1996. Their attorneys had worked on the case free of charge for six years; journalism students from Northwestern University had uncovered evidence of the men's innocence as part of a class project.[10] Gary Nelson was released in 1991 after 12 years under sentence of death in Georgia; his attorneys completed more than $250,000 worth of their time and funds on his case, money which they knew they would not recover from the authorities.

Even when wrongful convictions are reversed, prosecutors may continue to re-try defendants, ignoring strong evidence of their innocence. Curtis Kyles, whose capital conviction was overturned by the US Supreme Court after 11 years, faced three more trials (all of which resulted in hung juries) before the District Attorney of New Orleans finally dropped the charges against him. Kyles was subjected to five trials over 14 years for a crime he did not commit.

Trial and error: risking innocent lives

"It is as much the duty of the prosecuting attorney to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one...a prosecutor's proper interest is not that he shall win a case, but that justice shall be done."

US Supreme Court ruling in *Burger v United States*, (1935)

The criminal justice system in the USA is failing to fulfil its highest duty: to protect innocent people from wrongful convictions and death sentences. At the heart of the adversarial model of justice is the concept of the defence and the prosecution as equally-matched opponents who do battle at trial so that the truth will prevail. Yet, all of the evidence suggests that, in US death penalty trials, the prosecution possesses overwhelming advantages which frequently corrupt the outcome.

The responsibility for prosecuting cases rests most often with an elected District Attorney, who is entrusted with broad discretionary powers in deciding whether or not to seek death sentences. In many US jurisdictions, the trial judge and the local sheriff are also elected officials. The temptation to seek and impose death sentences to satisfy a fearful electorate can be overwhelming; many local politicians exploit the politicization of the death penalty by running for reelection on their record of capital convictions.

[10]For further details see *A Promise of Justice,* David Protess and Rob Warden, NY: Hyperion, 1998.

There are strong indications that the procedure used for selecting capital juries is a significant risk factor contributing to wrongful convictions. In most US jurisdictions which retain the death penalty, the jury must recommend a death sentence unanimously, based on a separate sentencing hearing following the jury's determination of guilt. To avoid the possibility of jurors voting against the imposition of the death penalty because of personal principles, prospective capital jurors must indicate their willingness to impose a death sentence.

All jurors in US death penalty trials must be "death-qualified": those who completely oppose the death penalty (or who would always vote for its imposition) are excluded from the jury during the jury selection process. Although "death-qualification" was intended to ensure the fairness of capital sentencing, the practical result has been the selection of capital juries which are biased towards the death penalty from the outset. At least 16 published studies have found that death-qualified jurors are more prone to believe the prosecution's version of events and are more likely to convict the defendant than non-capital jurors.

One researcher determined that merely asking prospective jurors about their attitudes toward the death penalty taints the process from the outset, both by implying that the defendant is guilty and that the law disapproves of people who oppose the death penalty.[11]

Despite this persuasive data, the US Supreme Court has upheld the practice of death-qualification for the guilt phase of capital trials, finding that the statistical evidence of bias in favour of conviction was inconclusive and that these findings do not affect the impartiality of any given jury.[12]

Examples of juror prejudice abound in the cases of exonerated death row prisoners. For instance, a juror in the trial of Rolando Cruz (see page 31) told a newspaper reporter: "Half the jury made up their minds on the first day [of the trial]. There was a strong feeling that someone had to pay for this [murder]."

[11] See: *On the Selection of Capital Juries:The Biasing Effects of the Death-Qualification Process*, Craig Haney (1984), Law and Human Behavior vol. 8, 121-132.

[12] *Lockhart v. McCree* (1986). The Supreme Court refused to give credence to 15 studies submitted in support of using non-death qualified jurors for the determination of guilt or innocence.

Amnesty International has concluded that using death-qualified jurors for the guilt or innocence phase of capital trials clearly results in an unfair bias towards conviction.

When this predisposition to convict is combined with the low standards of legal representation in many death penalty trials, the disadvantages facing the defendant become overwhelming. The single most common factor leading to mistaken death sentences may well be the failure of authorities to provide adequate resources for the defence of individuals on trial for their lives.

The case histories which Amnesty International has reviewed are replete with examples of defence lawyers who conducted little or no pre-trial investigation, were severely underfunded by the state or who were completely unfamiliar with the highly-complex field of capital law. The fact that these attorneys will often face experienced prosecutors with vastly greater resources at their disposal tips the scales of justice still further.

Andrew Golden's lawyer failed to present evidence that his wife drowning was simply an accident. At the trial in 1991, the attorney presented no defence, leaving the jury with little option but to believe the prosecution's theory that Golden had murdered his wife to collect her life insurance.

The police investigator and medical examiner later admitted that there was no evidence of murder in his wife's death. After two years on Florida's death row, Golden was released following a unanimous ruling from the Florida Supreme Court that the prosecution had "failed to show beyond a reasonable doubt that Mrs. Golden's death resulted from the criminal agency of another person rather than from an accident."

A study completed in 1995 detailed the shockingly low reimbursement paid to death penalty defence lawyers for trial representation in many US states.[13] Preparing a competent trial defence is a process which takes weeks of intensive work, yet Alabama limits reimbursement for capital trial preparation to just $2,000. In Mississippi, the average salary for court-appointed lawyers in death penalty cases works out to $11.75 per hour. The majority of states have no minimum standards for appointing counsel in death penalty trials; any individual who has passed the state's general bar examination is deemed competent to practice this most complex and demanding area of law.

[13] *With Justice for the Few: The Growing Crisis in Death Penalty Representation*, published by the Death Penalty Information Center, October 1995.

Federico Martinez Macias was wrongfully confined on death row in Texas for nine years. According to the Federal district court judge who ordered the new hearing which eventually freed him, "the errors that occurred in this case are inherent in a system which paid attorneys such a meagre amount." Texas maintains no statewide system to represent indigent defendants and has no meaningful criteria for the appointment of trial counsel.[14]

Under the standards which prevail in many US jurisdictions, it would be logically absurd to pretend that most indigent defendants receive adequate representation in capital trials. Nonetheless, the appellate courts have been instructed to turn a blind eye to the magnitude of the problem.

In 1984, the US Supreme Court set the terms for overturning death sentences based on a claim of "ineffective assistance of counsel". In *Strickland v. Washington*, the Court declared that errors by trial counsel would not merit reversal of the conviction or the sentence unless the defendant proved that the errors had actually prejudiced the outcome of the case. In a number of subsequent decisions, courts of appeal have interpreted "harmless error" by attorneys so broadly that virtually any mistake or omission made at trial goes unremedied.

The Court based its opinion on the premise that "the government is not responsible for, and hence not able to prevent, attorney errors". This is an appalling evasion of the USA's responsibility under international law to ensure that the death penalty is only applied to those who have received a fair trial and who are afforded every opportunity to appeal their sentences. The attitude of the Supreme Court is all the more dangerous in light of the fact that the USA has no universal standard of competence for attorneys defending prisoners facing death.

Racism and wrongful convictions

Former death row inmate Dennis Williams
were guilty or innocent."

[14]For further information see *USA: The Death Penalty in Texas: Lethal Injustice*, AI index AMR 51/10/98.

Racial prejudice infects the administration of the death penalty in the USA; for many innocent prisoners from ethnic minorities, racism was a significant factor in their prosecution and conviction. Racial bias is an especially persistent structural problem which is largely immune to correction under existing procedural safeguards.[15]

In 1980, a 16-year-old white pupil was raped and murdered at a Texas school. The police suspected that the crime was committed by one of the school janitors. Of the five janitors, Clarence Brandley was the only black. On the day of the murder, Brandley and another janitor were interviewed by a police officer. According to the other janitor, the officer said, "One of you two is going to hang for this." Turning to Brandley he added, "Since you're the nigger, you're elected."

Brandley's original trial led to a hung jury; his second trial resulted in a conviction and death sentence. Both trials were held before all-white juries. In 1986, a woman approached the prosecutor claiming that her husband had confessed to the murder for which Brandley was sentenced to death. The prosecutor refused to act on the new information. Eventually, in 1990, after the unreliability of the evidence and testimony at the original trial had been conclusively established, Clarence Brandley was released from death row and his conviction was overturned.

The judge who recommended the reversal of Brandley's conviction wrote: "...the investigation was conducted not to solve the crime, but to convict Brandley...no case has presented a more shocking scenario of the effects of racial prejudice...The Court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution against him."

Walter McMillian, black, was convicted and sentenced to death in Alabama after a trial lasting only a day and a half. McMillian was confined on death row two weeks after his arrest, only leaving briefly for his trial a year later. To Amnesty International's knowledge, no other defendant in the USA has ever been placed on death row prior to their conviction.

McMillian was accused of the murder of a white female. The jury refused to believe the 12 black witnesses who testified that McMillian, who had no prior criminal record, was present at a church fundraising event at the time of the murder. Instead, they chose to believe the induced testimony of three prosecution witnesses, including a convicted murderer.

[15]Amnesty International is scheduled to release a study on race and the death penalty in the USA in February 1999.

The racially-inspired animosity directed against McMillian may have been aggravated by the fact that he had a white girlfriend and his son had married a white woman. Shortly after the arrest, the sheriff told McMillian "I ought to take you off and hang you like we done that nigger in Mobile, but we can't." On four occasions state appeal courts upheld McMillian's conviction, each time refusing to credit the mounting evidence of official misconduct. Following nationwide media coverage of his case, McMillian was finally freed in 1993.

Other innocent people sentenced to death have alleged that racial prejudice played a major part in their ordeal. Dennis Williams, one of four black men wrongly convicted in Illinois, stated at a press conference following his release: "The police just picked up the first four young black men they could and that was it. They didn't care if we were guilty or innocent."

Innocence as a legal standard: US Supreme Court decisions

"Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."[16]

The rules and procedures of US death penalty law erect numerous - and sometimes insurmountable - barriers to proving a prisoner's innocence following conviction. Merely providing proof that the jury erred is often insufficient. For the judicial system to admit its mistake, the defendant typically must also show that the correct procedures and constitutional standards were not followed. Post-conviction claims of innocence must be linked to other legal issues, such as the failure of the prosecution to disclose evidence favourable to the defence, or that the defence attorney provided "ineffective assistance of counsel" at trial.

[16]Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in Resolution 1984/50 on 25 May 1984 and endorsed by the UN General Assembly in Resolution 39/118 on 14 December 1984.

But compelling late evidence can also surface in cases where all due process requirements were met at trial and where the inmate's appeals have already received full judicial review. Several landmark Supreme Court rulings have produced complex and bewildering decisions addressing different categories of late claims of innocence. The obvious reluctance of the highest court in the USA to admit the probability of fatal error has resulted in the creation of a judicial maze from which even the most deserving prisoners may not escape.

In 1992, the US Supreme Court voted 6-3 to deny the final appeal of Leonel Herrera, a Texas death row inmate facing imminent execution despite new exonerating evidence. Because Herrera was not alleging a constitutional defect in the trial proceedings, no lower court had held a hearing to review his late claim of actual innocence. The Supreme Court was asked to answer this stark and simple question: does the US Constitution prohibit the execution of an innocent person?

The Supreme Court ruled that, although the execution of a truly innocent person might arguably be unconstitutional, innocence claims alone are not grounds for *habeas corpus* relief through the Federal courts "absent an independent constitutional violation". federal *habeas* courts sit "to ensure individuals are not imprisoned in violation of the Constitution, not to correct errors of fact".

The Court grudgingly admitted that some rare cases might warrant a judicial review of new evidence where "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal *habeas* relief if there were no state avenue open to process the claim". Given the need for finality and the "enormous burden" of having to retry old cases, "the threshold showing for such an assumed right would necessarily be extraordinarily high".[17]

In a strongly-worded dissent, three justices argued that the protection of the Eighth Amendment (prohibiting cruel and unusual punishment) did not end once a defendant was validly sentenced to death. Individuals should be entitled to seek relief through the federal courts based on newly-discovered evidence, if only because "The

[17]All quotes are taken from the majority opinion in *Herrera v. Collins* (1993).

execution of a person who can show that he is innocent comes perilously close to simple murder".[18]

The Supreme Court hearing in *Herrera* produced comments which illustrate the desperate lengths some prosecutors are prepared to go to ensure the execution of a condemned prisoner under any circumstances. The Assistant Attorney General of Texas was asked, "Suppose you have a videotape which conclusively shows the person is innocent, and you have a state which, as a matter of policy or law, simply does not hear new evidence claims, is there a federal constitutional violation?". She replied, "No, Your Honor, there is not...such an execution would not be violative of the Constitution."

[18] *Herrera v. Collins*, Blackmun J., dissenting.

The Court evaded responsibility for sending a possibly innocent man to his death by pointing out that Herrera could take his claim to the Texas Board of Pardons and Paroles. Chief Justice Rehnquist put his faith in executive clemency as the 'fail-safe' mechanism to prevent miscarriages of justice, writing that "...under Texas law, petitioner may file a request for executive clemency...Clemency is deeply rooted in our Anglo-American tradition of justice, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted".[19]

The decision neglected to note that the Texas Board of Pardons and Paroles consistently refuses to hold clemency hearings in capital cases, even when confronted with doubts over the actual guilt of condemned prisoners.[20] Leonel Herrera was executed on 12 May 1992, after the Board declined to hear his clemency petition. His final words were: "I am innocent, innocent, innocent... Something very wrong is happening here".

Six months earlier, the Supreme Court ruled on the appeal of Robert Sawyer, a mentally-handicapped death row inmate in Louisiana. Sawyer's attorneys were not alleging his actual innocence, but instead were seeking another *habeas corpus* hearing to review new mitigating evidence which could have persuaded the jury to impose a lesser sentence.

In a unanimous decision, the Court found that the standard applicable to the "fundamental miscarriage of justice" exception for repeat appeals was a showing of "actual innocence", which was defined as clear and convincing evidence that, "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty". Sawyer's appeal was bluntly dismissed.[21]

Based on the language of *Sawyer*, the lower courts later refused to grant an evidentiary hearing to Lloyd Schlup, a prisoner under sentence of death in Missouri. Like Sawyer, Schlup had exhausted all normal avenues of appeal and was raising a new claim of "ineffective assistance" by his trial attorney. However, Schlup's claim was based on persuasive new evidence suggesting that he could not possibly have committed the crime

[19]This confidence in the clemency process stands in glaring contrast to the Court's more recent statements. In 1997, in a case examining the clemency procedures for Ohio death row inmates (*Woodard v. Ohio*), Chief Justice Rehnquist observed that "by the time you get to clemency, beggars can't be choosers."

[20]Since resuming executions in 1982, Texas has commuted only one death sentence on humanitarian grounds or because of possible innocence (Henry Lucas in June 1998 - see page 19) and has permitted over 150 executions to proceed without meaningful clemency review.

[21]*Sawyer v. Whitley* (1992). Although the Louisiana Board of Pardons voted to commute the death sentence, two successive Louisiana governors failed to act on their recommendation. Robert Sawyer was executed on 5 March, 1993.

and was thus actually innocent. In 1995, the Supreme Court was asked to clearly define the applicable standard of review under these circumstances.

Confronted with its own contradictory precedents, the Supreme Court resorted to splitting hairs. Ruling 5-4, the majority found that the lower courts had erred in applying the highest barrier to deny Schlup a hearing of his innocence claim. The proper standard in a case like Schlup's was that a defendant is required to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent". "Probably" in this context means "more likely than not", a less rigorous standard than "clear and convincing evidence" - although still dauntingly high.

The majority emphasized that it was writing a new rule only for the "extremely rare" case where an inmate files a successive *habeas* petition based on new and substantial evidence of actual innocence, indicating that the execution would result in a "fundamental miscarriage of justice". But the Court took no position on Schlup's innocence claim or his argument that trial counsel was ineffective. Instead, they simply returned the case for reconsideration by the district court, which was ordered to decide for itself whether Schlup's evidence merited a new hearing under the standard set by the Court's decision.[22]

Amnesty International believes that these recent rulings place an impossibly high burden of proof on death row prisoners alleging innocence.

Too late for the truth?

The Supreme Court's obsession with the need for "finality" in capital cases would be more comprehensible were it not for the daunting obstacles erected by state laws at the earliest stages of appellate review. More than 30 US states which impose death sentences mandate time limits on the admissibility of new exonerating evidence following a conviction. In more than a dozen states, the time allowed is 30 days or less.

Most US states which mandate time limits may extend or waive the restriction under extraordinary circumstances. However, many prosecutors are extremely reluctant to admit new evidence and no federal standard of judicial review exists for determining when a time limit should be lifted.

[22] *Schlup v. Delo* (1995). In his dissent, the Chief Justice wrote that the majority had adopted a "watered down and confusing" standard. The new exonerating evidence included multiple eye-witness statements and a surveillance videotape indicating Schlup's exact whereabouts at the time of the murder. For further information *see USA: Death Penalty Developments 1994, 1995 and 1996*, AI publications index: AMR 51/01/95, AMR 51/01/96 and AMR 51/01/97.

Even the faint possibility of evading these restrictions is absent in one jurisdiction. Virginia strictly enforces its 21-day limit on the introduction of new evidence in capital cases. It has been suggested that the origins of Virginia's '21-day rule' date back to the colonial era, when trial courts would delay entering a final judgement until testifying witnesses could arrive from the more remote areas of the colony. If this interpretation is correct, it is a telling irony that a procedural safeguard originally intended to preserve the fairness of trials is now used instead to prevent the judicial review of potentially-erroneous death sentences.

Executive clemency: a defective safety net

Crucial extenuating factors such as a prisoner's mental incompetence or evidence not presented at trial may merit a reduction of sentence, but can lie beyond the scope of judicial review. International law reflects the consensus of humanity: Article 6 of the International Covenant on Civil and Political Rights asserts that every condemned person has the right to seek pardon or commutation of sentence, which may be granted in all cases.

Throughout US history, heads of state have exercised authority independent of the courts to consider and rule on clemency petitions. When US executions peaked in the 1930s (but before the politicization of the death penalty issue), approximately one-third of condemned prisoners had their sentence commuted to a term of imprisonment.

Today, US governors frequently avoid taking final responsibility for the execution of a prisoner by referring to their "duty to uphold the laws of this state" or by maintaining that "the courts have spoken". Ironically, many of those same governors actively promote legislation to curtail appellate review of death sentences, ensuring that the voice of the courts will, in fact, be as muted as possible.

Elected officials responsible for executive clemency are extremely reluctant to commute death sentences, in part out of fear that political opponents will accuse them of being "soft on crime". On 26 June 1998, Governor George W. Bush of Texas granted clemency to Henry Lucas on the grounds of his possible innocence, an unprecedented event in that state. Even though both the previous and current Attorneys General of Texas had expressed strong doubts over Lucas' guilt, the Governor's decision to commute the sentence to life imprisonment attracted political criticism.

Bush’s political opponent in the forthcoming elections for the governorship of Texas, Gerry Macro, was quick to respond. "There is no doubt in my mind that Henry Lee Lucas is guilty enough of the murders he confessed to that he earned the death penalty", Macro said. While admitting that Lucas was probably innocent of the murder

for which he was sentenced to die, Macro maintained that it was acceptable to execute him because he had confessed to other crimes for which he had not been convicted.[23]

In the current political climate, belated proof of innocence is the one narrow criterion for mercy which many US politicians believe that voters will still tolerate. Even so, commutations on grounds of reasonable doubt are extremely rare. There is little indication that executive intervention is any less crucial today than in the past, yet the current rate of death sentence commutations is paltry, averaging between one and three per year.

In at least nine of the 38 states which retain the death penalty, another hurdle is imposed between a condemned prisoner and clemency. The inmate must first persuade a pardons board (typically consisting of political appointees) to recommend commutation to the governor. While the governor may still ignore the recommendation and allow the execution to proceed, the sentence may not be commuted without a favourable majority recommendation from the board. Nor are these arbitrary decisions subject to judicial review: in the USA, access to clemency is treated not as a universal right, but as an executive privilege to be dispensed or withheld as state officials see fit.

Some states have placed additional obstacles in the way of commutation. In Nebraska, the decision is taken by the majority vote of a three-member board which includes the state Attorney General. As the officials responsible for overseeing the state's opposition to inmates' appeals, Attorneys General cannot be viewed as impartial participants in the clemency process and are extremely unlikely to vote for mercy. In Nevada, the clemency board includes both the Attorney General and the justices of the state Supreme Court, who will have upheld the inmate's conviction and death sentence on at least two occasions.

Even in those rare situations where a prisoner obtains clemency on the grounds of possible innocence, they may continue to face prolonged imprisonment. Earl Washington Jr., black, was convicted and sentenced to death in Virginia for the 1982 rape and murder of Rebecca Williams, white. Washington, who is borderline mentally retarded, was convicted on the weight of his confession, even though his statement contradicted many of the facts of the case. No physical evidence linked him to the crime.

In October 1993 the Attorney General of Virginia ordered that a new form of DNA testing be carried out on a vaginal swab from the victim. The results raised strong doubts concerning Washington's guilt: since the DNA could not have come from him,

[23]Lucas had 'confessed' to over 600 murders and was obviously incriminating himself only in a compulsive attempt to gain attention.

another perpetrator must have been involved. The victim's dying testimony had been that she was attacked by a single assailant.

But the new evidence could not be heard in court, under the conditions of Virginia's '21-day rule'. At the time of Washington's conviction, the DNA test later used to exonerate him was not available. In 1994, outgoing Governor Douglas Wilder commuted Washington's death sentence to life imprisonment. While admitting that, had the jury seen the DNA evidence "their opinions as to the appropriate conclusions may have been different", Governor Wilder chose to allow Washington's conviction to stand rather than grant a pardon or order a new trial. Washington remains imprisoned.

The case of Earl Washington is not unusual. Other prisoners nationwide are serving long sentences after being spared from execution because of persuasive doubts about their guilt.

Former members of clemency boards have spoken of the outside pressure exerted on them to ensure that mercy is never recommended in capital cases. During a candid 1996 interview with the British newspaper *The Observer*, Howard Marsellus, chairman of the Louisiana Board of Pardons and Parole from 1984 to 1986, admitted that political pressure influenced decisions on clemency.[24]

When the US Supreme Court approved new death penalty procedures in 1976, it was careful to point out that a capital punishment system without executive clemency "would be totally alien to our notions of criminal justice".[25] Some two hundred executions later, the Court reaffirmed this article of faith in its *Herrera* decision, even though executive review has proved to be a haphazard and unreliable fail-safe mechanism. Amnesty International strongly believes that without immediate and far-reaching reforms, US clemency procedures cannot be depended on to prevent irreversible miscarriages of justice in growing numbers.

From bad to worse: scrapping the safeguards

Two recent actions by the Federal authorities have dramatically increased the likelihood that mistaken death sentences will go uncorrected.

Post-Conviction Defender Organisations (PCDOs), also known as Capital Resource Centers, were established by the US Congress in 1988 to ensure adequate legal

[24]For further information see *Death Penalty Developments in 1996,* AI Index: AMR 51/01/97

[25]*Gregg v. Georgia* (1976)

representation for death row inmates during the federal and state *habeas corpus* appeal process. This followed the enactment of a law obliging federal courts to provide lawyers for defendants appealing their death sentences.

In 1995, Congress voted to eliminate the $20 million annual budget for PCDOs nationwide, leaving the majority of the centers with insufficient funding and forcing their closure. One of the sponsors of the bill to remove the funding, Representative Bob Inglis, claimed the centers were going beyond their legal duties by actively opposing the death penalty. "We should not be spending federal dollars to subsidise think tanks run by people whose sole purpose is to concoct legal theories to frustrate the implementation of the death penalty," Inglis claimed.[26]

A *New York Times* editorial noted that "...the legislation will increase the chance that innocent defendants, or defendants whose trials were constitutionally flawed, will be executed...The defenders' program deserves to live. A Congress committed to the death penalty cannot in good conscience deny competent legal counsel."

Many innocent people sent to death row obtained their release largely through the efforts of attorneys affiliated with the PCDOs. By April 1996, the vast majority of the resource centers had been forced to close, leaving hundreds of condemned prisoners without any form of legal representation.

On 24 April 1996, President Clinton signed the *Anti-terrorism and Effective Penalty Act* into law. The Act places strict limits on inmates' access to federal court review of their death sentences, a blatant attempt to accelerate the frequency of executions in the USA. Under its provisions, prisoners are permitted to file a *habeas corpus* petition only once in federal court, within one year of the conclusion of state court proceedings.

Federal courts are now required to defer to the *habeas corpus* judgements of the state courts in almost all circumstances. The only narrow exceptions are state rulings which are contrary to clearly established federal law, involve an "unreasonable application" of those laws or whose factual findings were clearly unreasonable. The federal courts have thus been stripped of their independent authority to interpret and

[26]There is substantial evidence that the PCDOs were, in fact, victims of their own legitimate legal successes. During the period in which the resource centers operated, approximately 40% of all death sentences reviewed by the courts were reversed, indicating both the defective nature of many death penalty trials and the crying need for competent representation on appeal.

safeguard the protections enshrined in the US Constitution and are reduced in many cases to merely rubber-stamping state court decisions.

Orrin Hatch, Chairman of the Senate Judiciary Committee and one of the sponsors of the bill, hailed the law as a step forward: "We've protected the rights of these people who have been convicted, but we are going to quit playing this game of incessant frivolous appeals at the cost of taxpayers paying unnecessary dollars...".[27] However, constitutional experts have warned that the new restrictions could lead to the execution of prisoners who were innocent but were now denied the opportunity for subsequent appeals which might exonerate them.

The statute directs federal courts to give priority to death penalty cases: all federal issues to be appealed must be filed within two years of the final affirmation of the conviction by the state courts. Furthermore, states which can demonstrate that they provide adequate post-conviction representation may "opt in" to the law, reducing the deadline for filing a federal claim to just six months. To date, no applying state has been deemed by the US courts to be providing the post-conviction resources necessary to qualify for this provision.

An inmate seeking to file a petition in federal court on an issue which was not included in their original federal *habeas* claim must first obtain permission from a 3-member panel of appellate court judges. Denial by the panel may not be appealed. To obtain review of a successive petition, prisoners must show "clear and convincing" evidence of actual innocence.

Had the Act been in effect two years earlier, prisoners like Lloyd Schlup would likely have failed to meet this standard (see page 17). As Sean O'Brien, counsel to Lloyd Schlup, stated to the *National Law Journal*, "We have a statute now that would tolerate the execution of people who are probably innocent. That's the absurdity of this thing".

Case histories

The following case histories have been chosen from scores of examples to illustrate many of the points previously made. They include the stories of individuals found to be innocent and released from death row, prisoners awaiting execution where strong doubts

[27] A 1995 study by the National Center for State Courts and the US Department of Justice Bureau of Justice Statistics found that of every 100 *habeas corpus* filings in federal district courts, only 1 arose from a death penalty case. "It is difficult to conceive how 1 per cent of the *habeas* caseload...can dominate the entire processing of federal *habeas corpus*", the report dryly noted.

concerning their guilt exist and those already executed despite unresolved questions of innocence.

Prisoners currently on death row who may be innocent

Amnesty International is not able to state categorically that the case histories of the following individuals establish their innocence. However, these cases display patterns of events and discrepancies in evidence similar to those of other death row inmates who have been exonerated.

Aaron Patterson

Aaron Patterson was convicted and sentenced to death for the murder of an elderly couple in Chicago, Illinois, in 1989; he has always maintained his innocence. In recent years, Illinois has led all US states in the number of innocent men released from death row; seven have been exonerated in the past four years.

No physical evidence linked Patterson to the crime; fingerprints and footprints from the crime scene did not belong to him and no eyewitnesses placed him there. He was convicted almost solely on the strength of a "confession" extracted by the officers interrogating him. Patterson alleges that he was tortured during the interrogation. Amnesty International has received numerous reports of defendants being abused in Chicago's Area 2 police station in order to elicit confessions.[28]

The only other evidence against Patterson was the testimony of 16-year-old Marva Hall, whose cousin was being held by police in connection with the murders at the time of her initial statement. She implicated Patterson in the murders, telling police that Patterson told her he killed the couple and had asked if she knew anyone who wanted to

[28] In 1990, Amnesty International released a report detailing its concerns: *USA: Allegations of Police Torture in Chicago, Illinois*, (AMR 51/42/90)

buy a shotgun or chain saw (items stolen from the crime scene). After recanting her statement, she changed her mind again, claiming that she recanted because Patterson's friends had threatened her. The trial judge ruled that her testimony was admissible, along with her statement that she "felt afraid" of Patterson; her simultaneous statement that she was equally afraid of the police was not allowed.

In an affidavit given in 1998 (and in an interview with a journalist in 1994), Hall admitted that Patterson had never told her he committed the murders; she concocted the story because she was angry with him for his behaviour towards her boyfriend. She stood by her allegation that Patterson's friends had threatened her, but added that the District Attorney had threatened that if she did not testify, she would go to prison for wasting police time. According to Hall's affidavit, the prosecution was aware that her testimony was false.

Patterson's description of the torture he received at the Area 2 police station is consistent with the numerous allegations made by other detainees. The majority of the complaints involved police officers commanded by Jon Burge. In 1989, the People's Law Office, a law firm specializing in civil rights cases, assembled details of 72 detainees who alleged being tortured by Burge and his men over a 20-year period. The firm went on to win more than one million dollars in compensation for torture victims.

In 1990, an investigation by the police department's Office of Professional Standards confirmed that "systematic" abuse had occurred under Burge's command. The report concluded that the abuse "was not limited to the usual beatings, but went into such esoteric areas as psychological techniques and planned torture." In 1993, Jon Burge was finally fired from the police force for "physically abusing" a suspect.

By his own admission, Aaron Patterson was a well-known gang leader at the time of the arrest. This background may have motivated the police to focus on him, apparently ignoring several other suspects, two of whom were seen leaving the murder scene around the time of the victims' deaths. One suspect, Michael Arbuckle, has testified that he was questioned at Area 2 police station by Burge, who told him that the police "really wanted to get Patterson". When Arbuckle refused to implicate Patterson and requested a lawyer, Burge threatened him with electrocution and allegedly stated that he "would cooperate one way or another".

Patterson was interrogated for 25 hours, during which time his requests for a lawyer and to see his father (a police officer) were denied. In May 1998, an Amnesty International delegation visited Patterson on death row. He described his treatment at the hands of the police:

> "They handcuffed me to the wall. The lights were turned off and the detectives placed a plastic typewriter cover over my face to suffocate me for about a minute.

> While I was being suffocated, other detectives kicked and punched me - or restrained me so I couldn't resist. This was done twice. The detectives kept yelling at me to cooperate or else they would continue doing this...Later Burge came back into the room and put his gun on the table. He told me that what I got earlier would be a 'snack' compared to what they would do to me now if I didn't 'cooperate'".

Despite the torture, Patterson did not make any incriminating statements about himself but merely "agreed" with whatever the detectives said in order to avoid further brutality. His alleged confession consists of a statement written by the police officers, which he refused to sign. While alone in the interrogation room, Patterson scratched a message on a wooden bench that read; "Aaron 4/30 I lie about murders Police threaten me with violence Slapped and suffocated me with plastic No lawyer or dad No phone".

Other death row inmates have alleged that they were beaten into "confessing" to murders in Chicago. They include Ronald Jones, sentenced to death for rape and murder in 1989. Jones recently won a new trial after DNA testing established that semen found inside the victim was not his. The prosecution then suggested that the semen came from the victim having sex with her fiancé shortly before her murder and that Jones raped her but did not ejaculate. However, further DNA tests ruled out the fiancé as the source of the semen. Efforts to retry Jones continue, although prosecutors are no longer seeking the death penalty because they "don't have the moral certainty any more" that he is guilty.

Kenneth Richey

Kenneth Richey, who lived in the UK until he was 17-years-old, when he moved to the USA, was sentenced to death in Ohio in 1987 for the murder of two-year-old Cynthia Collins. He was tried before a three-judge panel after his attorneys advised him that he might not get a fair trial before a jury whose passions could be inflamed by the killing of a child.

At trial, the prosecution based its theory of the crime on "transferred intent": that Richey formed the intent to kill his former girlfriend and/or her new boyfriend by setting a fire in the apartment above the one where they were staying. That apartment was the home of Hope Collins and her child Cynthia, who had been left alone in the apartment that night. The prosecution conceded that there was no evidence that Richey intended to kill Cynthia Collins and that he made several attempts to save her during the fire, but was beaten back by flames and smoke.

The authorities originally concluded that the fire was started accidentally by an electric fan, but at trial the Assistant Fire Marshall testified that it was started deliberately by igniting paint thinner and gasoline on the carpet. Richey's attorneys failed to have their

own forensic tests carried out. In 1996, arson experts far more qualified than those who testified at the trial examined the laboratory reports and concluded that the original findings were based on "unsound scientific principles that are not accepted in the forensic science community for the investigation of arson-related fires" and that the fire was probably caused by the careless discarding of smoking materials.

Another possible cause of the fire was Cynthia Collins herself. Richey's court-appointed attorney was aware that the young girl had a history of playing with lighters, cigarettes and matches and had caused a fire on at least three occasions. Although a neighbour had earlier told him about Cynthia's fascination with fire, the attorney neglected to raise the issue during his cross-examination at trial. The lawyer has since admitted that his representation of Richey was inadequate.

Two weeks prior to the trial, the prosecution offered a plea-bargain agreement whereby, in return for a guilty plea, Richey would serve 11 years imprisonment for involuntary manslaughter. Had he accepted the offer he would now be free. Insisting on his innocence, Richey refused to plead guilty.

On the night of the fire, Richey was at a party in the same apartment complex. The prosecution contended that Richey had become incensed at his former girlfriend's new relationship and, after making several threats to others at the party to burn down a building, he climbed onto a shed, over a balcony and into the apartment while carrying containers of paint thinner and gasoline stolen from a nearby greenhouse. The owner of

the greenhouse from which the paint thinner and gasoline were allegedly stolen was unable to confirm that either item was actually missing.

Since the trial, much of the incriminating evidence has been discredited. At least two witnesses who testified they heard Richey make threats to set fire to the building have since recanted their testimony. One recently told a newspaper reporter: "I said what I thought the [prosecution] attorney wanted me to say."

No trace of paint thinner or gasoline was found on the clothing Richey wore on the night of the fire. The prosecution's theory that he climbed up into the apartment while extremely drunk, carrying two containers of flammable liquids which he spread on the carpet - without spilling a drop on himself - strains credulity. It is all the harder to believe since Richey had broken his hand the previous week and was wearing a splint on it. No gasoline or paint thinner containers were found after the fire.

During the penalty phase of the trial, the judges refused to credit Richey's attempts to save the life of Cynthia Collins, suggesting that he had disabled the smoke detector while starting the fire. The judges appear to have simply created this theory, since the prosecution never suggested that Richey was responsible for the disabled alarm. The building caretaker has since sworn that he regularly had to reactivate the smoke alarm because Hope Collins frequently disabled it when cooking. A neighbour has confirmed that she had noticed the smoke detector was deactivated, while having dinner in the Collins apartment on the day of the fire.

In a recent letter, the Attorney General of Ohio stated: "To our knowledge, the prosecutor has not been presented with any evidence that would exculpate Mr Richey from the crime...Mr Richey has received a fair trial...". But at a court hearing examining new evidence that the fire was not started deliberately, the prosecutor argued that "The discovery of new evidence of innocence after a defendant has been tried, convicted and sentenced to death does not, by itself, constitute a triable post-conviction claim." The judge denied Richey's appeal.

Executed despite severe doubts concerning his guilt

Dennis Stockton

Dennis Stockton was executed in Virginia on 27 September 1995 after being sentenced to death in 1983 for the murder of Kenneth Arnder in 1978. Arnder's body was found in North Carolina. It was alleged that he was killed in Virginia and his body was moved. North Carolina authorities investigated the killing in 1978, but no charges were filed due to lack of evidence.

At Dennis Stockton's trial the Commonwealth of Virginia's case rested almost entirely on the testimony of one witness, Randy Bowman, who later reportedly confessed to the murder himself. Bowman claimed to have been at a meeting during which Stockton was hired to kill Arnder for a fee of $1,500. At the time of Stockton's trial, Bowman was serving a prison sentence for larceny and firearm offenses.

Allegations that he was offered incentives to testify against Stockton cast serious doubt on Bowman's credibility. The prosecution claimed that Bowman had not been offered any inducements for his testimony. However, in a letter written in 1990 by prosecuting attorney Anthony Giorno to Stockton's defence attorneys, Giorno stated: "I am not aware of any promises made to Bowman other than that I told him I would endeavour to see that he would be transferred [to a different prison]."

Giorno also enclosed a letter written by Bowman to the prosecution two weeks before the trial, in which he stated that "I am writing to you to let you know that I'm not going to court [to testify] unless you can get this 6 or 7 months I've got left cut off where I don't have to come back to prison." Regardless of whether Bowman received any preferential treatment, the fact that he believed his testimony was beneficial to him taints the credibility of his incriminating statements.

Stockton's attorneys obtained affidavits from law enforcement officials in 1994, stating that Bowman had become angry after Stockton's trial "because promises allegedly made to him were not kept." According to the affidavits, Bowman stated that he had been promised a reduction in his sentence or that he would be transferred to another prison. Seventeen days after Stockton was sentenced to death, prosecutors dropped charges of obtaining stolen property against Bowman. Fourteen months after the trial Bowman was released on parole.

In 1987, a federal judge set aside Stockton's death sentence and offered him the choice of life imprisonment or a new sentencing hearing, after learning that the 1983 jury deliberations had been tainted. Stockton, insisting on his innocence, chose a new sentencing hearing. However, US law does not allow for evidence concerning guilt or innocence to be heard at a re-sentencing hearing and Stockton was again sentenced to death.

Tommy McBride, who according to Bowman had hired Stockton for the killing, was charged with conspiracy to commit capital murder. McBride's case was sent to be tried in North Carolina, but the authorities found no credible evidence against McBride and dismissed the charge. A motion to dismiss the charges against McBride in Virginia alleged that his indictment "was designed only to impeach" McBride's credibility as a possible defence witness for Stockton. McBride, who under Virginia’s laws would be as guilty as Stockton if the accusation was true, has never been tried for the murder.

On 25 September 1995, a district court judge ordered a 60-day stay of execution, after defence attorneys presented affidavits from Bowman's former wife, his son and a friend, all stating that Bowman had admitted to committing the murder; a Virginia newspaper reported that Bowman had also confessed to a journalist. Nevertheless, a federal court lifted the stay the following day and Dennis Stockton was executed.

People released from death row

Sabrina Butler

Sabrina Butler, black, was sentenced to death in Mississippi for the murder of her infant son Walter in 1990. The prosecution contended that the child's death was caused by a blow to the stomach. Butler, who was aged 18 at the time of her son's death and is borderline mentally retarded, discovered the child was not breathing and, after attempting to resuscitate him, took the child to a hospital emergency room for treatment. Walter was pronounced dead on arrival at the hospital. Butler was charged with capital murder because the alleged murder took place during the commission of another offence, child abuse.

The authorities had become suspicious of Butler after she gave several conflicting versions of the events leading up to her taking her son to the hospital. She was arrested the following morning. No weight appears to have been given to the possibility that her differing statements were caused by Butler's panic and shock over her son's death, compounded by the effects of her borderline mental retardation on her capacity to explain herself clearly.

Defence attorneys contended that the child's injuries were caused by Butler's attempts to resuscitate him but failed to provide adequate evidence to support this theory. One of the lawyers was described in a local newspaper as an "incompetent drunk".

The Mississippi Supreme Court overturned Butler's conviction and sentence in 1992, on the grounds that the prosecutor had urged the jury to infer guilt from the fact that Butler had not testified in her own defence. Her second trial took place in 1995, at which Butler was represented by a leading death penalty defence lawyer. A neighbour who had tried to help Butler revive her son came forward to substantiate her version of events and the physician who conducted the autopsy admitted that his work had been inadequate. After a very brief jury deliberation, Sabrina Butler was acquitted. It is now believed that the baby probably died of cystic kidney disease or sudden infant death syndrome.

Rolando Cruz and Alejandro Hernandez

Rolando Cruz and Alejandro Hernandez were sentenced to death in 1985 for the 1983 rape and murder of 10-year-old Jeanine Nicarico in Naperville, Illinois; a crime which shocked and outraged the community. The police questioned Hernandez, 19, (who is borderline mentally retarded and has a propensity for fantasy), based on a tip from an anonymous caller. Hernandez told the police that several of his friends, including Cruz, 20, had knowledge of the crime.

The police alleged that when they questioned Cruz he told them details of the crime which supposedly came to him in a "vision". However, no record was made of these statements by the officers involved. Cruz vehemently denied making any such statements.

Both Cruz and Hernandez appear to have led police to believe that they had knowledge of the crime after learning of the $10,000 reward offered for information leading to an arrest and after being told by police officers that they would be heros if they helped solve the murder. Neither was able to provide police with any details that were not readily available to the public though media reports.

In January 1984, the District Attorney disclosed that his office lacked sufficient evidence to issue charges, prompting a public outcry. Six weeks later, just before the local Republican Party was due to select its candidate for District Attorney, charges against Cruz and Hernandez were announced. A member of the Sheriff's Department who had been vocal in stating that Cruz and Hernandez were not the murderers resigned in protest.

Shortly after Cruz and Hernandez were convicted, Brian Dugan, a repeat sex offender and murderer, confessed to six rape-murders, including that of Jeanine Nicarico. His confession included many details of the crime which only the perpetrator could know; Dugan's confession was concealed from the lawyers representing Cruz and Hernandez for over four years.

In 1988 the Illinois Supreme Court overturned the original convictions and death sentences on the grounds that the defendants should have had separate trials. In 1990, Cruz and Hernandez were retried and once again convicted; Cruz received a second death sentence, while Hernandez was sentenced to 80 years' imprisonment.

In return for a four-month reduction in his sentence, a former cellmate testified at the original trial that Cruz had admitted committing the murder to him. At the later trials he refused to testify, stating that he had fabricated the story. In 1988, another death row inmate, Robert Turner, wrote to the state Attorney General, offering to testify against eight inmates, including Cruz. Turner testified at the second trial that Cruz had confessed

that he committed the murder along with Hernandez and Dugan. But two other death row inmates testified that Turner had told them how he was "going to set up" Cruz using law books which described the crime.

The prosecution told the jury that Turner had not been offered any deal in return for his incriminating testimony. Nine months later a prosecutor testified on Turner's behalf at his re-sentencing hearing: a highly unusual event. The Illinois Supreme Court later ruled that Turner's testimony was "unchallenged".

In 1992, Assistant Attorney General Mary Brigid Kenney wrote a memorandum identifying numerous errors made in the prosecution of Cruz and urging their acknowledgement to the court. The memorandum concluded: "I cannot, in good conscience, allow my name to appear on a brief asking...to affirm his conviction."

State Attorney General Roland Burris then removed Kenney from the case and she resigned. In her resignation letter, Kenney wrote: "I was being asked to help execute an innocent man. Unfortunately, you [the Attorney General] have seen fit to ignore the evidence in this case." In press conferences following the resignation of his assistant, the Attorney General abdicated his responsibility to prevent the execution of a possibly innocent person. "A jury has found this individual guilty and given him the death penalty," Burris said. "It is my role to see to it that it is upheld. That's my job."

Cruz's second conviction was originally affirmed by the Illinois Supreme Court. In 1990, volunteer lawyers took up the case, which also began to receive widespread publicity. After a judicial election altered the membership of the Illinois Supreme Court, the justices reconsidered their decision in the case; a divided court granted Cruz another new trial because evidence regarding similar crimes committed by Brian Dugan was excluded by the trial judge.

Despite mounting media criticism and DNA test results which excluded Hernandez as the rapist (and which implicated Dugan), the prosecution decided to try Cruz for a third time. On the eve of the trial, the prosecutor stated: "The DNA results...do not in any way negate Cruz's involvement in the Nicarico crime."

The defence attorneys opted for a trial by judge, after concluding from their interviews of jurors from the previous trials that "a lot of jurors got caught up in the emotion that surrounds a crime of this kind." During the trial, a police officer finally admitted that he had fabricated Cruz's initial self-incriminating statement about seeing the crime scene in a "vision". The judge immediately directed a verdict of 'not guilty'.

Prosecutors continued to threaten to re-try Hernandez, whose conviction had also been overturned, but finally dropped the charges on the eve of the trial. Rolando Cruz was freed on 3 November 1995. Alejandro Hernandez was released on 8 December 1995.

The District Attorney who prosecuted Cruz has since become the state Attorney General; another prosecutor in the case is now a judge.

In a highly unusual move, a special prosecutor was appointed in 1996 to investigate whether police and prosecutors broke the law. As a result, criminal charges of perjury and official misconduct were brought against four police officers and three former prosecutors. None of the trials have taken place to date. Although Brian Dugan remains imprisoned for the rape and murder of other women and girls, he has yet to be charged with the murder of Jeanine Nicarico.

Other recent cases involving the issue of innocence and the death penalty documented by Amnesty International include: Roy Stewart and Joseph Burrows[29]; Jesse DeWayne Jacobs, Girvies Davies, Larry Griffin and Robert Charles Cruz;[30] Ellis Wayne Felker, Roberto Miranda and Niel Farber[31]; Randall Padgett, Kerry Max Cook, Joseph Roger O'Dell, Robert Lee Miller Jr.[32]; Cesar Fierro[33]; and Jerry Banks.[34]

Conclusion

For more than two decades judges and legislators in the USA have struggled with - and failed to resolve - the central paradox of the death penalty: how to impose an irreversible punishment fairly and accurately, while ensuring that the sentence is carried out without delay. There is clear and convincing evidence that this attempt to balance fairness and finality has now been abandoned, sacrificed for the sake of political expediency.

Some supporters of the death penalty have argued that the potential execution of innocent people is a justifiable risk, because of the purported benefits which the death penalty confers on society. This is a falsehood. There is no credible evidence to support the notion that the death penalty possesses any unique value in deterring criminal behaviour or that it brings any net societal benefits in its wake. Indeed, there is considerable data indicating the contrary: that executions have a brutalizing effect on US

[29] *USA: Death Penalty Developments 1994*, AI Index: AMR 51/01/95

[30] *USA: Death Penalty Developments 1995*, AI Index: AMR 51/01/96

[31] *USA: Death Penalty Developments 1996*, AI Index AMR 51/01/97

[32] *USA: Death Penalty Developments 1997*, AI Index: AMR 51/20/98

[33] *USA: The Death Penalty in Texas: Lethal Injustice*, AI Index: AMR 51/10/98

[34] *USA: The Death Penalty in Georgia: Racist, Arbitrary and Unfair*, AI Index AMR 51/25/96

society as a whole and that the death penalty is corroding the workings of the US criminal justice system. The irrefutable fact that guiltless defendants risk execution only amplifies these negative effects.

More than 3,400 individuals are already under sentence of death in the USA and the range of offences resulting in death sentences is expanding. An increasingly draconian political climate and a deteriorating system of legal protections compound the risk of fatal error. What was already a crisis situation has worsened lately, due to a series of legislative and judicial measures which have the sole aim of reducing the time between conviction and execution. Many of the 75 death row inmates released in recent years on grounds of innocence would undoubtedly have been executed had these measures been implemented earlier.

Many innocent defendants confronting a death sentence in the USA must traverse a legal minefield of official misconduct, shoddy legal representation and impassable procedural obstacles. Far more than a few innocent lives are at risk: fundamental safeguards which protect the rights and liberty of all people in the USA are being systematically dismantled, in order to hasten a brutal, perilous and ultimately futile punishment.

Recommendations

In the interests of protecting fundamental and universal human rights, Amnesty International is committed to the complete elimination of the death penalty worldwide. The following recommendations for the USA should therefore be seen as interim measures to reduce the risk of executing innocent people, pending total abolition of the death penalty itself.

1. Amnesty International fully supports the American Bar Association (ABA) decision calling for a total moratorium on all executions in the USA and the establishment of adequate legal safeguards at all stages of the death penalty process.

2. In addition, Amnesty International is recommending the following proposals as part of a comprehensive review of US death penalty procedures:

a) All US jurisdictions which still retain the death penalty should immediately implement minimum standards for the appointment and funding of defence counsel at all stages of capital cases, based on the American Bar Association's "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases", adopted by the ABA in 1989.

b) In order to reduce the risk of wrongful sentencing, prosecutors should exercise their discretion by declining to seek the death penalty in all cases where a conviction would rest on the induced testimony of informants or the retracted confession of the defendant.

c) All statutory time limits on the introduction of post-conviction evidence of innocence in death penalty cases should be abolished immediately. Reasonable legal standards should be established to permit full judicial review and intervention by the state courts in capital cases raising substantial late claims of innocence.

d) State appellate courts should be guided by the ABA performance standards for appointed counsel when ruling on "ineffective assistance of counsel" claims in death penalty appeals.

e) Federal authorities should immediately commission an independent inquiry into the effect of recent Congressional legislation on the risk of executing the innocent. The study should thoroughly examine the impact on wrongful death sentences of removing funding for Post-Conviction Defender Organizations and the procedural limits imposed by *The Anti-terrorism and Effective Death Penalty Act*. The findings of the inquiry should include proposals to amend or repeal these laws as necessary.

APPENDIX: STATEMENT OF JOSEPH 'SHABAKA' GREEN BROWN

My name is Joseph Green Brown, but most people know me as Shabaka. I live in Port Washington, Maryland. I spent fourteen and one-half years of my life on Florida's death row for a crime I did not commit. Granted they were three horrific crimes – murder, rape and robbery. That's what I was charged with.

A lot of people talk about death row around this country… that the inmates are just sitting up there getting fat, watching television, having endless appeals, having all these smart lawyers. I don't know where all that is. My time spent on death row in Florida – at that time, you were granted one lawyer and that was your trial lawyer. Upon conviction, your trial lawyer handled your appeal. If that lawyer decided to leave your case for any reason, you were not permitted another lawyer unless you were financially able to get one or you had friends to get you one free. My trial lawyer was a gentleman three years out of law school. He had never handled a death penalty case; he had handled only ten felony cases.

How can I describe death row to you? The closest I could come is this - if you could just picture yourself being taken into a dark, dark room - being put into this room and every so often someone would come by and say, "I'm going to kill you." And every so often they would come by and slide a little food to you. When you are removed from that cell, this person would escort you to wherever you wanted to go, then escort you

back and throw you into that hole. You see, that's all it is - a hole. It was a 6 x 8 foot cell, where you could take 5 feet forward and 5 feet backward. You have a little iron bunk and a sink and commode combination. You did everything in that cell. You were allowed out of that cell for 2 hours once a week for recreation, weather permitting. If you violated any rules of the institution, whatever privileges you had, such as visitation and mail, were taken for 30 days.

When my death warrant was signed, my mother suffered a heart attack and a stroke and she is still paralysed on the left side of her body today. My mother is not a young woman; she just turned 98-years-old. How do I feel about all this? I can't put it into words because, truthfully, I don't think any of you would understand. I don't think I can explain what it is like to have a governor sign your death warrant. You see, in Florida you were removed from death row and placed in what was called "death watch." Death watch is a cell located exactly thirty feet from the electric chair. You spent an average of twenty-one to twenty-three days in that cell and there were only two ways out - in a pine box or by a stay of execution. But while you were in that cell, you were treated to what we jokingly called the "presidential treatment." This consisted of listening to that chair being tested twice a day, and knowing it was being done in your honour. I can't explain to you how it is for someone to come ask what you would like to have as a last meal, and how you tried to decline as graciously as you could because you knew it wasn't your last meal. I can't tell you how it is to stand outside of that cell and have a gentleman come and put a tape measure around your chest, around your waist, the inseam of your legs, and measure you for your burial suit.

It is very difficult for a young man - one night you're on death row, and the next night you're in a Holiday Inn. That's what happened to me. After fourteen and one-half years on death row and coming within fifteen hours of being killed I found myself in a Holiday Inn waiting on a ride to take me back to Gainesville, Florida. And once out, I'm told to forgive, to forget what took place. But the thing is, there was no one to talk to. Because there were no books written or classes taught to deal with people such as myself because we were to be killed or spend the rest of our lives in prison. Actually, I was evicted to come back out into society to do the best that I can. But how?

How can I explain why every time I walk into a room I open the door, immediately close it and then open it back up just to make sure it wasn't locked? How can I explain how a friend of mine came to pick me up at the Holiday Inn and turned to me and said, "Shabaka, you must put on a seat belt." I turned cold, and I told her, "I have spent almost fifteen years of my life trying to prevent someone from strapping me in a chair, and here you are trying to get me to strap myself in." How can I explain the joy that I felt when I first saw my mother after all those years? I never allowed my mother to come visit me; I don't know whether I was protecting her or protecting myself.

Florida killed sixteen men when I was there. I came close to being number 17. There is a stink that hangs around for a couple of weeks; you can't get rid of it. And we always knew when a man was killed, we didn't have to be told, it was something in here [points to his heart]. You knew when he died. Some that were killed - did they deserve it? That is not for me to say. Am I against capital punishment? No, I'm against killing, whether that killing is done by an individual or done by a state, I'm against killing, period. Did I ever give capital punishment thought before my incarceration? No, I did not.

There are many Shabakas in prison; there were many before me, and let's be honest with ourselves, there are many right now.

Death row is just that - death. When dehumanization is heaped upon you day in and day out, it is up to that person to dig down each day to see whether something is left for him or her to survive that particular day.

KEYWORDS: DEATH PENALTY1 / CAMPAIGNS / DEATH SENTENCE / EXECUTION / RACIAL DISCRIMINATION / LEGISLATION / INDEPENDENCE OF JUDICIARY / TRIALS