CAPITAL PUNISHMENT

on the

25th Anniversary

of

FURMAN v. GEORGIA

A report by the

SOUTHERN CENTER for HUMAN RIGHTS

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These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.... [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

- Justice Potter Stewart, *Furman v. Georgia*, June 29, 1972

Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.

- American Bar Association's Report Regarding its Call for A Moratorium on Executions, February 1997

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INTRODUCTION

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

- Justice Harry Blackmun, *Callins v. Collins*
114 S. Ct. 1127, 1130 (1994) (dissenting from denial of *certiorari*)

Twenty-five years ago on June 29, 1972, the United States Supreme Court held in *Furman v. Georgia* that the death penalty as it had been inflicted in the United States until that time violated the prohibition against cruel and unusual punishment contained in Eighth Amendment of the United States Constitution. In five separate opinions, Supreme Court justices cited factors such as racial discrimination, the poor quality of court-appointed lawyers for the accused, arbitrariness, and the risk of executing the innocent as some of the reasons that the death penalty was cruel and unusual. New death penalty statutes - supposedly designed to prevent arbitrariness and discrimination - were passed almost immediately by several states in response to the *Furman* decision. The Supreme Court in 1976 upheld the statues passed by Georgia, Florida and Texas.

Now, on the 25th anniversary of the Court's decision in *Furman*, it has become apparent that the new statutes have failed to correct the constitutional and human rights deficiencies identified by the Supreme Court in 1972. The American Bar Association concluded last February that the death penalty continues to be "a haphazard maze of unfair practices" in calling for a moratorium on capital punishment. The report to the ABA's House of Delegates in support of the moratorium noted that those facing the death penalty are often not provided competent counsel, that racial factors influence the capital sentencing decision, that the mentally ill and mentally retarded are not protected from death sentences, that children are sentenced to death in many states, and that full federal review of state death sentences through habeas corpus is no longer available. The ABA had made recommendations for im-

provements in each of these areas, but it found that its recommendations have not been followed and that in some areas things are worse than they have been in the past.

The ABA report is only the most recent indicator that the new death penalty statutes have failed to achieve fair and consistent application of the death penalty. The International Commission of Jurists concluded after a visit to the United States last year that racial prejudice influences the imposition of the death penalty and that elected judges lack the independence to protect constitutional and human rights in capital cases. The Constitutional Court of South Africa, after examining the experience of the United States with capital punishment, unanimously concluded in 1995 that the death penalty is cruel, unusual, and degrading under its Constitution.

Two United States Supreme Court justices who voted to uphold the death penalty in *Furman v. Georgia* in 1972 and the new death penalty statutes in 1976 have since changed their opinions. Justice Harry A. Blackmun concluded before his retirement from the United States Supreme Court that "the death penalty experiment has failed" because "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies." Justice Lewis Powell, who wrote the Supreme Court's opinion in *McCleskey v. Kemp*, which, by a 5-4 vote, allowed Georgia to carry out its death penalty law despite racial disparities in its infliction, told his biographer that he now regrets his vote in *McCleskey* more than any other vote during his tenure on the Court.

Supreme Court Justice John Paul Stevens questioned the continued use of the death penalty in a speech to the American Bar Association meeting in August, 1996, observing that "recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent." Over 65 people sentenced to death in the United States since 1972 have been found innocent and released from prison. Others have had their death sentences commuted to life imprisonment because of doubts about their guilt, and some have been executed despite questions of innocence.

United States Court of Appeals Judge Gerald W. Heaney observed this year in a concurring opinion:

> My thirty years' experience on this court have compelled me to conclude that the imposition of the death penalty is arbitrary and capricious. At every stage, I believe the decision of who shall live and who shall die for his crime turns less on the nature of the of-

> fense and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defense lawyers.

This report examines the reasons given by the Supreme Court justices in 1972 for their conclusion that the death penalty was "cruel and unusual" and compares them to current practices. As set out on the following pages, it finds that race continues to influence who is sentenced to die. Poverty • the inability to retain a lawyer • also has an impact on who receives a death sentence. And the imposition of the death penalty continues to be as arbitrary as ever, as Judge Heaney pointed out in the quotation above. A number of innocent people have been sentenced to death under the new statues; some were released only because of the development of DNA technology or press interest in their cases. Many states continue to execute mentally ill and mentally retarded people, as well as children.

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RACE

The Supreme Court in *Furman v. Georgia*:

It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

- Justice William O. Douglas' opinion in *Furman*, 408 U.S. Supreme Court Reports, pages 242, 256.

A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.

- Justice Thurgood Marshall, 408 U.S. page 364.

The death penalty since *Furman*:

Harris County [Houston, Texas] has sent blacks to death row nearly twice as often as whites during the last ten years, a growing imbalance that eclipses the pre-civil rights days of `Old Sparky,' the notorious Texas electric chair.

- Bryan Denson. "Death Penalty: Equal Justice?" *The Houston Post*. Oct. 16, 1994.

[T]he application of the death penalty in Florida is not color-blind.

- Racial and Ethnic Bias Commission of the Florida Supreme Court, 1991.

The failure of the modern death penalty statutes to eliminate the role of race in deciding who dies is most starkly illustrated by the administration of the federal death penalty. There are 13 people currently under federal death sentence. Timothy McVeigh is one of only two who are white. Nine are African Americans, one is Hispanic, and one is Asian. Of the 92 cases approved for federal death prosecution by the Attorney General, 56 have been against

African Americans, 11 against Hispanics, five against Asians, and 20 against whites.

Racial disparities are found in capital sentencing through the country. The General Accounting Office, after an analysis of 28 studies of death penalty sentencing, reported in 1990 that "race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e. those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques."

Since that report, other studies have confirmed the continuing role of race in death penalty sentencing.

A 1994 *Houston Post* study of death sentences in Harris County, Texas found that blacks were sentenced to death twice as often as whites. Harris County has carried out more executions than any state other than Texas itself and has sentenced more people to death than most states.

Racial discrimination in capital sentencing has been most closely examined in Georgia, where disparities under the current law are almost identical to those seen before the *Furman* decision in 1972. Although over sixty percent of the victims of murders in Georgia each year are African American, 20 of the 22 cases in which executions have been carried out under the current law involved white victims. Over eighty percent of those on Georgia's death row are there for the murders of white victims.

Twelve of the 22 people executed by Georgia under the death penalty law adopted in 1973 have been African Americans. Six of the 12 African Americans executed were convicted and sentenced to death by all-white juries.

Interracial murders make up less than 10 percent of the total homicides that occur in Georgia. Georgia prosecutors, however, seek the death penalty in 70 percent of cases involving crimes committed by black people against white victims. They seek the death penalty in less than 35 percent of cases involving other racial combinations.

A comprehensive study of sentencing patterns in Georgia found that prosecutors are more likely to seek and juries are more likely to impose the death penalty where the victim is white. Defendants charged with murders of white persons received the death penalty in 11 percent of the cases, while defendants charged with murders of blacks received the death penalty in only one percent of the cases. Defendants charged with killing white victims were

4.3 times more likely to receive a death sentence than defendants charged with killing blacks.

Nevertheless, the United States Supreme Court, by a 5-4 vote, held in *McCleskey v. Kemp* that Georgia could carry out its death penalty law despite such racial disparities which would not be officially tolerated in any other area of law. The Court accepted the racial disparities as "an inevitable part of our criminal justice system" and expressed its concern that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." Justice William Brennan, in dissent, characterized this concern as "a fear of too much justice."

Several factors contribute to the influence of race in capital sentencing: prosecutorial discretion, the exclusion of African American citizens from the process, and the failure of courts to acknowledge and deal with racial issues.

Prosecutorial discretion. Prosecutors are never required to seek the death penalty in any case. Most of the death penalty schemes adopted by the states after *Furman v. Georgia* provide for the death penalty in most first degree and felony murders. Any murder involving a robbery, arson, burglary, rape, or kidnapping may be prosecuted as a capital case. In addition, death may be imposed for any other "heinous, atrocious or cruel" or "horrible" murder, which of course describes almost all murders. But no crime - no matter how heinous - has to be punished by death.

The breadth of the death penalty statutes and the unfettered discretion given to prosecutors and juries provide ample room for racial prejudice to influence whether death is sought or imposed. For the most part, African Americans have no voice in the two most important decisions that determine whether death will be imposed for a crime: the prosecutor's decisions whether to seek the death penalty, and whether to resolve a case with a plea bargain and a sentence less than death.

Exclusion. Although crime falls most heavily on communities of color, members of those communities have long been under-represented among judges, prosecutors, jurors and attorneys. For example, only fifteen of Georgia's 169 Superior Court judges - eight percent - are African American. All but one of the 46 elected District Attorneys who prosecute cases in the courts are white.

Justice Leah Sears, an African American member of the Georgia Supreme Court, has observed that "[w]hen it comes to grappling with racial issues in the criminal justice system today, often

white Americans find one reality while African Americans see another." Yet when the criminal justice system decides whether an African American will lose his life or freedom, the decision is too often based only on the version of "reality" seen by white people.

A prosecutor's decision to seek the death penalty may never be reviewed by a person of color sitting as a juror. Many capital cases are tried in predominantly white suburban communities, such as Cobb County, Georgia, or Baltimore County, Maryland, where there are so few persons of color in the community that there is little likelihood that they will be represented on the jury. But even in communities where there is a substantial number of people of color in the population, prosecutors are often successful in preventing or minimizing participation by minorities.

For example, Joseph Briley, the prosecutor in Georgia's Ocmulgee Judicial Circuit tried 33 death penalty cases in his tenure as district attorney between 1974 and his resignation in 1994. Of those 33 cases, 24 were against African American defendants. In the cases in which the defendants were black and the victims were white, Briley used 94 percent of his discretionary jury challenges - 96 out of 103 - against black citizens. When a prosecutor uses the overwhelming majority of his jury strikes against a racial minority, that part of the community is barred from participating in the process. The jury does not reflect the conscience of the community.

African Americans and other people of color continue to be excluded from jury service, even after the Supreme Court's decision in *Batson v. Kentucky*, which was supposed to end the discrimination that had taken place in the jury selection process. Under the procedure adopted in the *Batson* decision, if a prosecutor strikes a disproportionate number of black jurors, he or she is required to give reasons for the strikes. Trial judges, who are elected in most states, then decide if the strikes are due to race or some legitimate reason having nothing to do with race. Judges routinely find that reasons are race neutral, even when they result in the removal of all minority jurors from venires.

Refusal to examine. Courts often refuse even to examine issues of racial prejudice. Two African American men sentenced to death by an all-white jury in Utah, Dale Pierre and William Andrews, were executed even though jurors received a note that contained the words "Hang the Nigger's" [sic] and a drawing of a figure hanging on a gallows. No court, state or federal, even had a hearing on such questions as who wrote the note, what influence it had on the jurors, and how widely it was discussed by the jurors.

In another case, William Henry Hance was executed by Georgia without any court holding a hearing on the use of racial slurs by jurors who decided his fate.

The criminal justice systems of the states are the institutions least affected by America's civil rights movement. African Americans and other people of color are more likely to be arrested, more likely to be denied bail, more likely to be sentenced to severe sentences than white people. The race of the victim has a major impact on how cases are investigated by law enforcement agencies and prosecuted in the courts. Yet courts are unwilling to come to grips with the influence of race on all sorts of sentencing.

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POVERTY

The Supreme Court in ***Furman v. Georgia***:

[Capital punishment] is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.

- Justice William O. Douglas 408 U.S. 247, 251

The death penalty since ***Furman***:

Southern justice in capital murder trials is more like a random flip of the coin than a delicate balancing of the scales. Who will live and who will die is decided not just by the nature of the crime committed but equally by the skills of the defense lawyer appointed by the court. And in the nation's Death Belt, that lawyer is too often ill-trained, unprepared and grossly underpaid.

- *National Law Journal* report, "Fatal Defense," June 11, 1990

The *Houston Chronicle* carried the following account of a capital murder trial in Houston, the city that has been responsible for more executions than any state except Texas:

"Seated beside his client - a convicted capital murderer - defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

"His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

"Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991,

arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

"When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"`It's boring,' the 72-year-old longtime Houston lawyer explained."

This does not offend the constitutional right to counsel, the trial judge explained, because, "[t]he Constitution doesn't say the lawyer has to be awake." The Texas Court of Criminal Appeals upheld McFarland's sentence of death, rejecting a claim of ineffective assistance of counsel, and the United States Supreme Court denied review of the case.

George McFarland is not the only person condemned to die at a trial in Texas where his defense lawyer slept during the proceedings Calvin Burdine and Carl Johnson both had the misfortune to have attorney Joe Frank Cannon assigned to defend them. They are among ten clients of Cannon who have been sentenced to death. Cannon has been appointed by judges in Houston to numerous criminal cases in the last 45 years despite his tendency to doze off during trial.

In Calvin Burdine's case, the trial court found that Cannon "dozed and actually fell asleep" during trial, "in particular during the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence." The clerk of the court testified that "defense counsel was asleep on several occasions on several days over the course of the proceedings." Cannon's file on the case contained only three pages of notes. Once again, the Texas Court of Criminal Appeals found that a sleeping attorney was sufficient "counsel" under the Constitution.

Cannon also slept when he was supposed to be defending Carl Johnson. Both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit held Johnson was not denied his right to counsel. Neither court published its opinion. Carl Johnson was executed on September 19, 1995.

A 1992 study of homicide cases in Philadelphia, which rivals Houston for its high number of death cases, found that the quality of lawyers appointed to capital cases in Philadelphia is so bad that “even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder.” The study found that many of the attorneys were appointed by judges based on political connections, not legal ability. “Philadelphia's poor

defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge's election campaigns."

The American Bar Association concluded in 1990 after an exhaustive study that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment systems in the states today."

Georgia's recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase. Even in cases in which the performances of counsel have passed constitutional muster . . and executions have been carried out, the representation provided has nevertheless been of very poor quality. In some instances, mistakes by counsel have resulted in the execution of one person while that person's codefendant has obtained relief on the identical issue. It has thus been argued that the death penalty is more a game of roulette than a rational system of review.

The Georgia experience is only one example. Defense representation is not necessarily better in other death penalty states.

- American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases,* 40 American Law Review 1, 65-67 (1990)

The ABA report pointed to numerous capital trials in which attorneys appointed to defend capital cases failed to offer any evidence in mitigation, were unaware of the law, distanced themselves from their clients, and gave arguments that either conceded guilt or did more harm than good. Since *Furman*, people have been sentenced to death at trials where they were represented by attorneys trying their first case, by attorneys who slept during parts of the trial, or by attorneys who were absent during parts of the trial.

In at least five cases tried in Georgia since *Furman* in which the death penalty was imposed, the accused were referred to by

racial slurs *by their own lawyers* during the trial. In one case, two attorneys presented different and conflicting defenses for the same client. One attorney, a former Grand Dragon of the Ku Klux Klan, representing an African American defendant, presented an incredible alibi defense while the other lawyer asserted a mental health defense that acknowledged the accused's participation in the crime.

Judge Alvin Rubin of the Fifth Circuit put it bluntly in a concurring opinion in the case of *Riles v. McCotter*: "The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel . . . . Consequently, accused persons who are represented by `not-legally-ineffective' lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence."

Most poor people facing the death penalty receive an altogether different type of representation than did O.J. Simpson or Fred Tokars, a former Georgia prosecutor and judge, who was convicted of the brutal contract killing of his wife in front of their two young children, but avoided the death penalty earlier this year with the help of a privately retained legal team which included prominent Georgia attorney Bobby Lee Cook.

The poor quality of representation often has fatal consequences for the person accused. Gary Nelson spent eleven years on Georgia's death row for a crime he did not commit. Nelson was represented at his capital trial in 1980 by a lawyer who had never tried a capital case. The lawyer was paid only $20 per hour. His request for a second lawyer on the case was denied. The case against Nelson was entirely circumstantial, based on the questionable opinion of a prosecution expert that a hair found on the victim's body came from Nelson. Nevertheless, the appointed lawyer was not provided funds for an investigator and, knowing that a request would be denied, did not seek funds for an expert. The lawyer's closing argument was only 255 words long. He was later disbarred for other reasons.

Nelson had the good fortune to be represented on a *pro bono* basis in post-conviction proceedings by lawyers willing to spend their own money to investigate his case. They discovered that the hair found on the victim's body, which had been linked to Nelson, lacked sufficient characteristics for microscopic comparison. Indeed, the Federal Bureau of Investigation had examined the hair and found that it could not be compared. As a result, Gary Nelson was released after eleven years on death row.

But many are not as fortunate as Nelson and such errors are never discovered. Cases in which executions have been carried out

often had the same poor quality of legal representation. For example, John Young was represented at his capital trial by an attorney who was dependent on amphetamines and other drugs which affected his ability to concentrate. The attorney was also suffering severe emotional strain, was physically exhausted, and was distracted because of marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business. Young was sentenced to death. A few weeks later, Young met his attorney at the prison yard in the Bibb County Jail. The attorney had been sent there after pleading guilty to state and federal drug charges. Georgia executed John Young on March 20, 1985.

James Messer was given a court-appointed lawyer who, at the guilt phase, gave no opening statement, presented no defense case, conducted cursory cross-examination, made no objections, and then emphasized the horror of the crime in some brief closing remarks. Even though Messer's severe mental impairment was important to issues at both the guilt and penalty phases, the lawyer presented no evidence regarding it because he failed to make an adequate showing to the judge of his need for a mental health expert. He also failed to present evidence of Messer's steady employment record, military record, church attendance, and cooperation with police. In his closing argument to the jury, he repeatedly hinted that death was the most appropriate punishment for his own client. James Messer was executed July 28, 1988.

The brief on direct appeal to the Alabama Supreme Court in the case of Larry Gene Heath consisted of only one page of argument and cited only one case, which did not support his position. Counsel did not appear for oral argument before the Alabama Supreme Court in the case. Nevertheless, the Alabama Supreme Court decided the case on the basis of the one page brief and despite the lawyer's failure to show up for argument. Larry Heath was executed by Alabama on March 20, 1992.

Numerous other examples of attorneys who did not know the law, failed to put on critical evidence, distanced themselves from their clients and failed to render assistance to their clients is documented in the sources listed in the references at the end of this section.

There are several reasons for the poor quality of representation:

Money. The lawyers appointed to defend capital cases are often paid a token amount, sometimes even less than the cost of overhead for operating the lawyer's office. They are often unqualified for the demanding task of defending a capital case and often provided no funds to investigate the case or present expert testimony.

Court-appointments in criminal cases pay less than any other kind of legal work. In Alabama, for example, attorneys are paid only twenty dollars an hour for out-of-court time in capital cases, with a limit of $2,000 per case. Mississippi limits payment to $1,000 a case. As a result, the poor are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have little or no inclination to help their clients, and have no incentive to develop criminal trial skills.

Lack of structure. Many states - particularly those in the southern death belt where most executions are carried out - do not have public defender offices. Attorneys in private practice are appointed to represent poor people who cannot afford a lawyer. Often the lawyers appointed do not even specialize in criminal law, have no familiarity with the law that governs the trial of capital cases, and have no knowledge of the types of investigation and other work that must be done to defend a capital case.

Lack of independence. In most states, a poor person facing the death penalty is assigned a lawyer by the locally elected judge, who may not always have the best interest of the defendant at heart. The attorney may have greater loyalty to the judge, upon whom he is dependent for future business, than to the client. As a result, poor defendants often do not receive zealous representation. For example, for a number of years, judges in Columbus, Georgia appointed a lawyer to capital cases who would not challenge the underrepresentation of black citizens in the jury pools for fear of incurring hostility from the community. As a result, six African Americans were tried by all-white juries in capital cases in that judicial circuit. Many others were tried before juries in which African Americans were underrepresented.

Tolerance by courts. The courts have tolerated such absurdly poor performances by counsel that the vice president of the Georgia Trial Lawyers Association once described the "simple test used in a lot of counties to show if a defendant receives adequate counsel" called the "mirror test." "You put a mirror under the court-appointed attorney's nose, and if the mirror clouds up, that's adequate counsel." In the case of *Strickland v. Washington*, 466 U.S. 668, 689 (1984), the Supreme Court adopted a standard for deciding whether a defendant was denied adequate counsel that is “highly deferential” to the performance of counsel and presumes adequate counsel even when there is no basis for the presumption.

Although courts have issued many pronouncements about the importance of the guiding hand of counsel, they have failed to deal with the failure of most state governments to pay for an adequate defense for the poor person accused of a crime. Harold

Clarke, as Chief Justice of the Georgia Supreme Court, once described to the Georgia legislature the state's response to the need for indigent defense: "[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."

The United States Supreme Court has held that the condemned are not entitled to lawyers for stages of review of their cases beyond the direct appeal to the state supreme court. Georgia became the first state in which a condemned man was forced to represent himself against his will when, on September 12, 1996, Judge Carlisle Overstreet conducted a hearing at which Exzavious Gibson, whose IQ is less than 80, was denied counsel.

In an effort to increase the number and speed of executions, Congress in 1995 eliminated funding for the death penalty resource centers, which had been created in 1987 and provided lawyers to the condemned in post-conviction proceedings. The elimination of federal funding has resulted in the closing of some resource centers and drastic reductions in staff at others, leaving many of those facing death without counsel.

The prospects for improvement are not good. As Robert Kennedy once pointed out, the poor person accused of a crime has no lobby. Courts and legislatures appear to be indifferent about the quality of representation in capital and other criminal cases. The reports and other sources cited in this report have been well publicized, but legislatures in most states - notable exceptions are New Jersey, New York and Colorado - have refused to establish capital defender programs to assure quality representation for those facing the death penalty.

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FACING DEATH WITHOUT A LAWYER

Exzavious Gibson, a man with an IQ less than 80, was denied a lawyer for his first state post-conviction proceedings in Georgia. At a hearing held on September 12, 1996, Judge J. Carlisle Overstreet required Gibson to proceed even though Gibson had no lawyer and lacked the ability to represent himself. The following is from the transcript of the hearing:

The Court: Okay. Mr. Gibson, do you want to proceed?

Gibson: I don't have an attorney.

The Court: I understand that.

Gibson: I am not waiving my rights.

The Court: I understand that. Do you have any evidence you want to put up?

Gibson: I don't know what to plead.

The Court: Huh?

Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.

The state was represented by an assistant Attorney General who specialized in capital habeas corpus cases. Gibson, left to attempt to represent himself, had no idea when to object to testimony or evidence. Gibson's cross examination of his former attorney follows:

The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

The Court: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.

Gibson tendered no evidence, examined no witnesses, and made no objections.

Nevertheless, Judge Overstreet denied Exzavious Gibson a lawyer and later signed an order, prepared by the Georgia Attorney General's office denying relief.

ARBITRARINESS

The Supreme Court in *Furman v. Georgia*:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

- Justice Potter Stewart, 408 U.S. at 309-10

[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.

- Justice Byron White, 408 U.S. at 313

[I]t smacks of little more than a lottery system.

- Justice William Brennan, 408 U.S. at 294 (1972)

The death penalty since *Furman*:

I dare say I could take every death sentence case that we have had where we affirmed, give you the facts and not tell you the outcome, and then pull an equal number of murder cases that have been in our system, give you the facts and not tell you the out-come, and challenge you to pick which ones got the death sentence and which ones did not, and you couldn't do it.

- Justice James Robertson, Supreme Court of Mississippi, testifying before the U.S. Senate Judiciary Committee (1989)

Any rational, reasonable person ought to be able to take 100 life and 100 death cases and shuffle them, and come back and place those cases back in the category they originally came from. And I'm saying it can't be done.

- Tommy Morris, Member, Georgia Board of Pardons and Paroles (1987)

In *Furman v. Georgia*, Justice William O. Douglas pointed to the case of two men sentenced to death in Georgia, James Avery and Aubrey Williams. Both were sentenced to death in the same county, where the jury selection procedures discriminated against African Americans in violation of the Constitution. Avery's lawyer objected to the jury selection and he won a new trial. Williams' lawyer did not object and the courts held he had not

raised the issue. He was executed.

Justice Douglas observed, "The disparity of representation in capital cases raises doubts about capital punishment itself. . . . If a James Avery can be saved from electrocution because his attorney made timely objection to the selection of a jury . . . , while an Aubry Williams can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion."

History repeated itself under the death penalty statute adopted by Georgia after *Furman*. John Eldon Smith, was sentenced to death by an unconstitutionally composed jury, as was Rebecca Machetti, another person involved in the same crime who was tried separately in the same county. Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not because they were unaware of the Supreme Court decision prohibiting gender discrimination in juries.

A new trial was ordered for Machetti by the federal court of appeals. At that trial, a jury that fairly represented the community imposed a sentence of life imprisonment. The federal courts refused to consider the identical issue in Smith's case because his lawyers had not preserved it. He was executed.

As in the cases of Avery and Williams, had the defendants' lawyers been reversed, the defendant who was executed would also have been switched. In other words, had Machetti been represented by Smith's lawyers in state court and vice versa, Machetti would have been executed and Smith would have obtained federal habeas corpus relief.

The vast discretion that prosecutors have in seeking the death penalty, previously described in this report in the section on race, also con-tributes to arbitrariness in the infliction of the death penalty. Some prosecutors seek the death penalty frequently, some occasionally, and some never seek it. In states where capital punishment is imposed, there are particular localities that sentence a vastly disproportionate number of people to die: for example Houston, Texas, Columbus, Georgia, Baltimore County, Maryland, and Talladega, Alabama.

The new death penalty statutes passed after *Furman v. Georgia* were supposed to end this arbitrariness, but have failed to do so. One way in which arbitrariness was to be prevented was by requiring state supreme courts to conduct proportionality review, i.e. requiring the state supreme court to compare the death sentence imposed in an individual case with sentences imposed in other cases. However, the United States Supreme Court held in *Pulley v. Harris* in 1984 that proportionality review was not

constitutionally required. Since that time many states have eliminated the requirement of proportionality review from their statutes and many state courts have simply ceased to conduct a proportionality review. Others purport to conduct proportionality review, but never find the death sentence imposed in a particular case to be disproportionate. For example, the Georgia Supreme Court has only once, in its review of over 300 death sentences, found a sentence to be disproportionate. The court has not found any sentences disproportionate since the United States Supreme Court held in *Pulley* that proportionality review was not constitutionally required.

The death penalty is imposed, on average, in only 250 of the approximately 20,000 homicides that occur each year in the United States. Death sentences are imposed in cases which are similar to thousands of cases in which death is not imposed.

The sentence a defendant receives still depends on the quality of the defense lawyer, the location of the crime, the race of the victim, and the political aspirations of the prosecutor rather than on how bad the crime was or how incorrigible the accused. There remains today, as Justice White observed in 1972, "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

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INNOCENCE

The Supreme Court in *Furman v. Georgia*:

Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

- Justice Thurgood Marshall, 408 U.S. at 366

The death penalty since *Furman*:

[R]ecent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent.

- Justice John Paul Stephens, *Opening Assembly Address*,
American Bar Association Annual Meeting. Aug. 3, 1996.

Since 1973, over 65 people sent to death have been released after evidence of their factual innocence emerged. They had been on death row an average of seven years from their conviction until the time they were released. Sixteen have been released since 1990.

Renaldo Cruz was released in 1995 after spending ten years on Illinois' death row. Three prosecutors and four law enforcement officials have since been indicted for obstruction of justice in his case. Mr. Cruz was one of four men released from Illinois' death row during a two-year period.

Dennis Williams was released from Illinois' death row last year after Professor David Protess and his students at Northwestern

University helped establish his innocence and that of three other men wrongfully convicted of rape and murder. Another man sentenced to death for the same crime, Verneal Jimerson, previously had his conviction overturned due to witness perjury. The men spent 18 years in prison before their innocence was established by DNA tests.

Gary Nelson, whose case is described in the previous section on poverty, is one of four people condemned to die by Georgia's court system since *Furman* who was later found to be innocent. Jerry Banks spent five years on Georgia's death row before his innocence was established and he was released. He committed suicide not long after his release. Earl Charles spent three and a half years on death row for a crime he did not commit. Robert Wallace was acquitted at his capital retrial in Greene County after his first death sentence was set aside by the federal courts.

Frederico Martinez-Macias was represented as his capital trial in El Paso, Texas, by a court-appointed attorney paid only $11.84 per hour. Counsel failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have testified in rebuttal of the prosecutor's case. Martinez-Macias was sentenced to death.

Martinez-Macias received competent representation for the first time when a Washington, D.C. law firm took his case *pro bono*. After a full investigation and development of facts regarding his innocence, Martinez-Macias won federal habeas corpus relief. An El Paso grand jury refused to re-indict him and he was released after nine years on death row.

Questions of the adequacy of the legal process are raised by several cases of innocent people sentenced to death who were not released by courts until after the media publicized their innocence. For example, Alabama courts ordered the release of Walter McMillian, who spent six years on Alabama's death row for a crime he did not commit, only after the CBS news program *60 Minutes* reported on his innocence. Similarly, it was only after *60 Minutes* publicized the innocence of Clarence Lee Brantley that the Texas courts, which had previously twice upheld Brantley's conviction and sentence, ordered a hearing that eventually led to his release. Randall Dale Adams, whose story was told in the motion picture *The Thin Blue Line*, was released from death row only because filmmakers demonstrated his innocence.

Demonstrating one's innocence from death row almost always requires great expenditure of time and money, neither of which death row inmates usually possess. As Justice Marshall noted in

Furman v. Georgia:

> proving one's innocence after a jury finding of guilt is almost impossible. While reviewing courts are willing to entertain all kinds of collateral attacks where a sentence of death is involved, they very rarely dispute the jury's interpretation of the evidence. This is, perhaps, as it should be. But, if an innocent man has been found guilty, he must then depend on the good faith of the prosecutor's office to help him establish his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely.

After an execution, proving that someone was innocent is even more difficult. Because investigation usually ends when someone is executed, it is impossible to know how many factually innocent people have been executed.

The federal Anti-terrorism and Effective Death Penalty Act, enacted in 1996, increases the likelihood that innocent people will be executed. A federal court ordered a new trial for Lloyd Schlup, who had been sentenced to death in Missouri, upon the discovery of a videotape which established that he had been somewhere else at the time of the crime. It is likely that Schlup would have been executed if the new law had been in effect. Schlup was granted a new trial only on his second federal appeal. Under the new law, such appeals are severely limited. Because the law restricts the ability of federal courts to hold hearings and hear claims, it curtails one of the important safeguards against executing an innocent person.

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MENTAL RETARDATION

The Supreme Court in *Furman v. Georgia*:

[T]he burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.

- Justice Thurgood Marshall, 408 U.S. at 365-66

The death penalty since *Furman*:

We are killing the mentally retarded without serious qualm. We are killing persons for crimes they committed as children. And it is increasingly difficult not to notice and admit we are mainly executing people of marginal intelligence, doubtful sanity, debilitating poverty. The death penalty has become an act of class warfare, fought top-down against the poor and incompetent.

- Tom Teepen, *Atlanta Journal & Constitution*, Sept. 5, 1987

Since the reinstatement of the death penalty in 1976, at least 27 mentally retarded defendants have been executed. Of the 38 states that have death penalty statutes, only 11 prohibit the execution of the mentally retarded. Mentally retarded prisoners account for 12 to 20 percent of the death row population.

Because of the inadequacy of the lawyers appointed and the denial of resources for expert witnesses or investigative assistance, lawyers appointed to defend capital cases frequently overlook mental retardation or fail to present it adequately to the jury. Many mentally retarded people mask their retardation, and untrained or inept lawyers sometimes miss even obvious signs. But even when retardation is recognized, counsel often lack the expert witnesses to explain the client's disability adequately to the jury.

The failure of defense counsel to present critical information about mental retardation is one reason Horace Dunkins was sentenced to death in Alabama. Before his execution in 1989, when newspapers reported that Dunkins was mentally retarded, at least one juror came forward and said she would not have voted for the

death sentence if she had known of his condition. Nevertheless, Dunkins was executed.

In another case, a court-appointed defense lawyer's only reference to his client during the penalty phase of a Georgia capital case was: "You have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer . . . . He is ignorant. I will venture to say he has an IQ of not over 80." The defendant was sentenced to death.

Had the lawyer done any investigation into the life and background of his client, he would have found that his client was not simply "ignorant." Instead, he was mentally retarded. For that reason, he had been rejected from military service. He had been unable to function in school or at any job except the most repetitive and menial ones. His actual IQ was far from 80; it was 68. He could not do such things as make change or drive an automobile. After his death sentence was set aside because of a failure to grant a change of venue, an investigation was conducted, these facts were documented, and the defendant received a life sentence.

Georgia put to death two mentally retarded men before passing a law that prohibits further execution of the mentally retarded. One, Jerome Bowden, grew up on a diet of powdered milk and eggs, rice, lard and Spam. His home had no electricity or running water, and during his first year of school he attended 96 days and was absent 83. After spending all his time in school in special education classes, he dropped out once he reached junior high.

Bowden had no concept of death. When he received a last minute stay from an execution, he asked his lawyer if that meant he could watch a television program that night. A few hours before he was executed, Bowden took an IQ test. Only a score of 70 or less would have saved him from execution. During one of his last phone calls to his lawyers, Jerome Bowden talked about the IQ test he had taken a few hours earlier. He told them, "I tried real hard. I did the best I could."

Earl Washington, who had an IQ of 69, was sentenced to death in Virginia after he "confessed" to a murder. During his confession, he repeatedly volunteered incorrect facts about the murder that he claimed to have committed. For example, he said that victim was black and short. She was white and 5'8" tall. Washington also said that he kicked the door in and stabbed the victim between one and three times. The door, however, was undamaged, and the victim had been stabbed 38 times. Police officers corrected each of his mistakes. Numerous fingerprints were found in the victim's home, but none belonged to Washington. Many years later, DNA testing excluded Washington as the rapist. After a great deal of media

attention and political pressure, the governor of Virginia commuted Washington's death sentence to life in prison.

The United States Supreme Court held that the cruel and unusual punishment clause of the Eighth Amendment does not prevent the execution of a mentally retarded person in the case of John Paul Penry, a man with an IQ between 61 and 63. Penry, who is unable to read or write also suffers from organic brain syndrome. He remains on death row in Texas.

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MENTAL ILLNESS

No state prohibits the execution of those who suffer serious mental illnesses. Although the Supreme Court ruled that states can not execute people who are insane, "insane" has been so narrowly defined as to allow people with severe mental illnesses to be put to death. Even if a person is found incompetent to be executed, the remedy is to treat the person until he or she regains competence so that the execution can be carried out.

Morris Mason suffered from mental illness and mental retardation when the state of Virginia executed him on June 25, 1985. He had an IQ of 66 and had schizophrenic reactions. After waiving his right to trial and being sentenced to death, he talked about being the "killer for the Eastern shore" and making "the Eastern shore popular." On the day he was to be executed, he gave his visitors a message to tell a fellow inmate that he'd play basketball with him the following day.

In 1992, Arkansas executed Ricky Ray Rector. Rector had a history of mental problems, and after he committed the crime for which he was sentenced to death, he put a gun to his head and pulled the trigger. The gunshot wound, combined with the surgery that followed, resulted in a full frontal lobotomy.

Right before his death, Rector told people he was going to vote for Bill Clinton, who set his execution date and denied him clemency, for president. After he was executed, guards found that Rector, who had a habit of saving his dessert for later, had put aside a piece of pecan pie, thinking he would have it later that evening after his execution. The notes of the guards who kept track of Ricky Rector's movements on death watch reflected that he was howling like a dog, laughing uncontrollably, and had little or no comprehension of the fate that awaited him.

Varnall Weeks, a paranoid schizophrenic who suffered from delusions and hallucinations, was executed by Alabama on May 12, 1995.

Weeks believed he was God in various manifestations, such as God the Father, Jesus Christ, and Allah. Every expert who evaluated Weeks, both for his lawyers and for the state of Alabama, concluded that he was a paranoid schizophrenic who suffered delusions and hallucinations.

In court proceedings shortly before he was executed, Weeks appeared with a shaved head, wearing a domino tied to a string on his head. In response to the judge's questions, he gave a rambling discourse on serpents, "cybernetics," albinos, Egyptians, the Bible, and reproduction. Weeks believed that his execution was part of a millennial religious scheme to destroy a sinful mankind, and that he would not die but would be transformed into a tortoise to reign in heaven. Prison records revealed that, on occasion, he would stand in his cell naked smeared with feces while mouthing sounds which appeared to have no meaning. Nevertheless, the judge held the execution could proceed because Weeks could answer questions about the date and purpose of his execution.

Many lawyers fail to adequately address mental illness in cases in which death is a possible punishment. No evidence about Varnall Weeks' mental illness was presented to the elected trial judge who sentenced him to die. Weeks gave up a right to an advisory jury verdict on sentencing and asked for the death penalty at his trial. Donald Thomas, a schizophrenic youth, was sentenced to death in Atlanta, where the jury knew nothing about his mental impairment because his lawyer failed to present any evidence about his condition.

The foregoing are but a few examples of persons suffering from major mental illnesses who have been sentenced to death since *Furman v. Georgia*. Although more is being learned about the effects of brain damage and chemical imbalnances in the brain, that knowledge generally has no bearing on the capital sentencing decision.

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CHILDREN

The United States is one of five countries that, since 1990, has executed prisoners who were under 18 years old at the crime of the crime and it leads the world in the execution of children during that time. The other nations that have executed children in this decade are Iran, Pakistan, Saudi Arabia, and Yemen.

Of the 38 states that have the death penalty, only fourteen have a minimum age of 18 at the time of the crime as the age of eligibility for the death penalty. Four use 17 as the minimum age. The other 21 jurisdictions that have the death penalty have set a minimum age of 16, which is the lowest age for which the United States Supreme Court has upheld the constitutionality of executions.

Since 1973, death sentences have been imposed on 143 offenders under the age of 18. Forty-six inmates, who are all male, remain on death row. Nine inmates who were children at the time of the crime have been executed.

The large majority of children sentenced to death or executed suffered from extremely deprived backgrounds; were seriously physically or sexually abused; suffer from mental illness or brain damage; are of low intelligence or mentally retarded; have parents with histories of mental illness, alcoholism, and drug abuse; or abused drugs or alcohol from a young age. In many cases, juries were never told of this information and thus could not use it to help determine the sentence.

For example, Joseph John Cannon's jury in Texas was never told about his extensive psychiatric problems and his long history of injury and abuse. After being hit by a truck at age 4, he suffered a fractured skull, broken leg, and perforated lungs. He spent 11 months in the hospital, and his mother put him in an orphanage when he was released. His head injury made him hyperactive and unable to speak clearly until he was six. His school expelled him from first grade, and he received no further formal education. Before Cannon was ten, he began to sniff glue, solvent, and gasoline, which led to organic brain damage. He was diagnosed as schizophrenic and treated in mental hospitals from an early age. In addition, he was sexually assaulted by his stepfather when he was seven and eight. His grandfather regularly sexually abused Cannon from the time he was ten until he was seventeen. He suffered from severe depression most of his life

and attempted suicide when he was fifteen by drinking insect spray. Cannon was sentenced to death and remains on death row in Texas.

James Terry Roach pleaded guilty to murdering two teenagers when he was 17. Despite psychiatric testimony that he had the mental age of a twelve year old and suffered from a personality disorder, and although the trial judge found that he acted under the domination of an older codefendant, Roach was sentenced to death. Shortly before he was scheduled to be executed, a neurologist discovered that he suffered from Huntington's disease, a hereditary disease that likely affected his mental state at the time of the crime. Nevertheless, South Carolina electrocuted James Terry Roach on January 10, 1986.

Johnny Frank Garrett was 17 when he was convicted of capital murder in Texas and sentenced to death. After being put on death row, he was diagnosed with paranoid schizophrenia. This illness manifested itself in auditory and visual hallucinations, including conversations with a dead relative, who Garrett believed would save him from lethal injection. Shortly before he was executed, his symptoms became even worse. In addition to the hallucinations, he suffered from delusional beliefs, paranoid ideation, and a belief that he was controlled by external forces. He was also diagnosed with severe dissociative disorder, and multiple, independent personalities and personality fragments, which resulted from repeated sexual abuse as a child. Johnny Frank Garrett was executed by the state of Texas on February 11, 1992.

Despite opposition from groups such as the American Bar Association, the Inter-American Commission on Human Rights, and Human Rights Watch, the United States continues to sentence to death and execute children.

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