

## THE AMERICAN BAR ASSOCIATION'S RECOGNITION OF THE SACRIFICE OF FAIRNESS FOR RESULTS: WILL WE PAY THE PRICE FOR JUSTICE?

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The American Bar Association's (ABA's) call for a moratorium on executions demonstrates the recognition by the ABA that fairness has been sacrificed for results in the courts of the United States. The ABA's call for a moratorium should be the basis for a widespread reexamination by the bar, the judiciary, legislators, and citizens of the enormous price of compromising the integrity of the legal system that is being paid to carry out executions.

The question remains whether jurisdictions that want to carry out executions will pay a relatively modest price for competent representation of those facing the executioner and for procedures to guard against racial bias entering the capital sentencing process, and whether the Congress and the President will restore full review of capital cases by independent federal courts. The prospects do not look encouraging. The lack of commitment to fairness should be immensely disturbing to anyone who cares about justice, regardless of one's view on capital punishment.

The report regarding implementation of the ABA's call for a moratorium demonstrates that whether someone is sentenced to death is influenced by poverty and race; that the mentally ill, the mentally retarded, and children are not protected from the executioner; and that the role of the federal courts in preventing unconstitutional executions has been severely curtailed by the courts and the Congress.

The ABA's report is not the first indication that justice is not being achieved in the process by which human beings are selected to die in the United States. But previous warnings largely have been ignored in public discussion of crime issues as politicians compete to prove who is the "toughest on crime" by promising

more death sentences, less due process, and swifter executions.

Three U.S. Supreme Court justices—all of whom were appointed by Republican presidents and all of whom voted to uphold death penalty statutes in 1976 and in the following years—have expressed broad concerns that the promise of fair and consistent application of the death penalty, supposedly guaranteed by the statutes upheld in 1976, has not been realized.

Justice Harry A. Blackmun concluded before his retirement from the U.S. Supreme Court that "the death penalty experiment has failed" because "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."<sup>1</sup>

Justice Lewis Powell, who wrote the Supreme Court's opinion in *McCleskey v. Kemp*,<sup>2</sup> which, by a five-to-four vote, allowed Georgia to carry out its death penalty law despite significant racial disparities in its infliction, told his biographer that he later regretted his vote in *McCleskey* more than any other during his tenure on the Court.<sup>3</sup>

Justice John Paul Stevens questioned the continued use of the death penalty in a speech to the ABA in August 1996, observing that the "recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who ha[ve] been sentenced to death were actually innocent."<sup>4</sup> This, Justice Stevens continued, "most dramatically illustrates" the consequences of the failure to provide competent legal counsel to the poor.<sup>5</sup>

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about their guilt. Still others have been executed despite questions of innocence. These cases of innocence are troubling not only because there have been so many of them, but because in many of them innocence was established not by the legal process but by those outside the legal system.

For example, three men, including one sentenced to death, were released by the State of Illinois after their innocence was demonstrated by a journalism professor and his class at Northwestern University.<sup>7</sup> Alabama courts ordered the release of Walter McMillian, who spent six years on Alabama's death row for a crime he did not commit, only after the CBS News program *60 Minutes* reported on his innocence.<sup>8</sup> Similarly, it was only after *60 Minutes* publicized the innocence of Clarence Lee Brandley that the Texas courts, which had twice previously denied relief, ordered a hearing that eventually led to his release.<sup>9</sup> Randall Dale Adams, whose story was told in the motion picture *The Thin Blue Line*, was released from death row only because filmmakers demonstrated his innocence.<sup>10</sup> One cannot help but wonder how many other cases involving issues of innocence do not come to the attention of journalists or filmmakers.

The role of race in the infliction of the death penalty and the lack of independence of elected state court judges to protect constitutional rights in capital cases were identified by the International Commission of Jurists, in a report issued in July 1996, as serious flaws in the process of imposing death in the United States.<sup>11</sup> The Commission's concerns about the lack of an independent judiciary were confirmed the following August when Justice Penny White was voted off the Tennessee Supreme Court in a retention election that became a referendum on the death penalty. White had participated in only one capital case in nineteen months on the court. She concurred in an opinion that upheld the conviction but remanded the case for a

new sentencing hearing due to constitutional error.<sup>12</sup> Immediately after the retention election, the Governor of Tennessee, Don Sundquist, said: "Should a judge look over his shoulder [in making decisions] about whether they're going to be thrown out of office? I hope so."<sup>13</sup> A number of other judges and justices have been removed from office based on unpopular—but constitutionally required—votes to set aside death sentences.<sup>14</sup>

But the most disturbing evidence that fairness is being sacrificed in the pursuit of executions comes not from the reflections of U.S. Supreme Court justices, reports of distinguished organizations, or court opinions, but from the pages of the *Houston Chronicle*. Since the reinstatement of capital punishment in 1976, more people sentenced to death in Harris County, which includes Houston, have been executed than from any state other than Texas.<sup>15</sup> The *Chronicle* described as follows the process by which one man was condemned to die in Houston:

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

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

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the November 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

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

"It's boring," the 72-year-old long-time Houston lawyer explained.<sup>16</sup>

This kind of representation does not offend the Sixth Amendment, the trial judge explained, because, "[t]he Consti-

tution doesn't say the lawyer has to be awake."<sup>17</sup> The Texas Court of Criminal Appeals apparently agreed with this analysis. It rejected McFarland's claim of ineffective assistance of counsel,<sup>18</sup> finding that the sleeping lawyer met the standard for effective counsel set by the U.S. Supreme Court in *Strickland v. Washington*.<sup>19</sup>

George McFarland is not the only person condemned to die in Houston after a trial in which his defense lawyer slept. Calvin Burdine and Carl Johnson both had the misfortune to have attorney Joe Frank Cannon assigned to defend them. They are among two of Cannon's ten clients who have been sentenced to death.<sup>20</sup> Cannon has been appointed by judges in Houston to numerous criminal cases in the last forty-five years despite his tendency to doze off during trial.<sup>21</sup>

Although the clerk of the court testified that "defense counsel was asleep on several occasions on several days over the course of the proceedings,"<sup>22</sup> and Cannon's case file on Calvin Burdine's case contained only three pages of notes,<sup>23</sup> the Texas Court of Criminal Appeals found that a sleeping attorney was sufficient "counsel" under the Sixth Amendment.<sup>24</sup>

Professor David Dow of the University of Houston Law Center, who represented Carl Johnson in post-conviction proceedings, reported that upon his first reading of the transcript of trial "the ineptitude of the lawyer . . . jump[ed] off the printed page."<sup>25</sup>

During long periods of jury voir dire, while the State was asking questions of individual jurors, the transcripts give one the impression that Johnson's lawyer was not even present in the courtroom. Upon investigation, it turned out that he was in fact present; it's just that he was asleep.<sup>26</sup>

But sleeping during the trial was only one aspect of counsel's deficient perfor-

mance. Professor Dow reports:

The lawyer did as bad a job as one can imagine. In addition to sleeping during jury selection and portions of the testimony itself, he neglected to interview witnesses prior to putting them on the stand, which led to the entertaining spectacle of his not knowing in advance what his own witnesses planned to say. Although Johnson had given a confession, Johnson's lawyer put on a defense urging that Johnson was innocent.<sup>27</sup>

Nevertheless, both the Texas Court of Criminal Appeals and the U.S. Court of Appeals for the Fifth Circuit held that Johnson was not denied his Sixth Amendment right to counsel.<sup>28</sup> Neither court published its opinion.<sup>29</sup> Carl Johnson was executed on September 19, 1995.<sup>30</sup>

When state and federal courts uphold death sentences in cases in which the defense lawyer slept, not even the pretense of fairness is being maintained in the courts. Professor Dow correctly observed that courts have "ceased caring about the law" and "hide their shameful opinions by not publishing them."<sup>31</sup>

Justice Blackmun described the interests that have become preeminent in the administration of the death penalty in one of his many dissents from the Court's decisions limiting federal review of capital cases:

Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests . . . . One searches the majority's opinion in vain, however, for any mention of [a defendant's] right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death.<sup>32</sup>

Justice Blackmun could have added that the most fundamental requirement for a criminal proceeding free from constitutional defect—the right to competent counsel—is often missing because the

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Supreme Court in *Strickland v. Washington* adopted a standard that has made a mockery of the right to counsel.<sup>33</sup>

A study of homicide cases in Philadelphia, which rivals Houston for its high number of death cases,<sup>34</sup> found that the quality of lawyers appointed to capital cases in Philadelphia is so bad that “even officials in charge of the system say they wouldn’t want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder.”<sup>35</sup> The study found that many of the attorneys were appointed by judges based on political connections, not legal ability: “Philadelphia’s poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judges’ election campaigns.”<sup>36</sup>

Studies have found the same poor quality of representation in capital cases in one state after another. The *National Law Journal*, after an extensive study of capital cases in six Southern states, which account for the vast majority of executions, found that capital trials are “more like a random flip of the coin than a delicate balancing of the scales” because the defense lawyer is too often “ill trained, unprepared . . . [and] grossly underpaid.”<sup>37</sup>

Nevertheless jurisdictions have ignored previous recommendations by the ABA and others to deal with these defects. Indigent defense programs—already deficient due to underfunding and overwhelming caseloads—are deteriorating even further due to lack of funding, lack of structure, and lack of independence. Legislatures are simply unwilling to pay for an adequate defense for the indigent and courts are unwilling to order it.

The elimination of federal funding for the capital resource centers created in 1987 has resulted in inmates who had not finished elementary school attempting to represent themselves in complex proceedings in which their lives are at stake. Exzavious Gibson, a twenty-four-

year-old man with an IQ between 76 and 81, was not provided an attorney for a post-conviction hearing in Georgia.<sup>38</sup> The hearing was a complete farce because Gibson lacked the ability to present argument, offer evidence, or make objections.<sup>39</sup> Nevertheless, a Georgia Superior Court judge presided over the sham hearing at which the state was represented against Gibson by an experienced assistant attorney general who took full advantage of Gibson’s lack of representation.

Federal habeas corpus, which has corrected so many constitutional violations, has been eviscerated. Without federal habeas corpus relief, Tony Amadeo, who was sentenced to death at age eighteen in a two-day trial in Putnam County, Georgia, would not be alive today. The U.S. Supreme Court unanimously ordered relief for Amadeo in 1988 after it was revealed at a federal evidentiary hearing that the prosecutor had secretly directed jury commissioners to underrepresent African Americans in the jury pools.<sup>40</sup> Amadeo had been sentenced to death in Georgia by a jury drawn from those rigged pools. Tony Amadeo graduated *summa cum laude* from Mercer University in the summer of 1995.

It is doubtful whether, under the Anti-Terrorism and Effective Death Penalty Act of 1996, evidentiary hearings would be granted to Tony Amadeo and scores of others who won habeas corpus relief by showing fundamental violations of the Constitution. The constitutional violations still will exist, but under the new Act the federal courts are prohibited from conducting evidentiary hearings and receiving evidence of the violations.

Despite undeniable evidence that innocent people are being sentenced to death, that the quality of legal representation for the poor is a disgrace to our country, and that race often plays a decisive role in the sentencing decision in many cases, politicians are demanding less process, less judicial review, and swifter executions.

The provisions of the Anti-Terrorism

and Effective Death Penalty Act restricting the power of federal courts to correct constitutional error in criminal cases are the result of decisions that results are more important than process, that finality is more important than fairness, and that it is more important to get on with executions than to determine whether convictions and sentences were fairly and reliably obtained. Such a system produces results—convictions and death sentences—but it does not produce justice.

The ABA was right to call for a moratorium. Fairness matters. Fairness is important to achieving just results that command the respect of the community. A fair process is essential to ensure that decisions made by courts are as well informed as humanly possible. Before the execution of Horace Dunkins by the State of Alabama in 1989, when newspapers reported that Dunkins was mentally retarded, at least one citizen who sat on Dunkins' case as a juror came forward and said that she would not have voted for the death sentence if she had known of his mental limitations.<sup>41</sup> Because of the poor legal representation that Dunkins had received from his court-appointed lawyer, evidence of his mental retardation was not presented to the jury. The jury was unable to perform its constitutional obligation to impose a sentence based on "a reasoned *moral* response to the defendant's background, character and crime,"<sup>42</sup> because it was not informed of his disability by defense counsel. Nevertheless, Dunkins was executed.

No one can be expected to trust or respect judgments obtained at trials in which the accused was not represented adequately. Although on occasion the public demands a particular result in a case, ultimately citizens will have little respect for courts that bend with the political winds and ignore fundamental violations of the constitution.

The question of whether the death penalty is being fairly and consistently imposed is separate from the issue of

whether there should be a death penalty at all. Both questions are important and should be vigorously debated, but they should not be confused. One can be in favor of capital punishment but believe that it should be imposed fairly. The Supreme Court has held that "capital punishment must be imposed fairly, and with reasonable consistency, or not at all."<sup>43</sup> The ABA, like other observers, has found that the death penalty is not imposed fairly and consistently.

The ABA's message to jurisdictions that desire to carry out executions is that the cost of ensuring fairness is one of the costs of capital punishment. Yet the ABA's documentation of systematic unfairness, like others before it, is being met with indifference or resistance by those with the power to act on it. Jurisdictions have grown accustomed to death on the cheap. There is an impatience with process, a frustration with delay, and what appears to be an insatiable political appetite for executions. Yet the report in support of the ABA's recommendations makes it clear that to continue down the present path will result in even higher costs—the continued corruption of the criminal justice system and the eventual lack of public respect for the courts and their judgments.

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#### NOTES

<sup>1</sup> *Callins v. Collins*, 114 S.Ct. 1127 (1994) (Blackmun, J., dissenting from the denial of certiorari).

<sup>2</sup> 481 U.S. 279 (1987).

<sup>3</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).

<sup>4</sup> Justice John Paul Stevens, *Opening Assembly Address*, ABA ANNUAL MEETING at 13 (1996).

<sup>5</sup> *Id.* at 12.

<sup>6</sup> Ted Gest, *A House Without a Blueprint*, U.S. NEWS & WORLD REP., July 8, 1996, at 41.

<sup>7</sup> Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at 6.

<sup>8</sup> PETE EARLEY, CIRCUMSTANTIAL EVIDENCE: DEATH, LIFE AND JUSTICE IN A SOUTHERN TOWN 335-41, 347, 389-91 (1995) (describing *60 Minutes* report and eventual release of McMillian).

- <sup>9</sup> NICK DAVIES, *WHITE LIES: RAPE, MURDER, AND JUSTICE* TEXAS STYLE 307-09 (1991).
- <sup>10</sup> See RANDALL ADAMS ET AL., *ADAMS V. TEXAS* 242-64, 280-333 (1991).
- <sup>11</sup> INTERNATIONAL COMM'N OF JURISTS, *ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* 53-58 (1996).
- <sup>12</sup> *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).
- <sup>13</sup> Paula Wade, *White's Defeat Poses a Legal Dilemma: How Is a Replacement Justice Picked?*, MEMPHIS COM. APPEAL, Aug. 3, 1996, at A1.
- <sup>14</sup> See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).
- <sup>15</sup> Barry Schlachter, *Texas' Execution Record Defies Sole Answer*, FT. WORTH STAR-TELEGRAM, Feb. 12, 1995, at A10 ("Death sentences from courts in Houston's county, Harris, alone have accounted for more executions than the second-ranking state, Florida. It now has 114 inmates on death row.").
- <sup>16</sup> John Makeig, *Asleep on the Job?; Slay Trial Boring, Lawyer Says*, HOU. CHRON., Aug. 14, 1992, at A35.
- <sup>17</sup> *Id.*
- <sup>18</sup> *McFarland v. Texas*, 928 S.W.2d 482, 505-07 (Tex. Crim. App. 1996).
- <sup>19</sup> 466 U.S. 668 (1984).
- <sup>20</sup> Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1 (reporting that Cannon is known for hurrying through capital trials like "greased lightening," occasionally falls asleep, and has had 10 clients sentenced to death).
- <sup>21</sup> *Id.*
- <sup>22</sup> The clerk testified that counsel "fell asleep and was asleep for long periods of time during the questioning of witnesses." Ex parte Burdine, 901 S.W.2d 456, 457 n.1 (Tex. Crim. App. 1995) (Maloney, J., dissenting from denial of application for writ of habeas corpus).
- <sup>23</sup> Barrett, *supra* note 20, at A6.
- <sup>24</sup> Ex parte Burdine, 901 S.W.2d 456 (denying application for a writ of habeas corpus based on the ineffectiveness of Cannon).
- <sup>25</sup> David R. Dow, *The State, the Death Penalty and Carl Johnson*, 37 B.C. L. REV. 691, 694 (1996).
- <sup>26</sup> *Id.* at 694-95.
- <sup>27</sup> *Id.* at 696.
- <sup>28</sup> *Id.* at 700-01.
- <sup>29</sup> *Id.* at 701, 708 n.49.
- <sup>30</sup> NAACP LEGAL DEFENSE & EDUCATIONAL FUND, *DEATH ROW U.S.A.* 8 (1996).
- <sup>31</sup> Dow, *supra* note 25, at 708. Although Professor Dow was speaking of federal courts of appeal, his comments are equally true of state courts, as his description of Carl Johnson's treatment by the Texas Court of Criminal Appeals illustrates.
- <sup>32</sup> *Coleman v. Thompson*, 501 U.S. 722, 758 (1991) (Blackmun, J., dissenting).
- <sup>33</sup> For the results of the *Strickland* standard, see William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).
- <sup>34</sup> See Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6 (Magazine), at 22 (noting that Philadelphia County's death-row population of 105 is third largest of any county in the nation, close behind Houston's Harris County and Los Angeles County).
- <sup>35</sup> Fredric N. Tulskey, *Big-Time Trials, Small Time Defenses*, PHILA. INQUIRER, Sept 14, 1992, at A1, A8.
- <sup>36</sup> *Id.*
- <sup>37</sup> Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT. L.J., June 11, 1990, at 30. Twelve articles examining the quality of representation in numerous cases in the six states appear in *id.* at 30-44.
- <sup>38</sup> Bob Herbert, *The Hanging Tree*, N.Y. TIMES, Jan. 6, 1997, at A13, reprinted in 4 GEO. J. ON FIGHTING POVERTY 189 (1996).
- <sup>39</sup> *Id.*
- <sup>40</sup> *Amadeo v. Zant*, 486 U.S. 214 (1988).
- <sup>41</sup> Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6.
- <sup>42</sup> *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).
- <sup>43</sup> See *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).