

Report

Investigative Mission

United States of America

The Death Penalty in the United States

I - THE DEATH PENALTY IN THE UNITED STATES IN THE CONTEXT OF NATIONAL AND INTERNATIONAL JURISPRUDENCE	5
II - THE TRIAL	9
III - AFTER THE DEATH SENTENCE	27
IV - MOVEMENTS CAMPAIGNING FOR ABOLITION AND THE MORATORIUM NOW IN PLACE IN ILLINOIS	31
V - CONCLUSIONS	34
ANNEXES	35

INTRODUCTION

The death penalty has been steadily losing ground almost everywhere in the world. A growing number of states - and they now form the majority - have come to recognise its futility and have abolished it. The states comprising the Council of Europe have in recent years made a point of putting on record their radical opposition to this archaic punishment. And yet some pockets of resistance still subsist, holding out against the tide of history. If it is hardly surprising that a totalitarian regime like China continues to carry out executions so zealously, it is all the more astonishing that the United States, which claims to be a democracy upholding the rights of the individual, should still cling to the practice. Japan, Malaysia, Saudi Arabia and others still recognise and carry out the death penalty. And whereas in those countries which have abolished it, its passing is now taken for granted, capital punishment has received little if any critical attention in those countries where it still survives.

It is within this context that the FIDH decided to undertake a series of investigative missions to countries where the death penalty is still in use. Given the considerations in the foregoing paragraph, it made sense to begin the task in the United States. An international team of six (Dany Cohen, Michael McColgan, Daniel Jacoby, Etienne Jaudel, Hafez Abu Se'eda and Pansy Tiakula) was therefore mandated to visit the USA from 9 April to 21 April 2001. The mission was organised in co-ordination with the Center for Constitutional Rights in New York, a body affiliated to the FIDH.

All six members of the mission spent the first few days in New York. They then divided into two groups: Michael McColgan, Daniel Jacoby, Etienne Jaudel and Pansy Tiakula went to Texas, while Dany Cohen and Hafez Abu Se'eda visited Illinois and Washington. The large number of individuals interviewed and institutions visited is listed in Annex 1.

The aim of the mission was to gather as much evidence as possible to be able not only to describe and analyse the system, in particular the process leading to the pronouncement of the death penalty - while at the same time striving to take account of the variables influencing the decision to invoke it - but also to examine the lot of the condemned in the time, usually many years, between sentence and execution. Texas and Illinois were put under particular scrutiny in the course of the analysis, Texas being the state which has amassed the most executions, and Illinois

being the state where the Governor recently declared a moratorium on the death penalty.

After setting the present American situation in its national and international legal context (I), this report will focus on the trial process itself and on the many various issues to which it gives rise in light of the generally accepted rules that obtain in democratic countries (II). This report will then focus on what occurs after the death sentence, before turning its attention to the movements campaigning for the abolition of the death penalty, and the moratorium declared in Illinois.

Authors of this report:

Dany Cohen, Professor at Paris XIII University, lawyer, FIDH Mission officer
Michael MacColgan, lawyer, FIDH Mission officer (Great Britain)
Daniel Jacoby, lawyer, FIDH Honour President (Paris)
Etienne Jaudel, lawyer, former FIDH Secretary General (Paris)
Hafez Abu Se'eda, lawyer, FIDH Vice-President, General Secretary of the Egyptian Organisation for Human Rights (EOHR) (Cairo)
Pansy Tiakula, lawyer (South Africa)

CONTENTS

I - THE DEATH PENALTY IN THE UNITED STATES IN THE CONTEXT OF NATIONAL AND INTERNATIONAL JURISPRUDENCE	5
- Historical background	5
- Right to a fair trial	6
- Prohibition of cruel, inhuman and degrading treatment	7
- The case of Texas	7
II - THE TRIAL	9
A/ The Initial Trial	9
1. The courts' lack of independence and neutrality	9
a) Bias and lack of independence in the Texas criminal justice system	9
b) The influence of racism	13
c) The acceptance in Illinois of serious police misconduct	14
2. Trial procedure and the rights of the defendant	15
a) Texas	15
b) Illinois	20
B/ The Appeal Mechanisms	23
1. Texas	23
2. Illinois	25
III - AFTER THE DEATH SENTENCE	27
A/ Death row and the Execution Chamber in Texas	27
B/ Execution of the most vulnerable condemned prisoners	29
1. Execution of the mentally retarded	29
2. Execution of those who were minors at the material time	30
IV - ABOLITIONIST MOVEMENTS AND THE ILLINOIS MORATORIUM	31
V - CONCLUSIONS	34
ANNEXES	35

I - THE NATIONAL AND INTERNATIONAL LEGAL CONTEXT OF THE DEATH PENALTY IN THE UNITED STATES OF AMERICA

Historical Background

It is to the enduring honour of the founding fathers of American democracy that they should have inscribed within the American Constitution as far back as 1791 most of the elements of the right to a fair trial (the Sixth, Seventh and Fourteenth Amendments) and the prohibition of cruel and "unusual" punishments (Eighth Amendment).

The Sixth and Seventh Amendments guarantee the defendant in a criminal prosecution the right to the assistance of legal counsel, and enshrine the right to be tried promptly and in public by an impartial jury from the State or the District where the offence is alleged to have been committed.

The Fourteenth Amendment forbids the State from depriving any person of his or her life without a trial conducted in conformity with the law and affirms the right of every person within the United States to equal protection before the law.

It should also be remembered, moreover, that the American delegation at the United Nations played a very active role in the drafting, adoption and proclamation of the Universal Declaration of Human Rights (UDHR) by the General Assembly on 10 December 1948, prohibiting cruel, inhuman or degrading treatment or punishment and establishing the right to a fair trial.

ARTICLE 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

ARTICLE 11.1: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

In 1972 the US Supreme Court decreed that the application of the death penalty under the laws of Texas and Georgia constituted cruel and unusual punishment and therefore violated the Eighth and Fourteenth Amendments (Furman judgement). Following this landmark ruling, fourteen states and the District of Columbia (DC) abolished the death penalty. But 35 others decided to revise their criminal legislation with a view to situating the death penalty in a legal framework

designed specifically to eliminate any danger of racial discrimination in trials likely to end in the death sentence.

Four years on from Furman, in 1976, the Justices of the Supreme Court considered the modifications made by North Carolina, Louisiana, Georgia, Florida and Texas to their criminal laws, all of them calculated to reinstate the death penalty. The Supreme Court declared constitutional the changes made by Georgia, Florida and Texas. At about the same time, in *Gregg v. Georgia*, the Court declared that the death penalty *per se* was not unconstitutional. This was the signal for the great majority of states to re-introduce the death penalty into their criminal law. Thirty-eight states as well as the Federal State currently include it in their legislation.

In June 1992 the United States ratified the International Covenant on Civil and Political Rights of 1966 (ICCPR). Two years later, in October 1994, they went on to ratify the 1966 International Convention on the Elimination of All Forms of Racism. But each of these ratifications has been accompanied by important US reservations, some of them in turn criticized by the United Nations Committee on Human Rights.

Moreover, the US has not recognized the rights of individuals to make submissions before either the Committee on Human Rights, a right provided for in the discretionary Protocol relating to Article 1 of the ICCPR, or the Committee on the Elimination of Racial Discrimination, as laid down in the International Convention on the Elimination of All Forms of Racial Discrimination.

Nonetheless, the US has agreed to submit periodic reports to the Committees set up to monitor each of these instruments.

And finally, on 1 June 1977, the US Government signed the American Convention on Human Rights, but has still not ratified it.

The Right to a Fair Trial

The right to a fair trial, recognized by the United States, is made up of a number of elements:

1. The right to equal treatment before the Courts (Fourteenth Amendment, Articles 7 and 10 of the UDHR, Article 14 of the ICCPR, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination).
2. The right to a trial before an independent and impartial tribunal established by law (Seventh Amendment, Article 10 of the UDHR, Article 14-1 of the ICCPR).
3. The presumption of innocence (Article 11-1 of the UDHR, Article 14-2 of the ICCPR).
4. The right to sufficient time and adequate facilities to prepare one's defense (Article 11-1 of the UDHR, Article 14-3b of the ICCPR).
5. The right to defense counsel of one's choice or assigned by the Court (Sixth Amendment, Article 14-3d of the ICCPR).
6. The right to be tried promptly (Seventh Amendment, Article 14-3c of the ICCPR).
7. The right to be present and defend oneself at one's trial (Sixth Amendment, Article 14-3t of the ICCPR).
8. The right not to bear witness against oneself (Sixth Amendment, Article 14-3g of the ICCPR).
9. The right of appeal to a higher court (Article 14-5 of the ICCPR).
10. The right to a public trial (Seventh Amendment, articles 10 and 11-1 of the UDHR, Article 14-1 of the ICCPR).

Focusing on the states of Texas and Illinois, the FIDH mission paid particular attention to the application of the principle of equality before the courts, to the issue of the independence and impartiality of the courts which pass the death sentence, and to the right to a fair trial. Each of these topics will be discussed in this report.

It is axiomatic that in trials where the death penalty is liable to be pronounced, the rules regarding the fairness of the trial must be scrupulously observed. To tolerate even the most minor violation of these rules would be to condone the return

of, at worst, lynch law, at best an arbitrary system such as that rightly condemned by the Supreme Court in *Furman* and denounced by Justice Douglas in the following terms: "It is the poor, the sick, the ignorant, those who have no power and those who are detested who are executed. One looks in vain in the execution records for a single member of an influential sector in society." (408 US 238, 251).

The European Court of Human Rights (ECHR) has cited numerous examples of what it considers to be violations of the right to a fair trial in respect of the issues examined by our mission.

For example, it condemned as a violation of the right to a fair trial both the refusal of the Irish State to grant legal aid for cases of judicial separation and the high costs of proceedings in such cases (*Airey v. Ireland*, Judgement: 10.9.1979).

In October 1984, in *Sramek v. Austria* the Court judged that a "regional authority for property transactions," composed of elected members of Parliament, could not be considered an independent and impartial tribunal. In the same vein, the Court also decided that the Maltese Chamber of Representatives, made up of elected members, could not constitute an independent and impartial tribunal (*Demicoli v. Malta*, 8.27.1991).

Switzerland was condemned by the Court for infringing the principle of equality as a result of a discriminatory action based on sex by the Federal Insurance Tribunal (*Schuler-Zraggen v. Switzerland*, 24.6.1993). A legislative measure which purported to annul an arbitration judgement confirming a State's debt was also deemed by the Court to be a violation of the right to be tried by an independent and impartial tribunal (*Andreadis v. Greece*, 12.9.1994).

On numerous occasions the Court has condemned various European states for failing to provide legal assistance for a defendant in criminal proceedings (*Artico v. Italy*, 5.13.1980; *Pakelli v. Germany*, 4.25.1983).

The Inter-American Court of Human Rights takes a very similar line on the elements essential for a fair trial examined by our mission. Hence, the Inter-American Court has judged that a military tribunal does not constitute an independent and impartial tribunal (*Castillo Petruzzi v. Peru*, 5.30.1999).

As far as the right to a free trial is concerned, the Inter-American Court has adopted the same judicial doctrine as the European Court.

The Prohibition of Cruel, Inhuman or Degrading Treatments

The Eighth Amendment to the US Constitution prohibits the imposition of cruel and unusual punishment; but Article 5 of the UDHR goes further: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Exactly the same terms are to be found in the ICCPR, an instrument binding on the USA, even if the USA has indicated that it interprets them in line with the Eighth Amendment.

The mission set out to establish whether or not the conditions of detention in Death Row, extending over many years, constituted this type of treatment.

The European Court dealt with precisely this kind of issue when examining the cases of Irish detainees held in special interrogation centres. The Court found that certain of the techniques practised in these countries did constitute inhuman treatment (*Ireland v. UK*, 1.18.1978). The issue of whether secret detention in high-security complexes is compatible with the prohibition on principle of all cruel treatment has been submitted to the Court, but so far no decision has been forthcoming.

The Case of Texas

The period immediately after the American Civil War (1861-1865) saw the passage of the Thirteenth and Fourteenth Amendments to the Constitution and the Civil Rights Act of 1871. Slavery and involuntary servitude were outlawed - "except as punishment of crime whereof the party shall have been duly convicted". Texas was one of the many former Confederacy states to exploit this loophole by enacting legislation to establish the Board of Labour. The Board drew up contracts for the exploitation of prisoners, while the prisons themselves came to resemble more and more the slave plantations of old. Physical brutality and segregation were to be the order, not just of the day, but of the next hundred years.

At the same time, in Texan society at large, racism and racist killings - the Ku Klux Klan was formed in the 1860s - became an integral part of the reactionary struggle to keep the recently "emancipated" blacks "in their place", excluded from political, legal, economic and social power. Even in those early days representatives of the "white" Texas establishment adopted a belligerent attitude towards outsiders who questioned the increasing frequency of lynching as a form of (white) popular justice. Senator Richard Coke, explaining the particularly horrific lynching of Joseph Hoffman in Washington

County, Texas, used language, echoes of which are still discernible today:

"It is reserved for the South to have to stand face to face with the black man and solve the problem of joint government and joint residence, and we are solving it. If you will let us alone, we will solve it."

Just how little progress was made in these matters is well documented in *The Rope, the Chair and the Needle*, a study of capital punishment in Texas by three academic lawyers, Marquart, Ekland-Olson and Sorensen.

In 1972, the US Supreme Court, in *FURNESS v. Georgia*, invalidated the existing system or systems of capital punishment. It was not, it has to be said, a clear-cut decision: the majority was narrow, 5-4, and the reasoning behind the judgement was not based solely on a principled objection to capital punishment as such, but rather on the arbitrary nature of the procedures leading to the death sentence. Two of the Justices in the majority, Brennan and Marshall, concluded that capital punishment was cruel and unusual punishment and hence a violation of the Eighth Amendment. Their proposed remedy was total abolition. The remaining three justices were more ambivalent, stressing instead the "capricious" and "freakish" legislative schemes then in existence and calling, in effect, for stricter statutory provisions to eliminate the discretionary power of the jury in particular.

Texas, like its fellow Southern states, was not slow to elaborate a Furman-friendly statute. House Bill 200 came into effect in June 1973, only eleven months after the Furman judgement. Elsewhere in this report, we will deal with the great shortcomings of the new system. Suffice it to say here that the attempt to accommodate Furman has resulted, in Texas, in the bizarre obligation on the jury to predicate the death sentence on legally sanctioned star-gazing, an exercise henceforth sanctioned by the courts.

"What is wanted, and wanting, is an example, one single example in the whole range of civilized law outside of this one statute, that explicitly and in terms makes a person's cruel death depend on a prediction of that person's future conduct."

Charles Black, Capital Punishment: The Inevitability of Caprice and Mistake (1977)

Strangely, this, in our view, disturbing feature, was one of the factors that persuaded the US Supreme Court to uphold the

The Death Penalty in the United States

new Texas statute in the case of *Jurek v. Texas*. Consideration of the offender's "future dangerousness", the Court held, allowed the jury to take into consideration any relevant mitigating or aggravating factors!

In practice, the post-Furman legislation has served to perpetuate much of the race bias that has characterised both legal and extra-legal executions in Texas in the last 150 years. Research has shown consistently that death sentences are most likely to be imposed when the victim of the murder is white, and especially so if the offender or alleged offender is African-American. This is certainly true of those presently on Death Row in Texas, as evidenced not only by the anecdotal accounts of defense attorneys and campaigners, but also by the data released by the Texas Department of Criminal Justice.

It is important to stress, nevertheless, that the bias and prejudice does not come into play only at the "sentencing phase." It begins at a much earlier stage, not in the unsophisticated prejudices of the once-in-a-lifetime jury-man, but at the professional heart of the criminal justice system.

"Discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the death penalty does not begin at trial; it begins in the prosecutor's office."

*Justices Brennan and Marshall in *Degarno v. Texas* (1985)*

Just how that selection process has functioned in Texas is illustrated by the official TDCJ statistics. The first man to be executed under the post-Furman legislation was Charlie Brooks in 1982. Since then 240 people have been executed. In the year 2000 alone, 40 people were put to death by the State, putting it alongside "rogue states" such as Iran and China in its enthusiasm for the ultimate punishment. There were 447 inmates on Death Row on 12 January 2001. Of those, 183 or 40.9% were black, 121 (22.6%) Hispanic, 5 (1.1%) other people of colour, and 158 (35.3%) white. African-Americans and Hispanics make up a far smaller proportion of the total population. The Texas Board of Justice, appointed by the Governor to oversee the Texas Department of Criminal Justice, has nine members, each of whom serves for six years. Eight are white, one is black. In the 254 counties that comprise the State of Texas, there is not a single District Attorney of colour. We acknowledge that statistics cannot tell the whole story, but we dare to suggest that in the context of the criminal justice system they should be, at the very least, a cause for concern.

The mission was received at length by a representative of the State Department. He endeavoured to explain on behalf of the US Government that the attitude of the United States in these matters was in conformity with the treaties it had signed and hence did not fall foul of international law. It should perhaps be pointed out here that this point of view needs to be qualified, particularly when it is recalled that United States has been especially niggardly with its signature on the international documents that already exist. Moreover, our interlocutor maintained that the death penalty was a matter for the individual states and not a federal question, an assertion shown to be false by the execution of Timothy McVeigh¹.

Footnote :

1. Timothy McVeigh was the first federal defendant condemned to death actually to have been executed since 1963, whereas, by contrast, he was the 716th condemned person to be executed in the United States overall since the re-admission of the death penalty in 1976 by the Supreme Court. In the year 2001 alone 32 others preceded him to the execution chamber.

II - THE TRIAL

Since the avenues of appeal are both many and varied, we have chosen to examine them separately (B) from our analysis of the trial at first instance (A).

A/ The Trial At First Instance

Our examination of cases involving the death penalty has highlighted grave shortcomings in respect of the principles governing a fair trial.

On the one hand, the courts are far from providing the requisite guarantees of independence and neutrality, and on the other, our analysis of the trial procedures reveals effectively entrenched violations of defense rights, particularly in the trials of indigent defendants.

1. The lack of independence and neutrality of the Courts themselves

Of the 38 states which have re-established the death penalty in their statute book, 32 acquire their judges and prosecutors by way of elections. In Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia, the candidates for office run for election under the direct patronage and in the colours of a political party.

In only 6 states - Connecticut, Delaware, New Hampshire, New Jersey, South Carolina and Virginia - are the judges appointed for life by the State Governor.

The federal judges are appointed for life by the President of the United States, subject to endorsement by the Senate.

a) Partiality and lack of independence in the Texas criminal justice system

The election of the judges and prosecutors in Texas is manifestly and profoundly political in character.

Candidates for election or re-election, whether they be judges or prosecutors, go on the campaign trail. In order to do so, they have to appeal to support committees for financial backing. The election campaigns, even at the level of judges and prosecutors, are costly business, to the extent that all candidates need to make themselves and their platforms known to the electorate, that is to say, the citizens at the grass

roots. If they are going for re-election, they need to be able to present a balance sheet of their achievements.

According to the information we received during our stay in Austin and Houston, almost half the members of the support committees for judges are lawyers. This in itself is not surprising, but when one takes into account the fact that it is the judges who not only appoint the attorneys assigned to defend the indigent, but also fix their remuneration, it is understandable that small mafias should come into being at election times, anxious to obtain cases and honoraria from the judges once they have been elected.

A certain number of young Texan attorneys, newly admitted to their local bar and eager to introduce themselves to the judge with a view to letting him know they wished to be included on the list of those assigned to such defense work, found themselves rejected because they had not contributed to the fund-raising efforts in support of that particular judge's electoral campaign.

It is not difficult to imagine the kind of collusion which is likely to develop in consequence between a judge who has been elected or re-elected and the attorneys who were part of the committee that supported his campaign. In order to remain on the roster of assigned defense attorneys, they will, in addition to their financial support, have to pledge their docility so as not to make the judge's work too complicated and above all so as to allow him to present, at the end of his term of office, a balance sheet likely to satisfy the repressive appetites of his electorate.

In the June 2000 issue of the "Texas Law Review", given over to the question of elected judges and the death penalty in Texas, Stephen B. Bright, Professor of Law at Yale Law School and later at the University of Kentucky, recalls some edifying anecdotes:

In 1980, Michael J. McCormick, at the time Executive Director of a Texan attorneys' association, stood for election against a Texas Court of Appeal judge who, according to McCormick, "could not be regarded as well-disposed towards prosecutors." McCormick campaigned for "rigorous application of the law," made speeches attacking the legal provisions which allowed the Court to review jury decisions where there had been a fundamental flaw in the case - and won the election.

The Death Penalty in the United States

Bright points out laconically that, throughout the twenty years during which McCormick sat as a judge in the Court of Appeal, there was not the slightest danger of his "being accused of not being well-disposed towards prosecutors."

Four years after his election, McCormick published an article in a legal review, attributing more than a hundred judgements setting aside a lower court's decision to the "fundamental flaw" provision and arguing for the provision to be abandoned.

The following year, the Court adopted McCormick's position and abandoned the doctrine of the "fundamental flaw", replacing it with the tenet that, if the Court was confronted with a flaw, it would have to be "overwhelmingly prejudicial" in order to justify quashing the original verdict.

McCormick, in his role as judge, even went so far as to criticise the decisions of the US Supreme Court stating that the states were obliged to provide defense counsel for poor people accused of crimes. He also opposed the bill prohibiting the death penalty for mentally retarded defendants.

Bright also recounts the story of Judge Campbell, a former prosecutor turned Criminal Appeal Court judge. In a famous case, *Rodriguez v. The State*, the Court set aside the death sentence passed at first instance. A representative of the Republican Party called upon Republicans to replace him for that reason alone. The following year Stephen Mansfield stood against him on a platform promising greater use of the death penalty and sanctions against attorneys who submit what he called "frivolous" appeals, particularly in capital cases.

Before the election was held, Mansfield was exposed : he had lied about his place of birth and his previous political experience. He had been penalised for practising illegally as an attorney in Florida, and, contrary to his claims, he had no experience of criminal cases.

Nonetheless, he was elected with 55% of the votes. It was later discovered that he was responsible for breach of confidence involving \$10,000. He was arrested, but simply reprimanded by the Ethics Commission of the state judges.

Beyond these anecdotes, of course, lies the issue of the independence and impartiality of the courts which pass the death sentence in Texas. They are in effect composed of two bodies elected on a party-political basis - the prosecutor and the judge - and a third element, a jury of twelve people theoretically chosen at random.

The fact that the judges and prosecutors are elected is perverse in itself and results in a profound violation of independence and impartiality of capital-case courts in Texas.

The discretionary power of the prosecutors

As in most European countries, the prosecutors conducting the case have the discretionary power to demand a particular sentence: in Texas, therefore, it is the prosecutors who are the source of the death sentence, if that is the penalty they seek. Of course, they cannot demand the death penalty except for crimes which attract it. But at the same time, the discretionary power that they wield is not subject to any form of judicial or administrative scrutiny.

A similar system operates in most other democratic countries, with the important difference that, in those countries, the prosecutors are not elected, but appointed and represent the Justice Ministry as members of a hierarchy to which they have to answer for their decisions and their professional conduct.

In the *Berger* judgement, a landmark statement of principle dating from 1935, the US Supreme Court made it clear that the prosecutor is the representative, not of an ordinary party in a partisan procedure, but of the sovereignty of the State, with a bounden duty to conduct himself with impartiality from the moment that sovereign state acts on behalf of all. Consequently, his concern in a criminal trial is not to win the case, but to ensure that justice is done. It is therefore his duty both to refrain from all incorrect procedures in order to obtain an unjust guilty verdict, and to use all legitimate means to attain a just finding of guilt.

Unfortunately, the election of prosecutors and their compliance with public opinion, which in Texas as elsewhere calls for tighter security, more repression and sterner sentences, inevitably vitiates the duty to be impartial proclaimed by the Supreme Court.

The examples of prosecution files manipulated by the police in order to incriminate a pre-determined suspect, like the all too frequent use of perjured testimony, demonstrate that some prosecutors will not hesitate to sacrifice their code of impartiality in order to achieve another death sentence.

The Texas Defender Service² recently published a lengthy report entitled *A State of Denial: Texas Justice and the Death Penalty*³. The report identified and analysed 84 cases in which the prosecution's incorrect handling of the investigation had resulted in the death sentence: manipulation, threats

The Death Penalty in the United States

against witnesses, identifications based on hair colour, refusal to carry out blood or DNA tests, concealment of evidence favorable to the defense, the use of witnesses and co-defendants in the wake of financial deals. The urge of prosecutors to win their case so as to be able to present their electors with a high-profile image of themselves as hunters more than outweigh the duty to be impartial spelled out in the Berger judgement.

The consequences are manifestly tragic in a state such as Texas, where a large majority of the population supports the death penalty and where the Black and Hispanic communities are the object of widespread discrimination at the hands of the white majority.

The Interference of the Judges in the Defense of the Poor

As already indicated, it is the judges who appoint the attorneys responsible for defending poor clients in the criminal courts. From the outset they consider the admissibility of a request for a trial attorney appointed by the county on the grounds of the defendant's lack of resources. Since such an attorney costs the county, which is responsible for this kind of legal aid, a good deal of money, judges in the less well-off counties will be more inclined to reject claims for legal aid where they suspect that they are dealing with a defendant who has the means to pay an attorney privately.

The judges' responsibility to the electorate as regards the budget they are allotted for indigent defense obviously tends to make them very frugal and restrictive in the poorer counties.

Likewise, as we have already noted, the judges tend to appoint, more often than not, attorneys who have ingratiated themselves, by contributing financially to their election or re-election campaign - unfortunately with little regard for their competence.

The case of the "sleeping lawyers" is well-known. Three Houston courts have passed death sentences after trials during which the defendant's attorney fell asleep. The Houston Chronicle described one of these trials. The paper points out that the defendant's attorney John Benn spent the whole Tuesday afternoon of the trial in an apparently deep sleep, seated in front of his client accused of a murder incurring capital punishment. His mouth remained open and his head nodded on his shoulders, and then he woke himself with just enough time to straighten and seat himself correctly. Then that began again. And again. And again. Each time he

opened his eyes, a new witness for the prosecution was at the bar describing another aspect of the 19 November 1991 arrest of George McFarland after the robbery and murder of grocer Kenneth Kwan. When finally Judge Doug Shaver pronounced a suspension, he asked Benn if he had really slept through a trial for a murder punishable by the death penalty. 'It's boring,' explained this 72-year-old lawyer from Houston... Some observers said that Benn seemed to have slept during practically the entire trial.

However, the presiding judge in McFarland's trial at Houston authorized the trial to continue, giving as his reason the fact that "the Constitution does not say that counsel has to be awake." The Court of Criminal Appeals confirmed the judgment in spite of the dissenting opinions of two judges, who referred to the [inability] of a "sleeping counsel" to conduct a proper defense, even though a second assigned attorney was present, albeit one not conversant with the trial and therefore equally unable to contribute effectively to cross-examination.

It is true that not all cases are this extreme. Nevertheless, it happens all too often that the attorneys assigned by the judges to act as defense counsel are not capable of providing an effective defense for their clients.

Even so, the US Court of Appeal itself has not accepted the notion that a defendant should receive effective assistance from counsel. In *Strickland v. Washington*, Judge Rubin observed that "the Constitution, as interpreted by the Courts, does not require that the accused, even in a fair trial, should be represented by capable and effective counsel."

To summarise: the election of judges on a political basis, which obliges them to campaign on manifestos and balance sheets and to be concerned with economizing on the budget assigned to them for the defense of the poor, creates a situation which gravely impairs their independence, particularly in states where the majority of the population, poorly educated and still subject to racial prejudice, remains in favour of the death penalty.

In this matter, the mission finds itself at one with the conclusions of Professor Stephen Bright⁴: according to him, Texas has neither an independent judicial organisation, nor

Footnotes :

2. A private, not-for-profit organisation that takes up cases on behalf of indigent prisoners on Death Row.

3. Accessible on the TDS web site: www.texasdefender.org

4. Texas Law Review Volume 78: 1805, p. 1836

The Death Penalty in the United States

an adequate system to assure the representation of poor people. The result: the trials by which poor people are condemned to death are often a farce, a parody, and a scandal for the legal system and legal professionals.

Jury Selection

The five district judges interviewed by the mission in Houston told us that it was not the judges who were responsible for the death penalty, but the prosecutors who sought it and the juries who pronounced it.

It is a fact that in Texas, one in 33 of the 38 states that have retained the death penalty, the jury has not only to determine the facts necessary to prove the charges against the accused, but also to determine - in those cases where the death penalty can be passed - whether those facts warrant the death sentence or life imprisonment.

The composition of the jury is therefore extremely important. In order to meet the requirements of independence, impartiality and equality before the law, the twelve people who make up the jury must be representative of the population of the State which is prosecuting the defendant.

By dint of bias in the selection of jurors, prosecutors, more concerned to win their trial at any cost than to safeguard the principles of equality and jury impartiality, strive to eliminate representatives of minority communities from juries.

The jury in a criminal trial is chosen from a panel of between 400 and 500 people selected among those in the county who are on the electoral roll or have a driving licence. Their fitness for jury service is determined by a commission, generally connected to the court, on the basis of a specially designed questionnaire. One of the first questions concerns the death penalty. Declaring one's opposition to it means automatic rejection.

Those who get onto the panel, the "veniremen", are then subjected to questioning from both prosecutor and defense before being accepted as jurors. Each side is allowed to challenge without cause fifteen "veniremen". Once twelve names have been drawn from the lot and accepted in this "voire dire" hearing, the jury is complete.

It is at the "voire dire" stage that Texan prosecutors, in time-honored manner, attempt to systematically challenge off the jury members of a minority community or those who have indicated verbally that they are opposed to capital punishment.

The Texas Defender Service report retells the story of Henry Wade, District Attorney for Dallas County. Reprimanding one of his assistants in 1950 for having accepted a black man onto a jury, he told him: "*Put another nigger on the jury and I'll fire you.*"

In 1963 Bill Alexander, one of Wade's assistants, wrote a paper on jury selection in criminal trials, warning prosecutors: "*Don't take any Jews, Negroes, wops, Mexicans or members of any minority race, even if they are rich or well educated.*" Not much later Jon Sparling, Assistant District Attorney in Dallas, wrote a memorable memorandum entitled, "Jury Selection in Criminal Trials" (the Sparling memo). It advised prosecutors to exclude from the jury "all members of a minority group that has suffered oppression - they are always liable to sympathize with the accused." Sparling also advised prosecutors to steer clear of women jurors ("I don't like female jurors - you can't trust them"), Jews ("Jewish veniremen generally make bad state jurors ... the Jews have a history of oppression and generally sympathize with the accused") and handicapped people ("Beware of physically handicapped people ... these people generally sympathize with the accused.")

Sparling's advice was still included in the manuals being used by Dallas prosecutors in the 1970s.

In 1985 the Dallas Morning News published the results of an investigation into jury selection in Dallas County. Of 4,434 potential jurors summoned to take part in a "voire dire" for capital trials, 467 black people were accepted, that is just over 10%, whereas the black population of Dallas at the time was 18% of the total. But of those 467 black "veniremen", the prosecutor managed to reject 405, leaving the black community of Dallas represented by 4% of all jurors. The same study indicated that 72% of trials, including 96% of those where the defendant was black, were judged by all-white juries. Black veniremen were rejected by prosecutions five times as often as their white counterparts and twice as often as "latinos"⁵.

Racial discrimination in the selection of juries is not limited to Dallas, but is common in many other counties of Texas. Comparable figures exist for the towns of Montgomery, Texarkana, Houston and Bowie.

Footnote :

5. Texas Defender Service report previously cited, pp. 52-55.

The Death Penalty in the United States

It is hardly surprising, then, that in 1998, taking account of all murder trials across the entire state, only 0.4% of whites were executed for having killed a black, whereas 34.2% of those executed are blacks found guilty of murdering a white woman. It is worth noting that 23% of murder victims in Texas are black and 0.8% are white women.

These alarming statistics demonstrate clearly the degree of inequality before the law between whites and blacks and the extent to which the essential principles of jury independence and impartiality continue to be violated.

b) The Influence of Racism

The United States of America is one of the countries that have ratified the International Convention on the Elimination of All Forms of Racial Discrimination. Yet this country, like many other countries in the world, is struggling with the issue of racism and racial discrimination. This explains the reason why any discussion on the death penalty in the United States of America in general and in Texas in particular is bedevilled by claims of racism and racial bias. The mission received repeated reports of racial bias from defense attorneys and activists who opine that racial disparities manifest themselves in every sphere of the criminal justice system in death penalty cases, from arrest to sentencing. Racial statistics of death penalty cases that were made available to the mission, though not conclusive, seem to confirm this viewpoint. According to these statistics (see Death Row USA - www.deathpenaltyinfo.org) as of 1 January 2001, out of 3,726 death row inmates in the U.S.A, 2,006 (54 %) are minorities (i.e. African-Americans, Latinos, Native Americans and Asians). In Texas, out of a total of 448 death row inmates, 283 (63 %) are minorities (i.e. African-American and Hispanics).

Documented information from the Texas Defender Services reveals a pattern of racial disparities in death penalty cases. According to the TDS (Texas Defender Services) report, these disparities are found in three discretionary aspects of the criminal justice system, namely: "the prosecutor's decision to seek the death penalty; the prosecutor's decision to remove black jurors from capital trials; and the jury's decision to sentence the defendant to die".

The general trend revealed in the report is that the prosecution is more likely to ask for the death penalty in cases involving a white murder victim (especially a white woman) than in a case involving a black murder victim. This conclusion is based on a detailed study of all murders that were

committed in Montgomery County, Texas between 1 January 1995 and 31 December 1999.

The report also reveals that murders of whites were statistically more likely to lead to arrest than that of blacks. For example, during the five years period studied, in cases involving white victims, the rate of arrest was 92% compared to 58% where victims were blacks. Furthermore, cases involving white victims were more likely to proceed to trial than those involving black victims, with 90% of the former going to trial compared to only two cases in respect of the latter.

The reports note that according to the available data from other parts of the state of Texas, the situation in Montgomery County is not too different from the situation in other parts of Texas. The view held being that in Texas generally, the criminal justice system regards the loss of life of a white person to be more important than that of a black person. To underscore this point, the report quotes the view of Professors Sorenson and Marquart of the University of Texas who said "all other things being equal, a Texan who commits the capital murder of a white person is more than five times more likely to be sentenced to death than a Texan who commits a capital murder of an African-American".

The mission noted with interest the reaction of the Director of Capital Litigation Division in the Department of Justice in Texas to the report of the TDS who, while questioning TDS's source of information, nonetheless admitted that more black people were executed in Texas in comparison to white people but attributed this to social and economic conditions of blacks.

While a former judge of the Criminal Court of Appeal (CCA) admitted that the death penalty in Texas was disproportionately applied according to race, the district attorney of the Harris County did not appear to be concerned about this fact. His attitude was that racial statistics were not important to him because of concerns to him was whether a case met the requirements for a death penalty or not. If it does, then he asks for the death penalty irrespective of the race of the defendant.

The mission did not meet any black member of the judiciary but noted from the former judge of the CCA that during his tenure, there was only one African-American judge on the bench, who did not seek re-election when his term expired. The mission further noted information given during the meetings with the Harris County judges that out of 15 criminal

The Death Penalty in the United States

judges in the county, 3 were black and out of 22 district court judges, 4 were black (1 criminal and 3 civil).

The mission received reports from capital defense lawyers of disproportionate number of blacks executed, and they attributed this to racial stereotyping and the perception that young black men were more violent than any other racial group, which resulted in them being targeted for prosecution. The mission also noted their opinion that in the majority of death penalty cases, black defendants are usually defended by white lawyers, and these lawyers might be perceived as not being "too sensitive" to the cases.

The mission observed that amongst a number of activist defense attorneys met, none were black. This was the situation despite the information given to the mission that Houston has a larger number of black lawyers (approximately 10%) than any other part of the state. The explanation that was given to the perceived lack of interest of black lawyers in capital cases was that a demand for their services in corporate law firms was high.

The mission also met members of various abolitionist activist organisations who also confirmed the prevalence of racial disparities in death penalty cases. The view of these members was that the criminal justice system in Texas targeted black, poor and uneducated minorities who are unable to defend themselves. Of note was the view of some of them that African-Americans regard the death penalty as a continuation of slavery and is used to keep the number of black people down. On the other hand, the mission noted with interest the view that African-American elected government officials support the death penalty. The mission was informed that the same applies to the representative of the National Association for the Advancement of Colored People (NAACP) in Texas.

Racism in Jury Selection

The mission received reports of racial bias in the selection of the jury. The report of the TDS states that Texas has a long history of systemic exclusion of black people from jury selection through a process of peremptory strikes. This is a procedure used to determine whether a person is fit and eligible to serve on the jury as a peer. The history of the practice of excluding blacks from the jury in Texas is traced back to the days of the so-called "Sparling memo", cited earlier. This memo was used to train prosecutors on the technique of excluding blacks and other minorities during the jury selection process. Of concern to the mission is the fact

that the 1986 Supreme Court decision of *Batson v. Kentucky* 476 US 79, which held that prosecutors could only remove a black juror by giving a race neutral explanation for the removal, has not changed the practice of removing blacks from the jury on the ground of their race. Resultantly, *Batson's* decision notwithstanding, the number of blacks serving on juries is still relatively low. In the murder trial involving a Hispanic defendant that the mission observed, the jury looked predominantly white. The mission also noted the fact that the presiding judge in this matter remarked on the case when he met with the mission during the adjournment of this case, a behaviour that the mission opines is highly unethical and inappropriate.

Racism in the determination of "Future Dangerousness" of the defendant

In terms of the law that governs capital sentencing in Texas, one of the questions that the jury has to answer in determining whether to impose the death penalty or not is whether a convicted accused poses a future danger to society. This is generally known as the future dangerousness question. According to the reports received by the mission from a number of defense attorneys, studies that have been conducted in Texas point to the fact that in the past white jurors used the race of the defendant as a criterion to answer this question. Furthermore, that whites are more likely to perceive a black defendant as a future danger to society. They often use previous convictions of the defendant to determine his future dangerousness. In a country where reports point to the fact that the incarceration rate of black men is four times higher than that of whites, the likelihood of the jury finding a black defendant to pose a future danger to society is undoubtedly high.

The mission was informed that on 23 February 2001, the Senate Criminal Justice Committee of Texas approved the Racial Evidence Bill. This bill prohibits the use of race in determining whether or not the defendant is likely to commit a crime in future. Although this bill still has a long way to go before it becomes law, the mission is encouraged by it and believes that it is a step in the right direction.

c) Illinois acknowledges instances of grave police malpractice

In Illinois, the problem has been accentuated as a result of certain police malpractices, especially in Chicago. In several cases it turned out that the police themselves had fabricated statements, attributed to the accused, which just happened

The Death Penalty in the United States

to match up perfectly with the evidence gathered in the case. The case of Rolando Cruz, whom the mission met (see below), is a striking example. A major reason why Cruz, having been sentenced to death, was later declared innocent was that one of his lawyers, Professor Larry Marshall, succeeded in proving that the police officer officially named as the one who took down Cruz's alleged confession was in fact, on the day in question, thousands of miles away in Florida.

Cases of torture carried out by the Chicago police are reported regularly - without any subsequent sanctions - and the Chicago press has in recent years largely taken on the role of police mouthpiece. A number of attorneys told us that it is extremely difficult to get allegations of torture even considered, let alone examined, by the judges. One of the very rare cases where the use of torture had to be acknowledged was that of a suspect whom the police had tortured by tying him to a radiator and switching on the power, to the extent that the burn marks on his back corresponded precisely to the gills of the radiator - irrefutable evidence of his ordeal. There have also been reports of suspects under interrogation being suffocated by plastic bags placed over their head. In spite of the frequency of such instances of torture, many of which have occurred in a largely black areas of Chicago, the Courts have not only obstructed the prosecution of the torturers, but have striven every step of the way to prevent defendants, who have been victims of torture, from having a fresh trial. It is no exaggeration to talk of an implicit alliance between prosecutors and police aimed at covering up the actions, however reprehensible, of the latter.

The unreliability of confessions obtained under such duress or torture is obvious, but the system manifests in this respect the failing that derives from the methods employed: as soon as the police have, by one means or another, "proved" the guilt of a suspect, they close the investigation - with the real perpetrator perhaps still at large - and refuse almost systematically, so we were given to understand by a number of informed sources, to reconsider its position, still less to reopen the case. Almost always, the prosecuting attorneys take the same line.

2. Trial Procedure and the Rights of the Defendant

a) Texas

The Criminal Justice System in Texas, as in the whole of the United States, is adversarial rather than inquisitorial in nature. Death penalty trials are presided over by a District Court Judge elected to his or her position for a period of six

years in partisan political elections. The State is represented by the Prosecutor, a District Attorney (DA) or an Assistant DA, whose job it is to put the case against the defendant before the Court. S/he calls witnesses for the prosecution and questions them (in "direct examination") on the basis of statements made previously and disclosed to the defense team before the trial. Forensic evidence, and other material and exhibits allegedly pointing to the guilt of the defendant are also presented to the Court by the prosecutor.

Each prosecution witness can be questioned and challenged by the defense lawyer (in "cross-examination"). S/he may also challenge and attempt to refute the prosecution's case by calling witnesses on behalf of the defendant (themselves subject to "cross-examination" by the prosecutor) and adducing contrary scientific and forensic evidence. There is no place in the adversarial system for a figure such as the examining magistrate ("Juge d'instruction").

Final arguments are presented by the prosecution and defense lawyers (unlike in England, the prosecutor has the last word), before the Judge instructs the twelve-strong jury on their duties. This "jury charge":

- summarises the relevant law;
- explains which issues the jury has to decide;
- advises them on how to deliberate.

The jury then proceeds to consider the evidence with a view to coming to a decision. In Texas, the jury's decision or verdict must be unanimous. If it is not, the outcome is a "hung jury" whereupon the judge has to declare a mis-trial and either the prosecutor decides not to proceed or the case returns to the stage of jury selection in readiness for a second trial.

Texas criminal law permits the death sentence to be imposed for 11 offences, among them murder in the course of a robbery, burglary or sexual assault, and the murder of a child under six. But the death sentence is not obligatory: it is the prosecutor in the case who decides whether or not to seek the death penalty by charging the alleged offence as capital murder. This in itself makes for an unacceptable degree of arbitrariness: not only are there wide variations among the 254 counties in Texas, reflecting individual prosecutors' predilection or distaste for the death penalty, but there is clear and disturbing evidence that a disproportionate number of African-Americans are charged with capital murder and that far more individuals (of all races) are so charged when the victim is white.

The Death Penalty in the United States

The jury in a Texas death penalty trial has a two-fold task. In the "guilt/innocence phase", it determines whether or not the defendant committed the alleged offence. If it finds the defendant guilty and the prosecutor is seeking the death penalty, it then enters what is called the "sentencing phase". It is at this stage that the jury hears evidence of the defendant's character, his personal history and circumstances, his criminal record and his mental/physical condition.

More important, however, are the "special issues" which the trial judge puts to the jury in the form of two, or possibly three, questions. The first, always asked, is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society". This is known as the "future dangerousness" question. The second question, which is put to the jury only where the evidence at trial raises the possibility that the acts of the defendant did not directly cause the victim's death, asks "whether the defendant intended to kill the deceased or another, or anticipated that a human life would be taken".

If the jury's answer is "no" to either question, the death sentence cannot be passed. Instead, life imprisonment is imposed, which means at least 40 years without parole.

If the jury's answer is "yes" to each question, it goes on to consider a third, which is "whether, taking into consideration all the evidence there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment, rather than a death sentence, be imposed" "Yes" to this question triggers a life sentence, "no" the death penalty.

It could be said - indeed, it has been said - that giving the jury responsibility for resolving the "special issues" and hence determining whether a defendant should live or die, democratizes the death penalty procedure. It does nothing of the kind. In the first place, juries in Texas death penalty trials are notoriously and almost always all white as a result of prosecutorial challenges to potential jurors from minorities. Once unashamedly racist (see the infamous memorandum of Assistant DA Jon Sparling, "Jury Selection in a Criminal Trial"), the practice continues to this very day, albeit less overtly. At a conference on the death penalty at the University of Texas in April of this year, Robert Kepple, General Counsel for the Texas District and County Attorneys Association, made it clear to his largely student audience that he was not prepared to countenance any "wild cards" on "his" juries. (At the same gathering, incidentally, John Bradley, Assistant DA of

Williamson County, opined that the quest for 100% certainty - as regards guilt or innocence - "leads to social paralysis"! The dangers of racial bias hardly need to be spelled out here.

Secondly, "future dangerousness" is a concept itself fraught with dangers. In Texas, many of the psychiatric "experts", who testify for the State on the issue, rarely collect or review information about the particular defendant, let alone interview the individual concerned, but rely largely on information provided by the prosecution, on the basis of which they formulate their hypothetical and largely speculative forecasts. The notorious James Grigson, "Dr Death", whose testimony has ensured the execution of numerous defendants, still gives evidence for the state of Texas, despite having been expelled from the American Psychiatric Association in 1995 for his failure to examine the individuals in question and for stating that "he could predict with 100% certainty that the individuals would engage in future violent acts".

If Grigson and his kind are charlatans, the dangers of allowing their testimony to be presented as authoritative are all too obvious. A Supreme Court Justice, Harry Blackmun, said "In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself."

Solemnly affirmed by the Supreme Court in applying the Sixth Amendment to the Constitution, respect for the rights of the defense (due process or the right to a fair trial) assumes particular importance in Texas, as indeed it does in all countries where the criminal justice system is accusatory in character.

In the absence of a procedure which provides for investigation of both inculpatory and exculpatory evidence by an ostensibly non-partisan examining magistrate ("juge d'instruction"), it is largely up to the defense to uncover the evidence that will exonerate the accused or at least attenuate his culpability. This is no mean task when it is the very existence of the accused which is at stake, and it is made even more difficult by the diversity of first instance and appeal proceedings and the complex rules to which they are each subject. The situation calls for attorneys with specialised skills, and demands from them considerable expenditure of time and resources.

But, almost all the crimes which attract the death penalty are committed by men and women who lack the means to pay the

The Death Penalty in the United States

substantial costs which the attorneys are bound to claim, given the inevitable gravity and complexity of the work involved.

In a celebrated leading judgement handed down in 1963 (*Gideon v. Wainwright*), the Supreme Court emphasized that the Constitution "demanded the appointment of an attorney paid from the public purse to assist the poor in criminal cases." And the Court went on: "Every person brought before the Court who is too poor to engage an attorney cannot be considered to have been fairly tried unless he or she has been assisted by counsel (...). That is a necessity, not a luxury." This principle was in fact laid down by the Court as far back as 1932 in respect of capital cases (*Powell v. Alabama*).

Texas itself did not wait for Supreme Court decisions before affirming the right of the poor defendant to benefit from counsel's assistance within the framework of its own constitutional guarantee of a fair trial. As long ago as 1857, the Code of Criminal Procedure specified that, "when the accused is brought before the court, if it is apparent that he has no counsel and is too poor to engage one, the Court will appoint one or more lawyers to conduct his defense." This statement of principle was reaffirmed by Article 1-051c of the Code of Criminal Procedure, which lays down that such legal assistance should be granted as soon as possible.

In spite of its centrality to the notion of due process in all the relevant international conventions, this principle has been applied in Texas in a random manner, due in large part to a historical distrust of centralized power.

Whereas a large number of states in the Union have set up a centralized legal aid system financed by the State, Texas has left the organizing and financing of legal aid for the poor to each of its 457 counties.

Very few of the counties have implemented a centralized legal aid system, let alone worked out annual pay agreements with the law firms that undertake to carry out the work entailed for fixed fees. In almost all of them, it is the local judges who are made responsible for appointing counsel for poor defendants and fixing their honoraria.

This kind of set-up is totally at odds with the right to a fair trial so solemnly proclaimed. It effectively does away with the independence of the attorneys vis-à-vis the court, since they are dependent on it both for their appointment and for their remuneration, and hence have little to gain by being too openly adversarial if they are hoping to be appointed to future cases.

On top of that, the judges themselves, anxious to save public money, rarely provide the financial resources needed to fund an effective defense, especially where capital crimes are concerned.

The consequence is a domain where the judges in each Texas court enjoy wide discretionary powers, starting with the determination as to whether or not a particular defendant is to be considered indigent and therefore entitled to free legal aid.

It is the judges who appoint the two defense attorneys prescribed by the Code for cases where the prosecution seeks the death penalty, and it is the judges who evaluate their competence in criminal cases and fix their honoraria and those of the experts whom they allow to participate in the case.

The attachment of the judges to this exorbitant privilege is one of the chief reasons why so far all attempts to organize a legal aid system at State level have floundered.

The Bill adopted by the Texan legislature in 1999 was vetoed by Governor (now President) George W. Bush on the basis of a hostile petition signed by hundreds of state judges. Even the latest bill, recently introduced by Senator Ellis, the Texas Fair Defense Bill, envisages nothing more than the setting up of a task force composed of judges and members of the legislature, whose only function would be to establish principles in the absence of agreement on a better organized system - which, according to witnesses who spoke to the mission - would not have any prospect of success.

Numerous scandals involving people condemned to death have drawn the attention of American and even world public opinion to the defects inherent in such a decentralized system where the right to a fair trial is at issue. However, it is difficult to gain an overall perspective on legal aid for poor defendants in Texas, since so much depends on the individual personalities of the 800 judges who preside over the criminal courts across the state. Some of them have taken steps to ameliorate the defense of those who come before them accused of capital crimes. And the "Fair Defense Act" will lay down a number of legal rules designed to limit their arbitrary power.

Nevertheless, the lack of independence and insufficient defense resources, both particularly important for defendants facing the death sentence, remains essentially unchanged, which goes a long way to explaining the number of miscarriages of justice that have occurred in Texas.

The Death Penalty in the United States

It is no longer disputed that a number of innocent people have been put to death in the Execution Chamber at Huntsville because they were not effectively represented at trial. Others have been languishing for decades on Death Row in spite of mitigating circumstances which they ought to have benefited from, but which their lawyers were not able to exploit, either because of lack of expertise or inadequate resources. The Bobby Moore story is a case in point (cf. Annex 2).

Incompetent Lawyers

Defending those accused of capital crimes in the USA is fraught with such difficulties, both evidential and legal, that the American Bar Association has issued "Guidelines for the Appointment and Performance of Council in Death Penalty Cases⁶". We quote: "Cases where the death penalty is demanded have become so specialized that the duties and obligations of defense counsel are substantially different from those in other criminal cases. At each stage, counsel has to be au fait with the frequent changes in the law and with the appropriate rules of procedure, and capable of elaborating a strategy and applying it in the charged atmosphere of complex proceedings."

Those who act for the defendant at trial have a two-fold task:

- At the stage where guilt or innocence still has to be established, they have to assess the merits of the investigation carried out and the strength of the case presented by the prosecution in conjunction with the police and its own experts; uncover evidence and witnesses who will undermine the prosecution case and exonerate the defendant, possibly with the aid of other experts whose testimony contradicts that of their prosecution counterparts; uncover evidence and documents which the prosecution are reluctant to reveal and those which their own investigations have brought to light. All in all, a task that demands a great deal of time, money and expertise, all in advance of the hearing itself.

- At the sentencing stage, it is their job to establish whatever mitigating circumstances that might be to the advantage or credit of the guilty defendant, and to contest the issue of his "future dangerousness" - two issues which are central to the applicability of the death penalty and at the core of the "special issues" put to the jury at this stage. It is also incumbent upon those specialist attorneys to have a thorough grasp of post-conviction procedures, especially those relating to "Habeas Corpus", which calls for particular competence in constitutional law and the questions of what constitutes a fair trial and defense rights.

Research carried out in recent years by numerous organizations has revealed that in all too many capital cases the two counsel appointed by the judges possessed neither the necessary experience nor the requisite competence.

True, the Texas legislature did in 1995 impose an obligation on all courts to draw up a list of counsel qualified to take on "capital" cases. But the standards are so low that most of the criminal lawyers in each county can count on being thought suitable for inclusion on the list, since more often than not the sole criterion is the number of years they have been professionally qualified (for many it is just five). Moreover, as an inquiry conducted by the "Texas Appleseed Fair Defense Project" in December 2000 revealed, the judges occasionally nominate attorneys who are not on the list - this is often so in the case of the second defense attorney required for capital cases but frequently appointed only shortly before the actual hearing.

An opinion poll of a large number of judges, prosecutors and attorneys at the Texas bar was carried out towards the end of 1999 and published under the title "Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas." It showed that "the decision to appoint counsel for indigent defendants is often based on factors other than their presence on this list". A third of the prosecutors questioned stated that the judges ask for their agreement before going ahead with the appointment. And although all the judges claimed that they themselves choose experienced lawyers, nearly half of them intimated that their fellow judges often pick attorneys who have a reputation, whatever their experience, for not making trials "drag on". A similar number admitted that their decisions were sometimes influenced by the financial needs of the attorneys.

Personal factors come into play in this appointment process: 39.5% of judges said that personal friendship played a role and the same proportion took into account whether or not appointees were political supporters and had contributed financially to their election campaigns. "They refused to appoint me", said one attorney in Harris County, quoted in the same report, "because I didn't have the means to give the judge money for his re-election campaign".

The Dallas Morning News recently published the results of an investigation into the situation of lawyers in Texas who act for those sentenced to death. It found that they faced on average eight times more disciplinary sanctions than their colleagues.

Footnote :

6. See www.capdefnet.org

The Death Penalty in the United States

It must have been shocking to see a defense counsel sleeping during the trial which led his client onto Death Row, but the response of Judge Doug Shaver of Harris County at the Habeas Corpus hearing was simply : "The Constitution imposes no duty on Counsel to stay awake". Others have ended up being struck off by the bar for drunkenness, drug taking or dishonesty.

Many of these appointed counsel devote very little time to studying their client's case papers and tracking down potential defense witnesses, and moreover consult with their clients only briefly and rarely. The lawyers acting for E. Willis, who was probably innocent of the crime for which he was executed, spent only three hours in total with their client before his trial got underway.

The picture is even more striking in relation to the counsel appointed to appear before the state courts at the Habeas Corpus proceedings. The Texas legislature in 1995 adopted a provision (Article 11.071 of the Code of Criminal Procedure) specifying that the counsel appointed for this essential phase of the proceedings should be "competent" and chosen with the approval of the Court of Criminal Appeals (CCA).

But according to the Texas Defender Service, many of them have neither the necessary knowledge nor the requisite level of competence, and limit themselves to simply reiterating the arguments already dismissed by the judges at first instance. The 103 appeal submissions studied by the TDS lawyers turned out to be particularly skimpy: in some cases less than 30 pages long, whereas experienced counsel would normally expect to have to make detailed submissions running to 150 pages or more. The TDS study comes to the conclusion that "Article 11.071 has in no way improved the appeals procedure for those condemned to death." And it goes on to state that, whereas attorneys from big firms draft lengthy and detailed arguments, often backed by several volumes of appendices, most other attorneys content themselves with arguments that are often in any case inadmissible, showing clearly thereby how little work they have done on the case.

"I would have been ashamed to put my signature on some of those appeals," said one president of the CCA.

Counsel without resources

If the counsel appointed in Texas to assist those at risk of being sentenced to death are sometimes of questionable competence, far more serious is the lack of financial resources made available to them by the counties. That fact alone makes

it impossible for them to guarantee their client an effective defense against the charges he or she faces. Equality of arms is after all an essential element of "due process".

The picture varies from county to county and from judge to judge, but in many counties the fees allowed are not even enough to cover the running expenses of the lawyer's offices, forcing them to work at a loss. Paying counsel at a flat rate or on the basis of time spent does not allow them to devote the necessary time to preparing the case, nor to remunerate the specialists whose assistance is, after all, indispensable, both in the preparation of the case and at the jury trial itself.

Texan law, however, specifies that the fees must be "reasonable" and fixed "in accordance with a scale established by each county".

But the elected judges are all concerned to husband public monies, an effective political argument when it comes to standing for re-election. And besides, they are subject to pressure from those who control the county's purse-strings to limit the sums spent on legal aid. Moreover, they are legally entitled to cut down the fees claimed by the appointed lawyers without giving reasons and without the lawyers having any right of appeal. Their power is likewise discretionary when it comes to nominating and remunerating the experts whose collaboration is sought by the defense - with difficulty, for the same economic reasons.

By contrast, defense lawyers find themselves confronted by prosecution teams consisting of large numbers of lawyers, assisted by full-time investigators and able to call on the assistance of the police and all the experts they need.

Charles Rosenthal, District Attorney for Harris County, who claims to have secured 17 death sentences since becoming DA, has a large chart on the wall in his office which shows him as having under his leadership 230 assistant prosecutors and 60 investigators. What can two badly paid and under-resourced defense lawyers hope to achieve against such odds?

There are in Texas some large law firms which have undertaken to devote some of their resources to "pro bono" work on behalf of poor defendants. This is a service which, because it is costly and demands a large number of fee-paying cases to compensate, is all too rare. All the others are dependent on the modest fees fixed by the judges in accordance with the norms peculiar to each court.

There is an old American saying, "You get what you pay for." In the

The Death Penalty in the United States

area of indigent defense, as we've seen, it's not very much...

A recent investigation by the Texas Bar revealed that the fees fixed by the judges in death penalty cases rarely exceed \$30-\$50 dollars an hour for the leading counsel and \$25-\$40 for the second counsel, whereas the running costs for law firms average out at \$71.30 an hour - which means that not even they are covered. Some judges even go so far as to put a limit on the number of hours for which payment will be authorized (for example, in Bexar, the county which passes the second highest number of death sentences in Texas, it is 60 hours for preparing the case and a fixed sum for each day of the hearing).

The TDS reports, by way of contrast, the case of the Mexican citizen, Guerra, who spent 15 years on Death Row before being acquitted and freed thanks to the work of a well-known law firm which took instructions from the Mexican Consulate and worked largely "pro bono" on the case. The lawyers involved calculated that they had worked for four years on the case and that, had they been paid on the basis of time spent on it, their fees would have amounted to two million dollars!

This denial of adequate resources to the defense has particularly grave repercussions when it comes to the sentencing phase of the trial procedure.

Establishing the "future dangerousness" of the condemned person, which is the key factor in determining whether or not he receives the death sentence, demands detailed investigation into and analysis of his personality.

According to the American Bar guidelines previously cited, counsel representing persons liable to be sentenced to death need to address a wide range of issues if they are to be able to plead mitigating circumstances successfully and thereby avoid the death penalty for their client: his medical history, his education and his capacity for learning, his military record, the jobs he has worked in, his family circumstances, his cultural and religious environment, his rehabilitation prospects, his criminal record, and so on. And for all this counsel needs to produce witnesses, testimonials, expert opinions and all the other documentation necessary to refute the prosecution's case. What is required, in other words, is a mass of evidence compiled with the help of specialists - psychologists, psychiatrists, social workers - which is beyond the means of most counsel representing the poor.

Such expert help is all the more necessary given the frequent unreliability of the so-called experts produced by the prosecution, many of whom appear to be concerned only to

support the line of those who engage their services. (These are the "phony experts" - denounced by defense lawyers - such as the "psychiatrist" known as "Doctor Death" because of the number of times his testimony for the prosecution has sent condemned defendants to Death Row.)

Most states which have set up a centralized system of legal aid, such as New York, include in the scheme a raft of experts whose services are available to defense attorneys. Nothing of the kind exists in Texas, and as a result the defense is denied the resources it needs to fulfill this vital function.

Signs of change

The numerous scandals which have resulted in innocent persons being put to death in the Execution Chamber at Huntsville have at long last prompted a reaction in Texas.

Efforts are now being made here and there to ensure that counsel representing defendants at risk of the death sentence have the requisite competence.

The judges in Harris County have organized a three-day training session for lawyers on the "capital cases" list. And the questionnaire which all those desirous of being appointed to act in capital cases are obliged to complete makes it compulsory to provide details of their professional experience (cf. Annex 2). But this is not the situation in many of the state's counties less subject to the glare of public opinion.

The legislature in Austin looks certain to make a contribution out of state funds to the counties' legal aid budget, but ultimately it is the local authorities themselves who will remain responsible for the way the money is spent.

More is needed to stem the tide of what is a veritable "homicidal rage" on the part of so many of those responsible for prosecuting in Texas. For them, whether out of conviction or for electoral reasons, all means of dispatching criminals to Huntsville are acceptable. What is more, they are confronted by defense lawyers who are often incompetent and always under-resourced, large numbers of racially prejudiced jurors and judges concerned with their electoral reputation. It is truly justice denied.

b) In Illinois

Prior to the Supreme Court's 1972 restriction on cases punishable by death, the last execution in Illinois had taken place in 1964 (James Dukes, electric chair).

The Death Penalty in the United States

Trial Procedure

The trial procedure liable to lead to the ultimate penalty has certain specific features, which are important first because they can influence the outcome, and then because they demonstrate a flagrant inequality of arms as between prosecution and defense.

First, it is up to the prosecutor to decide - and it is a matter for his discretion - whether or not to demand the death penalty. If he does so, the subsequent hearing will follow specific rules. Hence, the prosecutor's choice has important practical consequences. Until very recently, the prosecutor was not obliged to reveal his / her intention in advance, which meant that the defense did not know until the very last minute which regime was going to govern the actual hearing.

Once the prosecutor has established the existence of aggravating circumstances and the adult status (over 18) of the defendant at the material time, and once he has decided to call for the death penalty, it becomes possible for him, contrary to normal evidential standards, to utilize almost anything as evidence against the defendant. For example, vague circumstantial evidence which in normal times would clearly have no probative value can be brought into play. This exceptional rule considerably extends the range of what is regarded as admissible evidence: even, for instance, the image of a defendant formed by his teacher when he, the defendant, was only six years old. There is a manifest paradox: from the prosecutor's point of view it is better to demand the death penalty since the demand in itself makes his task easier in that he is then allowed to adduce as evidence what in normal "non capital" cases would be nothing more than circumstantial factors of no probative weight.

Deficiencies in the system of indigent defense

If the defendant does not have the means to pay for an attorney, the Court will assign him one, but one whom he is not free to choose. Up until 2000, there was no precise rule in Illinois as to the payment of court-appointed lawyers, and neither experience nor specialization was demanded of those assigned to capital murder cases. As a result, counsel who had not done any criminal work for 30 years would find themselves appointed to cases where the death penalty was invoked. In 2000, the system was reformed and counsel was now required to have at least 5 years experience in criminal law. Moreover, there are now always two counsel appointed to act for the defense. On the other hand, there is still the lack of choice for the person too poor to pay for a lawyer himself.

The issue of fees for appointed lawyers in Illinois was until very recently a problem of such magnitude that it constituted a severe infringement of the right to due process. The present position is markedly better. Until two years ago, the appointed attorney in a death penalty case would receive 40 US\$ an hour, a very low figure considering the running costs of a law firm, but absolutely derisory when it is remembered that, within the accusatory system that operates in the USA, the defense needs, if it is to be effective, to be able to carry out often lengthy investigations, employing for the purpose one or more researchers, who have to be paid out of the 40 US\$ granted to the lawyer by the state. It was clearly not enough, and it meant that the lawyer could not undertake serious investigations without financing them out of his own personal funds.

Two years ago, the hourly rate was raised to 125 US\$, with further provision for the appointment of a researcher. It is, however, important to bear in mind that this improved scheme of public funding is a provisional measure, in place initially for two years and at present not guaranteed to be renewed.

The trial proceeds in two stages: one dealing with culpability, the other with the sentence. The defense has a choice: it can ask for sentence to be pronounced by the jury which found the defendant guilty, or it can ask for another jury - or even a single judge - to pass sentence.

It would be useful at this point to give a concrete illustration of the way the system functions. While in Chicago, the mission met two men who had been condemned to death before finally being acquitted, one, Rolando Cruz, after twelve years, the other, Gary Gauger, after two.

Rolando Cruz

Rolando Cruz, an American-Mexican with strong Mexican physical features, was arrested in 1983, when he was 19, and charged with the abduction, rape and murder of a 10-year-old child. He consistently protested his innocence, but the police submitted an alleged confession to the court giving all the details of the crime. Cruz, coming as he did from a poor background, did not have the means to pay for a lawyer and was therefore defended by an appointed counsel.

After two years of hearings - during which time he was remanded in custody - he was found guilty without any mitigating circumstances and sentenced to death. The prosecutor had described the rape of the victim with a wealth of details, provided, so he claimed, by Cruz himself. At the age of 21, then, Cruz found himself on Death Row.

The Death Penalty in the United States

Meanwhile, a man already guilty of several murders and sexual attacks, confessed to six rapes and murders, among them the one for which Rolando Cruz had been sentenced. Rather than prosecute this man, the prosecutor decided to carry on with the charge against Cruz, and although at the first appeal, the initial death sentence was quashed, Cruz was re-tried, found guilty once more and condemned to death for the second time.

In part, this situation came about as a result of the attitude of the police, who regarded any reconsideration of Cruz's initial conviction as an unacceptable climb-down. It later transpired that the confession statement in which Cruz allegedly provided all the details of the crime did not correspond at all to any statements which he had made. The document had been fabricated by the police, who had put into it everything that seemed plausible in the light of what they had established in the course of their investigation. It is not difficult to see, therefore, why the document should have matched so completely the evidence gathered at the scene.

Proving that Cruz's so-called statements were in reality fabricated fell to his last lawyer, Professor Lawrence Marshall of the Northwestern University, Illinois, who was able to establish that the police officer supposed to have taken down the defendant's admissions was actually thousands of miles away from Chicago on that particular day - in Florida!

This confirms, if indeed it is necessary to do so, just how far the police of this state were prepared to depart from acceptable standards of practice, even to the point of consigning someone to the ultimate penalty whom they must have known and who was later shown to be innocent.

But proven malpractice and a fierce determination to avoid a reconsideration of the case, even if it meant the death of an innocent man, were not restricted to the police alone. The prosecutors in the Cruz case deliberately ignored material evidence and hung on to the bitter end to the notion that he was guilty. Several other cases were brought to the attention of the mission which betray a similar attitude on the part of the prosecution.

To summarize: Rolando Cruz was arrested at 19 and convicted twice of crimes which he had not committed, spent twelve years behind bars, ten of them on Death Row, and did not regain his freedom until he was 31.

One might have expected such wrongful convictions to have raised at least some doubts and led to a more cautious

attitude vis-à-vis capital punishment. But that is far from being the case in certain quarters. The most committed champions of the death penalty, such as District Attorney Kunkla, do not deny that miscarriages of justice sometimes occur, but they argue that that is a price that has to be paid. Just as, they say (and the comparison is frequently made), one has to expect some essential goods being transported by road to be damaged en route, so one has to expect accidents in the criminal justice system which entail the life of a human being.

Gary Gauger

Gary Gauger lived with his wife and parents in a rural area outside Chicago. The family were farmers.

One day he discovered the bodies of his mother and father. They had been murdered. He contacted the police, who immediately suspected him. This simple man was arrested on 1 April 1993 at the age of 40, imprisoned and charged with the double murder. After 18 hours of interrogation - throughout which he protested his innocence - the police fabricated an unsigned confession. The prosecutor, as is common in the American system, offered him a deal: plead guilty and you won't get more than 15 years in prison. Gary Gauger turned the deal down. At the conclusion of a trial in which he was defended by a court-appointed attorney - under material conditions similar to those described earlier - he was found guilty and condemned to death, still protesting his innocence.

His new lawyer submitted an appeal on his behalf in February 1996. In June of the same year, in spite of the unyielding opposition of the District Attorney's office, the Appeal Court decided that he had been unlawfully arrested and that the "confession" attributed to him was worthless. A year after his acquittal, the two killers of his parents were arrested, and one of them confessed.

We have focused particularly on these two cases, although there are a hundred other examples relating to the same period in the US, because members of the mission were able to meet and talk with these two men for several hours and hence obtain a very detailed view of their cases.

The Death Penalty in the United States

In Illinois alone, ten people condemned to death have been officially declared innocent in the course of the last twelve years. Of those ten, six were black and two Hispanic. There is no reason to think that this figure of ten is exhaustive. One has to bear in mind:

- that the re-examination of a case is an enormous and complex undertaking;
- that it has frequently been done on a "pro bono" basis by teams of young lawyers or students acting under the guidance of a university professor;
- and that this kind of work is not undertaken, except in very rare cases, on behalf of people who have already been executed.

That is to say, work of this nature can only be carried out exceptionally, which means that the cases which are actually re-examined represent only a tiny fraction of decided cases. It is more than reasonable to assume that the true figure for miscarriages of justice is much higher than it appears to be.

Faced with this series of wrongful convictions, a number of concerned individuals, mainly academics, set up organizations to investigate them. The Center on Wrongful Convictions came into being in 1999 at Northwestern University, with the aim of rectifying miscarriages of justice and educating the public (especially students). The Center later joined with the Cardozo Law School in New York to establish the Innocence Project.

In similar vein, the Center for Justice in Capital Cases was created in July 2000 at De Paul University in Chicago under the direction of Professor Andrea Lyon, who as a public defender (attorney appointed by the public authority to defend the indigent) had taken on a series of death penalty cases. The Center functions as a kind of clinic, where Ms Lyon elects to look into a minimum of two death penalty cases at any one time, which she will then work on with her students.

The work involved is of great import and has already led to some progressive responses from the courts themselves. The most significant recent achievement was the securing of an order from a judge that the US government should hand over certain documents which had never previously been disclosed. (They have still not been handed over, incidentally, since the government has refused to comply with the order and has lodged an appeal). The documents involved are memoranda drawn up by federal prosecutors indicating in each case why they demanded the death penalty in some thirty federal cases. The defense teams believe - and the US

government probably fears, which would explain its recalcitrance - that a comparative study of these cases would reveal that there is no rational basis for the prosecutor's decision in this matter and that the process is both haphazard and arbitrary.

B/ The Appeal Mechanisms

a) Texas

The Avenues of Appeal

In spite of the protestations of its apologists, the system of appellate and post-conviction review in Texas, while formally impressive, in reality does little or nothing to repair the damage inflicted on defendants in the lower courts as a result of the flaws and weaknesses described previously.

There are three stages of a post-conviction review:

1. The direct appeal to the Court of Criminal Appeals (CCA);
2. State "Habeas corpus" proceedings;
3. Federal "Habeas corpus" proceedings.

The Direct Appeal

A death sentence passed by the Court of Trial is subject to mandatory review by the CCA. The CCA consists of nine judges, each elected to sit for six years in partisan political elections. At present all nine are Republicans, and most of them are former prosecutors with a reputation for being "tough on crime". The Direct Appeal is based on what is "on the record", in other words, on the transcript of the trial. The defendant may challenge, for example, the judge's decision to admit or exclude evidence, or the improper questioning of a witness. However, the defendant's attorney cannot go "outside the record" except in very limited circumstances, where relevant issues that are not "on the record" have been discovered within 30 days of the trial.

The CCA in recent years has rarely interfered with the procedure and outcome of the trial court, even where it has acknowledged in a published judgment that its earlier decision to affirm a particular death sentence was wrong. (See the cases of Kenneth Granviel and Troy Farris). Where it discovers mistakes in the conduct of the trial, it is prone to resort to the notion of "harmless error" in order to be able to affirm the original verdict. Not surprisingly, most defense

The Death Penalty in the United States

lawyers with whom the mission spoke set little store by this particular appeal mechanism.

State "Habeas corpus" proceedings

These begin in the same Court with the same Judge as presided over the original trial, in itself surely questionable for an appellate body. The proceedings usually involve constitutional issues that go beyond the bare record of the trial. Among the matters raised most frequently at this stage are: the competence/incompetence of trial counsel; non-disclosure by the State of evidence tending to undermine the prosecution case; and (very commonly) evidence of secret deals done by the police or the District Attorney with prosecution witnesses to ensure favorable testimony. In essence, then, State "Habeas corpus" proceedings are about the fairness of the trial.

The problem in Texas is that these proceedings are conducted almost invariably on paper: no witnesses are called and no cross-examination takes place. Instead, the defense files an application supported by documentary evidence, to which the prosecution responds. It is then up to the judge to determine whether or not there are pertinent, factual issues about which the parties disagree. If the judge finds that there are no such issues, the parties file "proposed findings of facts and conclusions of law". If the Court finds such issues do exist, it seeks to resolve them, calling for affidavits, interrogatories, etc., but also relying on the trial judge's own personal recollections. Again, both parties at this juncture file "proposed findings of fact and conclusions of law".

The Court now has to decide whether or not to recommend that the CCA grant relief. A study by the Texas Defender Service of over 100 State "Habeas" proceedings since 1995 has revealed that the Trial Court's findings - on which its recommendation to the CCA is based - were identical or almost identical to those submitted by the prosecution in 83.7% of the cases. In other words, the trial judge, far from exercising his independent powers of review and scrutiny, has simply adopted the prosecution's version of events.

If this were just an illustration of the trial judge's partiality, it would be bad enough. But under the law as it stands at present, the trial judge's "findings" of fact guide the deliberations of every court at every subsequent stage of the appeals procedure, right up to and including the US Supreme Court. The CCA, like the trial judge, has shown itself loath to question the prosecution version, which therefore proceeds virtually unscathed a stage further through the system (78.2%

of the cases in the TDS study).

Even in those cases where the CCA has not adopted the findings of the trial court, it has not explained why, nor has it granted the appropriate relief. The cavalier attitude of the CCA is best illustrated by its repeated failure to enforce the rights to "competent counsel", a right guaranteed by law since 1995. We were referred to a large number of cases where it was clear that defense counsel was indifferent or incompetent or both, failing utterly to provide even minimal service to its client, yet the CCA refused to intervene.

Federal "Habeas corpus" proceedings

Once seen as a truly independent review system, the federal review scheme has been severely curtailed by the Anti-Terrorism and Effective Death Penalty Act of 1996. Under the AEDPA, the federal court is no longer entitled to put what might be thought to be the only appropriate question: "Did the defendant get a fair trial?" No, the question it now has to ask is: "Did the State Court, in denying relief, act unreasonably?" Understandably, but regrettably, the federal judges of the Fifth Circuit, to which Texas belongs, have been reluctant to find their colleagues on the State bench "unreasonable". Furthermore, the AEDPA creates a presumption that the findings of fact of the State Court are correct unless the defense can prove otherwise by "clear and convincing" evidence. The previous qualification that such findings should not bind the federal court unless they resulted from a fair process has been eliminated from the statute altogether. More and more commonly, federal "Habeas" decisions are being taken in haste and without even a cursory scrutiny of the evidence. In the case of Lesley Lee Gosch in 1998, the federal panel took less than 24 hours to deny Mr. Gosch's claim. The dissenting judge noted: "This matter, reviewed and decided in less than a day, is a prime example of the tail of a pending execution wagging this panel's dog. This court should be more reticent in deciding any death penalty case so quickly - especially one in which the merits have not been previously reviewed by an appellate court."

Of equal concern is the ruling of the US Supreme Court in Strickland v. Washington. The Court decreed that it was incumbent on the appellant to demonstrate that his counsel made such gross errors that it amounted to his being effectively denied the right to defense counsel guaranteed by the Sixth Amendment, and that in consequence his trial had been rendered unjust - something which it is all but impossible to prove.

The Death Penalty in the United States

Texan lawyers recall the case of Gary Graham, condemned to death on the basis of just a single witness' evidence and unable, for purely procedural reasons, to have taken into consideration evidence gathered at a later stage by his lawyers which would have exonerated him entirely. Gary Graham was executed in Texas on 22 June 2000.

"The widespread notion that the detainees on Death Row in Texas have benefited from meaningful reviews of their sentences is a myth," say the lawyers of the Texas Defender Service.

The overall picture is quite depressing. The avenues of appeal, following on from what is all too often an unreliable, inadequately prepared trial (by the defense, of course, since the prosecution, in the shape of the District Attorney's office, can call on almost limitless resources), are being narrowed, even obstructed, by a combination of political posturing, judicial conformism and cowardice, and reactionary legislation. But the situation is not static. In the Texas State Legislature, politicians like Rodney Ellis have succeeded in getting issues such as indigent defense and the execution of juveniles and the mentally retarded onto the floor of the debating chamber. Indeed, both houses of the State Legislature recently (May 2001) outlawed the execution of mentally retarded defendants. But progress is bound to be slow until there is more widespread public opposition to the curtailments of basic rights presently characteristic of capital trial and appeal procedures.

b) Illinois

Whenever there is a death sentence, an appeal is automatically brought (regardless of the convict's opinion) to the Supreme Court of Illinois, which reexamines the whole case. This appeal is justified by the fact that there are great disparities with regards to the way penal cases are tried between the different counties (there are 112 counties in Illinois). This disparity entails that capital punishment may be demanded in county A, whereas for the same events, it will rarely or never be so in county B. What is essential here is the prosecutor's attitude, and all those who examined a good number of cases concluded that the prosecutors do not proceed in a very Cartesian manner. Indeed, the prosecutor who demanded Cruz's death did not demand capital punishment for the murder of a ten-year old black girl. According to Seymour Simon, former judge of the Illinois Supreme Court, the Illinois Supreme Court's decision to reopen or not the case of a death row prisoner is totally random. He explains that, in his experience, one of the main

problems is that in practice, one absolutely cannot trace a reliable, somewhat rational, predictable line between who is to be condemned and who is to be spared. In this regard, the system ended up appearing totally arbitrary to him.

If the appeal is dismissed, the accused can recourse to the US Supreme Court, but for it to be accepted, five judges of the Supreme Court (in practice four) upon nine have to accept to examine the case, which they have no obligation of doing. If the case is to be examined, it takes up to six months or even a year.

If this appeal too is turned down, the convict can appeal to the local judge again - this is called a post-conviction recourse - but only if he proves the existence of a new element. The latter is defined broadly enough to include a new witness, for example. But bringing in a new element does not guaranty anything insofar as in most cases, the appeal is dismissed without even having been heard in court because the judge considers that the new element does not change much to the case. This phase takes about a year.

If this petition fails, one can theoretically lodge an appeal with the Illinois Supreme Court, but only if one manages to prove that the former jurisdictions made a clear error of appreciation when judging the case. The chances of such an appeal are therefore very low. Once this appeal is dismissed, one can still appeal again to the US Supreme Court but, as in the previous situation, it can clearly and simply refuse to examine the case.

Once all these solutions have failed, the last thing the convict can do is to seize the District Court with a Habeas corpus appeal (called "great writ"), based on the allegation of a violation of the Constitution. If this recourse is dismissed, one can still appeal to the US Court of Appeal (seventh circuit) and in case of yet another failure, the convict can for the third and last time turn to the US Supreme Court, but it gets increasingly difficult each time. In case it is turned down, there is no further jurisdictional recourse possible.

The totality of these appeals can last from eight to ten years.

Once all these appeals have been exhausted, the convict has no other solution but to ask the Governor of Illinois for a reprieve. This procedure leads to an audition by a commission which gives its opinion, but the governor is free to decide what he wants. The pardon system here seems more objective than in Texas where in practice, the pardon Commission is known to recommend exactly what the Governor wants it to recommend.

The Death Penalty in the United States

Although in Illinois, there are more safeguards than in other states (like Texas, for example), a very broad investigation conducted over a long period of time by Rob Warden and David Protess, two journalism professors at Northwestern University, has revealed a great number of miscarriages of justice over the last few years. The mission met extensively and quite a few times with Rob Warden. Over the last ten years, the innocence of ten not-yet-executed death row prisoners was proven. The study only concerned prisoners still alive, but it allows us to believe that an important number of those already executed were probably wrongly executed. One can also note that DNA tests were used to innocent only a minority of the persons convicted: only ten out of the last sixty-six death row prisoners in the USA to be innocent were innocent on the basis of DNA tests. The majority of revisions were caused by rather classical elements like, for example, the proof of the impossibility of the defendant's guilt, or the discovery of the true perpetrator of the crime.

III - AFTER THE DEATH SENTENCE

A/ Death Row and the Execution Chamber in Texas

Death row

On 18 April Etienne Jaudel and Michael McColgan visited "Death Row", the Terrell Units, in Livingston, north of Houston. This vast prison complex, built in 1993 in a quiet woodland setting, took over the function of "Death Row" from Ellis Penitentiary in 1998.

Our visit was arranged through the Texas Department of Criminal Justice (TDCJ), and we were received and accompanied by Larry Fitzgerald of the TDCJ, Assistant Warden Loyd C. Massey and Major Lister. They answered all our questions - we were not allowed to talk to any prisoners - and gave us a copy of the Death Row Plan 2000, 22 pages of regulations and provisions specially designed for prisoners sentenced to die. We were unable to verify the information provided while at the prison, but both defense attorneys and campaigning groups whom we met in Houston and Austin expressed scepticism about various aspects of the "Death Row" regime, in particular the disciplinary system and prison classification, health care (both physical and mental) and prison officers' attitudes to their charges.

The Terrell Units are largely, but not exclusively, occupied by Death Row prisoners. At present there are about 450 men awaiting execution, among them one prisoner who has been on Death Row for 20 years. The average length of incarceration on Death Row before execution or exoneration is just over 10 years. (Between 7 and 10 women are similarly imprisoned in the Mountain View Unit in Gatesville, which we unfortunately did not have time to visit.) The majority, over 370, are classified as Level 1 prisoners (standard regime), about 50 are assigned to Level 2, and 15 to Level 3. Those on Level 2 and Level 3 are usually deemed to have committed serious disciplinary offences. The body which adjudicates on discipline and classification is the Death Row Review Committee (DRRC), which comprises: the Warden or his representative, an officer of the rank of Lieutenant or above, a security representative (an officer assigned to the Death Row area), and a representative from the Health Services Division.

The DRRC reviews the initial classification of new inmates, and also acts as a disciplinary tribunal. Its recommendations on, for instance, Work Capable Status - (to which we shall return later in

this section) - go to the State Classification Committee (SCC). Our impression was that the recommendations of the DRRC are rarely countermanded by the SCC. Given its wide powers - which include the power to restrict visits and purchases from the prison commissary, in addition to the power to reclassify a prisoner formally - we were concerned that there is no provision for legal representation at DRRC hearings. For major disciplinary hearings, we were told, the prisoner is allowed a "counsel substitute", who will be a prison employee and not legally qualified. On lesser matters, the prisoner / defendant has to fend for himself. In our view, this arrangement does not provide the prisoner with adequate rights and safeguards. In effect, the prison authorities are acting as prosecutor, judge and jury.

We raised the issue of complaints by prisoners about their treatment at the hands of prison officers. One of our interlocutors told us that the staff "doesn't go into that", meaning abuse of prisoners, and another referred to "chronic complainers". If such complaints cannot be resolved through the internal grievance procedure - again, something which a number of campaign activists have described as ineffectual - they go to the Internal Affairs Department (IAD). We felt that our hosts were less than pleased that we had aired the topic. We in turn, having heard a number of persuasive accounts of ill treatment of prisoners in the course of our stay in Texas, were not too convinced by our hosts' dismissal of the question.

Work, which can be a positive and productive aspect of human prison regimes, is denied the inmates of Death Row. On page 4 of the Death Row Plan we read: "The Work Capable Program for male offenders is suspended further, decision by the Texas Board of Criminal Justice". Prisoners therefore spend 23 hours a day in their small, spartanly furnished cells (approximately 5.7 m², 18.5 square feet), emerging only for one hour of "recreation" a day. The recreation areas, whether under cover or in the open air, are nothing but large, triangular cages (about 40 m², 130 square feet), reminiscent of those that house the most ferocious members of the cat family in an urban zoo. Since these cages are constructed in pairs, a prisoner is able to converse with his co-prisoner in the next "cage" - otherwise, when he is confined to his cell, one of a row of seven, he has no proper visual contact with anyone at all. All the fittings in his cell are made of iron and bolted to the floor or wall. A radio point is fitted - but there is no television socket. A tight check is kept on prisoner's own embellishments to their cell. The cell door has two narrow

The Death Penalty in the United States

panels of what looked like frosted glass, through which it is difficult to see clearly, and the outside wall of his cell is broken only by a slit about 10 cm wide, some 2.50 m off the floor.

Add to these spatial restrictions the prohibition (page 12) of direct access to the prison library by Death Row inmates and further limitations on their access to law library books - which is governed by procedures established in the Access to Court Rules and the Access to Court Procedures Manual (page 12) - and one begins to wonder why the prison authorities bother to uphold the paper distinction between "Work Capable Offenders" and "Death Row Segregation Offenders". The recreation facility - while we were there we saw two prisoners, each listlessly playing basketball on his own - was quite depressing; all the more so for the prisoners, one imagines, since even that harmless activity was being supervised by officers looking out from a glass fronted construction that vaguely resembled the flight desk of the Starship Enterprise.

Visits for those on Death Row - between one and four a month, depending on the prisoner's disciplinary level - are strictly "no contact" visits. The prisoner sits behind a glass screen and communicates with his family or friends opposite by telephone. This is a permanent arrangement and not contingent in any way on breaches of discipline by the inmate.

Some days before our visit to the Terrell Units, Carl Reynolds, of the Department of Criminal Justice, had pinpointed "isolation" as the worst aspect of the regime there. He conceded, and his colleagues present at the meeting did not demur, that there existed "an 'a priori' assumption that no prisoner was safe to be with other prisoners". The implication of that assumption was all too evident on our visit.

Overall, our impression was that behind all the modern technology and the detailed provisions of the Death Row Plan lay a large measure of indifference towards the rights and needs of Death Row prisoners. Apart from the initial medical and psychiatric evaluation carried out when a prisoner first enters Death Row, monitoring of their physical and mental health (the latter surely a matter of concern, given that the average length of incarceration is 10 years or more) is surprisingly infrequent: a thorough "physical" of a 40 year old prisoner occurs only every five years, that of a 66-year old prisoner once a year.

Not content with sentencing them to die, the State of Texas has devised a prison regime that is calculated to demean, depress and (especially by cutting them off, to all intents and purposes, from their fellow human beings) dehumanize them for however long it takes to execute - or exonerate - them.

The execution chamber

The Texas execution chamber is situated in a wing of Huntsville Penitentiary, a two-hour drive north of Houston. It is a room about 13 by 10 feet (4 m by 3 m). To the right, behind glass partitions, are two viewing rooms with chairs, not dissimilar to theatre boxes. They are for the families of the condemned man and the victim, as well as five representatives of the media. To the left, behind a one-way window, is another small room. Next to the window, at about waist height, is what looks like a vent, roughly 0.8 square inches (20 cm²). Supported by a two-foot high single pillar bolted to the floor of the execution chamber is the gurney or death bed, a padded pallet crossed by six broad leather straps and with two arms or wings, one to each side, both likewise fitted with leather straps.

The execution ritual was described to us by Assistant Warden Williamson, a big, cheerful man, who assured us he ate and slept well. The condemned man - for it is nearly always a man - is brought to Huntsville from Death Row, the Terrell Units, about six hours before he is due to be executed. On arrival he is searched and placed in a holding cell, the second from the end of a row of six empty cells next to the execution chamber. He is provided with a radio and religious material and can ask for a chaplain to visit. If he has his own chaplain, he will have received a visit from him in the morning; and his chaplain is allowed to witness the execution. His attorney is permitted to visit him on the day of his execution both in the Terrell Units, 45 miles to the east, and in Huntsville. Often, however, the attorney will be working up until the very last minute trying to secure a reprieve or a stay of execution and hence unable to attend the defendant. If his lawyer does come, lawyer and client are placed in the cell nearest the execution chamber, fitted, unlike the other cells, with fine black mesh across the bars.

At about 4.00 p.m., the prisoner is offered his last meal. (Those who wish to know what the 238 men and 2 women executed since 1982 chose for their last meal can log on to www.tdjc.state.tx.us/stat/finalmeals.htm).

He is then given the opportunity to take a shower and change into the clothes he wishes to be executed in. After that he is placed in the cell next to the one with the black mesh, two doors away from the execution chamber. The Senior Warden of the prison, presently Warden Hodges, enters the cell shortly before 6.00 p.m. to tell him, "It's time."

The prisoner is asked to walk unaided a few metres into the execution chamber. He is not shackled or handcuffed. Once in

The Death Penalty in the United States

the chamber he is helped onto the gurney and strapped in. Intravenous tubes containing a saline solution are inserted into a vein in each of the prisoner's arms. They lead through the vent-like aperture into the room on the left-hand side of the chamber. At this point the visitors and the official witnesses take up their places.

The prisoner is asked if he wishes to make a final statement into the microphone above his head. This can be heard by the witnesses. Mr. Williamson makes the point that very few final statements are "negative or derogatory". The prisoner then tells the Warden, standing at his side, that he is through. The chaplain, if present, will normally have his hand on the prisoner's right leg.

The Warden gives a sign to the unseen prison agency employee behind the one-way glass. He, the executioner, "piggy-backs" the lethal drugs from syringes into the IV tubes going through the vent and into the prisoner's arms. He has no contact at all with the person. Mr. Williamson now calls the victim, and neither the man on the gurney nor the man administering the lethal poison ever see each other. The executioner is not a doctor. A doctor has been waiting outside and now comes in to check that the person on the gurney is dead. He then pronounces the death and time of death.

All cells in the prison that overlook the execution chamber and the adjoining row of cells are kept empty, and the yard outside is draped with large tarpaulin sheets whenever an execution is due to take place. The entire ceremony, which lasts about fifteen minutes in all, is literally shrouded.

It is both banal and barbaric: ritualised, cold-blooded execution in a room that might have been an operating theater in a country hospital 70 years ago. But the doctor is kept outside while the patient, strapped helpless to the operating table (looking, with his little arms stretched out somewhat like on a horizontal crucifix), is fed intravenously with a deadly cocktail of sodium pentathol, Pavulon and potassium chloride, calculated to induce death within a few minutes. By all accounts, including that of Mr. Williamson, it is done very matter-of-factly. That is what is barbaric about it.

B/ Execution of the most vulnerable condemned

1. Execution of the mentally retarded

According to the reports that were presented to the mission, Texas is one of the 37 states that continue to execute mentally retarded persons. This according to these reports, is the

position despite the decision of the US Supreme Court (California v. Brown 479 US 538, 543{1987}) to the effect that personal culpability of the defendant must be determined before the decision to impose the death penalty can be made. The law in Texas (Article 46.02 of the Texas Code of Criminal Procedure) states that a defendant is "presumed to be competent to stand trial unless proven incompetent by preponderance of the evidence". The decision whether or not the defendant is competent to stand trial lies with the jury. The reports received by the mission point to a number of problems in the competency determination process. The report of the TDS highlights as some of the problems the fact that "blameworthiness" is subjectively assessed and incidents of corruption and racial bias that are prevalent within the criminal justice system. According to research that was done by one activist organisation that the mission met, The Fair Defense Report (Texas Appleseed Fair Defense Project), other problems in the competency determination process are:

- Complicated competence statutes which legal practitioners and judicial offices do not often use and find difficult to understand.
- Lack of resources for indigent defendants to pay for private, competent and impartial psychiatrists.

According to the information that was given to the mission, in Texas, judges determine fees that are paid to defense attorneys and experts appointed for indigent defendants, and often set arbitrary limits, which, the mission was informed, are often low. The mission believes that such a system has a bearing on the quality of experts appointed for indigent defendants and therefore on their right to adequate and competent defense:

In this regard, some statements can be done concerning:

- Perception that defense attorneys ask for sanity evaluation as a delaying tactic,
- Widespread delays in competency evaluation proceedings,
- Methods used to diagnose retardation.

The mission noted reports of unethical conduct of prosecutors in competency determination proceedings. In this regard, the mission was informed of a case in which psychiatrists called by the prosecution who had previously examined the defendant testified that the defendant was incompetent to stand trial. Dissatisfied with this, the prosecution called other psychiatrists who had never examined the defendant and who testified that the defendant was competent to start trial. In this case, the mission was informed, the court turned down the request of the defendant that he should be allowed to bring in his own expert to assist him in his defense. He stood trial and was found guilty and executed.

The Death Penalty in the United States

All these factors, together with lack of understanding of mental retardation and its manifestations on the part of the courts, are said to result in the execution of mentally retarded people.

The mission noted the concern of one of the activist organisations, that, although there is a growing national consensus against the execution of mentally retarded defendants, Texas continues to execute them. The mission noted with regret the information that a bill seeking to ban such executions was passed by the Senate, but was not approved by the House. This requires a hearing to be held to determine whether a person with an IQ of 70 or below is mentally retarded before the death penalty can be sought. It further makes life without parole the maximum sentence possible for a mentally retarded defendant convicted of capital murder in Texas.

According to some of the activists we met, the number of people with mental illnesses on Death Row is very high. They attribute this to conditions on Death Row, where inmates are kept in isolation, with no human contact. They further attribute this to a cut in the mental health budget. This, according to them, resulted in the closure of many mental health facilities. They rank Texas 48th out of the 50 states as far as the level of health care facility funding for the mentally ill is concerned.

2. Execution of those who were minors at the material time

International human rights instruments do not only set the age of legal majority at 18 but also prohibit the execution of defendants who were below the age of 18 at the time they committed an offence. Texas is one of the states that set the age of eligibility for the death penalty at 17. According to the information that was given to the mission, other states that set eligibility at 17 have a requirement that if the defendant is below 17, a pre-trial hearing must be held by a judge to determine his or her level of maturity. The same does not obtain in Texas. Neither is it a legal requirement for the jury to consider the age of the defendant when deciding whether to impose the death penalty. According to a newspaper report (Houston Chronicle, 7 February 2001), the Harris County Assistant District Attorney did not see any necessity for this because, according to her, in practice, when the death penalty is sought for a 17-year old defendant, the jury always takes his or her age into consideration before imposing the death penalty.

The mission considers that this state of affairs is highly unsatisfactory, particularly if one takes into account reports that juvenile offenders face problems faced by other

offenders in death penalty cases. According to the Fair Defense Report cited above, the problems encountered by juvenile offenders include the following:

- "Excessive case loads (of defense attorneys); lack of resources for independent evaluations, expert witnesses, and investigatory support; lack of computers, telephones, files and adequate office space; inexperience, lack of training, low morale, and salaries lower than those of their counterparts who defend adults or serve as prosecutors; inability to keep up with rapidly changing juvenile codes."
- This report also mentions allegations of racial bias in the handling of cases involving offenders from the minority communities.

Research that has been conducted into the execution of juveniles in Texas points out that most laws in Texas designate 18 years as the age of legal majority except in the imposition of the death penalty. The situation was aptly described by an attorney who was quoted in one of the newspapers (Houston Chronicle, 7 February 2001) as follows: "At 17, Texans cannot vote, join the Army on their own or drink legally. A 17-year-old girl is not considered mature enough to choose to have an abortion without parental permission unless a judge consents... But a 17-year old commits a crime and they're thought mature enough to face the death penalty". In response to this, the Harris County Assistant District Attorney is quoted in the same newspaper as having said the following "If you're old enough at the age of 17 to pull a trigger and kill someone, you're old enough to face the consequences". Regarding setting the age of eligibility for the death penalty at 17, she is reported to have said: "You've got to pick a line somewhere. You have to pick an age, and that is 17. And you know what? Most people don't disagree with that line being 17". Apart from this statement, if it is true, trivialising a very serious matter, it contradicts the outcome of a survey that was conducted by the University of Houston's Center for Public Policy Research Institute on behalf of the Houston Chronicle in 2000. This survey was conducted nationally, in Harris County and elsewhere in Texas. Nationally, 48.2% of respondents said that they did not support the death penalty if they were convinced that the defendant was guilty but was a juvenile at the time he or she committed the crime, while 26.4% said they supported it. In Harris County, 52% said they did not support it while 25.3% said they supported it. In Texas, as a whole, 42.3% said they did not support it and 34.2% said they supported it.

IV - ABOLITIONIST MOVEMENTS AND THE ILLINOIS MORATORIUM

Abolitionist movements

During the preparation for the mission's visit and while the mission were in the United States, we met and spoke to many individuals and organisations involved in what might loosely be termed the movement for the abolition of the death penalty. It seemed clear to us, casting our minds back particularly to the 1980s, that the mood in the country is changing quite dramatically. The legal and campaigning work carried out over many decades by organisations such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), among others, is now part of a nation-wide development.

At the academic level, capital punishment features increasingly on the curriculum of university law and human rights departments. The work done by Professor Marshall at the Center on Wrongful Convictions at Northwestern University, Illinois, together with that of his colleague in the School of Journalism, Professor Protes, have brought about the suspension of the death penalty by the State Governor. Work of a similar kind, albeit less highly publicised, is being conducted at universities and colleges throughout the country. In Texas itself, there are academics in Austin, Houston and San Antonio carrying out research, publishing books and articles, holding seminars and awarding doctorates on the issue of capital punishment, something that would have been perhaps unthinkable only 20 years ago.

Then there are the directly campaigning groups. More than 50 national organisations constitute the National Coalition to Abolish the Death Penalty, based in Washington D.C. The mission met with Steve Hawkins, President of the National Coalition against the Death Penalty, and with his assistant. They explained that their organization, created in 1976, worked together with a 170 other organizations in sixty-six countries across the world, and that it had branches in many states of the USA.

Steve Hawkins underlined many worrisome issues:

- First of all, some states (Massachusetts, Rhode Island, Vermont) are trying to reinstitute capital punishment which, for the moment, is no longer a part of their repressive arsenal;
- Judicial miscarriages are very common: in the whole of the United States, over the past few years, 96 death row prisoners were later declared not guilty.

- When the life of a person is at stake, there is a reversal of logic: capital punishment is not considered a federal issue but a local one, that depends on local politics. This is quite paradoxical insofar as the issue at stake (life) is of such utmost importance. (However, this does not prevent the federal justice from pronouncing death sentences and proceeding - although it is rare - to federal executions, like that of Timothy Mac Veigh on 11 June 2001).

- The victims' families are instrumentalized by the prosecutors who "sort them out" according to whether they are for or against capital punishment: if they are for capital punishment, the prosecutor makes sure they appear on television, if not, he prefers appearing himself.

Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, is justly renowned for his publications and his tireless efforts to bring the issue into focus. But there are many like him, some working in bodies such as the Texas Defender Service, the Sentencing Project in Washington and the Center for Constitutional Rights in New York, some working individually as journalists and writers.

At the "grass roots" level, organisations are springing up almost daily. They do not all share the same perspective on the death penalty or pursue the same objectives. Some, perhaps the majority, are explicitly or implicitly opposed to the death penalty in principle. Others are primarily concerned with issues such as due process, indigent defense, the rights of the mentally retarded, and prison conditions. But together they form a wide-ranging coalition of concerned and critical citizens, matched in their numbers and influence perhaps only by the ecological movement. Murder Victims' Families for Reconciliation (MVFR) is a bold and imaginative initiative: it brings together the families of both murder victims and murderers in a campaign to expose the death penalty as a cruel and futile means of providing compensation and "closure". MVFR has thousands of members nationally and a 50-person strong branch in Texas. The list is constantly growing, with associations such as Texas Appleseed (campaigning for an adequate publicly funded system of indigent defense), Moratorium 2002, Standdown Texas, the Houston-based Death Penalty Abolition Movement.

The churches, too, are active on the issue. The Catholic Church in Texas, spurred by the Pope's stand on capital

The Death Penalty in the United States

punishment and perhaps by the number of its Hispanic adherents in Texas, has been in the forefront of the struggle. The leadership of some of the other denominations - Methodists, Episcopal, Lutheran - have generally adopted a more or less abolitionist stance, but it is uncertain how far they carry their congregations with them.

As for the African-American religious communities, representing proportionately those worst affected by the death penalty, some commentators have suggested that a certain Old Testament fundamentalism, not wholly different from the fiercely pro-death penalty traditions of the largely white Southern Baptists, has kept involvement in the organized abolition movement at a lower level than might have been expected. But, of course, there could be other reasons: centuries of segregation, the continuing and all too apparent gulf between whites and blacks, with its concomitant contrasts in wealth, status, power and attitudes, do not make the task of forming alliances and coalitions easy. The problem is being addressed, however, and there are already signs - the emergence of the Death Penalty Abolition Movement in Houston, for instance, which embraces black and white activists and families of people on Death Row - that the old hierarchies and divisions are starting to dissolve.

Recently, the abolitionists have also questioned the fact that doctors participate in the execution (by giving lethal injections) on the grounds that they are bound by the Hippocratic oath which is incompatible with voluntary killing. Some doctors answered this criticism by saying that they were not violating their pledge by giving lethal injections because this action resulted from a public authority order. But it was noted (especially by Prof. Chérif Bassiouni of De Paul University) that such reasoning considers the problem solved, because it postulates, implicitly but necessarily, that if there is an obvious contradiction between a public order and the Hippocratic oath, the former takes precedence. But this is precisely what is not obvious. Prof. Bassiouni observes that in this logic, what the Nazi doctors did in concentration camps could be legitimated in the same way by the order given by the authority in power. This clearly leads to the conclusion that the Hippocratic oath should override any order from the public authorities, and that a doctor, therefore, cannot participate in an execution.

The Moratorium

- In Illinois

This series of miscarriages of justice, and the racial discrimination they reveal - of the ten people mentioned who

were wrongly convicted, six were black and two Hispanic - spurred on the abolitionist campaigns and led the Republican Governor, Ryan, to declare a moratorium on executions in 2000.

This measure was taken only after several unsuccessful (because of a lack of majority support) parliamentary efforts to get the death penalty suspended. At present, there is no indication that Governor Ryan saw it as a first step towards outright abolition.

It is uncertain whether or for how long the moratorium will remain in force, since it seems that Governor Ryan is not going to stand for reelection and many of the people we met in Chicago doubt if any other governor will uphold his courageous decision.

The mission does not have any tangible evidence of popular backing for the moratorium. Nevertheless, abolitionist campaigning continues unabated. In February 2001, a bill calling for the abolition of the death penalty and its replacement with life imprisonment was laid before the legislature. Another is in the pipeline, designed to prevent the administration of the prison system from obliging doctors to take part in executions.

Along with the moratorium, Governor Ryan set up a commission charged with overseeing its application in practice and reporting to him on their findings. The commission has twelve members from different backgrounds, including representatives of the civil society such as Mr Roberto Ramirez, whom the mission was able to meet. He is not a lawyer; he runs an office-cleaning company. Mr. Ramirez was born in Mexico, where his father was murdered when he was only eight, and came to the United States. The murder of his father puts him in the ranks of victims of serious crime, but that does not prevent his being openly opposed to the death penalty. It was quite remarkable to hear him explain that he never for a moment sought or even wished for the death sentence for his father's killer.

Eventually, he told us his grandfather killed the guilty person, but Mr. Ramirez stressed that this act of vengeance brought him neither satisfaction nor "closure", because in his view it simply added to the cycle of violence already inflicted.

Mr. Ramirez told us that the Commission had already met several times and was looking on the issue in an open-minded way. It is too early to predict whether or not their findings will help the abolitionist cause.

The Death Penalty in the United States

But the moratorium has at least set off a period of evaluation and reflection. If it is maintained for long enough, it will allow people to realize that stopping executions in no way leads to a rise in the number of serious crimes. This is easy to predict, having been borne out in all countries throughout the world which have suspended or abolished the death penalty, and is therefore one of the simplest and strongest arguments for doing away with it altogether.

- In Texas:

During the mission's stay in Texas, the two parliamentary commissions on criminal justice of the House of Representatives and the Senate adopted a resolution calling for an identical two-year moratorium on executions.

Governor Perry, George W. Bush's successor, immediately declared that he would oppose any such move, which in any case has little chance of being adopted by the legislature and would, according to some, moreover, require an amendment to the constitution.

Nevertheless, the fact that the resolution was adopted at all indicates a certain shift in people's thinking.

The New York Bar and the Federal Bar have passed resolutions along the same lines.

However, the abolitionists are at pains to point out that the object of these "moratoria" (whether already in force or proposed) is simply the suspension of capital punishment pending procedural improvements in the criminal justice system, but not in any sense the abolition of this anachronistic punishment, unworthy of a modern democracy.

The overall issue remains in the hands of the Supreme Court, the only body in a position to impose abolition throughout the United States.

V - CONCLUSION

The investigation conducted by the FIDH experts has exposed the fact that most death row prisoners in the USA, particularly when they are poor and destitute, do not get a fair trial as provided for by the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Constitution of the United States of America.

Moreover, the conditions in which death row prisoners are incarcerated over the very long periods of time preceding their execution constitute "cruel, inhuman and degrading treatments", prohibited by the same international instruments.

The FIDH fears that these "moratoria" on executions - under consideration by several states following the one adopted in Illinois - aim only to improve the criminal procedures leading to capital punishment.

The FIDH cannot be content with such moratoria, any more than it can accept indispensable procedural changes designed to bring about "fair" trials, if in the end such changes still lead to the imposition of the death penalty.

The death penalty is indeed unworthy of a modern democracy.

The FIDH asks the Justices of the Supreme Court of the United States, the only ones who can impose abolition upon all the states in the Union, to declare this punishment unconstitutional once for all.

The recent and increasing success of the abolitionist movements, the high number of miscarriages of justice in trials leading to capital punishment, and the publicly expressed doubts of one of the Judges of the Supreme Court of the United States, encourage us to hope that the United States will finally join the growing number of democratic countries in this world which have abolished this particular punishment, which constitutes in itself cruel, degrading and inhuman treatment.

ANNEX 1 : LIST OF THE MISSION'S MEETINGS

New York:

- Evan Davis, President of the New York City Bar Association
- Jane Fritsch, New York Times Journalist, author of several articles on indigents defense in New York.
- Lucy Herschel, organizer in New York of the Campaign to End the Death Penalty
- Pierre Schon, Swedish Ambassador to the United nations
- Peter Weiss, Vice-President, Ron Daniels, Executive Director, Bill Goodman, Legal Director of the Center for Constitutional Rights.

Austin (Texas):

- Jordan Steiker, Professor of Law at the University of Texas in Austin
- Judith Torrea, Spanish journalist

Activist organisations:

- Bill Beardall, Texas Appleseed
- Steve Hall, Standdown Texas, a group campaigning for a moratorium
- Will Harrell, American Civil Liberties Union (ACLU)
- Maurie Levin and Raoul Schönemann, attorneys, members of the Texas Defender Service
- Susan Solar, campaigner against the death penalty

Defense attorneys involved in capital cases:

- Helen Bearsley
- Keith Hampton, drafted several bills to reform the current legislation
- Walter Long, mental retardation and juvenile defendant
- Rob Owen
- Meredith Rountree
- Gary Taylor

Judiciary and legal staff:

- Charlie Baird, former Judge of the Court of Criminal Appeals (CCA)
- Hanna Liebman, Counsel to Senator Rodney Ellis (initiator of several bills to improve the rights of the defense)
- Michaël McCant, Deputy Attorney-General in Texas Department Of Criminal Justice (TDCJ)
- Genna Bunn, Director of the Capital Litigation Division
- Gerald Garret, President of the Board of Bars and Laura

McElroy, Principal Counsel,
- Carl Reynolds, TDCJ Principal Counsel

Houston (Texas):

- Fref Baca, Jury foreman in Bobby Moore trial

Activist organisations

- Dave and Priscilla Atwood, Texas Coalition to Abolish the Death Penalty
- Carole Byars, widow of a murder victim and leading member of the Texas branch of Murder Victims' Families for Reconciliation (MVFR)
- Jim Marcus, Executive Director of the Texas Defender Service; Bryce Benjer, Dick Burr and Mandy Welch, lawyers and members of the Texas Defender Service
- Njeri Shakur, Gloria Rubac and other members of the Texas Abolitionist Movement

Defense attorneys involved in capital cases:

- Michael Charlton

Judiciary and legal staff:

- Harris County judges: Georges Godwin, Presiding Judge; Debbie Mantooh Strickland and Brian Rains, judges; Jay Burnett, retired judge.
- Larry Fitzgerald, Department of Criminal Justice
- Major Lister
- Loyd C. Massey, Assistant Warden
- Michael O'Connor, retired judge
- Charles Rosenthal, District Attorney for Harris County

Terrell units (Livingston, Texas):

Meeting with Farley Matchett, sentenced to death

Execution Chamber at Huntsville Prison

Chicago:

De Paul University:

- Chérif Bassiouni, Professor of Law
- Andrea Lyon, Professor of Law, Director of the Center for Justice in Capital Cases

The Death Penalty in the United States

Northwestern University

- Larry Marshall, Professor of Law
- Rob Warden, journalist, executive Director of the Center on Wrongful Convictions

Former sentenced to death finally declared non guilty

- Rolando Cruz
- Gary Gauger

Activist organisations:

- 2 prison visitors
- Jeff Riley, former Executive Director of the Illinois Death Penalty Education Project

Defense attorneys involved in capital cases:

- Jeffrey Colman
- Aviva Futorian
- Charles Hoffman, Assistant Attorney in trials in appeal at the State level
- G. Flint Taylor Jr

Judiciary and legal staff:

- Matt Bettenhausen, Illinois Deputy Governor
- Cow Pujh, former congressman in Illinois
- Roberto Ramirez, Company manager and Member of the commission charged with overseeing death penalty application in practice.
- Seymour Simon, former judge of the Illinois Supreme Court
- A former District Attorney
- A member of the Office for judicial assistance to the Poor

Washington:

- Steve Hawkins, President of the National Coalition Against Death Penalty

Conferences:

- Fairfield University, Connecticut: *The Death Penalty - Legal and Moral Questions*
- University of Texas, Austin, Panel discussion: *Legal Perspectives on Capital Punishment.*

ANNEX 2 : THE BOBBY JAMES MOORE CASE

During their stay in Houston, the FIDH experts were told by one of the Texas Defender Service lawyers that the foreman of a jury which had recently sentenced a defendant to death wanted to meet them. This was quite surprising in view of French law regarding the secrecy of deliberations, but acceptable under Texan law, according to this lawyer.

Two of the experts of the mission therefore met with Mr. Fred Baca, a prominent real estate agent, in the luxurious offices of his company in Houston.

Mr. Baca explained to the FIDH representatives that since presiding over the jury which sentenced Bobby Moore to death last February, his conscience had kept him awake at night. He has been visiting the convict in the Terrell death row since then, and when the time is appropriate, he intends to ask the Texas Governor to grant a free pardon to Bobby Moore, although he has no illusions about his chances of success.

Anxious to get more information on this case, the FIDH experts looked into the judicial vicissitudes Bobby Moore went through. In light of the evidence, he is not one of those numerous innocents crowding American death rows. Moore is a very ordinary criminal. But he is also a criminal who was sentenced to death more than twenty years back and who has been through an extraordinary judicial tragedy: a tragedy typical of Texan justice, with its merciless prosecutors and judges, its incompetent and negligent lawyers, and its endless but ineffectual appeal procedures which give the fallacious impression that the right to a fair trial is being scrupulously respected.

When the President of the United States was Governor of Texas, he declared that all death row prisoners had benefited from the strictest protection the law could provide and that they, therefore, did not deserve to be spared...

Let us measure this claim by examining the case of Bobby Moore.

THE CASE

On April 25, 1980, around 2:30 p.m., three African-Americans entered the Birdsall supermarket in Houston. One of them, who was wearing a wig and dark glasses, took out a gun from

a plastic bag and pointed it at the shop owner: "This is a hold-up, old man! ... Fill up this bag! ..." And because one of the employees was screaming, he put a bullet through the head of Mr. Mc Carble who died on the spot. The three men fled without taking anything.

Their staggering amateurism allowed the police to find them very easily.

When running away, the murderer threw away his wig and plastic bag, inside which the police found a receipt in Betty Nolan's name. Easily traced, Mrs. Nolan admitted that a friend of her son, Bobby Moore, was staying with her. Under his bed, the police found a gun identical to the one used in the hold-up. Moreover, Mrs. Nolan had a collection of wigs from which two were missing: they were found at the crime scene. The police set out to find Bobby Moore, who had gone underground.

One of the supermarket clients had noted down the plate number of the red and white car the robbers used. It belonged to a certain Koonce, who confessed to having participated in the hold-up with his two friends, Prada and Moore. He was identified by the shop employees. Prada, too, admitted to having participated in the scam and named Moore as being the third man present on the scene.

A friend of the Moore family told the police that Bobby was staying with his grandmother in Coushatta, Louisiana, and that he himself and Bobby's father had driven Bobby there the day following the crime. The Louisiana police immediately arrested Bobby Moore, and he was transferred to Houston on May 5th.

According to the police, Moore then signed a written confession.

He declared that he was riding in the car with Koonce and Prada, looking for a shop to rob. On spotting the supermarket, they decided that Koonce would go to the cash register to take the money while Moore, who was wearing a wig and holding a gun in a plastic bag, would cover him with his weapon. When one of the employees started screaming that a hold-up was taking place, Moore yelled at Koonce that they had to go and he approached the cash register where the shop owner stood.

The Death Penalty in the United States

According to Moore, "The old man then bent down to open a drawer. I tried to push him back with the cylinder of the gun when the gun went off. It was only later that I learnt from the television that the old man had been hit. I swear I didn't want to kill the old man, and that it was an accident."

It is on the basis of this confession that the Houston Prosecutor decided to demand the death sentence for Moore in accordance with Article 19-03-2 of the Texas Penal Code, which requires such a penalty in cases of intentional murder during a robbery.

THE TRIAL

The trial took place in Houston in July 1980. Moore's family decided to pay to have Alfred Bonner assist C.C. Devine, the lawyer designated by the Judge. Alfred Bonner was struck off the bar ten years later.

In a manner which was later described by the federal jurisdictions as "surprising", the two counsel could not reach an understanding with regard to a common defense strategy, and their contradictory standpoints ended up sending this 20-year-old young man to death row where he still is today, 21 years later.

Mr. Bonner, against all odds, decided to plead what is Moore's case as it stands today: that his so-called confession was actually extracted by violence, the proof being a photograph taken at the time and which shows bruises on his face. He did not sign this confession, but only two blank sheets of paper which the police got him to sign, promising him his freedom in return. .

Besides, at the material time, he was not in Houston but in Louisiana with his sick grandmother, something which his sister confirmed.

The defense needed, therefore, to eliminate the alleged confession which was threatening to sink him. After lengthy discussions in the absence of the jury, Defense and Prosecution came to an agreement: the so-called "confession" could be adduced in evidence, but purged of the reference to the alleged firing of a shot. The jury would consequently be presented with a text in which Mr. Moore admits to being on the scene of the crime and pointing a pistol in the direction of the victim, Mr. MacCarble, and this would be followed by a blank space corresponding to the censored passages, after which the confession would resume with the three man fleeing from the shop store...

It was to prove to be a fatal move for Mr. Moore.

The prosecution was in possession of an overwhelming amount of evidence with which to counter Moore's defense, including, in particular, the evidence of Prada, who had struck a deal with the prosecutor to save his own skin and said at the trial that all three men had met at Betty Nolan's house in the morning of 25 April to drink and take drugs. They had then taken Koonce's car to look for a shop to rob. He testified to the jury that, when Koonce and Moore joined him in the car after the hold-up, Moore said that he had shot someone in the shop. He, Prada, did not believe him until he heard of McCarble's death on the News.

As for Moore's alibi, this was later disputed by the Federal Court of Appeal as "pathetically weak". Although his sister insisted that he had been at his grandmother's house on the day of the shooting, every other witness swore that he had arrived there the following day and that his grandmother was in any case not ill at all... And when, to cap it all, Moore claimed that he had left Mrs. Nolan's house several weeks earlier and that it must therefore have been her son who took part in the robbery, the prosecutor was able to show that on the day in question Mrs. Nolan's son was himself in prison.

The "alibi" put forward by the defendant was to have fateful consequences for him.

Everything he was alleged to have said about the unintentional nature of the gunshot was automatically excluded from the defense case, since he was claiming in his alibi not to have been present on the scene of the crime.

Moreover, in accordance with the Texas Code of Criminal Procedure, the Prosecution was now entitled to introduce extrinsic evidence into the proceedings, which it would not have been able to do had Moore accepted the facts (i.e the presence on the scene). Hence, the prosecutor was able to refer to previous assaults for which Moore had not been prosecuted, and witnesses to his previous hold-ups were called to accuse Moore of having been the one who had threatened them with a gun during the hold-up. A dangerous man...

Moore later said his counsel was unaware of this provision in the Penal Code, something which does not seem to have taken the Court by surprise.

In the course of his argument to the Court, the prosecutor insisted that Moore's confession was legally admissible. The

The Death Penalty in the United States

evidence for his claim, he said, was that the confession included mention of the unintentional nature of the gun-shot - saying this was itself a flagrant breach of the agreement with the defense - which would not have been included if the confession had been fabricated by the police. This particular line of reasoning in no way prevented the prosecutor from later maintaining how the crime was deliberate.

In their closing speeches, Moore's two counsel advanced contradictory arguments.

Mr. Devine claimed that the gunshot had not been intentional, which was difficult to prove, given the absence in court of the relevant section of his client's confession.

Mr. Bonner, who asked the jury not to attach too much importance to the disagreement between the two counsels, attempted to show that Moore's presence on the scene of the crime had not been proved. Altogether, the short closing speeches taking up only 15 pages of the stenographer's notebook - to cover a case where their client's life was at stake...

The jury needed only two hours of deliberations before returning a guilty verdict.

As for the sentencing phase, they took all of ten minutes.

The two defense counsels had no useful evidence or arguments to put forward, and the prosecutor was able to use this to support his argument that there were no mitigating circumstances, that he had killed the victim deliberately and that he posed a danger to the safety of the public.

The jury thus unanimously answered positively to the three "special questions" set out in Article 37.071 of the Criminal Code of Procedure, the responses to which determine whether or not the death sentence is pronounced.

The following week, Moore was sentenced to death and sent to Death Row in Elis Prison.

THE APPEAL

The day before the hearing was due to start, Mr Devine announced that he would not be representing Mr Moore. He died not long after. So it was Mr Bonner alone who acted on behalf of Mr Moore at the Court of Appeal, to which all cases involving the death penalty are sent.

But Mr Moore by this time had lost all confidence in his

counsel. From his prison cell, he demanded vehemently that the Court should allow him to conduct his own defense, citing the breakdown of relations with a lawyer with whom he no longer had any contact, who failed to reply to Mr Moore's letters and who missed deadlines imposed by the Court for the submission of his grounds of appeal.

The Court refused to allow him to defend himself, but appointed a new counsel to represent him, Mr John Ward. Mr Ward, whether stalling for time or out of negligence, waited until he was threatened with professional sanctions before producing his grounds of appeal, which were derisory. He invoked exclusively the weaknesses of his client's defense at the court of first instance, particularly during the punishment phase of the proceedings where no extenuating circumstances had been advanced - but these were matters which the Court of Criminal Appeal was not competent to deal with.

The tragedy was that Moore himself, who had no contact with his lawyer, continued to stick to his alibi, thereby contradicting his own counsel. In the memorandum he submitted to the court he criticised his lawyers for not having called his grandmother and his father, who would have confirmed his alibi. No extenuating circumstances, then, since he was not guilty of the crime!

In October 1985, more than five years after his initial conviction, the Court of Criminal Appeals confirmed Bobby Moore's death sentence and set his execution for February 26th 1986. The Court pointed out that any possible weaknesses in the defense were beyond its sphere of competence. And as far as the alibi and the extenuating circumstances were concerned, it could only base its findings on the record of the lower court, from which of course the passage in Moore's confession describing the gun shot as involuntary had been excluded. Moreover, the lower court had not heard evidence from any witness in favour of the defendant.

HABEAS CORPUS PROCEEDINGS

On February 24th 1986, two days before Moore was due to be executed, a new lawyer presented a Habeas Corpus writ to the court in Houston, asking for the execution to be postponed. The judge who had condemned Moore to death rejected the demand without even holding a hearing. The Court of Criminal Appeals was equally quick to confirm its decision without giving reasons.

The Death Penalty in the United States

What this meant was that all avenues of appeal in Texas had been exhausted. The next stage was the federal jurisdiction.

The District Court was seized of the matter only on February 25th, but nevertheless granted the application for a stay just hours before the execution was due to take place. Moreover, in its detailed judgment, the Court noted that several of Moore's arguments, both legal and factual, in support of his Habeas Corpus application had never been examined by the Texas state courts, to whom the case was now to be remitted.

In April 1992, Moore, whose case had meanwhile attracted the active interest of three new lawyers, presented the judge in Houston with a fresh Habeas Corpus application to give effect to the decision of the District Court.

And this time, the application was soundly based. His lawyers argued:

- that Moore's previous lawyers had incited their client to maintain an untruthful position by encouraging his two sisters to claim that he was at his grandmother's house at the material time;
- that they had not seriously studied the case papers, failing in particular to cross examine Koonce, Prada and the other prosecution witnesses;
- that they had made no efforts to establish whether or not the gun might have gone off accidentally, wrongly considering that this would contradict Moore's alibi;
- that they had failed to adduce the extenuating circumstances that could have influenced the jury's deliberations on the "special issues";
- that in consequence, Moore had not had the benefit of an effective defense in the Strickland sense and that the conviction ought therefore to be overturned.

The hearing took place on April 23rd 1993 before the judge in Houston. Evidence was heard from Mr Bonner, Mr Moore, his two sisters and several other members of his family. Relying on these witnesses, Moore's lawyers were able to demonstrate how disturbed his family history had been. His alcoholic father had taken no interest in his family and had physically abused his wife and his children. Moore had therefore been forced to leave the family home at 14, living on the streets and surviving by stealing food. His school record revealed that his development had been substantially

retarded. Dr Borda, whom the defense called as a witness, testified that at the time of the killing Moore's mental age would have been 14 or lower, placing him on the borderline of mental debility.

The three previous convictions raised by the prosecution when Moore was 17 had in fact been pronounced on the very day when Moore, having been sentenced to eight years in prison, had been released after two years because of his good conduct, a telling indication of his lack of "dangerousness".

None of these essential considerations had been advanced in the course of the initial trial. This did not deter the judge in Houston from dismissing Moore's appeal, remarking in so doing that it had not been demonstrated that Moore had not had the benefit of effective defence counsel at the time of his death sentence. This decision was confirmed by the CCA on October 4th 1993.

Back to the beginning!

On October 12th 1993, Moore lodged a fresh application for Habeas Corpus with the Texas Federal Court, employing the same arguments that had been rejected by the state court.

On September 29th 1995, the Federal Court, which deliberated without convening the hearing requested by Moore, rejected his argument about the inadequacy of the strategy adopted by his trial counsel and confirmed the finding of guilt. According to the Federal Court it was Moore himself who foisted the alibi on his lawyers, not they on him. The Court described the alibi as "foolish", but added that "the defendant is in charge of his own defense."

On the other hand, and in contradistinction to the arguments of the prosecution, the Court did find that Moore's lawyers had been seriously at fault during the punishment phase of the proceedings. It therefore remitted the case once more to the Houston judge for reconsideration of the penal sanction to be incurred for the crime, of which he was henceforth to be definitively regarded as guilty.

The prosecution appealed, but the Federal Appeal Court, the Circuit Court, confirmed this decision on August 10th 1999. In a detailed judgment, the Federal Court held that Moore's defense team had failed blatantly to meet its obligations (theirs was a "constitutionally deficient performance") by dismissing the passage in their client's confession relating to the involuntary character of the fatal gun shot and by omitting to cross-examine the prosecution witnesses. The Court also

emphasised that the mitigating circumstances invoked by Moore should have been adduced during the punishment phase of the trial, in spite of Bonner's protestations that they were incompatible with his client's alibi.

The Court, using Strickland as a yardstick, characterised counsel's attitude as "professionally unreasonable" and "a deficient performance". In its view, the cumulative errors of the defence had rendered the sentence "unreliable". It was therefore appropriate to remit the matter yet again to the judge in Houston for further deliberation on sentence.

The matter was heard afresh in February 2000, with Fred Baca acting as the foreman of the jury. Bobby Moore was sentenced to death yet again. The case has now gone to the Court of Criminal Appeals in Texas, which consists of nine judges all elected to their post on a Republican ticket and all proponents of the death penalty - as indeed is Mr Baca himself. The chances of reversing this decision are indeed slim.

Fred Baca explained to the mission how scrupulously the twelve jurors over whom he presided had deliberated for two days before responding to the special questions they were called upon to resolve, and how that had enhanced his respect for his country's justice system. However, he pointed out that at no time was the jury informed of the consequences for Moore of the responses given to those questions, in particular the fact that a single dissenting voice would have led to the defendant being sentenced to life imprisonment and thus escaping the execution chamber.

Fred Baca said that it was the issue of the defendant's "future dangerousness" which had taken up the biggest part of the jury's deliberations. How, Mr Baca asked, could one possibly know if a man who had been on death row for more than 20 years was still a "continuing threat to society"? Impressed by the photos of the murder obligingly displayed by the prosecution, and not wanting to take the risk of seeing Moore set free on licence, which is what would have happened had he been sentenced to a term of imprisonment, the jury responded affirmatively to the question as to the defendant's "future dangerousness" - and this in turn entailed the passing, yet again, of the death sentence.

There are ample grounds for believing that Moore will die in detention before the conclusion of any new trial. Unless he goes mad in the high security prison at Terrell, as so many other condemned prisoners in Texas before him have done.

ANNEX 3 :

**APPLICATION FOR APPROVAL AS QUALIFIED COUNSEL
IN DEATH PENALTY LITIGATION**

I, _____, Texas Bar License Number _____, do request approval by the local administrative judge or his/her designee of this judicial district to be qualified for appointment in death penalty cases as:

Appellate counsel

First chair

Second chair

I certify that I meet all of the following requirements for such appointments in the following respects:

I have been licensed for a period of _____ and have five years experience in trial work.

2. I have successfully completed a continuing education course concerning death penalty litigation approved by State Bar of Texas for MCLE for at least twenty hours AND have passed the Qualification Test for death penalty education approved by the Article 26.052 Committee for the Second Administrative Judicial Region of Texas. [Attach proof of CLE and Test Completion].

Appellate Counsel

- I qualify as first chair as indicated below and additionally I have tried five felony trials as first chair, or have handled three or more capital appeals, or have handled ten appeals, or have had experience as a briefing attorney for an appellate court.

First Chair (In addition to items 1 and 2 above, I meet or exceed three or more of the following criteria as indicated below.)

Second Chair (In addition to items 1 and 2 above, I meet two of the following criteria as indicated below. Unless and until I have acted as legal counsel in more than one death penalty trial I will not accept an appointment unless first chair counsel has tried or handled on direct appeal two or more death penalty cases.)

I have been counsel in one or more death penalty cases as first or second chair;

I have been counsel in two or more cases of post-conviction writ of habeas corpus in death penalty cases;

I have been appellate counsel in one or more cases on direct appeal of death penalty case;

I have been counsel in ten or more felony cases tried to a jury verdict as first chair;

**APPLICATION FOR APPROVAL AS QUALIFIED COUNSEL
IN DEATH PENALTY LITIGATION**

- I have been appellate counsel in five or more felony direct appeals as lead counsel.
- I have attained Board Certification in Criminal Law by Texas Board of Legal Specialization;
- I have ten years experience during which 25 % or more of practice is devoted to practice of criminal law.

I, _____, certify that the above representations are true and correct and I make these representations in order to gain approval by the local administrative judge of this judicial district to be qualified for appointment as counsel in death penalty cases.

Applicant Signature

APPROVAL BY LOCAL ADMINISTRATIVE JUDGE

Having reviewed the application above, _____, attorney at Law, Texas Bar License Number _____, is hereby approved for appointment in this judicial district as counsel in death penalty cases, as indicated below, and the District Clerk of each county is hereby ordered to add the name of said counsel to the list of approved counsel for appointment in death penalty cases pursuant to Article 26.052 of the Texas Code of Criminal Procedure:

Counsel is approved for appointment as:

- Appellate counsel
- First chair
- Second chair

JUDGE PRESIDING

The Death Penalty in the United States

ANNEX 4 : ATTORNEY FEES EXPENSE CLAIM

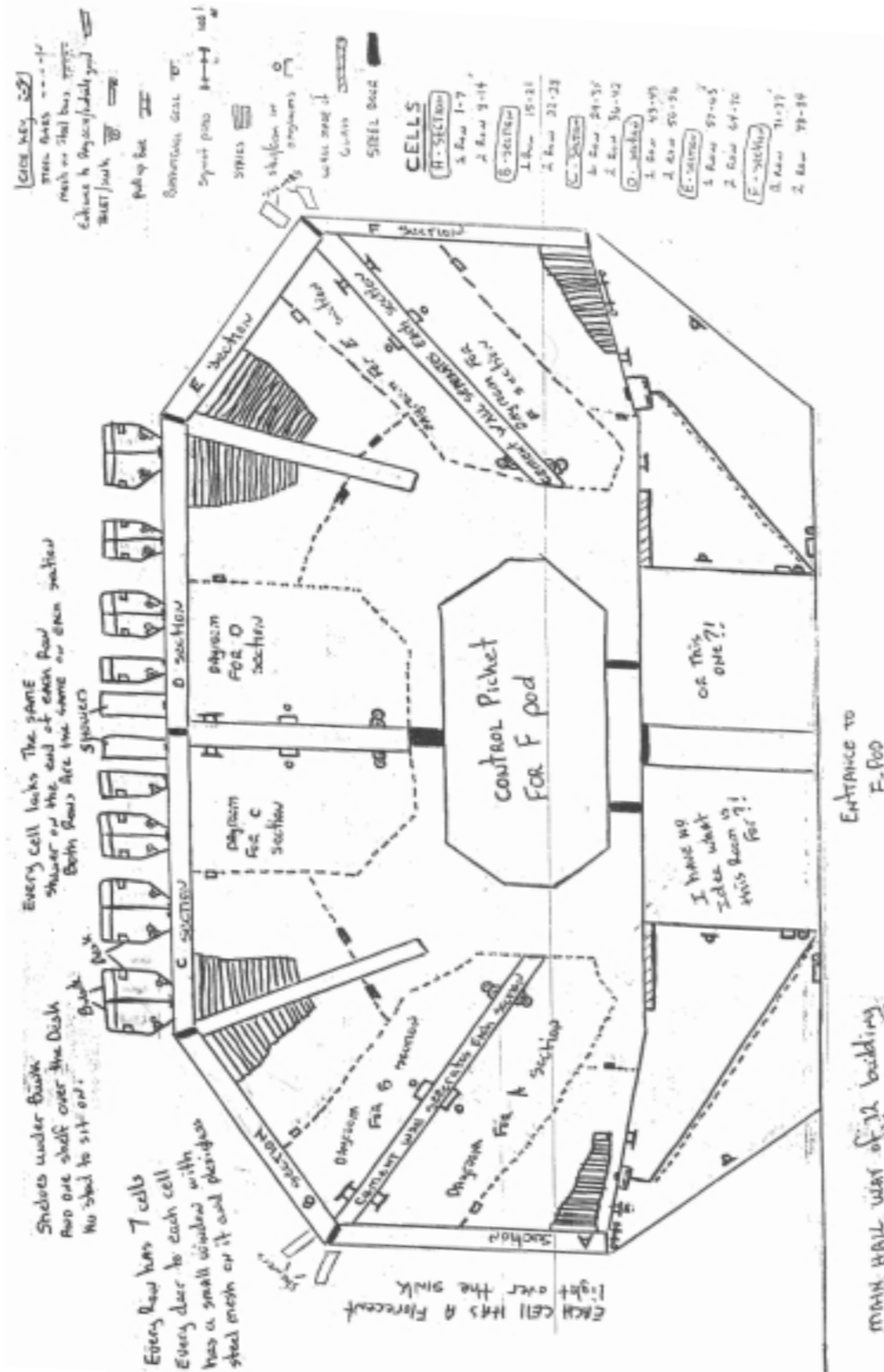
COUNTY AUDITOR'S FORM #40-1 TARRANT COUNTY, TEXAS (REV. 1998)		INSTRUCTIONS				
ATTORNEY FEES EXPENSE CLAIM - DISTRICT COURTS		1. Show only one defendant and type of case per claim. 2. Before payment can be authorized, each item must be completed legibly in ink. 3. For investigations, paid bills must be submitted by the attorney for expenses claimed. 4. Forward completed claim to the presiding judge for approval.				
COURT APPEARANCE INFORMATION						
COURT NUMBER		DEFENDANT				
		CASE NUMBER				
IN-COURT APPEARANCE						
		NUMBER OF COURT DAYS / HOURS	RATE (Judge Complete)	DAILY RATE (MIN/MAX)	TOTAL (Not to Exceed)	AMOUNT (Judge Complete)
NON-TRIAL APPEARANCE , to include: Pre-Indictment Appearance Post-Indictment Appearance Arraignment Non-Issue				\$ 65 \$ 130		\$
PRE-TRIAL HEARING/MOTION WITH TESTIMONY				65 175		
NON-CAPITAL TRIAL - Testimony must be taken				180 270		
<input type="checkbox"/> If Trial Exceeds Five Days				180 270	2250	
CAPITAL TRIAL (No more than two attorneys will be appointed)				270 540		
<input type="checkbox"/> 1st Chair				180 360		
<input type="checkbox"/> 2nd Chair				180 400		
<input type="checkbox"/> Capital Non-Trial Appearance, (non-issue)						
OUT OF COURT						
		NUMBER OF COURT DAYS / HOURS	RATE (Judge Complete)	HOURLY RATE (MIN/MAX)	FIXED RATE (MINIMUM / MAXIMUM Total Not to Exceed)	
OUT OF COURT HOURS - Prior Written Court Approval Required, Not to Exceed 10 Hours. To include: Documented Independent Research, Police Show Up, Grand Jury Appearances Does Not include: Routine Jail Visits, Interviews, Telephone Calls				\$ 40	\$ 240	
INVESTIGATION - Prior Written Court Approval Required					600	
EXPERT TESTIMONY, PLUS EXPENSES BASED ON CURRENT COUNTY POLICY - Prior Written Court Approval Required					250 750	
APPEALS						
CAPITAL APPEAL				\$ 45	13000	
NON-CAPITAL APPEAL					1750	
NON-CAPITAL APPEAL IN WHICH TRIAL EXCEEDED FIVE DAYS OR TRANSCRIPT EXCEEDED 800 PAGES					2400	
PETITION FOR DISCRETIONARY REVIEW NOT GRANTED					300	
PETITION FOR DISCRETIONARY REVIEW GRANTED					450	
NEW BRIEF AFTER PDR GRANTED					1300	
ORAL ARGUMENT AT COURT OF CRIMINAL APPEALS, AUSTIN, ON PDR					450	
CHANGE OF VENUE - Reasonable Expenses, According to County Travel Policies						
THREE FULL-TIME APPOINTED COUNSEL					2312/WK	
OTHER (Prior Approval of Fee Schedule Committee Required)						
					TOTAL	\$
DATES IN COURT (Enter type of case followed by Date, EXAMPLE: In Court Appearance - 9/12, 9/13, 9/14/90)						
PERSONAL INFORMATION						
SOCIAL SECURITY NUMBER		TELEPHONE NUMBER		BAR CARD NUMBER		
MAILING ADDRESS (Number)		(Street)		(City) (State) (Zip Code)		
CERTIFICATION						
I, _____, Attorney at Law, swear or affirm to the Court and to the County Auditor that they may rely upon the information contained above to make payment according to the fee schedule adopted by the Board of Judges pursuant to Article 26.05 Code of Criminal Procedure effective September 1, 1987. I further swear or affirm that I have not received nor will I receive any other money or anything else of value for representing the accused, except as otherwise disclosed to the Court in writing.						
SWORN TO AND SUBSCRIBED BEFORE ME ON THIS						
THE _____ DAY OF _____		A.D., _____		_____ Attorney at Law (Signature)		
Approved _____		Presiding Judge (Signature)		DISTRICT CLERK DEPUTY (SIGNATURE)		
COURT NUMBER _____						

WHITE - COURT

GREEN - AUDITOR

YELLOW - ATTORNEY

ANNEX 5 : LAY-OUT OF ONE OF THE BUILDINGS ON DEATH ROW TERRELL UNITS (LIVINGSTON, TEXAS) (Njeri Shaker - Texas Death Penalty Abolition Movement)



ANNEX 6 : EXTRACTS FROM "DEATH ROW PLAN", TEXAS

(Texas department of Criminal Justice, Institutional Division, Death Row Plan, July 2000)

(...)

The purpose of Death Row Plan is to provide uniform rules and regulations in managing Death-Sentenced offenders. Although the terms "his" or "he" are used throughout the Death Row Plan, the contents refer to male and female Death Row offenders, except where specifically limited (i.e., due to facility structural differences).

DEFINITIONS

I. Death Row Segregation - A death-sentenced offender who refuses to or is not allowed to work. Death Row Segregation offenders may be assigned to Levels I, II, or III. Offenders assigned to levels II or III require more intensive supervision due to poor institutional behavior.

II. Death Row Work Capable - A death-sentenced offender assigned to and required to work at a meaningful prison job, if available.

(...)

PROCEDURES

The classification process for death sentenced offenders shall be governed by the following:

I. CLASSIFICATION PROCESS

A. Intake and Orientation for Newly Received Death Row Offenders

1. Initial Intake at Byrd/Woodman Units

- a. Offender arrives from county.
- b. Byrd/Woodman staff completes: offender photographs, offender Identification Card

(...)

- c. The offender is then transported to the Unit of assignment.

2. Intake and Orientation at Unit of Assignment

- a. Housing Unit receives offender, Offender property and sealed envelope with initial intake and orientation information as well as photographs.
- b. Death Row supervisors conduct an interview with the offender and complete several forms and information sheets (information is self-reported by the offender).

B. DRCC Review (Death Row Classification Committee)

Newly received Death Row offenders shall be reviewed by the DRCC within 48 hours of arrival for their initial levelling. New arrivals shall generally be classified as level I.

C. Admission Summary

The Sociology Department shall complete an Admission Summary that will be used to create the Travel Card.

D. Work Capable Review

The Work Capable program for male offenders is suspended pending further decision by the Texas Board Of Criminal Justice. The female Work Capable program is functional. Therefore, the review procedures apply only to female offenders at this time.

A Death-sentenced offender shall undergo a ninety (90) day diagnostic process. The offender shall be reviewed by the DRCC for work Capable status as indicated below.

1. When assigning offenders to work Capable, it is the policy of the TDCJID to assign offenders to a meaningful prison job when available.

2. Work Capable Criteria

When reviewing an offender for Work Capable status, the committee shall consider the following:

- a. History of serious destruction of State property;
- b. Escape or attempted escapes; possession of escape paraphernalia;
- c. History of prior convictions involving assaultive behavior;
- d. History of Security Threat Group (STG) affiliation or involvement;
- e. History of offender misconduct resulting in the application of serious institutional disciplinary proceedings, as follows:
 - i. Assaults on staff or offenders;
 - ii. Possession of deadly or dangerous weapons;
 - iii. Involvement in smuggling or trafficking in contraband;
 - iv. Inciting or participating in a disturbance of a violent disruptive nature; or
 - v. Committing major disciplinary infractions or multiple minor

The Death Penalty in the United States

disciplinary infractions.

- f. History of below average performance in work;
- g. History of medical (which would limit ability to work) or psychiatric conditions;
- h. Presence within the unit of personal enemies or possibility of retaliation (e.g., former police officer or hate crime perpetrator);
- i. Incapable of or refusal to work in available prison jobs;
- j. Not psychologically cleared by unit Psychiatric Team; and
- k. Refusal to participate during classification process.

Offenders assigned to Level II and Level III will be ineligible for Work Capable status.

3. Offender Appearance at DRCC

The offender shall be given an opportunity to appear before the DRCC and be provided with a written record of the reasons for the committee decision upon conclusion of the review. An offender who is present at the DRCC shall be verbally advised of the committee's recommendation to the SCC. An offender who refuses to attend committee proceedings shall automatically be denied Work Capable status and shall be notified in writing by use of the I-204 (Management Level Review/Determination) form.

4. Appeal of DRCC Decision

The offender may appeal the decision of the DRCC through the Offender Grievance procedures.

(...)

E. Death Row Segregation

- 1. Level I - Offenders assigned to level I shall be reviewed for Work Capable status no less than six (6) months and not more than one (1) year after completing the initial intake process or no less than six (6) months and not more than (1) year from their last Work Capable status review.
- 2. Level II - Offenders assigned to level II shall be reviewed for a possible change in level status every ninety (90) days from their initial placement in level II.
- 3. Level III - Offenders assigned to Level III shall be reviewed for possible change in level status every thirty (30) days from their initial placement in Level III. (...)

II. GENERAL PROVISIONS

A. Visiting: Security cubicles shall be utilized in the unit visiting room for Death Row Segregation offenders. Death Row Work

Capable offenders shall be allowed to utilize the General Population non-contact visitation area. Death Row offenders are not allowed contact visits. Visitation shall be held in conformance with the rules established by the TDCJ Offender Visitation Plan.

1. Number of visits

Death Row offenders are allowed visits based on the schedule below. Generally, visits shall be two (2) hours in length (except where noted in the *Visitation Plan*. Special security procedures may be utilized during visitation periods to ensure the safety and security of all offenders, offender visitors, staff and the security of institution.

<u>Custody Level</u>	<u># of General Visits Allowed</u>
Work Capable & Level I	1 per week
Level II	2 per month
Level III	1 per month

D. In-Cell Programs

Death Row work Capable and Segregation Level I offenders may have access to in-cell programs that are consistent with security requirements. Only supplies available through the commissary may be used by male Death Row Offenders. Item available may be limited by the Warden if abused by an offender and property may be limited by the disciplinary process. These programs may be in the area of education as well as arts and crafts pursuant to AD-14.59 "Offender Piddling and Crafts Sales" with the exception of in-cell art programs. The Warden, Assistant Warden or designee may, on a case-by-case basis, suspend an in-cell program when an offender has abused that privilege. Offenders assigned to Level II or Level III are ineligible for In-Cell Programs.

E. Security Measures

Death Row security procedures shall be handled in accordance with the appropriate post orders.

- 1. Prior to and after each use, the shower areas, dayrooms, inside recreational areas and outside recreation areas are to be thoroughly searched.
- 2. Offenders shall be thoroughly strip-searched before and after recreation or leaving or returning to the assigned cellblock.
- 3. Frequent, thorough searches of cells, cell runs, shower areas and other locations within the housing area shall be conducted. Each cell shall be thoroughly searched prior to

The Death Penalty in the United States

assigning an offender to the cell.

4. Support service inmates (SSIs) assigned to Death Row shall be strip-searched each time they enter or leave the Death Row area. While in the Death Row area, SSIs are to be kept under constant, direct supervision.

5. At any time that a problem develops with a particular offender in Death Row, the Death Row supervisor shall ensure that the problem is identified and addressed as soon as possible. Unresolved problems are not to be left to escalate into larger problems.

III. MANAGEMENT OF DEATH ROW WORK CAPABLE

(...)

B. Recreation

Each Death Row Work Capable offender shall be allowed two (2) hours of recreation per day (either dayroom or recreation yard) with at least two (2) days outside, weather permitting. Four (4) offenders may exercise at one time in the dayroom, which shall be equipped with a table for tabletop games as well as a television. Therefore, an offender may have the option to forgo outside recreation and choose dayroom recreation. Female offenders may recreate in groups of four (4) outside as well.

C. Visitation

Visitation hours for Work Capable offenders shall be scheduled according to the TDCJ Offender Visitation Plan. Each Work Capable offender shall be allowed one (1) two (2) hour visit per week. Ministerial/Spiritual Advisor visits shall be conducted according to AD-07-30, "Procedures for Religious Programming," the TDCJ Offender Visitation Plan, and the Death Row Plan.

D. Meals: Work Capable Feeding Procedures

Work Capable offenders shall receive the same food tray as general population and Level I Death Row Segregation offenders. Work Capable offenders shall eat their meals in their cells or at their work site, as the Warden or designee deem appropriate.

E. Commissary

1. Work capable offenders have the same access to commissary items as minimum custody general population offenders.

2. Work Capable offenders shall have their purchases delivered to their cells.

F. Property

Work Capable offenders are required to maintain their property as outlined in AD-03.72, "guidelines for TDCJ Offender Personal Property and Confiscation and Disposal."

G. Showering

Offenders in Death Row Work Capable shall be provided the opportunity to take a shower seven (7) days per week. Death Row Work Capable offenders will be furnished and are expected to wear clean clothes as outlined in AD-09.26, "Allocation of Necessity." They must Also adhere to grooming standards as outlined in AD-03.83, "TDCJ Offenders Who Refuse to Comply With Grooming Standards." Items allowed during showering are the as general population offenders.

(...)

IV. MANAGEMENT OF DEATH ROW SEGREGATION

A. Confinement Procedures

A death row segregation offender may be assigned to Level I, level II, or Level III, based upon his behaviour. The Death Row classification committee (DRCC) shall have the authority to change the level to which an offender is assigned. Regardless of level, Death Row Segregation offenders shall be single-celled.

1. Level I - Offenders assigned to Level I are generally maintaining good behaviour but for one or more reasons (see Work capable review) are not eligible for work capable.

2. Level II - Offenders assigned to Level II:

a. May be chronic rule violators but do not show a recent (within the last three [3] months) history of in-prison assaultive or aggressive behaviour.

b. The offender may have been assigned to Level III due to a positive change in behaviour and attitude, the DRCC has reviewed his status and reclassified the offender to Level II.

c. The offender may have been involved in an incident or have received a disciplinary case that warrants placement in a more restrictive level.

3. Level III - Offenders assigned to Level III are chronic rule violators and are assaultive or aggressive in nature (i.e., history of institutional violence, offender assaults with weapons, history of weapons possession, assaults or attempted assault on offenders or staff, fighting with or without a weapon). The offender may be:

The Death Penalty in the United States

a. A current escape risk (escape or escape attempt was assaultive in nature or it was determined on the basis of the circumstances surrounding the escape or escape attempt that the offender had a high potential for assaultiveness);

b. A threat to the order and security of the institution as evidenced by repeated serious disciplinary violation (assaultive in nature); or

c. A threat to the physical safety of other offenders or staff due to assaultive behaviour that includes assaultive offenders identified and confirmed as being members of an STG.

(...)

C. Recreation Schedule

1. Offenders in any category of Death Row Segregation shall be allowed physical recreation out of their cells in conformity with the level to which they have been assigned.

2. Level I offenders shall be allowed out-of-cell recreation in accordance with one of the three following schedules at the discretion of the Warden or designee :

a. Seven (7) days per week with one (1) hour of out-of-cell physical recreation each day ; two (2) hours of the weekly out-of-cell recreation shall be outdoors, weather permitting ; or

b. Five (5) days per week with two (2) hours of out-of-cell physical recreation each of the five (5) days ; two (2) hours of the weekly out-of-cell recreation shall be outdoors, weather permitting ; or

c. Four (4) days per week with three (3) hours out-of-cell physical recreation each of the four (4) days ; three (3) hours of the weekly out-of-cell recreation shall be outdoors, weather permitting.

3. Level II - Offenders assigned to this level shall be allowed out-of-cell recreation four (4) days per week with one (1) hour out-of-cell physical recreation each of the four (4) days ; one (1) hour of the weekly out-of-cell recreation shall be outdoors, weather permitting.

4. Level III - Offenders assigned to this level shall be allowed out-of-cell recreation three (3) days per week with one (1) hour out-of-cell physical recreation each of the three (3) days ; one (1) hour of the weekly out-of-cell recreation shall be outdoors, weather permitting.

D. Visitation

1. Death Row Segregation offenders shall be allowed visitation privileges according to the level to which they have been assigned:

a. Level I - one (1) general visit per week.

b. Level II - two (2) general visits per month.

c. Level III - one (1) general visit per month.

2. Visitation hours for segregation offenders shall be scheduled according to the *TDCJ Offender Visitation Plan*. Ministerial/Spiritual Advisor and Execution visitation shall be scheduled in accordance with AD-07.30 and the *TDCJ Offender Visitation Plan*.

E. Meals

Death Row Segregation offenders shall have access to nutritionally adequate meals. Specific dietary requirements shall be met for those offenders whose religious, medical or dental condition requires dietary management. The Death Row Segregation Supervisor and the Food Service Manager will need to coordinate the number and type of food trays to be delivered to Death Row Segregation offenders. Offenders in Death Row Segregation shall receive the following type of food tray according to the level to which they have been assigned.

1. Level I - regular food tray with dessert

2. Level II - regular food tray, no dessert

3. Level III - regular food tray, no dessert

F. Commissary

Death Row Segregation offenders shall have access to commissary in accordance with the level to which they have been assigned:

1. Level I - Same access to commissary as minimum custody general population offenders (\$75.00 every two [2] weeks) to include approved TDCJ electrical appliances (i.e., fan, typewriter, radio, and other similar items);

2. Level II - purchase of one (1) item each of personal hygiene items and correspondence supplies not to exceed \$10.00 every two (2) weeks;

3. Level III - purchase of correspondence/legal materials not to exceed \$10.00 every two (2) weeks.

Specific limitations may be placed on an offender's property by the DRCC for documented reasons. Commissary items shall be delivered to Death Row Segregation offenders.

(...)

1. Death Row Segregation Housing Practices:

a. Each unit shall ensure that categories and levels of Death Row Segregation can be identified by the cell number or row of the segregation housing area. Offenders in Level I, Level II, and Level III should be housed in separate physical locations (e.g., different rows, or with partitions between the groups). If this separation of levels cannot be accomplished in this manner, every effort shall be made to maintain an empty cell between the levels. It is recommended that whenever it is necessary to designate cells on a single row to house different levels of Death Row Segregation offenders (e.g., 10 cells for Level III and 15 cells for Level II with an empty cell between the groups), the first group of cells on the row should be designated for Level II offenders and the last group of cells should be designated for Level III offenders. The rows or group of cells designated for specific levels of Death Row Segregation offenders should remain constant to the extent possible (i.e., only under special circumstances such as lack of bed space for another level of Death Row Segregation shall the designation of rows or cells change in the Administration Segregation housing area).

(...)

FIDH represents 115 Leagues or Human Rights organisations

The International Federation for Human Rights (FIDH) is an international non-governmental organisation dedicated to the worldwide defence of human rights as defined by the Universal Declaration of Human Rights of 1948. Founded in 1922, the FIDH has 115 national affiliates in all regions. To date, the FIDH has undertaken more than a thousand international fact-finding, judicial, mediation or training missions in over one hundred countries.

Subscriptions

La Lettre

France - Europe : 45 Euros / £ 27,40
 League Members : 38 Euros / £ 23,14
 Air mail (outside Europe) : 53 Euros / £ 32,27
 Students / Unwaged : 30 Euros / £ 18,27
La Lettre and mission reports
 France - Europe : 90 Euros / £ 54,81
 League Members : 76 Euros / £ 46,28
 Air mail (outside Europe) : 106 Euros / £ 64,55
 Students / Unwaged : 60 Euros / £ 36,54
 Supporters subscription : 150 Euros / £ 91,35

71 affiliate members

ALGERIE (LADDH)
 ALLEMAGNE (ILMR)
 ARGENTINE (LADH)
 AUTRICHE (OLFM)
 BAHREIN (CDHRB)
 BELGIQUE (LDH et LVM)
 BENIN (LDDH)
 BOLIVIE (APDHB)
 BRESIL (MNDH)
 BURKINA FASO (MBDHP)
 BURUNDI (ITEKA)
 CAMBODGE (ADHOC)
 CAMEROUN (LCDH)
 CANADA (LDL)
 CENTRAFRIQUE (LCDH)
 CHILI (CODEPU)
 CHINE (HRIC)
 COLOMBIE (CCA)
 CONGO BRAZZAVILLE (OCDH)
 COTE D'IVOIRE (LIDO)
 CROATIE (CCDH)
 EGYPT (EOHR)
 EL SALVADOR (CDHES)
 EQUATEUR (INREDH)
 ESPAGNE (LEDH)
 FINLANDE (FLHR)
 FRANCE (LDH)
 GRECE (LHDH)
 GUATEMALA (CDHG)
 GUINEE (OGDH)
 GUINEE BISSAU (LGDH)
 IRAN (LDDH)
 IRLANDE (ICCL)
 ISRAEL (ACRI)
 ITALIE (LIDH)
 KENYA (KHRC)
 KOSOVO (CDDHL)
 MALI (AMDH)
 MALTE (MAHR)
 MAROC (OMDH)
 MAROC (AMDH)
 MAURITANIE (AMDH)
 MEXIQUE (CMDPDH)
 MEXIQUE (LIMEDDH)
 MOZAMBIQUE (LMDDH)

NICARAGUA (CENIDH)
 NIGER (ANDDH)
 NIGERIA (CLO)
 PAKISTAN (HRCP)
 PALESTINE (PCHR)
 PALESTINE (LAW)
 PANAMA (CCS)
 PAYS BAS (LVRM)
 PEROU (CEDAL)
 PEROU (APRODEH)
 PHILIPPINES (PAHRA)
 PORTUGAL (CIVITAS)
 RDC (ASADHO)
 REPUBLIQUE DE YOUGOSLAVIE (CHR)
 ROUMANIE (LADO)
 ROYAUME-UNI (LIBERTY)
 RWANDA (CLADHO)
 SOUDAN (SHRO)
 SENEGAL (ONDH)
 SUISSE (LSDH)
 SYRIE (CDF)
 TCHAD (LTDH)
 TOGO (LTDH)
 TUNISIE (LTDH)
 TURQUIE (IHD/A)
 VIETNAM (CVDDH)

and 44 correspondent members

AFRIQUE DU SUD (HRC)
 ALBANIE (AHRG)
 ALGERIE (LADH)
 ARGENTINE (CAJ)
 ARGENTINE (CELS)
 ARMENIE (ACHR)
 BOUTHAN (PFHRB)
 BULGARIE (LBOP)
 BRESIL (JC)
 CAMBODGE (LICADHO)
 COLOMBIE (CPDDH)
 COLOMBIE (ILSA)
 CUBA (CCDHRN)
 ECOSSE (SHRC)
 ESPAGNE (APDH)
 ETATS UNIS (CCR)
 ETHIOPIE (EHRCO)
 IRLANDE DU NORD (CAJ)
 ISRAEL (B'TSELEM)
 JORDANIE (JSHR)
 KIRGHIZISTAN (KCHR)
 LAOS (MLDH)
 LETTONIE (LHRC)
 LIBAN (ALDHOM)
 LIBAN (FHHRL)
 LIBERIA (LWHR)
 LYBIE (LLHR)
 LITHUANIE (LHRA)
 MOLDOVIE (LADOM)
 RDC (LE)
 RDCONGO (LOTUS)
 REPUBLIQUE DE DJIBOUTI (LDDH)
 RUSSIE (CW)
 RUSSIE (MCHR)
 RWANDA (LIPRODHOR)
 RWANDA (ADL)
 SENEGAL (RADDHO)
 TANZANIE (LHRC)
 TCHAD (ATPDH)
 TUNISIE (CNLT)
 TURQUIE (HRFT)
 TURQUIE (IHD/D)
 YEMEN (YODHRF)
 ZIMBABWE (ZIMRIGHTS)

La Lettre

is published by Fédération Internationale des Ligues des Droits de l'Homme (FIDH), founded by Pierre Dupuy.
 It is sent to subscribers, to member organisations of the FIDH, to international organisations, to State representatives and the media.

17, passage de la Main d'Or - 75011 - Paris - France
 CCP Paris : 76 76 Z
 Tel : (33-1) 43 55 25 18 / Fax : (33-1) 43 55 18 80
 E-mail: fidh@fidh.org/ Internet site: <http://www.fidh.org>

Director of the publication: Sidiki Kaba
 Editor: Antoine Bernard
 Assistant of publication: Céline Ballereau-Tetu
 Original : French, ISSN en cours.
 Printing by the FIDH.
 Dépot légal May 2002 - Commission paritaire N° 0904P11341
 Fichier informatique conforme à la loi du 6 janvier 1978
 (Déclaration N° 330 675)

Prix : 4 Euros / £2.50