USA

ANOTHER BRICK FROM THE WALL

CONNECTICUT ABOLISHES DEATH PENALTY, AND NORTH CAROLINA JUDGE ISSUES LANDMARK RACE RULING, AS MOMENTUM AGAINST CAPITAL PUNISHMENT CONTINUES

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If the death penalty is not a deterrent, and it is not, and if the death penalty does not make us safer, and it does not, then it is only high-cost revenge
Florida judge, April 2012[1]

Another brick has been removed from the USA's death penalty wall, with Connecticut becoming the country's 17th abolitionist state. On 25 April 2012, the state governor signed into law a bill abolishing the death penalty.

Connecticut's move is further evidence of a trend away from the death penalty in the USA – this is the fourth state in five years to legislate to abolish capital punishment, in addition to the demise of the death penalty in New York State.[2] There also appears to be some momentum against the death penalty in a number of other states – for example, a majority of Maryland legislators are believed to favour abolition,[3] the Oregon governor has imposed a moratorium on executions and called on the legislature there to reconsider the death penalty, and some 800,000 citizens in California – the state which accounts for one in five of the USA's death row inmates – have endorsed putting abolition to the popular vote. As a result the choice to repeal the death penalty will now be on the ballot for California voters at the general election on 6 November 2012.[4] If the initiative is passed, the state's death penalty will be replaced by life imprisonment without the possibility of parole, repeal will apply retroactively to the more than 700 prisoners already on the state's death row, and a fund of US$100 million will be created for use by law enforcement agencies in investigating murders and rape.[5]

18 down, 35 to go

Abolitionist

Alaska; Connecticut; Hawaii; Illinois; Iowa; Maine; Massachusetts; Michigan; Minnesota; New Jersey; New Mexico; New York; North Dakota; Rhode Island; Vermont; West Virginia; Wisconsin; District of Columbia

Retentionist

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

If the California initiative is approved, this will be the biggest chunk of the USA's death penalty edifice to fall in the past 40 years. Even if this were to happen, however, there would still be a long way to go before the USA joins the majority of countries that have turned their backs on judicial killing. For the death penalty appears relatively more entrenched in a number of states, particularly across the southern region. There have been 17 executions in seven states already this year.[6] There have been nearly 700 executions in the USA since the turn of the century – only six of which were carried out in California, compared to the more than 360 that have been conducted in Oklahoma and Texas, for example. Indeed it is possible that in 2012, the combined total of executions since 1977 of just three states – Texas, Oklahoma and Virginia – will reach 700. It currently stands at 688, out of a national judicial death total of 1,293 (53 per cent). And at the national level, while there has not been a federal execution for nearly a decade, the US administration is adding to its regular pursuit of death sentencing in domestic cases in federal court by moving towards its first capital trials by military commissions held at the US Naval Base in Guantánamo Bay, Cuba.

Nevertheless, the new law in Connecticut – which follows the passage of similar bills in New Jersey (2007), New Mexico (2009) and Illinois (2010) – shows that the wind is blowing in an abolitionist direction across at least parts of the country. Coming on top of a two-thirds reduction in annual death sentences in the USA since the mid-1990s, a halving in the annual judicial death toll since 1999, and the removal by the US Supreme court during the past decade of children and people with certain mental disabilities from the reach of the executioner, such legislative activity appears to be part of a general cooling in the USA's relationship with the death penalty compared to earlier decades.

In North Carolina, which accounted for five per cent of the USA's executions in the decade from 1997, there have been no executions since 2006. While this court-ordered suspension in state killing comes in the context of litigation over lethal injection issues, a halt to executions was what many in North Carolina had called for prior to this. Under a two-year campaign launched by People of Faith Against the Death Penalty (PFADP) in 1999, over 1,000 businesses and community groups, more than three dozen local governments, and more than 50,000 North Carolinians, had endorsed a moratorium. Today the PFADP continues to work for abolition.[7]

The abolitionist cause in North Carolina was done no harm when, on 20 April 2012, a state judge handed down a landmark ruling under North Carolina's Racial Justice Act (RJA), overturning a death sentence on the grounds of systemic racial discrimination in jury selection in capital cases. By coincidence, the decision came just two days before the 25th anniversary of the US Supreme Court's *McCleskey v. Kemp* ruling of 22 April 1987. For the past quarter of a century, in the general absence of legislation like that taken in North Carolina expressly allowing such challenges, the *McCleskey* ruling has reached down over the years to block judicial remedy for systemic racial bias in the capital justice system.

As an organization that unconditionally opposes the death penalty, in every case and every country, Amnesty International welcomes Connecticut's decision to abolish this punishment. On 5 April 2012, by 20 votes to 16, the Connecticut Senate passed a bill replacing the death penalty with mandatory life imprisonment without the possibility of parole. Six days later, the state House of Representatives took the same step by 86 votes to 62. Governor Dannel P. Malloy immediately pledged that he would sign the bill into law "when it gets to my desk", adding that his state would be joining "16 other states and almost every other industrialized nation in moving toward what I believe is better public policy". He made good his pledge on 25 April 2012.

The statements made by the governors of New Jersey, New Mexico, Illinois and now Connecticut when signing abolitionist bills in their states over the past five years echoed each other in their recognition of why the death penalty is *and always will be* the wrong policy. Governor Pat Quinn of Illinois said that "our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment". He referred to the "inherent" flaws of the death penalty and the "impossibility" of devising a system that is "consistent, free of discrimination on the basis of race, geography or economic circumstance" and that "always gets it right". He had found "no credible evidence that the death penalty has a deterrent effect on the crime of murder".

In New Mexico, Governor Bill Richardson also questioned the purported deterrent effect of the death penalty, as well as concluding that "the system is inherently defective". To carry out an irrevocable punishment, he said, "we must have ultimate confidence – I would say certitude – that the system is without flaw or prejudice." This, he added, "is demonstrably not the case". In New Jersey, Governor Jon Corzine suggested that "government cannot

provide a foolproof death penalty that precludes the possibility of executing the innocent". The death penalty, he said, had little if any deterrent value, while risking a brutalizing effect through its erosion of "our commitment to the sanctity of life".

After signing his state's abolitionist bill into law with immediate effect on 25 April 2012, Governor Malloy of Connecticut said that his position on the death penalty had "evolved over a long period of time". As a young man, he had supported it; then, during his years as a prosecutor, he had learned firsthand that "our system of justice is very imperfect" and "like most of human experience, it is subject to the fallibility of those who participate in it". He said that he had seen defendants "who were poorly served by their counsel" or "wrongly accused or mistakenly identified", and that he had witnessed discrimination. The end result was that he had come to believe that eradicating the death penalty was "the only way to ensure it would not be unfairly imposed". Governor Malloy paid tribute to the role of those dozens of family members of murder victims who had led the state abolitionist campaign.

The vast majority of those on death row in the USA were convicted under state law in the individual states that have the death penalty. More than 3,000 individuals are on state death rows (including now 13 individuals who remain on death row in Connecticut and New Mexico where the abolitionist laws were not retroactive). The federal government also employs the death penalty for capital crimes under federal law. There are currently 57 federal death row prisoners. In addition, the US military has the death penalty for capital crimes under military law. There are currently six men on military death row, four African Americans and two whites.

1972 – *Furman v. Georgia* – death penalty as applied ruled unconstitutional by the US Supreme Court
1976 – *Gregg v. Georgia* – Death penalty constitutional under revised laws
1977 – First execution
1984 – Military death penalty reinstated
1987 – *McCleskey v. Kemp* – Statistical evidence of racial bias in capital sentencing not ground for constitutional violation without proof of intentional discrimination against particular defendant. The Supreme Court says the matter is one that is best left to legislatures
1988 – Federal death penalty reintroduced
1989 – 100th execution
1994 – Federal death penalty expanded
1998 – 500th execution
2001 – First federal execution
2002 – *Atkins v. Virginia* – execution of people with mental retardation ruled unconstitutional by US Supreme Court
2002 – 100th release from death row on grounds of innocence
2003 – 100th execution of a "volunteer"
2004 – New York State death penalty law ruled unconstitutional by state Supreme Court
2005 – 1,000th execution
2005 – *Roper v. Simmons* – execution of people under 18 at time of crime ruled unconstitutional by US Supreme Court
2007 – New Jersey abolishes death penalty
2007 – 400th execution in Texas since *Gregg v. Georgia*
2008 – 100th execution in Virginia since *Gregg v. Georgia*
2009 – New Mexico abolishes death penalty
2009 – 1,000th execution by lethal injection
2009 – North Carolina passes Racial Justice Act (RJA)
2010 – 1,200th execution
2011 – Illinois abolishes death penalty
2012 – Connecticut abolishes death penalty
2012 – First ruling under North Carolina's RJA, finding systemic discrimination in jury selection in capital cases

Amnesty International regrets that Connecticut's abolitionist law is not retroactive and leaves 11 men on the state's death row, a total that could yet increase if anyone charged with capital crimes prior to the new law being enacted is condemned to death.[8] Governor Malloy suggested that these men "are far more likely to die of old age than they are to be put to death." Nevertheless, these death sentences should be seen within Connecticut as clearly incompatible with the state's abolitionist move. The authorities should desist from pursuing any further death sentences in Connecticut and work

to ensure that no executions of those who fall outside the reach of the new law are carried out and that Connecticut's death row is emptied of inmates as soon as possible.[9]

Connecticut has carried out only one execution since 1976 when the US Supreme Court, in *Gregg v. Georgia*, gave the green light for executions to resume after nearly a decade without them. The post-*Gregg* execution in Connecticut was carried out on 13 May 2005 when the state killed Michael Ross by lethal injection after he had waived his appeals. Prior to that, the last time a prisoner was executed in the state was on 17 May 1960, when Joseph Taborsky was put to death in the state's electric chair. At the time of that execution, nine countries had abolished the death penalty for all crimes. Today, 97 countries are abolitionist for all crimes, and a total of 141 are abolitionist in law or practice. The move by Connecticut's government, and the other states, is clearly consistent with a worldwide trend.

Connecticut was one of 15 US states, in addition to the federal government, which resumed judicial killing after 1976 with the execution of a prisoner who had waived his appeals, a so-called "volunteer". Indeed Governor Malloy said that another factor that had led to him towards supporting abolition was the "unworkability" of Connecticut's capital statute, and he pointed to the fact that the only execution carried out by Connecticut since 1976 was of a "volunteer". This phenomenon – which accounts for more than 10 per cent of the total number of people put to death in the USA since the *Gregg* ruling – had been seen again five days earlier with the lethal injection of a "volunteer" in Delaware in the early hours of 20 April 2012.

In the remainder of this report, Amnesty International looks back on that Delaware execution, setting it alongside the decision by the Oregon governor five months earlier to prevent the execution of a prisoner who had waived his appeals and to impose a moratorium in Oregon. The report also reflects on the most recent execution in Ohio, the first there in six months after a federal judge overseeing litigation on the state's lethal injection protocol refused to issue a stay despite his clear disquiet with the state's past conduct during executions. The report then takes a look at the state court decision issued under the Racial Justice Act in North Carolina, before drawing attention to the failure of the US federal authorities to work for abolition as international standards could be said to expect of it.

Amnesty International reiterates its call on the federal government and the remaining 33 death penalty states to halt executions and set about advancing abolition of the death penalty across the USA as quickly as possible.

UNSEEMLY HASTE: ANOTHER PRISONER-ASSISTED HOMICIDE

Put simply, at some point the State has a right and duty to execute Johnson's lawfully obtained sentence. That point has come; the balance of harms and the public interest weigh against a stay of execution

State of Delaware, Department of Justice, 18 April 2012[10]

In the early hours of 20 April 2012, employees of the State of Delaware strapped Shannon Johnson down in the state's execution chamber and killed him. He was pronounced dead five minutes before the death warrant authorizing his execution ran out at 3am.

The state managed to kill this prisoner at this time because it had his assistance in doing so. Shannon Johnson had given up his appeals against his 2008 conviction and death sentence for the murder of Cameron Hamelin in September 2006 and did everything he could to get to the execution chamber, including by firing lawyers who did not facilitate this goal.

On 24 February 2012, having conducted an evidentiary hearing, the Delaware Superior Court ruled that Shannon Johnson did not have mental retardation (which would have rendered his execution unconstitutional) and that he was competent to waive his appeals. However, Shannon Johnson's half-sister sought a stay of execution, and on 18 April 2012 was granted one by Chief Judge Gregory Sleet of the US District Court for the District of Delaware, who ordered that the stay remain in place until he had been able to examine the arguments and voluminous materials submitted to him. He wrote:

> "[T]he court concludes that it has not had the time needed to consider this important matter in the way that it should. The court also notes that it, the State of Delaware in particular, and the parties involved, have an interest in ensuring that the process that may result in the execution of Shannon Johnson will be able to be judged in hindsight as having complied with the requirements of constitutional due process, as well as appear to the general public, which has a great interest in this issue, to have done so".[11]

The state appealed, however, describing the motion for a stay brought by the prisoner's half-sister as "blatantly obstructionist and legally unsupportable".[12] On 19 April 2012, the US Court of Appeals for the Third Circuit vacated the stay of execution, ruling that Judge Sleet's rationale was "insufficient", particularly in a case where the prisoner himself did not want his execution blocked. The three-judge panel emphasised that "from the time of Johnson's penalty phase [of his trial] to this very day, Johnson has consistently indicated his wish to proceed with his state-ordered execution".[13] It seemed as if it was the prisoner calling the shots, even if it was the state, so to speak, that was holding the gun to his head.

Later on 19 April 2012, Judge Sleets reinstated the stay of execution. He said that the motion brought by Johnson's half-sister had raised at least two issues that warranted further consideration. One was the question of whether the state competency proceeding had been sufficiently adversarial "to satisfy the dictates of constitutional due process" – given that the state, Shannon Johnson and his attorney had all advocated for competency (and hence execution). Indeed, as Judge Sleet put it, "the State wishes to execute Mr Johnson and [his lawyer] agrees they should be permitted to do so", precisely the sort of one-sidedness that invited "arbitrariness and error". At the same time, a lawyer appointed by the state court to advocate against a finding of competency had been curtailed by that court's refusal to order Johnson to meet with this lawyer or his mental health experts.

The second question raised in the half-sister's motion that Judge Sleet said was potentially meritorious was whether, in fact, Shannon Johnson was incompetent as a result of "mental retardation, delusional disorder, brain damage or trauma".[14] The motion pointed to the finding of one of the experts who had testified for the state at the competency hearing that Shannon Johnson believed that his "death will somehow punish those who snitched on him or otherwise betrayed him". The psychologist's notes of his interview with Johnson revealed that, "when pressed for his rationale for waiving his appeals, [Johnson] alluded to something that will harm his son if he remains alive". The psychologist had initially passed a diagnosis of delusional disorder. Shannon Johnson also apparently admitted to the psychologist that he had witnessed and experienced significant trauma, and the psychologist suspected that Johnson had suffered sexual abuse. Possibly linked to this trauma was evidence of depression in Shannon Johnson's background and "a number of reports that he attempted suicide as a child".

In addition, a neuropsychiatrist who reviewed another of the state expert's findings concluded that "it is my professional opinion… that Mr Johnson's cognitive deficits may significantly impair his ability to make a rational as well as intelligent waiver of his right to pursue post-conviction review of his convictions and death sentence". The motion also presented expert

evidence that Shannon Johnson had mental retardation, and that the finding to the contrary in state court had resulted from flawed assessment.

The state again appealed to the Third Circuit, which again vacated the District Court's stay. The Court of Appeals said that there was a lack of evidence to support a finding of Johnson's incompetence to waive his appeals. It said that Judge Sleet had focussed on "side issues" such as whether the state competency proceeding was sufficiently adversarial and the "extent of disagreement among the experts."[15] After the US Supreme Court refused to issue a stay, the execution went ahead. Asked if he had a final statement before being killed, Shannon Johnson responded, "Loyalty is important. Without loyalty you have nothing. Death before dishonour", according to the prison authorities.[16] Johnson had spoken in such a low voice that none of the media witnesses present had been able to hear what the condemned man had said.[17]

One in 10 of the nearly 1,300 men and women put to death in the USA since judicial killing resumed there in 1977 had given up their appeals (see appendix). Four of the first five executions in the USA after 1977 were of "volunteers". Put to death by firing squad, electrocution, and gas, perhaps their personal pursuit of execution made it easier for the USA to return to a punishment that much of the rest of the world was beginning to abandon. Since 1977, 15 US states, and the federal government, have resumed executions with the killing of a prisoner who had waived his appeals.

Any number of factors may contribute to a condemned inmate's decision not to pursue appeals, including mental disorder, physical illness, remorse, bravado, religious belief, a quest for notoriety, the severity of conditions of confinement, including prolonged isolation and lack of physical contact visits, the bleak alternative of life imprisonment without the possibility of parole, or pessimism about appeal prospects. In some cases it appears that the detainee may have committed the crime in order to receive a death sentence. Pre-trial or post-conviction suicidal ideation seems to motivate the decision-making of some such inmates, including some whose backgrounds had left them suffering mental health problems. With such cases in mind, the execution of "volunteers" is often likened to state-assisted suicide. However, "prisoner-assisted homicide" may be a more appropriate description. Given the rate of error found in capital cases on appeal, if the approximately 140 "volunteers" executed since 1977 had pursued their appeals, there is a significant possibility that a number of them would have had their death sentences overturned to prison terms. To look at it another way, the phenomenon of "volunteers" contributes to the arbitrariness that is a part of the death penalty in the USA.[18]

Fifteen per cent of Delaware's executions have been of prisoners who have given up their appeals. After the execution of Shannon Johnson on 20 April 2012, the state's Governor, Jack Markell, issued a short statement in which he said that the death sentence had been "recommended unanimously by a jury, imposed by a judge, and reviewed thoroughly on appeal", and that the prisoner's decision to waive his appeals had been "extensively reviewed" by the courts.[19]

Five months earlier, the Governor of Oregon had taken a very different approach, one far more consistent with human rights principles. Governor John Kitzhaber blocked the imminent execution of a prisoner who had dropped his appeals and announced that he would allow no further executions while he was governor, a term in office that is currently due not to expire until 2015.

Governor John Kitzhaber announced on 22 November 2011 that he was issuing a reprieve in the case of Gary Haugen, a 49-year-old man scheduled for execution on 6 December after

waiving his appeals. A day earlier, the Oregon Supreme Court had ruled by four votes to three that the execution could go forward, narrowly rejecting a petition asking the court to order a new mental competency hearing for Haugen. Oregon has carried out two executions since judicial killing resumed in the USA in 1977 – one in 1996 and one in 1997. Both were of inmates who had given up appeals against their death sentences. Both were executed during Governor Kitzhaber's first term in office.

Governor Kitzhaber said that he had allowed the two earlier executions to go ahead "despite my personal opposition to the death penalty." He said that at that time he had been "torn between my personal convictions about the morality of capital punishment and my oath to uphold the Oregon constitution". Now, he continued, "I do not believe that those executions made us safer; and certainly they did not make us nobler as a society". Today, he said, he could not "participate once again in something I believe to be morally wrong". Not only was he blocking the execution of Gary Haugen "for the duration of my term in office", he said he was refusing to be a part of "this compromised and inequitable system any longer" and that he would allow no further executions while he is governor.

He said that Oregon's death penalty was "neither fair nor just", nor "swift or certain", and that it was a "perversion of justice that the single best indicator of who will and who will not be executed" in Oregon is whether a prisoner "volunteers" for execution by giving up their appeals. He noted that many judges, prosecutors, legislators and victim family members were now in agreement that Oregon's capital justice system is "broken". He also pointed to the fact that in recent years, legislators and governors in Illinois, New Jersey and New Mexico had banned the death penalty, recognizing its unfairnesses, risks, costs and inequities. It is time, he said, for Oregon "to consider a different approach".

Governor Kitzhaber added that it was his hope and intention that the moratorium on executions he was imposing would bring about "a long overdue reevaluation of our current policy and our system of capital punishment" because "we can no longer ignore the contradictions and inequities of our current system". He concluded by saying that he was sure that Oregon could find a "better solution", one that ensures public safety and "supports the victims of crime and their families". [20]

In his statement after signing Connecticut's abolition bill into law on 25 April 2012, Governor Dannel Malloy noted that "As in past years, the campaign to abolish the death penalty in Connecticut has been led by dozens of family members of murder victims". The governor recalled the words of one of them who had been present at the signing and who had said "Now is the time to start the process of healing, a process that could have been started decades earlier with the finality of a life sentence. We cannot afford to put on hold the lives of these secondary victims. We need to allow them to find a way as early as possible to begin to live again."

THE EXECUTED GET NO SECOND CHANCES. UNLIKE THE STATE

This Court is therefore willing to trust Ohio, just enough to permit the scheduled execution
US District Court Judge Gregory Frost, 4 April 2012

The death penalty presumes 100 per cent culpability of the condemned and 100 per cent perfectibility of the justice system to reliably winnow out those who "deserve" to be killed for their crimes from those who do not. It entrusts the state with the power to end an already incarcerated individual's life in a manner, time and location of its choosing. At the same time, the death penalty denies the possibility of reform on the part of the condemned person

or any chance of reconciliation between the wrongdoer and those affected by his or her crimes.

Mark Wiles was sentenced to death in Ohio in January 1986 for the murder of a 15-year-old boy whom he stabbed to death during a burglary in 1985. Mark Wiles was 22 years old at the time of the crime. He was aged 49 when he was killed by the state on 18 April 2012 in its lethal injection chamber.

This was an execution of a person who had cooperated with the authorities after committing murder, who for years had displayed remorse for his crime, who had worked to reform himself in prison, and had sought to contact the family of the victim in order to apologize to them. Was he among the "worst of the worst" the USA says it reserves the death penalty for?[21] How does his case compare, say, to that of Gary Ridgway, who in Washington State in 2003 avoided the death penalty in return for his confession to murdering 48 women. Four judges on the state Supreme Court responded to it by suggesting in 2006 that "The death penalty is like lightning, randomly striking some defendants and not others... No rational explanation exists to explain why some individuals escape the penalty of death and others do not." The other five judges acknowledged that the fact that Gary Ridgway would serve a life sentence, while others would be executed for crimes with far fewer victims had "caused many in our community to seriously question whether the death penalty can, in fairness, be proportional when applied to any other defendant."

Five days after he committed murder, and after apparently contemplating suicide, Mark Wiles contacted the police and said he wanted to turn himself in. After waiving his right to a lawyer, he confessed to the crime. He waived his right to trial by jury, and was convicted and sentenced to death by a three-judge panel.

A quarter of a century later, seeking to have his death sentence commuted to life imprisonment without the possibility of parole, lawyers for Mark Wiles explained that over the years, their client had expressed great remorse for the crime, and that although he wanted to live, he did not believe there were "any excuses for his behaviour" and did not want anything presented that could be interpreted as offering an excuse. This had at times made him a difficult client to represent, for example, making him less than cooperative in having mitigation evidence presented on his behalf. Shortly before his clemency hearing in March 2012, he told the state parole board that he did not know whether he deserved clemency.[22]

At the actual clemency hearing 15 March 2012, as his execution date approached, the state parole board heard evidence from mental health professionals of Mark Wiles' possible serious brain damage and from his various lawyers about their client's long-held remorse. The board also heard about his good conduct and personal development in prison. One of his trial lawyers revealed that Mark Wiles had written to him from death row a few years earlier for his assistance in making contact with the victim's family because he wanted to apologize to them. His attempts to do that, via victim advocacy groups and churches, had been unsuccessful. The trial lawyer said that he had advised Mark Wiles against pursuing such contact with the victim's family as he considered that they would not be receptive to such an approach.

A videotaped statement from Mark Wiles himself was also presented to the parole board, in which he apologized to the victim's family and explained that this would be his final chance to say anything to them. He expressed the hope that if he was executed it would ease their pain. He had instructed that the statement only be presented at the hearing if it had first been sent to the family, which his lawyers did with a letter explaining its contents. The family apparently gave the DVD to the prosecution without viewing it.

Arguing against clemency, the state presented a description of the murder victim, the details of the crime, and its impact on the victim's parents. The victim's family asked the board to allow the execution to proceed, stating that the family had already had to wait too long for justice and that clemency would be "abhorrent" to them. The Board voted against clemency, saying that "remorse, acceptance of responsibility and good institutional conduct" was not enough to warrant clemency. Mark Wiles was put to death on the morning of 18 April 2012 after the governor refused to intervene.

Two days later, in Georgia, the Board of Pardons and Paroles in that state commuted the death sentence of Georgia death row prisoner Daniel Greene to life in prison without the possibility of parole.[23] He had been convicted in 1992 of the murder of a shopkeeper whom he stabbed to death during a robbery of a convenience store in 1991. The Board granted clemency, apparently accepting that the prisoner's remorse, good conduct in prison, and good character were reasons enough for mercy. In a letter to the Board, Daniel Greene had apologized for the pain he caused the victim's family and said, "I was on drugs at the time, but I took the drugs with my hands, and I take the responsibility. That choice to do drugs and what I did after were the worst mistakes of my life. I do not blame the drugs. I blame myself for everything."[24]

Deciding when remorse and reform is enough to warrant mercy will lead, inevitably, to inconsistent outcomes. So it is, too, in relation to any number of decision-making along the way in the capital justice process. To expect consistency would be to presume that human decision-making is an exact science, without any subjectivity, bias, politics, or extraneous pressures coming to bear. Clearly such a presumption would be to ignore reality. As Connecticut's Governor said on 25 April, abolishing the death penalty is "the only way to ensure it [will] not be unfairly imposed2.

The execution of Mark Wiles was the first in Ohio since Reginald Brooks was put to death on 15 November 2011. The Brooks execution was itself the first execution in the state for six months. The breaks in executions came as a result of litigation which had begun in federal court in December 2004 challenging the state's lethal injection protocol.

In July 2011, the US District Court for the Southern District of Ohio blocked executions pending revision of the state's protocol.[25] District Judge Gregory Frost found that through the seven years of the litigation – during which time Ohio had executed some 30 prisoners – the state had repeatedly used its "often teetering" written protocol as "both a sword and a shield" in seeking to stave off a judicial finding that the state's lethal injection practices were unconstitutional. But, the judge continued,

> "after literally over half a decade of litigating the issues that way, it now appears that the state officials involved have decided either to change their minds or to come clean on what the actual beliefs and practices are and not what they have previously told this Court to be true".

The reality in practice, the judge found, was vastly different from the words written in the protocol.

> "Ohio's execution policy now embraces a nearly unlimited capacity for deviation from the core or most critical execution procedures... These core deviations are not mere cosmetic variations from an optional or even aspirational set of guidelines. Rather, the deviations are substantive departures from some of the most fundamental tenets of Ohio's execution policy."

The authorities, among other things, had routinely failed to document the preparation of the lethal injection drugs, failed to follow procedures designed to ensure adequate preparation for their administration by intravenous (IV) injection, and failed to exercise control over who participated in executions. An example of the latter failure occurred during the attempt to execute Rommel Broom in September 2009.[26] After the execution team failed to find a suitable vein in the condemned man, a non-execution team member was brought in. According to testimony before the court, she had tried to start an IV line herself, had failed to do so, apparently hit an ankle bone with the needle in the attempt, and "eventually fled the execution chamber and now expresses concern about her enlistment and actions". Rommel Broom remains on death row, facing the prospect of another date with the execution team.

Judge Frost said that the question for him was whether the documented pattern of core deviations from the state's written protocol was "merely offensive in the why-cannot-government-work sense" but offensive "in the constitutional sense". He ruled that the core deviations from the protocol were "arbitrary and capricious", and thereby unconstitutional, and that to characterize them as inconsequential, as the state suggested, would be "to ignore the reality of what is going on":

> "Ohio pays lip service to standards it then ignores without valid reasons, sometimes with no physical ramifications and sometimes with what have been described as messy if not botched executions. Neither term is sufficient to capture the importance of what is involved here. 'Messy' is child's terminology that undermines the gravitas of state-sanctioned killing. 'Botched' sound perhaps comical and falls far short of what is necessary to describe the risky scenario Ohio's execution process presents."

The state revised its protocol and after it came into effect on 18 September 2011, Ohio moved to resume executions. It proceeded to kill Reginald Brooks, a 66-year-old man diagnosed with paranoid schizophrenia, on 15 November 2011.

Once again Judge Frost blocked executions after finding that the state had failed to adhere to its revised protocol in the Brooks execution.[27] He noted that the state had been in a "dubious cycle of defending often indefensible conduct, subsequently reforming its protocol when called on that conduct, and then failing to follow through on its reforms". He suggested that "It should not be so hard for Ohio to follow procedures that the state itself created."

In February 2012, lawyers for Mark Wiles filed a motion for a stay of his scheduled execution as a part of the litigation on the lethal injection issue. On 4 April, Judge Frost denied the motion, saying that Wiles had "fallen just short" of meeting his burden to show he was entitled to a stay.[28] The judge was highly critical of the state nonetheless. He recalled the Brooks execution and the conduct of the state authorities (the Defendants) in that:

> "*Trust us*, Defendants said, *we will not deviate from the core components of the protocol*. This Court accepted that contention. *Trust us*, Defendants continued, *we will let only the Director [of Corrections] decide whether to allow any potentially permissible deviation from the non-core components of the protocol*. This Court also accepted that statement. Unfortunately, Defendants once again fooled the court".

Judge Frost wrote that Ohio had "routinely offended" constitutional protections in carrying out lethal injections and had "time and again failed to follow through on its own execution protocol", and that while the written protocol itself was lawful, "the problem has been Ohio's repeated inability to do what it says it will do". The question for the court, he continued, was "can Ohio now be trusted?" He concluded:

> "Either this Court should look at Ohio's repeated practices of ignoring its protocol and reforms and never again take the state's word that it can and will perform executions properly or the Court has to be willing to believe that Ohio can reform itself and fulfil its execution duties responsibly, competently, and constitutionally."

The Constitution, Judge Frost said, "does not require a perfect execution", but just that Ohio apply its lethal injection protocol "in a manner that does not offend constitutional protections". He said that while he was "sceptical about Ohio's ability to follow through on its latest reforms", which consisted primarily of "newly implemented chain-of-command and documenting procedures", he was "willing to trust Ohio, just enough to permit the scheduled execution". Mark Wiles was killed by lethal injection two weeks later.

The executed get no second chances. The state, it seems, gets many.

In the end, however, no amount of tinkering with the method of execution or the protocols for carrying out such killings can alter the bigger picture surrounding the death penalty. Strap prisoners down in order to kill them with one brand or type of drug rather than another does not render the act compatible with human dignity or with the possibility of rehabilitation or reconciliation. Execute an innocent person with a bullet instead of by chemical poison, and the error is not eradicated. Kill by noose rather than in the electric chair a prisoner whose death sentence is marked by discrimination, and the unfairness does not die with the condemned. It is still cemented into irreversible permanence.

ACKNOWLEDGING THE ELEPHANT IN THE ROOM

> *It is a widely-accepted truth that race discrimination has historically had a distorting effect on national and state policy in every aspect of our private and public lives, including education, housing, employment, and criminal justice*
> North Carolina Superior Court judge, 20 April 2012[29]

In January 2007, Marcus Robinson, an African American man then aged 33, was less than 24 hours from execution in North Carolina when a judge granted a stay on a question relating to the lethal injection process.[30] Two and a half years later, with executions on hold (as they still are), the state legislature passed the Racial Justice Act (RJA) and on 11 August 2009 the state governor signed it into law.

In January 2012, five years after he narrowly avoided the execution chamber, and 18 years after he was sent to death row, Marcus Robinson became the first person to receive an evidentiary hearing under the RJA. Then, in a ruling issued on 20 April 2012, a state judge overturned his death sentence on the grounds that race had been a significant factor in its imposition.

The ruling serves as a reminder of the historical and continuing role of race in the application of the death penalty in the USA. And while undoubtedly an important decision, it should not be forgotten that it has come too late for numerous prisoners already executed in the state.

By coincidence, the decision in the Robinson case in North Carolina came just two days before the 25th anniversary of *McCleskey v. Kemp*, a US Supreme Court ruling which has laid like a cloud over the USA's capital justice system for the past quarter of a century.

On 22 April 1987, the Supreme Court by five votes to four rejected the appeal of Warren McCleskey, an African American man condemned to death in Georgia for the murder of a

white police officer.[31] The Justices had been presented with a detailed study showing that defendants who killed whites in Georgia were more than four times more likely to be sentenced to death than those who killed non-whites, a probability that was even higher if the defendant was black and the victim white. A majority of Justices held that "apparent disparities in sentencing are an inevitable part of our criminal justice system", and that for a defendant to be successful in an appeal, he or she would have to provide "exceptionally clear proof" that the decision-makers in his or her particular case had acted with discriminatory intent.[32] Absent such evidence of intentional discrimination, statistical evidence of racial disparities in death penalty case could not be used to prove a violation of the constitution, the Court said. Warren McCleskey was executed in September 1991.

More than 1,100 people have been executed in the USA since then, three quarters of whom had been convicted of killing white victims (in a country where blacks and whites are the victims of murder in approximately equal numbers). Twenty per cent of those executed were African Americans convicted of killing whites; two per cent were whites convicted of killing blacks.

The executed include those put to death in North Carolina who today might have been saved by the RJA if they had lived long enough to see it enacted or if the legislature had acted sooner. Harvey Green, for example, was an African American man convicted of the murder of two white people in Pitt County, North Carolina, in 1983. He became the only person to be executed for a crime committed in the state in 1983, although there were 550 other murders there that year. In Pitt County, there were 11 murders; in nine cases the victims were black. Harvey Green's was the only case in which the state sought the death penalty. From 1983 to 1992, there were 88 murders in Pitt County. Over two-thirds of the victims were black. Only four murders were inter-racial. The state sought death in all three cases involving white victims and black defendants. It did not do so in the white-on-black killing. In all four cases in which Pitt County juries returned death sentences between 1983 and 1992, the defendants were black. Appeals for clemency, including on the basis of this evidence of racial discrimination, were rejected and Harvey Green was executed in 1999. Three years later, Desmond Carter was killed in the same execution chamber. He, too, was African American. He had been sentenced to death in 1993 for the murder of a white woman in Rockingham County, where more than half of murder victims were African American. Again, the courts and the clemency authorities allowed the execution to proceed.

The *McCleskey* ruling placed a huge obstacle in the way of death row prisoners seeking to challenge their death sentences in court on the basis of evidence of racial discrimination in the system. In 1994, for example, Girvies Davis, a black man convicted by an all-white jury of the murder of a white victim, appealed on the basis of a study indicating that the murder of a white in Illinois was about six times more likely to lead to a death sentence than the murder of a black, and that a black defendant accused of killing a white was 3.75 times more likely to be sentenced to death than a white charged with killing another white person. The US Court of Appeals for the Seventh Circuit wrote that "our analysis begins and ends with *McCleskey v Kemp*", and rejected the appeal.[33] Davis was executed in Illinois in 1995.

In similar vein, in 2001, the Sixth Circuit Court of Appeals acknowledged that the disparities on Ohio's death row were "extremely troubling", but wrote that "*McCleskey* remains controlling law on the ability of statistically-based arguments concerning racial disparity to establish an unconstitutional application of the death penalty. Although the racial imbalance in the State of Ohio's capital sentencing system is glaringly extreme, it is no more so than the statistical disparities considered and rejected by the Supreme Court in *McCleskey*".[34] The Ohio death row prisoner on whose behalf the challenge had been brought, Alton Coleman, was executed in April 2002 for the murder of a white woman. He was African American.

The *McCleskey* decision said that the issue of death penalty bias was a matter "best presented to the legislative bodies". Legislatures have been slow to act, to say the least.[35] Attempts in US Congress in the late 1980s and early 1990s to introduce a national Racial Justice Act, to allow death row prisoners to challenge their death sentences on grounds of systemic discrimination, failed. Kentucky enacted an RJA in 1998 (limited to pre-trial challenges), and in August 2009, North Carolina passed its version. There have been no other such laws passed in the USA in the 25 years since *McCleskey*.

Under North Carolina's Racial Justice Act, a death row prisoner or capital defendant will prevail on a claim if the judge finds that race was a "significant factor" in the decisions to seek or impose death. Marcus Robinson's challenge brought under the RJA focussed on jury selection in his case (others will be raising claims based on disparities in sentencing based on race of defendant and/or victim).[36] Central to his challenge was a study carried out at the Michigan State University (MSU) College of Law into North Carolina's jury selection practices in capital cases between 1990 and 2010.

Superior Court Judge Gregory Weeks presided over the evidentiary hearing in Marcus Robinson's case at which numerous experts testified, and Judge Weeks issued his 168-page ruling on 20 April 2012. He found the MSU analysis to be "a valid, highly reliable, statistical study" and that its results, "with remarkable consistency across time and jurisdictions", showed that race was "highly correlated" to prosecutorial decisions to peremptorily dismiss African American prospective jurors during jury selection. At jury selection for a capital trial in the USA, each side has the right to exercise a certain number of "peremptory strikes" – the dismissal of prospective jurors without giving a reason. In North Carolina, for example, each side gets 14 peremptory strikes.[37]

Judge Weeks found that, even after non-racial variables were taken into account, "race was a materially, practically and statistically significant factor" in prosecutors' decisions to exercise peremptory challenges during jury selection in death penalty cases in North Carolina during the 20-year period in question, in Cumberland County (where Robinson was tried), and at the Robinson trial itself. The judge said that the statistical evidence was sufficiently strong to make a finding that "prosecutors have intentionally discriminated against black venire [jury pool] members during jury selection" in death penalty cases.

In addition, Marcus Robinson's challenge under the RJA had presented non-statistical evidence to supplement the MSU evidence of racial discrimination, including historical information and information from cases. Judge Weeks found that the evidence "overwhelmingly" supported a finding that race was a significant factor in jury selection across North Carolina, as well as in Cumberland County, at the time of Marcus Robinson's trial. The challenge also introduced evidence from experimental research regarding unconscious bias. Judge Weeks found that this evidence showed both that "actors discriminate without knowledge, and that they unconsciously ascribe non-discriminatory motives to their own actions" and that this "is further confirmation of the likelihood that an individual prosecutor could both simultaneously discriminate against African-American venire [jury pool] members and sincerely and in good faith deny such discrimination."

Under the 1986 Supreme Court decision *Batson v Kentucky*, prospective jurors can only be removed for "race neutral" reasons.[38] Judge Weeks noted that "post-Batson studies of jury selection in the United States show that discrimination against African-Americans remains a significant problem that will not be corrected without a conscious and overt commitment to change". In the *Batson* ruling, Justice Thurgood Marshall, who 10 years earlier had argued that the death penalty was "unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution" and dissented from the Court's decision to allow executions

to resume,[39] wrote that "the inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system." They have not been outlawed, however, and they have repeatedly been seen to have distorted the jury process in death penalty cases, including in North Carolina.

Harvey Green, for example, the African American man mentioned above who was executed in North Carolina in 1999, was twice subjected to what appeared to be discriminatory use of peremptory strikes by the prosecutor. In fact, prior to his 1984 sentencing (he had pleaded guilty), the defence asked the court to prevent the prosecutor from systematically removing blacks during jury selection, which the defence argued was his tendency. The court denied the request. At the subsequent jury selection, the prosecutor peremptorily excluded five of the six prospective black jurors, but only one of 26 white jurors. At his 1992 re-sentencing (his original sentence was overturned because of an erroneous jury instruction at the 1984 trial), Harvey Green faced the same prosecutor and a jury selection process which again resulted in one black and 11 white jurors.

One in five of the 81 African American men on North Carolina's death row as of the end of March 2012 were convicted and sentenced to death by all-white juries (17 of 81).[40] Another 24 per cent had been convicted by juries on which there was only one black juror (19 of 81).[41] Nearly a decade ago, Amnesty International reported that at least one in five of the nearly 300 African Americans executed in the USA between 1977 and early 2003 had been tried in front of all-white juries.[42]

Under *Batson*, if the defence makes a prima facie case of discrimination by the prosecution during jury selection, the burden shifts to the state to provide race neutral explanations for its peremptory dismissal of black jurors. As Justice Marshall wrote in 1990, "*Batson*'s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors... This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice".[43] Prosecutors simply have to come up with a vaguely plausible non-racial reason for dismissing a minority juror.

Michael Sexton, black, was executed in North Carolina on 9 November 2000 for the 1991 murder of Kimberly Crews, white. He was condemned to death by a jury of 11 whites and one black, after the prosecution peremptorily dismissed the only other four African Americans in the jury pool. Asked to explain his actions, the prosecutor said that one of the blacks had not maintained eye contact and "was not forthcoming"; another was "not mature" because of "the way he was dressed", including an earring; and another was rejected as "litigious", having witnessed an accident that resulted in a lawsuit.

Willie Fisher, black, was tried for a 1992 murder before a North Carolina jury also consisting of 11 whites and one black person. At the jury selection, the prosecutor peremptorily removed three African American men from the jury pool. When the defence objected, the prosecutor explained his reasons, which included: one juror was a painter (decorator) and people in his profession frequently have criminal records; one was inattentive during jury selection; and one had studied psychology and sociology at college, and displayed a "liberal attitude". The prosecutor was looking for "conservative" jurors. Willie Fisher was executed in March 2001.

In the RJA case brought by Marcus Robinson, the state sought to rebut his evidence of racial bias "by introducing *Batson*-style explanations for various strikes against African American venire members". For example, the state submitted an affidavit to Judge Weeks that at the 1999 trial of Iziah Barden, the prosecutor had dismissed a black prospective juror because,

asked if he could impose the death penalty, he had spoken very quietly and said 'Well, in some cases' and 'Yes, I think so'. Judge Weeks noted that the state had accepted several non-black jurors who had "expressed similar views and gave nearly identical answers". In another case, the 1995 trial of Darrell Woods, the state submitted to Judge Weeks that the prosecutor had dismissed a black prospective juror because she had "an elementary education degree and vast experience in psychology and the development of children". Judge Weeks noted that the prosecution accepted three female non-black jurors who had worked with children and had degrees and/or experience in elementary education and psychology.

Judge Weeks went through case after case. He found the state's *Batson*-like evidence unpersuasive and indeed that a number of the state's submissions to him "actually support[ed] a finding that race was a significant factor in the exercise of peremptory strikes". The state's own effort to collect evidence to rebut Robinson's had been flawed from the outset, Judge Weeks found, because it had been set up (by the Attorney General's Office) to produce only "race-neutral explanations and denials that race was a factor". In addition, it relied on self-reporting by prosecutors, an unscientific method unlikely to reveal the true influences on decisions "because much of the influence of race on people's perceptions and judgments is unconscious, and even where the actor may be conscious of a race-based decision, there is a strong psychological motive to deny it and search for other 'race-neutral' reasons."

Judge Weeks suggested that the "unfortunately high risk that unconscious bias will lead to discrimination in jury selection could be mitigated by thoughtful, careful, and focused trainings." He noted, however, that "to date, there is no evidence that North Carolina prosecutors have ever engaged in this kind of important training. Instead of training on how to comply with *Batson* v. *Kentucky,* and its mandate to stop discrimination in jury selection, North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson*."

In sum, Judge Weeks' findings on North Carolina's jury selection record in capital cases are damning. He wrote that:

> "In the first case to advance to an evidentiary hearing under the RJA, Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina. The evidence, largely unrebutted by the State, requires relief in his case and should serve as a clear signal of the need for reform in capital jury selection proceedings in the future."

Judge Weeks also pointed to the broader damage, beyond the cases in question, done to society by discriminatory jury selection practices:

> "African-Americans who believe or suspect that they have been excluded from service on account of their race feel burdened and victimized by that experience. Thus, the practice of bias and perception of bias is harmful to individual excluded jurors as well as their families and communities. Excluded African-American jurors in North Carolina are harmed by the experience of not being able to serve on a jury because of race and by their realization that there continues to be resistance to participation by people of color on capital juries. Discrimination in jury selection frustrates the commitment of African-Americans to full participation in civic life. One of the stereotypes particularly offensive to African-American citizens is that they are not interested in seeing criminals brought to justice. African-Americans who have been excluded from jury service on account of race compare their experience to the injustices and humiliations of the Jim Crow era.[44]

> The fact that race discrimination continues in jury selection in capital cases in North Carolina is further supported by statements by attorneys and judges acknowledging that the practice continues and is visible."

The state may yet appeal against Judge Weeks' ruling. Meanwhile, there are about 150 other North Carolina death row cases pending under the RJA. It remains to be seen what the long-term effects of the ruling in the Robinson case will be. While the ruling gives a welcome boost to those who have long pointed to compelling statistical and case evidence of racial discrimination in the application of the USA's death penalty, Amnesty International considers that it should provide further impetus towards abolishing rather than reforming the death penalty. This is a punishment that no amount of tinkering can fix.

When North Carolina's Governor, Bev Perdue, signed the Racial Justice Act into law in 2009, she stressed that she had "always been a supporter of the death penalty" but had at the same time believed it "must be carried out fairly". The Racial Justice Act, she said, would ensure that "when North Carolina hands down our state's harshest punishment to our most heinous criminals – the decision is based on the facts and the law, not racial prejudice."[45]

In death penalty cases where race is an issue, it is rarely the only issue of concern. In Marcus Robinson's case, for example, interviews with jurors after the trial revealed that during the sentencing deliberations, a juror had asked a court bailiff to bring in a Bible. Without either notifying or obtaining the approval of the judge, the bailiff did so. The juror then proceeded to read to other jurors a passage concerning the retributive notion of "an eye for an eye" in an effort to persuade them to vote for a death sentence. The claim on appeal that this introduced an external influence jeopardizing the impartiality of the jury was rejected and a hearing in federal court on the issue denied. In a 2-1 decision of the US Court of Appeals for the Fourth Circuit in 2006, the dissenting judge protested that "the majority ignores the fact that the Bible is an authoritative code of morality – and even law – to a sizable segment of our population." He argued that it would be "blinking (ignoring) reality not to recognize the profound influence that quotations from the Bible could carry in the jury room. Moreover, the specific passage read aloud… bears directly on the severity of punishment to be imposed for a criminal act and expressly requires the death penalty as a punishment for murder."

Abolition is the only solution to the death penalty. Justice Powell, who authored the 5-4 *McCleskey* decision, said after he retired from the Court that he wished he had voted differently in the 1987 ruling, and that he had come to think that the death penalty should be abolished.[46] Since retiring from the US Supreme Court in 2010, former Justice John Paul Stevens has said that there was one vote during his nearly 35 years on the Court that he regretted – his vote with the majority in *Gregg v. Georgia* which he now thinks was an "incorrect decision". It was the *Gregg* ruling that allowed executions to resume in the USA in 1977. Another of the Justices who voted with the *Gregg* majority was Justice Harry Blackmun, who in 1992 announced that he would "no longer tinker with the machinery of death" and that the death penalty "experiment" had "failed".[47] Given that the *Gregg* ruling was passed by seven votes to two, if Justices Blackmun, Lewis Powell and Stevens had voted in 1976 how they later suggested they would have voted had they known how the USA's experiment with the death penalty would turn out, judicial killing would not have been resumed in 1977, if at all.

Abolition, not reform, is the way to go now. North Carolina has now lived for six years without an execution. It can continue to do so permanently. So can other states. The death penalty comes with unacceptable costs and risks, and is unnecessary, cruel, and a part of a symptom of violence rather than a solution to it.

PASSIVE AGGRESSIVE – FEDERAL ACTION AND INACTION

The death penalty continues to be an issue of extensive debate and controversy in the United States

Obama administration, Fourth periodic report to the UN Human Rights Committee, 2011

When the USA's human rights record was scrutinized under the Universal Period Review process at the UN Human Rights Council in late 2010 and early 2011, the US administration rejected the many calls from other countries for the USA to work for a moratorium on executions in the USA with a view to abolition.[48] One of the few areas on which the administration seemed sensitive to criticism of US capital justice was in relation to race. It said that it supported France's recommendation that the USA undertake studies into racial disparities in the application of the death penalty and to ensure "effective strategies aimed at ending possible discriminatory practices".[49]

Similarly, in its fourth periodic report to the UN Human Rights Committee issued in December 2011 in preparation for the Committee's forthcoming examination of the USA's compliance with the ICCPR, the US administration acknowledged that there were concerns about "the overrepresentation of minority persons, particularly Blacks/African Americans, in the death row population".[52] In this regard, it pointed the Committee to the revised federal capital case review protocol issued in July 2011 in an effort to improve decision-making by the US Department of Justice in relation to the selection of death penalty cases.[53]

The protocol states that among the standards to be applied is that "bias for or against an individual based upon characteristics such as race or ethnic origin play no role in any recommendation or decision as to whether to seek the death penalty". In addition, the review of cases by the Capital Review Committee at the Justice Department will "consider all information presented to it, including any allegation of individual or systemic racial bias in the Federal administration of the death penalty". Of course, the protocol only applies to federal cases, not to the vast majority of death penalty cases in the USA that are conducted under state laws, the vast majority of which, like federal law, do not include a Racial Justice Act.

The federal government reintroduced the federal death penalty in 1988. Since then, the US Department of Justice has authorized capital prosecutions of 480 defendants, representing about 15 per cent of the cases in which the death penalty could have been sought. The cases of 273 defendants have gone to trial (in 214 trials). The government has obtained 72 death sentences. Three federal prisoners have been executed (two in 2001 and one in 2003).

Some 57 prisoners remain on federal death row, and there are around 30 pending or in progress at which federal prosecutors are authorized by the US Attorney General to seek the death penalty.[50]

The 480 defendants against whom federal prosecutors were authorized to pursue the death penalty included 243 African Americans (51%), 127 whites (26%), and 88 Latinos (18%).

Of the 57 individuals currently on death row, 61% are non-white. Of the 57 individuals currently on death row, 58 % were convicted of killing whites.

Source: Federal Death Penalty Resource Counsel Project (figures as of February/March 2012)[51]

While the effectiveness of this federal protocol in dealing with any racial bias in the federal system remains to be seen, Amnesty International does not doubt that the federal administration's sensitivity to the occurrence or appearance of racial discrimination in the federal death penalty is genuine. Among other things, knowledge of US history nurtures such

sensitivity. As Judge Weeks noted in his ruling on Marcus Robinson's challenge under the Racial Justice Act, "there is a history of the death penalty being applied in a racially-biased manner", and "the death penalty and lynching have a unique history as enforcement mechanisms for racial segregation and white superiority".

As already noted, Judge Weeks' ruling came a quarter of a century, almost to the day, after the US Supreme Court issued its *McCleskey* decision, so destructive to racial justice. In his dissent from the *McCleskey* majority, Justice William Brennan referred to the US history of racial discrimination and warned against thinking that the USA was now free of it:

> "In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that, in three decades, we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.
>
> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. The destinies of the two races in this country are indissolubly linked together, and the way in which we choose those who will die reveals the depth of moral commitment among the living."

Abolishing the death penalty is one way to demonstrate a society's commitment to life. It is a way to sever the historical links to racist state-sanctioned killing as well as to deal with evidence that racial discrimination continues to infect the capital justice system. In this regard, the moment of abolition is undoubtedly an "historic moment", as Governor Malloy described it after signing Connecticut's abolitionist bill into law on 25 April 2012. Now, he said, Connecticut "joins 16 other states and the rest of the industrialized world by taking this action".

"From an international human rights perspective", said New Mexico's Governor Bill Richardson in 2009 when signing the bill to abolish the death penalty in his state, "there is no reason the United States should be behind the rest of the world on this issue". Two years earlier, his counterpart in New Jersey, Jon Corzine, had signed an abolitionist bill, and described this legislative achievement as "a day of progress – for the State of New Jersey and for the millions of people across our nation and around the globe who reject the death penalty". And on 9 March 2011, Governor Quinn of Illinois asserted that "we are taking an important step forward in our history as Illinois joins the 15 other states and many nations of the world that have abolished the death penalty".

There is indeed no reason why the USA should not join the abolitionist countries of the world, yet the US administration continues to seem reluctant to offer any human rights leadership in this regard. Put under scrutiny at the United Nations Human Rights Council in 2010, it dismissed appeals from abolitionist countries for the USA to join them as reflecting "continuing policy differences, not a genuine difference about what international human rights law requires." This nod of deference to international law should be placed alongside

the fact that the USA continues to maintain that it is bound only by domestic constitutional standards in relation to the death penalty, including who it subjects to this punishment, how it ends their lives, and how long and under what conditions it keeps them on death row before killing them.

While it is true that international human rights law, including article 6 of the International Covenant on Civil and Political Rights (ICCPR), recognizes that some countries retain the death penalty, this acknowledgment of present reality should not be invoked "to delay or to prevent the abolition of capital punishment", in the words of article 6.6 of the ICCPR. The UN Human Rights Committee, the expert body established under the ICCPR to monitor the treaty's implementation, has said that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life".

The USA ratified the ICCPR two decades ago. The federal government's actions and inaction since then to take measures towards abolition constitute a failure of leadership. There are around 57 individuals on federal death row, and now the US administration is moving closer to opening a new chapter in the federal government's use of the death penalty. On 4 April 2012, the Convening Authority for military commissions referred charges against five Guantánamo detainees on for trial as capital, meaning the government can pursue death sentences against them upon conviction.[54] Pre-trial proceedings have continued in a sixth case in which the government is pursuing the death penalty.[55] The USA's military commission system falls short of international fair trial standards. Any imposition of the death penalty after such trials would violate international law, including the ICCPR.

The federal government should change tack. It should abandon the death penalty at federal level, including at Guantánamo, and begin to lead the country away from this cruel and unnecessary policy.

APPENDIX: EXECUTIONS IN THE USA SINCE 1977

Jurisdiction	**Total executions** (to 27 April 2012)	**'Volunteers'**	**% 'consensual'**
* Connecticut	1	1	100%
* New Mexico	1	1	100%
* Oregon	2	2	100%
* Pennsylvania	3	3	100%
* South Dakota	1	1	100%
* Nevada	12	11	92%
Kentucky	3	2	67%

* Washington	5	3	60%
* Utah	7	4	57%
* Idaho	2	1	50%
Montana	3	1	33%
* US Government	3	1	33%
* Indiana	20	5	25%
* Ohio	47	7	24%
South Carolina	43	9	21%
* Maryland	5	1	20%
* Illinois	12	2	17%
Tennessee	6	1	17%
Arkansas	27	4	15%
California	13	2	15%
* Delaware	16	5	15%
Arizona	31	4	13%
Florida	73	9	12%
Alabama	55	6	11%
North Carolina	43	4	9%
Oklahoma	98	7	7%
* Virginia	109	8	7%
Texas	482	28	6%
Mississippi	18	1[56]	6%
Missouri	68	4	6%
Louisiana	28	1	4%
Colorado	1	0	0%

Georgia	52	0	0%
Nebraska	3	0	0%
Wyoming	1	0	0%
Kansas	0	0	n/a
New Hampshire	0	0	n/a
New Jersey	0	0	n/a
New York	0	0	n/a
Total	**1294**	**139**	**11%**

* = Jurisdictions which resumed judicial killing after Gregg v. Georgia (1976) with the execution of a "volunteer"
Shaded rows are states which have abolished the death penalty since 1976

ENDNOTES

[1] Why Florida should abolish the death penalty. By Senior Judge Charles M. Harris, The Gainsville Sun, 18 April 2012, http://www.gainesville.com/article/20120418/OPINION/120419608/1109/

[2] In 2004 in New York State, the death penalty was declared unconstitutional under the state constitution. In 2007, its last death sentence was commuted.

[3] See Maryland's missed chance to repeal the death penalty, Washington Post editorial, 25 April 2012, http://www.washingtonpost.com/opinions/maryland-misses-another-chance-to-repeal-the-death-penalty/2012/04/24/gIQAVRxSfT_story.html?hpid=z3 ("Connecticut is set to become what Maryland should have been: the most recent state to abolish capital punishment… Maryland's lawmakers refused to seriously consider repeal during the recent legislative session. Connecticut's approach may be imperfect, but lawmakers there at least had the fortitude to act.")

[4] Fifth measure qualifies for November California ballot. News release, Debra Bowen, California Secretary of State, 23 April 2012, http://www.sos.ca.gov/admin/press-releases/2012/db12-052.pdf

[5] E.g. see http://www.safecalifornia.org/facts/unsolved ("In an average year in California, over one thousand homicides go unsolved – 46% of homicide cases are never closed – and 56% of reported rapes go unsolved. Killers walk our streets free and threaten our safety, while we spend hundreds of millions of taxpayer dollars on a select few who are already behind bars forever on death row. These resources would be better spent on violence prevention and education, to keep our families safe."). Also The Silent Crisis in California. California Crime Victims for Alternatives to the Death Penalty, 7 April 2010, http://www.californiacrimevictims.org/Publications/The%20Silent%20Crisis%20in%20California.pdf

[6] Arizona (3), Delaware (1), Florida (2), Mississippi (2), Ohio (1), Oklahoma (2), and Texas (5).

[7] See http://www.pfadp.org/

[8] The bill only applies to those arrested and charged with capital crimes after enactment of the law. For

example, at the time of writing, Richard Roszkowski was facing a sentencing hearing in September 2012 at which he could receive the death penalty. He was convicted in May 2009 of three murders committed in 2006. His sentencing was delayed when he was committed to a state mental hospital. On 13 April 2012, a state judge ruled that the defendant was now competent to face the death penalty hearing. See 'Judge: Man competent for death penalty trial', Connecticut Post, 14 April 2012.

[9] Two inmates remain on New Mexico's death row, as the abolitionist law signed by the governor in March 2009 only applied to offences committed after July 2009.

[10] *Johnson v. Phelps*, Respondents-Appellants' motion to vacate stay of execution, In the US Court of Appeals for the Third Circuit, 18 April 2012.

[11] *Johnson v Danberg*, Order, In the US District Court for the District of Delaware, 18 April 2018.

[12] *Johnson v. Phelps*, Respondents-Appellants' motion to vacate stay of execution, In the US Court of Appeals for the Third Circuit, 18 April 2012.

[13] *Johnson v. Phelps,* Order. US Court of Appeals for the Third Circuit, 19 April 2009.

[14] *Johnson v. Danberg*, Order. US District Court for the District of Delaware, 19 April 2012.

[15] *Johnson v. Phelps*, Order. US Court of Appeals for the Third Circuit, 20 April 2012.

[16] Court order to execute Johnson has been carried out. Media advisory, State of Delaware Department of Corrections, 20 April 2012, http://www.doc.delaware.gov/news/12press0420.pdf

[17] Delaware executes killer minutes before deadline, USA Today, 20 April 2012.

[18] See, USA: The illusion of control: "Consensual" executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment, April 2001, http://www.amnesty.org/en/library/info/AMR51/053/2001/en; USA: Prisoner-assisted homicide - more 'volunteer' executions loom, May 2007, http://www.amnesty.org/en/library/info/AMR51/087/2007/en

[19] Statement of Governor Jack A. Markell following the execution of Shannon Johnson, News release, 20 April 2012, http://news.delaware.gov/2012/04/20/statement-of-governor-jack-a-markell-following-the-execution-of-shannon-johnson/. On 17 January 2012, Governor Markell commuted the death sentence of Robert Gattis shortly he was due to be executed. See Amnesty International Urgent Action, USA: Mercy sought as Delaware execution nears, 6 January 2012, http://www.amnesty.org/en/library/info/AMR51/002/2012/en and update http://www.amnesty.org/en/library/info/AMR51/007/2012/en

[20] Governor Kitzhaber issues reprieve - calls for action on capital punishment, Press release, 22 November 2011, http://governor.oregon.gov/Gov/media_room/press_releases/p2011/press_112211.shtml

[21] See, for example, *Roper v. Simmons* (2005), (the death penalty in the USA is for "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.")

[22] Amnesty International Urgent action, USA: Ohio governor to decide on execution, 28 March 2012, http://www.amnesty.org/en/library/info/AMR51/024/2012/en

[23] Parole Board Grants Clemency in Daniel Greene Case, News release, Georgia Board of Pardons and Paroles, 20 April 2012, http://www.pap.state.ga.us/opencms/export/sites/default/index.html?page=index.html

[24] Petition outlines Taylor County killer Daniel Greene's clemency appeal, Columbus Ledger-Enquirer, 18 April 2012, http://www.ledger-enquirer.com/2012/04/18/2017162/petition-outlines-taylor-county.html

[25] *Cooey et al. v Kasich et al,* Opinion and Order, US District Court for Southern District of Ohio, 8 July 2011.

[26] See USA: Ohio execution attempt fails: new date set, Amnesty International Urgent Action, 18 September 2009, http://www.amnesty.org/en/library/info/AMR51/104/2009/en

[27] *In re: Ohio execution protocol litigation*, Opinion and Order, US District Court for the Southern District of Ohio, 11 January 2012.

[28] *In re: Ohio execution protocol litigation*, Opinion and Order, US District Court for the Southern District of Ohio, 4 April 2012.

[29] *State v. Robinson*, Order granting motion for appropriate relief, In the General Court of Justice, Superior Court Division (The Honorable Gregory A. Weeks, Senior Resident Superior Court Judge Presiding), 20 April 2012.

[30] See Amnesty International Urgent Action update, 26 January 2007, http://www.amnesty.org/en/library/info/AMR51/020/2007/en

[31] See also, USA: 'Unconscionable and unconstitutional': Troy Davis facing fourth execution date in two years, 19 May 2009, http://www.amnesty.org/en/library/info/AMR51/069/2009/en

[32] *McCleskey v Kemp*, 481 U.S. 279 (1987).

[33] *Davis v Greer*, US Court of Appeals for the Seventh Circuit, 13 January 1994.

[34] *Coleman v Mitchell*, US Court of Appeals for the Sixth Circuit, 10 October 2001.

[35] In his 1998 report on the USA, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions suggested that the *McCleskey* decision might be incompatible with the country's obligations under the Convention on the Elimination of All Forms of Racial Discrimination, "which requires States parties to take appropriate steps to eliminate both direct and indirect discrimination". E/CN.4/1998/68/Add.3, para 65.

[36] At the trial of Marcus Robinson, arguing for a death sentence before a jury made up of 11 whites and one non-white, the trial prosecutor had pointed to statements attributed to Robinson before the murder that he was going to rob or kill a white person. His appeal lawyers subsequently pointed to cases of white defendants who were sentenced to prison terms in North Carolina for the racially motivated murder of black victims. They pointed to the case of a 27-year-old white man who was convicted of the 1992 stabbing to death and castrating of a black man, whom he referred to as a "nigger". He received a life sentence. In another case, two white men, aged 20 and 21, were sentenced in 1997 to life imprisonment for shooting two randomly-chosen African-American victims.

[37] At Marcus Robinson's trial, the prosecutor used five peremptory challenges against African American would-be jurors – who represented 50 per cent of the blacks in the original jury pool.

[38] *Batson v. Kentucky*, 79 U.S. 476 (1986), Justice Marshall concurring.

[39] *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Marshall dissenting.

[40] Kenneth Rouse, Rayford Burkes, Martin Richardson, Wade Cole, Thomas Larry, Keith East, Russell Tucker, Guy LeGrande, Phillip Davis, Roger Blakeney, Andre Fletcher, Cerron Hooks, Paul Brown, Michael Holmes, Augustine Quintel, Terry Moore (Jathiyah Al-Bayyinah), and Andrew Ramseur. See Footnote 14 of *State v. Robinson* and 'Offenders on death row' at North Carolina Department of Public Safety, http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm

[41] Shawn Bonnett, Terrance Campbell, Frank Chambers, Paul Cummings, Eugene Decastro, Terrance Elliot, Malcolm Geddie, Tilmon Golphin, William Gregory, Alden Harden, Leroy Mann, John McNeil, Jeremy Murrell, Kenneth Neal, Christopher Roseboro, Jamie Smith, John Williams, Darrell Woods, Vincent Wooten. More than half of the Native Americans on North Carolina's death row were sentenced to death by all-white juries or juries on which there was only one African American (4 of 7) Darrell Strickland and Alexander Polke. Daniel Cummings and Jerry Cummings

[42] United States of America: Death by discrimination - the continuing role of race in capital cases, April 2003, http://www.amnesty.org/en/library/info/AMR51/046/2003/en

[43] *Wilkerson v Texas*, 493, U.S. 924 (1990), Justice Marshall dissenting from denial of *certiorari*.

[44] A period in the 19th and 20th century in the USA when state and local laws, known as Jim Crow laws, mandated racial segregation.

[45] Gov. Perdue Signs North Carolina Racial Justice Act, News release, 11 August 2009, http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=554

[46] John C. Jeffries, *Justice Lewis F. Powell, Jr.: A biography*. (1994).

[47] *Callins v. Collins*, Justice Blackmun dissenting from denial of certiorari.

[48] See UN Doc. A/HRC/16/11/Add. 1. Report of the Working Group on the Universal Periodic Review: United States of America. Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the state under review. 8 March 2011 (in particular, see para. 9 rejecting such calls from Russia, United Kingdom, Belgium, Switzerland, Italy, Uruguay, New Zealand, Netherlands, Cyprus, Australia, Hungary, Norway, Slovakia, Turky, Germany, France, Ireland, Holy See, Nicaragua, Algeria, Spain, Denmark and Bolivia).

[49] *Ibid*. para 7.

[50] Most recently, on 26 April 2012 in Atlanta, Georgia, at the federal trial of Brian Richardson, after the jury was unable to reach a unanimous sentencing verdict, the defendant was sentenced to life imprisonment without parole rather than the death penalty for the murder of a cell mate in federal prison.

[51] Federal Death Penalty Resource Counsel Project, http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094. And Declaration of Kevin McNally (Director of FDPRCP) regarding the geographic location of cases, the frequency of federal death sentences and the race of defendants.

[52] Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights, 30 December 2011, ¶ 155.

[53] The protocol is available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm

[54] See USA: Aiming for execution, denying fair trial: Government wants death penalty option at upcoming military commission trials in Guantánamo, 3 June 2011, http://www.amnesty.org/en/library/info/AMR51/049/2011/en

[55] See USA: 'Heads I win, tails you lose'. Government set to pursue death penalty at Guantánamo trial, but argues acquittal can still mean life in detention, 8 November 2011, http://www.amnesty.org/en/library/info/AMR51/090/2011/en

[56] Amnesty International is including the case of Bobby Wilcher, although he attempted to restart his appeals (but was denied and executed). See Amnesty International Urgent Action, 5 July 2006, http://www.amnesty.org/en/library/info/AMR51/105/2006/en, and updates 12 July 2006, http://www.amnesty.org/en/library/info/AMR51/112/2006/en, 16 October 2006, http://www.amnesty.org/en/library/info/AMR51/160/2006/en, 18 October 2006, http://www.amnesty.org/en/library/info/AMR51/162/2006/en