

# Broken Justice: The Death Penalty in Alabama

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# Broken Justice:

## The Death Penalty in Alabama

### I. Overview

Of all the actions carried out by the state, none warrants more cautious implementation and stringent review than the imposition of the death penalty. Yet in Alabama, this most solemn responsibility remains fraught with inconsistencies and inequities. The structure of the state's criminal justice system and the power given to its trial and appellate judges compromise and limit the ability of capital defendants to get a fair trial and appropriate sentencing.

In 1972, the U.S. Supreme Court struck down all death penalty statutes in the United States on the grounds that the way the penalty was applied was arbitrary, capricious and discriminatory.<sup>1</sup> This resulted in the commutation of the sentences of all 629 death row inmates, sending states scrambling to rewrite their capital punishment statutes. Four years later, the Court upheld newly crafted death penalty statutes.<sup>2</sup> Executions resumed in 1977; as of August 2005,<sup>3</sup> 981 people have been executed.<sup>4</sup> The period after 1976 is referred to as "the modern death penalty era."

During this same time period, Alabama has executed 33 individuals, including three in 2005: Mario Giovanni Centobie on April 28, Jerry Paul Henderson on June 2, and George Sibley on August 4. Seven people have died on Alabama's death row before their scheduled execution date - three from suicide.<sup>5</sup>

The Death Penalty Information Center has calculated that Alabama has the 6th highest execution rate in the country as well as the 6th

highest death-sentencing rate.<sup>6</sup> In 1999 Alabama sentenced more people to death per capita than any other state.<sup>7</sup> Yet, unlike many states, Alabama has no statewide public defender system. At least 30 current death row prisoners have no lawyer.<sup>8</sup> Alabama's death row occupants are overwhelmingly poor — 95 percent are indigent — and minority.<sup>9</sup>

The modern era death penalty statutes were supposed to guarantee that the process was fair and non-discriminatory. One way of ensuring accuracy was to create a bifurcated process. First, there must be a trial to determine guilt. This is followed by a penalty-phase evidentiary hearing to determine the appropriate sentence. In Alabama, the jury's determination at the penalty phase is a recommendation as to whether to impose a death sentence. However, the final decision rests with the trial judge who holds a third phase, sentencing hearing.<sup>10</sup> In order to obtain a jury recommendation of a death sentence, the state must prove beyond a reasonable doubt at least one aggravating factor.<sup>11</sup> The defendant may introduce any mitigating factors that are relevant. If the jury finds an aggravating factor, it must decide whether any mitigating factors outweigh the aggravating factor. If a jury finds the aggravating factors exist and that they outweigh the mitigating factors, the jury may vote to recommend a death sentence. If not, the jury recommends life. The vote is not required to be unanimous. No matter what the vote is, the case proceeds to the third phase, of the judge sentencing. Even if all jurors vote to recommend life, the judge may impose a death sentence. The judge is required

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to enter a written fact summary into the record in order to explain the final sentence imposed on the defendant.

Despite the *Gregg* decision, the death penalty process remains flawed in Alabama, as in many states. The problems are widespread and reach into many facets of Alabama's capital punishment and criminal justice systems. A July 2005 poll by the Capital Survey Research Center found that 57 percent of Alabamians have concerns about the fairness of the death penalty and would support a moratorium — or a temporary halt — of executions while questions of fairness and reliability are studied. The same poll found that 80 percent think that the current death penalty process could result in the execution of an innocent person.<sup>12</sup>

This report documents unfairness and unreliability that plague the death penalty system in Alabama and makes several recommendations, including a moratorium on executions. The major areas of focus the report examines are:

- **Inadequate defense:** Alabama has no statewide public defender system. Court-appointed defense attorneys are paid at \$40 an hour for time spent outside court and \$60 for time spent in court, significantly below the market rate for lawyers in private practice. Judges routinely do not pay lawyers the entire bill for work done in the case. One lawyer said the court paid him the equivalent of \$4.98 per hour to defend his client's life. Studies by legal experts have documented severe shortcomings among these poorly paid lawyers, including lawyers who fail to investigate the crime or their clients' background or to prepare cross-examination or argument for trial.<sup>13</sup>
- **Prosecutorial misconduct:** Prosecutorial misconduct taints judicial proceedings. Between 1973 and 2003, Alabama appellate courts found 325 instances of prosecutorial misconduct. Sixty-nine cases were reversed because of prosecutorial misconduct.

### Table 1

**Comparison of Top 10 Counties with the Largest Number of Death Penalty Cases (Since 1976) with their Population and Number of Murders**

County	# of Death Penalty Cases	% overall	Population	% overall	# of Murders	% overall
Jefferson	27	13.4	620,918	13.9	79	26
Mobile	26	9.4	380,878	8.5	52	17.2
Montgomery	23	8.3	225,490	5.0	31	10.2
Talladega	17	6.2	80,638	1.8	1	<1
Houston	17	6.2	84,675	1.9	1	<1
Morgan	10	3.6	109,841	2.5	5	1.6
Baldwin	9	3.3	117,363	2.6	6	2.0
Madison	9	3.3	278,690	6.2	9	3.0
Shelby	9	3.3	128,726	2.9	1	<1
St. Claire	9	3.3	44,525	1	1	<1

Several of these cases were death penalty cases, including one man who was later found to be innocent.<sup>14</sup>

- **Judicial overrides:** Alabama is among the few states that still allow their judges to override jury recommendations for lesser sentences and impose the death penalty in capital trials.
- **Execution of the mentally retarded:** In the 2002 case of *Atkins v. Virginia*, the U.S. Supreme Court declared it a violation of the Eighth Amendment to execute mentally

retarded offenders.<sup>15</sup> However, the Court's opinion did not define what constituted "mental retardation," nor did it outline the procedure to be used to determine if a prisoner was mentally retarded. Since the decision, some states — including Virginia, Utah, Illinois, Nevada, Idaho, and California — have passed laws to define retardation and to delineate the procedure for making that determination. The Alabama Legislature has not. As a result, there are no procedural protections in place to ensure that mentally retarded people are not sentenced to death or executed. Furthermore, because not every

**Table 2**

**Comparison of Top 20 Counties with the Largest Populations with the Number of Death Penalty Cases and the Murder Rates**

County	Population	% overall pop.	# of Death Penalty Cases	% overall	# of Murders	% overall
Jefferson	620,918	13.9	27	13.4	79	26
Mobile	380,878	8.5	26	9.4	52	17.2
Madison	278,690	6.2	9	3.3	9	3
Montgomery	225,490	5.0	23	8.3	31	10.2
Tuscaloosa	166,336	3.7	7	2.5	9	3.0
Shelby	128,726	2.9	9	3.3	1	<1
Baldwin	117,363	2.6	9	3.3	6	2.0
Lee	116,111	2.6	5	1.8	7	2.3
Calhoun	113,244	2.5	8	2.90	11	3.6
Morgan	109,841	2.5	10	3.6	5	1.6
Etowah	104,375	2.3	6	2.2	5	1.6
Lauderdale	88,407	2.0	0	0	2	<1
Houston	84,675	2.0	17	6.2	1	<1
Marshall	82,959	1.9	8	2.90	1	<1
Talladega	80,638	1.8	17	6.2	1	<1
Cullman	75,193	1.7	1	<1	1	<1
Walker	70,655	1.6	5	1.8	0	<1
Limestone	66,258	1.5	2	<1	5	1.6
DeKalb	65,605	1.5	1	<1	0	<1
Elmore	56,000	1.3	2	<1	1	<1

death row prisoner in Alabama is represented by counsel, there is a risk that a mentally retarded person who was sentenced to death before the *Atkins* decision could be executed without any court ever ruling on whether the execution was unconstitutional.

- **Racial discrimination:** In Alabama, individuals convicted of killing a white person are much more likely to be sentenced to death than those convicted of killing an African American. African Americans make up 26 percent of Alabama's overall population but comprise 47 percent of death row inmates.<sup>16</sup> Sixty percent of all homicide victims in Alabama are African American, while 80 percent of all inmates on Alabama's death row have been convicted of crimes in which the victims were white.<sup>17</sup> Of the 32 executions in Alabama since 1976, 15 have been for crimes involving white defendants and white victims (47 percent), 11 have been for crimes involving African American defendants and white victims (34 percent), 5 have been for crimes involving African American defendants and African American victims (16 percent) and 1 was for a crime involving a white defendant and an African American victim (3 percent).<sup>18</sup>
- **Geographic Disparities:** The death penalty is imposed unevenly throughout the State of Alabama. Table 1 compares the ten counties with the highest number of death penalty cases with the county population and number of homicides. Four counties ranking within the top ten highest number of death sentences account for less than 1 percent of the overall number of murders.<sup>19</sup> The counties are: Talladega County, 17 death sentences, the fourth highest number of any county; Houston County 15 death sentences, the fifth highest of any county, and Shelby and St.

Claire counties nine death sentences each, tied for seventh place with two other counties. These disparities suggest that the death penalty is imposed at a greater rate in those counties than in others.

## II. The State of Alabama Does Not Provide Adequate Indigent Defense

As noted above, Alabama has no statewide public defender system. Each judicial circuit independently determines how to administer indigent defense. Locally elected circuit judges along with local indigent defense commissions decide how each circuit will provide representation to defendants unable to pay for their own attorneys. Only four judicial circuits — Tuscaloosa, Shelby, Escambia, Conecuh/Monroe counties — have established centralized public defender offices. Twenty-six circuits use a court-appointment system in which judges appoint attorneys from lists maintained without any established criteria for inclusion on the list for each circuit. However, giving the judges the power to appoint attorneys has proven to be problematic. Judges may appoint attorneys with whom they are personally acquainted, creating potential conflicts of interest. Ten circuits employ a contract defender system, in which circuits hire attorneys for a set monthly fee. The contract attorneys handle all the indigent cases regardless of volume while continuing to run their private practices.

For wrongful convictions and sentences to be challenged effectively, death row inmates need lawyers. Alabama has no mechanism or state-funded agency to provide post-conviction counsel for persons sentenced to death. Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee all have established systems for providing counsel to indigent



death row prisoners.<sup>20</sup> State law in Alabama does permit a judge to appoint a lawyer for post-conviction proceedings, but the law does not authorize any appointment of counsel until a prisoner has filed a petition with the court.<sup>21</sup>

### **A. Inadequate qualifications for capital defense lawyers**

Historically, Alabama's required qualifications for capital defense counsel fall far below the American Bar Association's guidelines for the appointment of defense counsel for death penalty cases. Alabama merely requires five years' prior experience in the active practice of criminal law - with no distinction as to kinds of cases litigated or kinds of criminal law practiced. This is far from adequate preparation for the intricacies of a capital case. An attorney who spends five years representing defendants facing minor criminal charges such as shoplifting or trespassing will satisfy Alabama's capital counsel requirement. Such attorneys may be fine attorneys and able to provide misdemeanor defendants with very competent representation. However, the significant differences and complexities in capital trials and the severity and finality of the death penalty require attorneys to have specific capital experience. The ABA guidelines ask that capital attorneys have "substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive," that governs capital cases. And capital attorneys should also demonstrate "a skill in investigation, preparation and presentation of mitigating evidence."<sup>22</sup>

In January 2005, the Alabama Circuit Court Judges' Association adopted these guidelines as a model for use in capital cases.<sup>23</sup> These are not mandates and it is too early to tell if this action will have any affect on the quality of representation. However, it is a positive step. Unfortunately, it does not change the fact that many people now on death row did not have adequate representation at trial.

Other death penalty states have much more stringent requirements for appointed capital lawyers. Virginia, for instance, requires appointed capital counsel to have six hours of specialized training in capital litigation within the past two years and five years of criminal litigation practice - including experience as defense counsel in at least five jury trials for defendants charged with serious crimes. In 2002, Virginia opened four regional capital defense offices to represent and coordinate representation for indigent individuals charged with a capital crime.<sup>24</sup> Similarly, North Carolina requires appointed lead counsel to have tried a capital case to a verdict or to a hung jury as defense counsel, or to have represented defendants to disposition in four homicide cases at the trial level.<sup>25</sup>

### **B. Inadequate compensation for capital defense lawyers**

Lawyers must receive adequate compensation in order to defend the rights of their clients most effectively. Financial resources can buy time, experts, investigators, DNA testing — all important aspects of the legal process required to explore an inmate's legal history and options. Alabama provides only minimal compensation for lawyers in death penalty cases: \$60 an hour for in-court work and \$40 an hour for out-of-court work and no compensation for expenses. Historically, Alabama capped the total defense costs for both trial and post-conviction work at a maximum of \$2000. The cap has been lifted for trial work, but it still exists for post-conviction work. However, some trial attorneys have reported that they were not fully compensated for all of the hours they worked.<sup>26</sup>

These funding rates and caps are vastly insufficient for the amount of work required to properly represent an inmate's rights.<sup>27</sup> The funding cap must also be lifted for post-conviction

work, which sometimes requires even more preparation than trial representation because the post-conviction lawyer must be familiar with both the inmate's original trial and post-conviction claims. With such severe limits on attorney compensation, Alabama's indigent death row inmates essentially obtain counsel only when lawyers are willing to work for free. Often lawyers who are working on capital cases have to make tough choices as to where to spend their time and resources. Post-conviction lawyers must search diligently for mitigating evidence, which sometimes includes hiring experts or doing extensive investigation themselves to search the defendant's "psycho-social background."<sup>28</sup> This kind of research is where corners are often cut if budgets are tight and time is limited.

### **C. Post-conviction procedural constraints**

Even if a defendant manages to secure a lawyer, an inmate on death row in Alabama still faces significant obstacles. Alabama law limits the period within which an inmate can present post-conviction challenges. Alabama's Rule 32 of the Rules of Criminal Procedure governs an inmate's ability to raise issues in post-conviction proceedings regarding errors at trial and to bring up new evidence.<sup>29</sup> Rule 32 prevents convicted defendants from raising issues of trial error more than one year after a death sentence is certified.<sup>30</sup> Any claim of error must be made within one year of the first imposition of the death sentence if the inmate has any hope of obtaining a new trial or a new sentencing hearing. The Rules of Criminal Procedure in Alabama also lay out strict guidelines on filing an adequate petition. In order to withstand an immediate dismissal from the judge, the petition must contain "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere

conclusions of law shall not be sufficient to warrant any further proceedings."<sup>31</sup> This raises the bar very high, especially for death row prisoners who have to file the petitions on their own without the assistance of counsel.

In addition, Rule 32 prevents defendants from raising issues of newly discovered evidence more than six months after the evidence is discovered. Even if new evidence is discovered that clearly places the defendant's guilt into question, this rule restricts an inmate's ability to be heard in court at all.<sup>32</sup> Further, the rule puts up additional obstacles because the newly discovered evidence must also *clearly establish* either that the defendant is innocent of the crime charged or that the inmate should not have received the death sentence.<sup>33</sup> This standard is almost impossible to meet. Many petitions for post-conviction relief from death row are procedurally defaulted for failing to meet this steep burden. A person may have evidence indicating possible innocence but not be able to meet the high standard of *clearly establishing* innocence. Thus, no court will hold a hearing on this new evidence.

Furthermore, a state court may dismiss a post-conviction claim based solely on procedural errors — such as missing a filing deadline — without considering the merits of the claim. This is likely to happen when inmates are forced to file their own claims. If this happens, a federal court is also unlikely to consider the substantive claims.<sup>34</sup> This means that even prisoners with meritorious claims may be executed without a court ever considering whether they have a legitimate claim for relief.<sup>35</sup>

Robert Lee Tarver, executed by the State of Alabama on April 14, 2000, is one example. Mr. Tarver, an African American man, had been on death row for the murder of a white man. Prior to his execution, Mr. Tarver had obtained an affidavit from the district attorney who prosecuted his case that the prosecution considered

race when selecting his jury pool. Specifically, the District Attorney acknowledged using his peremptory challenges deliberately to exclude prospective African American jurors because of their race,<sup>36</sup> a practice that has been declared unconstitutional by the U. S. Supreme Court. Despite this acknowledgement, the Court of Criminal Appeals of Alabama denied relief to Mr. Tarver because the affidavit did not meet the requirements of Rule 32.

### III. Innocent People Have Been Wrongfully Convicted and Possibly Executed

As of August 2005, 121 prisoners throughout the country have been exonerated and released from death row during the modern era because they were innocent of the crime. During this same time period, 972 people have been executed.<sup>37</sup> This means that for every eight executions, one person is released from death row because proven innocent. These people spent an average of nine years in prison before their sentences were overturned. This is a terrible tragedy for the person who was wrongfully convicted, but it also means that the guilty person remained at large, perhaps harming others.

During the modern era, five prisoners in Alabama have been exonerated of all charges. Another, Daniel Wade Moore, was released from prison after the trial court dismissed all charges against him; but the state is appealing that dismissal.<sup>38</sup>

#### A. Alabama death row exonerees<sup>39</sup>

##### 1. Walter McMillian (African American; convicted 1988, exonerated 1993)

Mr. McMillian was accused of murdering a white woman and spent over a year in jail before his trial. At his trial, numerous witness-

es testified that at the time of the murder, he was at a fish fry with his sister. Despite this testimony, prosecutors instead relied on the testimony of a convicted murderer who later recanted his accusation to convict McMillian. The prosecution illegally withheld tape-recorded evidence of the state's primary witness recanting his testimony. After McMillian was found guilty at trial, the jury voted 7-5 for the sentence of life without the possibility of parole, but the judge overrode this decision and sentenced him to death. McMillian spent six years on death row before his case unraveled, every witness against him recanted and his conviction was thrown out.

##### 2. James "Bo" Cochran (African American; convicted 1976, exonerated 1997)

Cochran spent over twenty years on death row before he was released. After a mistrial, two separate convictions that were overturned, and a final trial, Cochran was found innocent. The lawyers at his first trial received only \$1000 for their work. In both of his trials that resulted in conviction, the jury was composed of eleven white jurors and one African American. His final trial took place before seven African American and five white jurors.

##### 3. Larry Randall Padgett (white; convicted 1992, exonerated 1997)

Padgett was convicted of killing his wife, Cathy Padgett, in 1990. He was convicted at his first trial and the jury recommended a sentence of life without parole, which the judge overrode and sentenced him to death. Five years later, he was granted a new trial because of harmful prosecutorial misconduct. The prosecuting attorney had withheld from the defense crucial blood test results until the fourth day of the initial trial. In the new trial, Padgett was found not guilty.

Birmingham Post-Herald Photo



**Gary Drinkard**

#### **4. Gary Drinkard (white; convicted 1995, exonerated 2001)**

Drinkard served eight years in prison and five on death row for a murder he didn't commit. In 1993, he was arrested for the murder and robbery of a local junk car dealer. It was two years before he was sentenced to death and moved to death row. The guilty verdict and death sentence from his first trial were overturned because of prosecutorial misconduct (prior convictions for prior crimes brought out at trial) and because he was represented by lawyers who had never specialized in criminal law and failed to present any mitigating evidence at his trial. At his second trial, he was represented by competent capital defense attorneys, who successfully brought in new testimony and evidence that led to his acquittal.

#### **5. Wesley Quick (white, convicted 1997, acquitted 2003)**

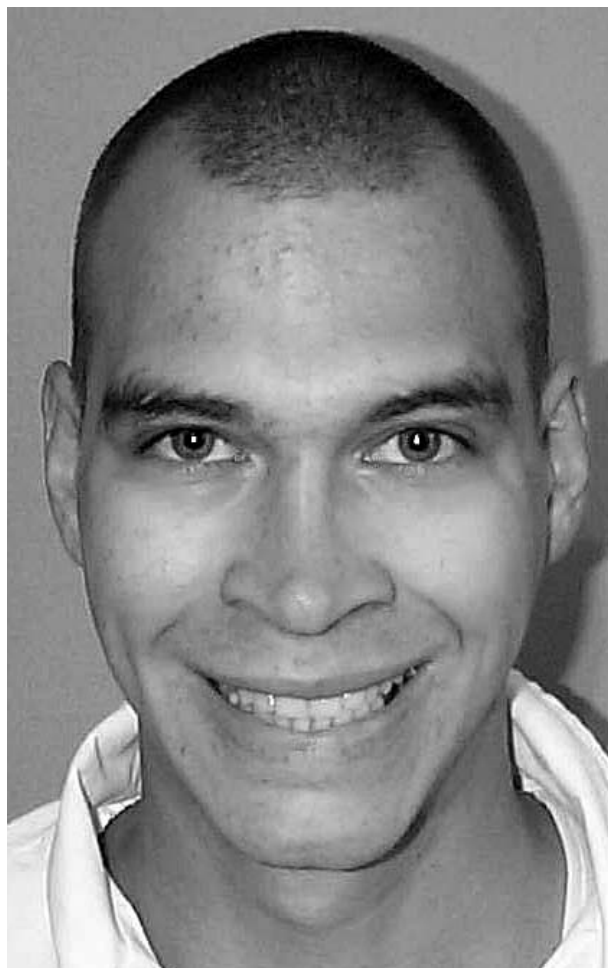
An Alabama jury acquitted death row inmate Wesley Quick of the 1995 double murder for which he was sentenced to death in 1997. The jury acquitted Quick at the conclusion of his third trial for this crime. Quick's first trial ended in a mistrial because of juror misconduct, but a second jury convicted him in 1997.<sup>40</sup> During that second trial, defense counsel tried to impeach the state's witness with prior inconsistent statements from the first trial, but the judge would not allow the attorney to use his notes, and would not provide counsel with a copy of the transcript from the previous trial. Quick was found guilty and sentenced to death. The Alabama Court of

Criminal Appeals overturned that verdict in 2001, stating that the judge in Quick's second trial was wrong to deny Quick a free copy of the transcript from the previous mistrial in light of his indigent status.

During Quick's third trial for the double murder, at which he received experienced representation, he testified that he did not commit the murders but said he was at the scene and saw the state's star witness against him, Jason Beninati, kill the men.<sup>41</sup> Beninati was never charged with committing the crime.

#### **B. Possibly innocent people who have been executed**

There have been no definitive cases during the modern era where it was proven that an



Birmingham Post-Herald Photo

**Wesley Quick**

innocent person was executed. However, there are three cases in Alabama in which people who had very strong claims of innocence *and who did not have a fair trial* were executed.

**1. Brian K. Baldwin (African American, convicted and sentenced to death 1977, executed June 18, 1999)<sup>42</sup>**

On March 14, 1977, 16-year-old Naomi Rolon was murdered. Prior to her murder, Rolon had picked up Brian Baldwin, age 18, and Edward Horsley, age 17, in North Carolina and driven them to Alabama. Baldwin and Horsley had recently escaped from a youth detention center. In Alabama, Baldwin stole a truck. Horsley

drove off with Rolon. Horsley later returned alone and on foot. Baldwin and Horsley were arrested, tried, and convicted for the murder of Naomi Rolon.

Baldwin was both beaten and cattle-prodded to obtain information about the whereabouts of Naomi Rolon. When Rolon's body was found, Baldwin was beaten and prodded again until he signed a "confession" that included inaccurate information, including the wrong weapon. In a separate confession, Horsley claimed Baldwin was the murderer, but he supplied accurate information about the murder weapon and the attack. The information was added to Baldwin's confession after the fact, as was the signature of a deputy who claimed to have witnessed Baldwin's waiver of rights, but who was not present.

The trial lasted only two days - August 8 and 9, 1977. Baldwin's court-appointed attorneys conducted no investigation and presented no witnesses other than Baldwin himself, even though Baldwin had identified potential witnesses who might have corroborated his torture claim. According to Baldwin, his lawyer met with him for a total of 20 minutes before the trial. Baldwin's attorney also failed to object when the prosecution suggested that a sexual assault might have taken place, even though Baldwin had never been charged with sexual assault. Baldwin was found guilty of murder and sentenced to die.

In addition, jurors did not learn that Rolon apparently had been beaten and stabbed by a left-handed person and that Baldwin was right-handed, that there was blood on Horsley's — but not on Baldwin's — clothes, or that Baldwin's purported confession was wrong about important facts. The trial judge, Robert E. Lee Key, called Baldwin a "boy" during the trial, and the prosecution called him "a savage."

The Alabama courts rejected Baldwin's appeal, but the U.S. Supreme Court remanded the case for further state proceedings in light of its decision in *Beck v. Alabama*,<sup>43</sup> holding that Alabama juries had to be given the option of finding defendants in capital cases guilty of a lesser-included non-capital offense when the facts would support such a finding. Soon thereafter, the U.S. Supreme Court clarified its *Beck* finding in *Hooper v. Evans*.<sup>44</sup> In view of the *Hooper* decision, the Court of Criminal Appeals granted a rehearing in Baldwin's case and reinstated his death sentence, holding that the evidence supported no verdict other than death.<sup>45</sup>

Next, Baldwin moved for post-conviction relief in state court, raising claims of ineffective assistance of counsel and racial discrimination in jury selection. After a two-day hearing, Judge Key denied the ineffective assistance claim on the merits and held that Baldwin's additional claims were procedurally barred because they could have been, but had not been, asserted on direct appeal. That decision was affirmed by the Court of Criminal Appeals and the Alabama Supreme Court; the U.S. Supreme Court declined review.<sup>46</sup> In 1991, U.S. District Court Judge Richard Vollmer, Jr., of the Southern District of Alabama, denied a federal writ of habeas corpus with a 177-page order, holding that the Alabama courts had fully and fairly considered the ineffective assistance claim and that the other issues were procedurally barred from consideration.

As Baldwin appealed Vollmer's decision, Horsley wrote a statement in 1994 asserting that he alone had killed Rolon. According to Horsley, Baldwin had been unaware that Rolon was dead at the time of their arrest.

As Baldwin's execution approached, his lawyers video-taped a deposition with a former Wilcox County deputy sheriff, Nathaniel

Manzie, who stated that Baldwin was beaten during interrogation and that a cattle prod was present in the jail at the time, although Manzie did not see it used on Baldwin. In addition, Manzie admitted signing a statement falsely stating that Baldwin had waived his right to counsel. It was at this point that Baldwin's lawyers also obtained the forensic report indicating that Rolon's wounds had been inflicted by a left-handed person.

By now, however, Baldwin's appeals had been exhausted. At no point during the 22-year appellate process had a court considered the merits of his innocence claim. His last hope was clemency from Alabama Governor Don Siegelman, who met privately with Manzie. During the meeting, Manzie inexplicably recanted his previous sworn statements indicating Baldwin's confession had been coerced. Despite last-minute pleas from, among others, former President Jimmy Carter, Coretta Scott King, and members of the Congressional Black Caucus, Siegelman allowed the execution to proceed on June 18, 1999.

### **2. Cornelius Singleton (African American, convicted and sentenced to death 1981, executed November 20, 1992)<sup>47</sup>**

Cornelius Singleton was convicted by an all-white jury of capital murder based largely on a coerced confession. Singleton had an IQ between 55 and 65.

After his arrest, Singleton was interrogated for several hours. There were a number of concerns about Singleton's "confession." Although he was severely mentally limited, he did not have the benefit of counsel during the interrogation. The police told him, untruthfully, that he could not get the death penalty for the crime. Also, the police brought his girlfriend to the station and told Singleton she could sit on his lap in exchange for waiving his right to

silence. Initially, Singleton thought he was being questioned about a recent incident involving bedsheets, in which Singleton thought he was buying bed sheets from another resident in his boarding house, but his neighbor had reported that her sheets were stolen.

The District Attorney reportedly dictated a confession, which he asked Singleton to repeat aloud while another officer recorded it as if it were Singleton's own words.

Singleton was then taken to the cemetery where the murder took place and was questioned about specific details, which he could not answer. According to Singleton, the victim's pager and some papers were on the ground and the police told him to pick them up, but he refused. He was then returned to the police station where he was told to sign the confession. He could not read, but he signed the "confession" with an X after being told that other charges pending against him would be dropped. In fact, no charges were pending. His girlfriend witnessed his signature, "X."

In order to secure a capital conviction, the state needed to convict Singleton not only of murder, but also of an aggravating circumstance, in this case, robbery. The state alleged the victim's watch was missing and undertook an extensive search of the home of Singleton's grandfather. The search failed to turn up the watch. A second, brief search subsequently was conducted and the watch was found in plain sight on his grandfather's mantel. The watch served as evidence that the victim had been killed during the commission of a felony robbery, which provided the necessary special circumstances for a capital conviction.

There was no evidence to link Singleton to the crime or the crime scene and no evidence that he knew the victim or had a motive to kill the victim. Eyewitnesses in the area described a suspicious white man with long blonde hair lurking around the cemetery on the day of the murder. There was some blood on the victim's blouse and the outline of a hand with fingers pointing downward on the

back of the blouse. The state failed to investigate eyewitness accounts and failed to link the forensic evidence to Singleton.

Singleton's court-appointed attorney refused to meet with him and didn't tell the jury that his client was retarded. Judge

Ferrill McRae allowed prosecutors to make inflammatory final arguments to the jury — one called the defendant a "creature [that] I can't refer to as a person or a human being" — and at sentencing dismissed the testimony of four defense psychologists while crediting a prosecution expert who said that Singleton was intellectually limited but not retarded. After the jury recommended a life sentence, Judge McRae overrode that decision and imposed a death sentence.

The conviction was upheld on appeal.<sup>48</sup> Singleton went to the electric chair in 1992. His IQ — in the range of 55 to 65 — was lower than that of anyone executed in the United States during the past quarter-century.

This case was cited in the United Nations' 1992 Country Report for the United States from the Special Rapporteur's Report on Extrajudicial, Summary or Arbitrary Executions.<sup>49</sup>

**Singleton went to the electric chair in 1992. His IQ — in the range of 55 to 65 — was lower than that of anyone executed in the United States during the past quarter-century.**

## Broken Justice: The Death Penalty in Alabama

### 3. Freddie Lee Wright (African American, convicted and sentenced to death 1979, executed March 3, 2000.)<sup>50</sup>

Warren and Lois Green, a white couple, were shot and killed during an armed robbery at their Western Auto Store in Mount Vernon, Alabama. Police initially charged another man, Theodore Roberts, with the murders after an eyewitness, Mary Johnson, identified him in a photograph and a police line-up. Roberts' girlfriend also told police that his gun was the murder weapon. However, seven months after the murders, charges against Roberts were dropped, and Wright was charged instead, after two men involved in the crime, Percy Craig and Roger McQueen, named him as the gunman. A third man also implicated Wright, but later retracted his accusation; however, he did not testify at the trial, and the jury did not hear this evidence. It took two trials to convict Freddie Lee Wright. The first trial, with a mixed-race jury, voted eleven to one in favor of acquittal, resulting in a mistrial. An all-white jury convicted him of armed robbery and capital murder in the second trial.

At his first trial in 1979, the prosecution presented testimony from Craig and McQueen, as well as expert testimony that a handgun traced to Wright was "consistent with", but not positively identified as, the murder weapon. The mixed race jury voted 11-1 to acquit and a mistrial was declared. Having come within one vote of acquittal, Freddie Wright was retried about a month later.

Craig and McQueen again testified against Wright. This time the jury was all-white after the prosecutor, without objection from the defense, removed black prospective jurors during jury selection. Appeals courts later rejected the claim that the prosecutor acted in a racially discriminatory manner, on the grounds that the claim should have been raised earlier. Aside



***(Left to right) Esther Brown with Protect Hope To Abolish The Death Penalty joins Alabama death row exonerees Gary Drinkard and James "Bo" Cochran at an event to end the Death Penalty.***

from the racial mix of the jury, the other difference from the first trial was that Wright's former girlfriend, Doris Lambert, testified that Wright had confessed the murders to her. After a two-day trial Wright was convicted and sentenced to death.

Wright's attorney continued to represent him in the appeals process, even after claims of ineffective representation were raised. Wright's attorney was subsequently disbarred. The District Attorney acknowledged that he should have disclosed evidence about Doris Lambert's psychiatric history and about deals made with Wright's co-defendants. In the course of denying Wright's *habeas corpus* petition, the



Eleventh Circuit was critical of the state's conduct. However, it denied relief, holding that most of Wright's claims were procedurally barred because they had not been raised at trial or on direct appeal.<sup>51</sup>

Two justices of the Alabama Supreme Court dissented from the denial of a stay of execution, on the grounds that the "petition recites persuasive facts that support the conclusion that [Wright] is innocent and that his conviction results from lack of a fair trial."<sup>52</sup>

### **C. The contribution of DNA testing to exonerations**

Where DNA may be ascertainable from evidence, defendants who have been convicted of crimes should be given access to DNA testing if they were not given a chance to test the evidence at trial or if new evidence or new testing procedures become available. Post-conviction DNA testing has led to the release of many innocent people as attested to by Peter J. Neufeld, Co-Director of the Innocence Project, before the House Judiciary Committee in 2003:

There are now at least one hundred and thirty-two Americans who have been exonerated by post-conviction DNA testing. Twelve of the exonerated were at one time on death row. Almost all of them had exhausted their appeals and post-conviction remedies. But for the serendipitous rescue by DNA, there is little doubt they would have been executed. Over forty of the exonerated were convicted of murder and many of them would have almost certainly faced execution if the death penalty had been applicable in the jurisdictions where they were tried. Collectively, these one hundred and thirty-two individuals have served 1,397 years in prison. With every wrongful conviction, not only does an innocent person suffer uncon-

**There are now at least one hundred and thirty-two Americans who have been exonerated by post-conviction DNA testing.**

scionably in prison or on death row but the real perpetrator remains free to commit serious crimes. In thirty-four of the post-conviction DNA exonerations in the United States, the actual perpetrator was identified through that same DNA, preventing more crime and protecting potential victims.<sup>53</sup>

In order to ensure that post-conviction DNA testing can occur, it is necessary to preserve evidence from the trial until the person is executed. Alabama does not have a law requiring that evidence in capital cases be preserved. In 2004, Congress passed a law that provides money to states to establish post-conviction testing procedures.<sup>54</sup> In order to qualify for the funds to establish this protocol, the Alabama Legislature must pass a law that provides for preservation of evidence and post-conviction testing. The majority of states have statutes that provide for post-conviction testing. Five states — Massachusetts, Mississippi, Rhode Island, Ohio and South Carolina — are considering legislation to provide testing. Iowa recently considered and failed to pass a post-conviction testing statute.

The only other states besides Alabama that have no law and are not considering passing one at this time are Alaska, Vermont, Wyoming and North Dakota.<sup>55</sup> South Dakota does not provide for testing by statute, but does through case law. Neither Alaska, Wyoming, nor North Dakota are death penalty states so there is no danger that any innocent person will be executed in those states.

### IV. The High Cost of the Death Penalty

Many diverse states — Tennessee, Kansas, Indiana, North Carolina, Florida, California and Texas — have found that capital cases cost substantially more than convicting and sentencing defendants to life in prison.<sup>56</sup> Death penalty trials take longer than other trials; attorneys for both parties spend substantially more time preparing for death penalty cases, and the actual cost of executing a human being is high. Judges in Alabama have commented on the significant costs of convicting, sentencing and executing defendants. In 2003, judges in Limestone, Walker and Jefferson counties acknowledged that death penalty trials contribute noticeably to their respective counties' high jury costs.<sup>57</sup> District Attorneys in Alabama also have recognized the high costs and strain of prosecuting so many capital cases. In February 2003, Montgomery D.A. Ellen Brooks, a 26-year veteran of prosecuting criminal cases, acknowledged that the high staffing and resource requirements of death penalty cases caused prosecution efforts to suffer in all cases prosecuted by her office.<sup>58</sup>

Not only is the prosecution of death penalty cases hampering the criminal justice system, but the complicated and error-ridden prosecution is a serious — if uncalculated — drain on state and local budgets. Alabama's citizens deserve for their tax dollars to be utilized in the most efficient way possible instead of allowing inefficiencies in the criminal justice system to impinge on essential state services. This is particularly true if you consider that, between 1976 and 2000, sixty percent of capital trials ended up with conviction reversals due to significant trial error.<sup>59</sup> Given Alabama's severe shortage of funding, the state cannot responsibly continue to strain its budget by pouring millions of dollars into error-ridden and inef-

**Many diverse states — Tennessee, Kansas, Indiana, North Carolina, Florida, California and Texas — have found that capital cases cost substantially more than convicting and sentencing defendants to life in prison.**

fective capital trials and executions, with the danger that the state and the defense will have to retry the case over, sometimes repeatedly, because it was reversed for errors.

### V. Prosecutorial misconduct

Prosecutorial misconduct in death penalty cases is a major problem in Alabama. Inappropriate actions or statements made during the trial by prosecutors can result in wrongful conviction, and, if detected, require a new trial or re-sentencing. Failure to disclose exculpatory evidence can result in the wrong person being convicted. Reversals by the Alabama appellate courts use up valuable resources from the state and the judicial system.

The Center for Public Integrity examined criminal cases in Alabama starting in 1970. They found that between 1970 and 2003 there were 325 allegations of misconduct. Of these, 69 decisions were reversed or remanded.<sup>63</sup> Of the cases of prosecutorial misconduct 28 involved discrimination in jury selection, 27 involved unethical acts during trial, nine involved withholding evidence from the defense, three involved a prosecutor violating ethical rules by testifying in the case, one involved the denial of a speedy trial and one involved the use of perjured testimony.<sup>64</sup>

## Some Quick Facts About Alabama's Death Penalty

1. In *Batson v. Kentucky*,<sup>60</sup> the U. S. Supreme Court ruled that the Equal Protection clause forbids a state from using peremptory strikes to remove jurors from the jury pool solely on the basis of race, yet it is a practice that unfortunately persists.<sup>61</sup> *Batson* violations have been identified in 14 cases since 1986; in one of these cases, the defendant was subsequently exonerated.

2. Alabama still allows individuals to be given sentences of death for crimes in which they themselves did not "pull the trigger." Six cases during the modern era have involved defendants sentenced to death when they were not actually the person who committed the murder.

3. Judges have the legal authority to override the jury's recommendation in capital cases. Judges have exercised override authority in at least 57 death cases during the modern era.<sup>62</sup> Although judges have the authority to override a jury recommendation either way — that is to give a life sentence instead of a recommended death sentence or to give a death sentence instead of a recommended life sentence — only two of the overrides were from death recommendations to life sentences. Interestingly, both of those cases involved African American defendants. Fifty-four death row inmates were given sentences of death by the sentencing judges — overruling the life sentences recommended by the juries. Twenty-five cases involved white defendants, 28 involved African American defendants and in one the race was unknown. This means that 25 percent of inmates who were sentenced to death during the modern era were given this sentence over the recommendation of the jury. Thirty-four separate judges took advantage of their judicial override authority to change a sentence of life in prison to death. However, 40 percent of those decisions came from the courts of four judges — H. Randall Thomas, Braxton Kittrell, Philip Segrest and Ferrill McRae. Judicial overrides are most common in Mobile and Montgomery counties.

## Broken Justice: The Death Penalty in Alabama

Nineteen of the 69 reversals were in death penalty cases. Two of those 19 cases were reversed two times because of prosecutorial misconduct — Timothy Powell and Phillip Tomlin.

Prosecutorial misconduct tends to go hand in hand with ineffective assistance of counsel. A prosecutor is much more likely to break rules if he or she is not facing a zealous advocate on the other side. Prosecutorial misconduct adds to the costs of the system when cases are reversed.

The following cases illustrate examples of prosecutorial misconduct.

Albert Lee Jefferson was convicted and sentenced to death. On appeal, defense counsel learned that the prosecution had withheld evidence that contradicted the state's witnesses who had claimed to have seen Jefferson at the crime scene. Had the defense had access to this evidence at trial, it could have used it to impeach the eyewitnesses' testimony.<sup>65</sup> Mr. Jefferson is now serving a sentence of life without parole.

In the case of Timothy Powell, Prosecutor Ellen Brooks used 13 out of 16 available strikes to eliminate jurors, all of whom were African American. The all-white jury found Powell guilty and sentenced him to death. When asked her reasons for dismissing the jurors, Brooks stated that the jurors she removed had been too young or had traffic violations on their records.<sup>66</sup> Later it was discovered that seven of the 12 white jurors selected to serve on the case had equally serious traffic violations and many were younger than the African American jurors who had been removed. After these discoveries, Powell was awarded a new trial. At this second trial, he was again convicted and sentenced to death, but the sentence was once more over-

turned for prosecutorial misconduct; this time for improper comments made during closing argument. Three other cases Brooks prosecuted were overturned because the misconduct was so severe that the reviewing courts declared that it had deprived the defendants of a fair trial.<sup>67</sup>

In another case involving Brooks, the appellate court reversed James Lewis Martin's capital murder conviction because "the verdict here was so tainted by the prosecutorial nondisclosure of material evidence that it is not worthy of confidence."<sup>68</sup>

The *Harmful Error* report found an extensive history of misconduct on the part of prosecutor Chris Galanos from Mobile County. The report stated:

Chris Galanos, who served as the jurisdiction's district attorney from 1979 to 1994, was responsible for at least 10 reversed convictions. In one case, judges ruled that Galanos withheld evidence from the defense; in another, a dissenting judge ruled that Galanos did not disclose evidence to opposing counsel. In three, he tried to serve as both prosecutor and state's witness. Galanos, 56, served as a circuit judge for the same district until he retired from the bench in 1999; he is now in private practice. He did not respond to requests for an interview.

Galanos' repeated attempts to serve as both the prosecutor and the state's witness prompted appellate judges to reverse three defendants' convictions.

During David Lee Waldrop's trial for a 1977 double capital murder, Galanos served as both the prosecutor and the state's chief witness. An appeals court reversed Waldrop's conviction in October 1982.

In 1982, Galanos prosecuted Bobby Tarver for capital murder. Again, Galanos attempted to win the conviction by serving as "the sole prosecutor that gave the opening and closing arguments, called all of the State's witnesses, and called himself as a witness to testify on behalf of the State." The appellate court reversed Tarver's conviction in June 1986.

In 1988, the appeals court reversed Robert Gilchrist's murder conviction due to the same conduct. "The district attorney for the 13th Judicial Circuit, Honorable Chris Galanos, performed all the functions of trial counsel, then testified as a witness, then resumed his role as counsel examining the witnesses and made the closing argument before the jury."<sup>69</sup>

Phillip Tomlin's case exemplifies how pervasive prosecutorial misconduct can be. His convictions were reversed three times. At his first and second trial Houston County prosecutor Donald Valeska improperly remarked about the defendant's failure to take the stand as well as making other inappropriate comments.<sup>70</sup> The death sentence imposed after Tomlin's third trial was reversed due to a juror's failure to disclose a criminal conviction with which Valeska should have been familiar. After each conviction, the jury recommended a sentence of life without parole; three times the judge overruled the jury's decision and sentenced Tomlin to death. Ultimately, the Alabama Supreme Court intervened and ordered the trial court to impose a life sentence.<sup>71</sup> Valeska represented the state in each of Philip Tomlin's four trials. In each trial, he acts as prosecutor directly caused retrial and reversals, yet he never faced any consequences.

## VI. Judicial Overrides and Death Sentencing

Alabama is one of only three states where the trial judge has the legal authority to disregard a jury's recommended sentence and impose a different one. The other two states are Delaware and Indiana; however, judges use the power much less frequently in those states and have basically stopped using it since the Supreme Court's *Ring* decision.<sup>72</sup>

Although a judge technically can override a jury decision either direction — change a life sentence to a death sentence or vice versa — in practice, overrides almost always involve judges imposing death sentences after the jury recommended life. We only identified two cases in which the judge changed a death sentence to a life sentence. Because Alabama judges are elected, they are likely to feel pressure from their voting public to impose the death penalty to show they are "tough on crime."<sup>73</sup>

During the modern era, judges have overridden 57 cases from life to death. Twenty-one of those cases involved white defendants and 23 had black defendants. At least sixteen percent of the prisoners on Alabama's death row are there as a result of judicial override.<sup>74</sup>

Although the trial court is legally required to make written findings concerning the evidence it relied upon in determining the aggravating and mitigating circumstances (particularly non-statutory mitigating circumstances) and must state reasons for not following the jury's life recommendation, trial judges have significant leeway in deciding to override jury decisions. It is extremely unusual for an appellate court to reverse a trial judge's override decision.

In 1995, the U. S. Supreme Court ruled that Alabama's judicial override system was constitutional in *Harris v. Alabama*.<sup>75</sup> We share the view of Justice Stevens who observed in dissent: "The absence of any rudder on a judge's free-floating power to negate the community's will renders Alabama's capital sentencing scheme fundamentally unfair."<sup>76</sup>

One judge who has gained notoriety because of his frequent use of the override power is Judge Merrill McRae from Mobile County. Judge McRae issued his first death sentence in 1981 and has sent many more defendants to the death chamber since then. In six cases, more than any other judge in the state, he's employed his override discretion - six times that he has 'enhanced' a jury's call for life without parole into a death sentence instead.<sup>77</sup> Five of the six men that he has sentenced to die were African American, and he has never substituted a life sentence for a jury verdict of death.

One of those men was Cornelius Singleton, the possibly innocent mentally retarded African American man whose case was discussed in Part III, section B.

### VII. Mentally Retarded Defendants and the Death Penalty

In the 2002 case of *Atkins v. Virginia*,<sup>78</sup> the U.S. Supreme Court declared it a violation of the Eighth Amendment to execute mentally retarded offenders.<sup>79</sup> The Court held that because of their disabilities in areas of reasoning, judgment and control of their impulses, mentally retarded people did not act with the level of moral culpability that characterizes the most serious adult criminal conduct. The Court also concluded that their impairments could jeopardize the reliability and fairness of the capital proceedings. Prior to *Atkins*, the State of Alabama executed at least

four people who were mentally retarded: Horace Dunkin, Cornelius Singleton, Willie Clisby and Varnell Weeks.<sup>80</sup>

However, the Court's opinion did not define what constituted mental retardation, nor did it outline the procedure to be used to determine if a prisoner was mentally retarded. As previously mentioned, the Alabama Legislature has yet to pass a law to come into compliance with the *Atkins* decision. As a result, there are no procedural protections in place to ensure that mentally retarded people are not sentenced to death or executed. Furthermore, because not every death row prisoner in Alabama is represented by counsel, there is a risk that a mentally retarded person who was sentenced to death before the *Atkins* decision could be executed without any court ever ruling on whether the execution was unconstitutional. The problem remains how to make sure that the nearly 200 prisoners on Alabama's death row can raise this issue, if it is relevant in their case.

The Alabama Court of Appeals in *Morrow v. State*<sup>81</sup> concluded that, until the Alabama Legislature acts to clarify these issues, the courts should use Rule 32 to determine whether a capital defendant is mentally retarded.

However, the Alabama Court of Appeals expressed its desire that the Legislature enact procedures for determining mental retardation before the trial begins, to save the state and defense the time and expense of pursuing a death penalty case if the person is ineligible to be executed.

The procedures vary from state to state in the burden of proof, in the specificity of the procedures, and in whether the determination is made by a court or a jury, but many of the states with such procedures recognize that the issue of mental retardation should be raised as soon as practicable. . . .

[W]here the court makes a pre-trial determination of whether the defendant is mentally retarded [it] thereby spares both the State and the defendant the onerous burden of a futile bifurcated capital sentencing procedure.<sup>82</sup>

We know that some of the people on death row are mentally retarded because Alabama courts have granted them relief in the wake of the *Atkins* decision. For example, in *Borden v. State*,<sup>83</sup> the Alabama Court of Criminal Appeals affirmed re-sentencing Mr. Borden to life in prison without parole because of his mental retardation. However, this was a clear-cut case of mental retardation in which the defendant had a full-scale IQ of only 53 and significant impairment and deficits in adaptive behavior.<sup>84</sup>

The concern is that other defendants who do not have as clear-cut case may have difficulty proving their claims because of the lack of procedures in place and the lack of legal assistance to pursue them.

The most prudent course of action would be for the Legislature to pass legislation establishing procedures and defining retardation to ensure that no mentally retarded defendant is sentenced to death or executed and to ensure that defendants on death row have access to post-conviction legal assistance so that someone can help them raise these claims.

## VII. Mental Illness and the Death Penalty

While precise statistics are not available, it is estimated that five to 10 percent of people on death row nationwide have a serious mental illness.<sup>85</sup> There are several ways that mental illness can affect capital proceedings. A person could be mentally ill at the time they committed the crime, which might have contributed to

the crime. Or after they committed the crime, they may have become incompetent to stand trial or after they have been convicted, they may develop a mental illness that makes them incompetent to be executed.

The Supreme Court has held that it is unconstitutional to execute insane people.<sup>86</sup> However, it is extremely difficult to prove insanity, and despite the *Ford* decision, mentally ill people are often convicted and sentenced to death, and even executed. Sometimes this happens without the jury ever knowing about the person's illness.

David Hocker was convicted and sentenced to death for the 1998 stabbing death and robbery of his boss, Jerry W. Robinson, 47, at his structural steel detailing company. His trial lasted one day and his lawyer didn't call any witnesses.<sup>87</sup> As a result, jurors never learned that Hocker had exhibited severe signs of mental illness, had a history of drug abuse, and was physically and mentally abused by his father while growing up. When Hocker was eight years old, his father committed suicide. Hocker later became suicidal himself, stating that he looked forward to dying. He volunteered to be executed. Hocker's sister, Kim Osborn, stated that Hocker had adopted a form of Christianity that led him to believe he would be a leader in the afterlife. As further evidence of his illness, Osborn stated that her brother had castrated himself while on death row.<sup>88</sup>

The case received a mandatory review by the Court of Criminal Appeals, but Hocker chose not to pursue further appeals, so there was never any determination as to whether or not he was mentally ill and, therefore, should not have been executed, nor was there ever any investigation as to whether he received adequate legal representation, or whether prosecutorial misconduct took place. Hocker did not ask Governor Bob Riley for clemency.

Varnall Weeks was sentenced to death for the October 1, 1981, killing of college student Mark Anthony Batts. His inexperienced, court-appointed attorney did not call any witnesses, nor raise the issue of his client's sanity.<sup>89</sup> A 1998 Amnesty International report detailed important aspects of Weeks' case: "Varnall Weeks was diagnosed as being severely mentally ill and suffering from pervasive and bizarre religious delusions. An Alabama state judge acknowledged that Varnall Weeks suffered from paranoid schizophrenia. The ruling agreed that he was 'insane' according to 'the dictionary generic definition of insanity' and what 'the average person on the street would regard to be insane,' but decided that his electrocution could proceed because he could answer a few questions, proving that he was legally 'competent.'<sup>90</sup> Varnall Weeks was executed in May 1995.

The *New York Times* reported that "Varnall Weeks, a convicted killer described by psychiatric experts as a paranoid schizophrenic who believed he would come back to life as a giant flying tortoise that would rule the world, was put to death . . . in Alabama's electric chair."<sup>91</sup> As the Times editorialized a few days before the execution, "if Alabama is allowed to take this sorry life, it will . . . expose just how barbaric and bloodthirsty this nation has become in its attempt to see justice done."<sup>92</sup>

Pernell Ford was convicted and sentenced to death for the murders of two women during a 1983 burglary.<sup>93</sup> Questions about Ford's sanity were first raised during his trial. While acting as his own defense attorney, he wrapped himself in a sheet during his penalty phase and demanded his victims be brought into the courtroom so God could resurrect them. Ford initially was set for execution in July 1999, but a federal appeals court delayed his death after his former attorney questioned his mental state. At a court hearing, Ford testified he could leave

death row through "translation," and had visited heaven and other spots worldwide while in prison. He said he had millions of dollars in a Swiss bank account, which would support his children and his 400,000 wives after he was executed and became a part of the Holy Trinity.<sup>94</sup> The court ruled in November, 2000 that Ford was competent to fire attorney LaJuana Davis and to drop his appeals. Governor Don Siegelman rejected a clemency request filed by Davis, who cited Ford's history of mental problems. Ford was executed on June 1, 2000.

### IX. Juveniles and the Death Penalty

On March 1, 2005, the U.S. Supreme Court ruled the juvenile death penalty unconstitutional in *Roper v. Simmons*,<sup>95</sup> concluding that the execution of offenders who committed crimes before the age of 18 constitutes cruel and unusual punishment in violation of the Eighth Amendment. In the majority opinion, Justice Anthony Kennedy wrote: "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."<sup>96</sup> He also alluded to growing international concerns regarding the execution of juveniles, writing: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."<sup>97</sup>

Prior to the Court's ruling, Alabama had the highest per capita rate of condemned juveniles in the United States and the country's second-highest number of juveniles on its death row, behind Texas.<sup>98</sup> Juveniles who had committed crimes as young as 16 could be sentenced to death. Fourteen Alabama death row inmates, all males, were affected by the decision and



should be resentenced, probably to life without the possibility of parole. However, as of September 1, 2005, some of those prisoners were still on death row.<sup>99</sup>

## X. Race and the Death Penalty

Twenty-six out of the 32 people (81 percent) who have been executed in Alabama during the modern era were convicted of killing white people. Although only 6 percent of all murders in Alabama involve black defendants and white victims, over 60 percent of black death row prisoners have been sentenced for killing someone white. Each year in Alabama, nearly 65 percent of all murders involve black victims. However, 80 percent of the prisoners currently awaiting execution in the state were convicted of crimes in which the victims were white.<sup>100</sup>

Furthermore, most of the people holding positions of power with decision-making authority in the criminal justice system in Alabama are white. none of Alabama's 22 appellate court judges are African American.<sup>101</sup> According to Amnesty International's 2003 report, "Death by Discrimination," only four percent of the criminal court judges are African American and none of Alabama's 40 District Attorneys are African American.<sup>102</sup> According to prominent death penalty attorney Bryan Stevenson, there are 128 judges in Alabama who preside over capital cases, and less than five percent of them are African American.<sup>103</sup> As a result, an observer

## Cases Where Race Played an Improper Role

1. In the case of Timothy Powell, prosecutor Ellen Brooks used 13 of 16 strikes to eliminate jurors. All 13 were African American. The all-white jury found Powell guilty and sentenced him to death. When asked her reasons for dismissing the jurors, Brooks related that the jurors she removed had been too young or had traffic violations on their records.<sup>108</sup> Later it was discovered that seven of the 12 white jurors selected to serve on the case had equally serious traffic violations and many were younger than the African American jurors who had been removed.<sup>109</sup> Powell's conviction and death sentence following the trial were reversed.

2. Levi Pace was charged by indictment in a county where 11 percent of the population was African American, but in 29 years not a single African American had served as jury foreperson. Also, the prosecutor struck a high percentage of African Americans from the jury pool. Pace was convicted and sentenced to death by a predominantly white jury.<sup>110</sup> His conviction was later reversed on appeal and he is currently serving a life sentence.<sup>111</sup>

3. Gregory Acres was convicted and sentenced to death after the prosecutor used 11 of his 12 preemptory challenges against African American jurors. When asked by defense counsel to state on the record his reasons for striking the jurors he replied, "I strike the jury on my individual personal belief as to the inclination to convict or acquit...they were not exercised along racial lines. The court of appeals did not find this explanation persuasive and reversed Acres' conviction."<sup>112</sup>

4. Vernon Madison was convicted by an all white jury after the prosecutor used preemptory challenges to remove all seven prospective African American jurors from the venire. The appellate court reversed his conviction finding that the reasons used by the prosecutor, which were found legitimate by the trial judge, were not so. One of the reasons used to strike two of the jurors was that their "demeanor was inappropriate."<sup>113</sup>

at a capital trial in Alabama is likely to see an African American defendant, a white judge, a white prosecutor, a white defense lawyer and a nearly all-white jury.<sup>104</sup>

### A. Batson violations

Prosecutors in capital cases sometimes exclude potential jurors to prevent participation of minorities on juries. This practice is especially noticeable when defendants are African American and victims are white.<sup>105</sup> It has historically been difficult for a defendant to challenge a prosecutor's decision to exclude African American jurors during the selection process because the prosecutor only has to articulate a reasonable, non-race-based argument for the dismissal. For example, a prosecutor in Alabama gave as his reason for striking several potential African American jurors the fact that they were affiliated with Alabama State University — a predominantly African American institution. This was considered a race-neutral reason by the reviewing court.<sup>106</sup> However, a June 2005 U.S. Supreme Court case reversed a death sentence on the grounds that the prosecutor who had claimed to have a race-neutral reason for excluding jurors was really acting on pretext.<sup>107</sup> Hopefully this case will help assure that jury composition is diverse. *See* section V above for additional examples of cases involving *Batson* violations.

### B. Triggerman issues

Alabama is one of the few states that allow the death penalty to be given to a defendant who did not actually "pull the trigger" in the alleged murder.<sup>114</sup> During the modern era, six persons who were not the triggerman received the death penalty in Alabama. Five of the six defendants were African American; of the eight victims, seven were white. In the one anomalous case, white supremacist Henry Hays was executed for the death of Michael Donald, an African American man.<sup>115</sup>

Three of these people have already been executed, while three remain on death row. In two of the six cases, the jury recommended life without parole, but the judge overrode that recommendation.

## XI. Conclusions and Recommendations

The people of Alabama want a criminal justice system that is fair and effective. We remain skeptical that the unfairness that has plagued the death penalty in Alabama and other death penalty states for so long can ever be completely eliminated. But as long as the death penalty remains public policy, basic decency requires all citizens of good will to try.

We urge the Alabama Legislature, the courts and the Governor to consider the following recommendations:

1. Impose a moratorium — a temporary freeze — on all executions in Alabama, at least until the recommendations of this report are in effect. During the moratorium, the State should undertake an exhaustive study of the death penalty in Alabama. It should be conducted by an independent commission appointed by the Legislature, with members from the legislative, executive and judicial branches, in addition to criminal justice experts. Defense attorneys, prosecutors, members of non-governmental organizations, and family members of murder victims and of people on death row should also take part in this study.
2. Establish a statewide public defender system insuring that all defendants are represented by qualified attorneys at trial, appeal and post-conviction proceedings.
3. Improve the quality of capital representation. Whether or not the Legislature decides to create a public defender system, imme-

diate steps should be taken to improve the quality of representation including requiring all attorneys to take part in ongoing training and have relevant experience in capital cases.

**Impose a moratorium — a temporary freeze — on all executions in Alabama, at least until the recommendations of this report are in effect. During the moratorium, the State should undertake an exhaustive study of the death penalty in Alabama.**

4. Institute meaningful checks on prosecutorial power, including "open-file" discovery to the defense in death penalty cases to lessen the likelihood of innocent people being convicted. Prosecutors' offices should develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on evidence subject to human error such as: eyewitness identification by strangers and informant testimony. Prosecutors who violate the law should be sanctioned.
5. The Alabama Court System should begin keeping statistics on every potential capital case in Alabama, including information about such factors as the race of the defendant, race of the victim, county where the case was brought, racial composition of the jury, and the names of prosecutors and defense attorneys. Having this information easily accessible will enable authorities to review whether death penalty prosecutions are taking place in a fair and non-discriminatory manner.
6. Establish a process for reviewing claims of mental retardation by death row inmates whose execution dates are approaching. The Legislature should revisit the mental retardation issue next session and pass legislation defining mental retardation and establishing procedures for defendants to raise the issue pre-trial.
7. Establish post-conviction DNA testing procedures, including protocols to ensure that evidence is preserved until the person is executed.
8. Abolish judicial override in capital cases.
9. Strictly enforce the rule prohibiting the discriminatory use of peremptory challenges in striking jurors.
10. The judiciary and the Attorney General should expand recruitment, retention and promotion of minority personnel to create a more diverse group of judges and prosecutors. Judges should make efforts to appoint people of color to represent indigent defendants in court-appointed cases.
11. Institute meaningful proportionality review to ensure that death sentences are meted out in a fair, rational and non-discriminatory fashion.

# Endnotes

<sup>1</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>2</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>3</sup> The numbers of executions change weekly. For purposes of this report, numbers cited will be as of August 31, 2005, unless otherwise stated.

<sup>4</sup> Death Penalty Information Center at: <http://www.deathpenaltyinfo.org/getexecdata.php>.

<sup>5</sup> The Alabama Civil Liberties Union and the Alabama Prison Project analyzed all 275 Alabama cases where people have been sentenced to death during the modern era and compiled a database, hereinafter referred to as the Database.

<sup>6</sup> See Death Penalty Information Center at: <http://www.deathpenaltyinfo.org/article.php?scid=8&did=477> and <http://www.deathpenaltyinfo.org/article.php?scid=67&did=915>. Note, these calculation were completed in August 2004 and the end of 1999 respectively.

<sup>7</sup> *Id.*

<sup>8</sup> Leonard Post, "On Their Own," *THE NATIONAL LAW JOURNAL*, December 1, 2003.

<sup>9</sup> *Id.*

<sup>10</sup> Ala. Code section 13-11-3 (1975).

<sup>11</sup> Ala. Code section 13-11-2 (a)(1) - (14) (1975).

<sup>12</sup> "Take a Breather on the Death Penalty," *THE BIRMINGHAM NEWS*, August 2, 2005.

<sup>13</sup> Sara Rimer, "In Alabama, a Neglected Defense System Skews Death Row Justice," *THE NEW YORK TIMES*, March 1, 2000.

<sup>14</sup> "Harmful Error: Investigating America's Local Prosecutors," Center for Public Integrity, available at: <http://www.publicintegrity.org/pm/states.aspx>.

<sup>15</sup> *Atkins v. Virginia*, 528 U.S. 304 (2002).

<sup>16</sup> NAACP Legal Defense and Education Fund, "Death Row U.S.A.," Spring 2005, at 31.

<sup>17</sup> *The Equal Justice Initiative Legal Quarterly*, Fall 2004, vol. 8, no. 3. at VIII-30.

<sup>18</sup> NAACP Legal Defense and Education Fund, "Death Row U.S.A.," Spring 2005, at 11. (This report updates their statistics, which did not include the last two executions.)

<sup>19</sup> The overall number of death penalty cases is taken from the time period 1976-2005. We were unable to find any data showing population changes during this 30-year period or data calculating total number of murders during the last 30 years. For those numbers, we used the most recent census data available, which was for 2002, and the number of murders during that year. This means that we are comparing a number obtained over 30 years with a number from a single year. This comparison would be less valid if the number of murders during 2002 was an aberration rather than a typical representation. While we realize this calculation is not perfect, it is useful for purposes of seeing which jurisdictions are bringing the most death penalty cases. We encourage Alabama court officials to start keeping statistics on the total number of murders each year by county as one piece of information necessary to ascertain whether the death penalty is being imposed in a geographically disparate manner. We obtained the population and murder data from the University of Virginia's comprehensive database, which lets users access the FBI uniform crime reports. See <http://fisher.lib.virginia.edu/cgi-local/>.

<sup>20</sup> Equal Justice Initiative, September 2000 available at: <http://www.eji.org/dpcrisis.pdf>.

<sup>21</sup> Ala. R. Crim. P. 32.7(c).

<sup>22</sup> American Bar Association, "American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," 31 *HOFSTRA L. REV.* 913, 961-962, Summer 2003.

<sup>23</sup> This action was confirmed in a phone conversation with a spokesperson for the Judge's Association. However, we were unable to find any supporting documentation.

<sup>24</sup> Virginia 19.2-163.8(E) - Standards for Counsel in Capital Cases.

<sup>25</sup> North Carolina Standards for Lead and Associate Trial Counsel in Capital Cases.

<sup>26</sup> See note 13.

<sup>27</sup> Ala. Code 1975 § 15-12-23(d) (2003).

<sup>28</sup> See note 17.

<sup>29</sup> Ala. R. Crim. P. 32.

- <sup>30</sup> Ala. R. Crim. P. 32.2(c)(1).
- <sup>31</sup> Ala. R. Crim. P. 32.6(b).
- <sup>32</sup> Ala. R. Crim. P. 32.2(c).
- <sup>33</sup> Ala. R. Crim. P. 32.1(e)(5).
- <sup>34</sup> See note 17.
- <sup>35</sup> Id. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) limits federal courts to granting relief only where the state-court adjudication resulted in a decision that (1) "was contrary to clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. sec. 2254 (d)(1). See *Williams v. Taylor*, 529 U.S. 362 (2000).
- <sup>36</sup> *Tarver v. State*, 769 So.2d 338, 340-341 (Ala. Crim. App. 2000).
- <sup>37</sup> "Innocence: Freed from Death Row," Death Penalty Information Center available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>.
- <sup>38</sup> Sheryl Marsh, "Judge's decision sets Moore free: Conduct of prosecutor, officer cited," [HTTP://WWW.DECATURDAILY.COM/DECATURDAILY/NEWS/050205/MOORE.SHTML](http://WWW.DECATURDAILY.COM/DECATURDAILY/NEWS/050205/MOORE.SHTML).
- <sup>39</sup> See note 37.
- <sup>40</sup> *Quick v. State*, 825 So. 2d 246 (2001).
- <sup>41</sup> Description taken from Death Penalty Information Center at: <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109>.
- <sup>42</sup> This account was taken largely from case synopses prepared by Rob Warden at the Center for Wrongful Convictions at Northwestern University available at: <http://www.law.northwestern.edu/depts/clinic/wrongful/Baldwin.htm> and the report "Reasonable Doubts: Is the U.S. Executing Innocent People?" prepared by Equal Justice U.S.A. available at: <http://www.quixote.org/ej/grip/reasonabledoubt/index.html>.
- <sup>43</sup> *Beck v. Alabama*, 447 U.S. 625 (1980).
- <sup>44</sup> *Hooper v. Evans*, 456 U.S. 605 (1982).
- <sup>45</sup> *Baldwin v. State*, 456 So.2d 117 (1983).
- <sup>46</sup> *Baldwin v. State*, 539 So.2d 1103 (1988) cert. denied *Baldwin v. Alabama*, 493 U.S. 874 (1989).
- <sup>47</sup> This synopsis was taken primarily from the Equal Justice U.S.A. report mentioned in note 42 and "The Judge as Lynch Mob," by Ken Silverstein published on May 7, 2001 in *The American Prospect*. Available at: <http://www.prospect.org/print/V12/8/silverstein-k.html>. This case was also listed on Northwestern University's Center for Wrongful Executions website as an example of a case where an innocent person may have been executed. See <http://www.law.northwestern.edu/depts/clinic/wrongful/executingtheinnocent.htm>.
- <sup>48</sup> *Singleton v. State*, 465 So. 2d 432 (Ala. Crim. App. 1984).
- <sup>49</sup> <http://justice.uaa.alaska.edu/death/usa/us1992.html>.
- <sup>50</sup> This synopsis was created using information from Amnesty International, available at: <http://web.amnesty.org/library/Index/ENGAMR510282000?open&of=ENG-2M4> and the Equal Justice U.S. A. report mentioned in note 42.
- <sup>51</sup> *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999).
- <sup>52</sup> Ex parte *Wright*, 766 So.2d 215 (Ala. 2000).
- <sup>53</sup> Peter Neufeld, "Forensic Technology," testimony before the House Judiciary Committee, July 17, 2003, available at [http://www.law-forensic.com/cfr\\_dna\\_backlog\\_02.htm](http://www.law-forensic.com/cfr_dna_backlog_02.htm).
- <sup>54</sup> Public Law 108-405, October 30, 2005.
- <sup>55</sup> See The Innocence Project website for a state list of post-conviction DNA testing laws at: [http://www.innocenceproject.org/legislation/display\\_legislation.php?sort=jurisdiction&filterJurisdiction=Wyoming&filterCategory=Postconviction&filterStatus=all](http://www.innocenceproject.org/legislation/display_legislation.php?sort=jurisdiction&filterJurisdiction=Wyoming&filterCategory=Postconviction&filterStatus=all).
- <sup>56</sup> See Kansas report, "Costs Incurred for Death Penalty Cases: A K-goal Audit of the Department of Corrections," December 2003. See also "The High Cost of Killing Killers: Death Penalty Prosecutors Cost Taxpayers Millions Annually," THE PALM BEACH POST, January 4, 2000, and Philip J. Cook, "The Cost of Processing Murder Cases in North Carolina," May 1993. For two extensive discussions of costs in capital cases go to: <http://www2.law.columbia.edu/brokensystem2/index2.html> and DPIC at: <http://www.deathpenaltyinfo.org/article.php?did=108&scid=7#financial%20facts>.
- <sup>57</sup> Associated Press, "Courts Take Aim At Jury Costs to Save on Budget." November 30, 2003.
- <sup>58</sup> Todd Kleffman, "Capital Cases Clutter Courts," MONTGOMERY ADVERTISER, February 9, 2003.

## Broken Justice: The Death Penalty in Alabama

<sup>59</sup> Barry Latzer and James N. G. Cauthen, "Capital Appeals Revisited," *JUDICATURE*, vol 84, no 2 September-October 2000. Available at <http://www.lib.jjay.cuny.edu/docs/latzer.htm>.

<sup>60</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>61</sup> Villanova Law School - <http://vls.law.villanova.edu/locator/3d/Mar2002/003744mo.txt>.

<sup>62</sup> We were not able to ascertain in some cases whether overrides had occurred or not.

<sup>63</sup> See note 14.

<sup>64</sup> *Id.* available at: <http://www.publicintegrity.org/pm/states.aspx>.

<sup>65</sup> *Jefferson v. State*, 645 So. 2d 313 (Ala. Crim. App. 1994).

<sup>66</sup> *Powell v. State*, 548 So.2d 590, 594 (Ala. Cr. App. 1988).

<sup>67</sup> See note 14. Reversals due to prosecutorial misconduct are unusual because the court requires a very high standard for a defendant to meet. Appellate judges reverse only if they are convinced that the error made a difference in the outcome of the case. Courts do not reverse cases involving errors that might have affected the outcome of the case.

<sup>68</sup> *Martin v. State*, 839 So.2d 665, 681 (Ala. Crim. App. 2001).

<sup>69</sup> See note 14 at: <http://www.publicintegrity.org/pm/states.aspx>.

<sup>70</sup> *Tomlin v. State*, 591 So.2d 550 (Ala. Crim. App. 1991).

<sup>71</sup> Ex parte *Tomlin*, 2003 WL 22272851 (Ala. 2003).

<sup>72</sup> *Ring v. Arizona*, 536 U.S. 584 (2002). In this landmark case, the Court ruled that a person's Sixth Amendment right to a jury trial guaranteed that any aggravating factors in death penalty cases must be ruled upon by a jury, not a judge. This decision struck down sentencing schemes in approximately a dozen states that allowed judges, instead of juries, to determine sentences in death penalty cases. This decision did not directly address the override issue, because in override cases the jury has decided whether aggravating factors exist, but the judge has decided to substitute his judgment about what weight those factors should be given.

<sup>73</sup> Ken Silverstein, "The Judge as Lynch Mob," *THE AMERICAN PROSPECT*, Vol. 12, issue 8, May 7, 2001.

<sup>74</sup> Database. Note: we were not able to identify in every case whether an override had occurred, so there may have been more than what we have indicated. Also, in one case where an override occurred, we could not identify the race of the defendant. According to Amnesty International, Alabama judges have used overrides to sentence to death more than 70 defendants for whom the jury had recommended a life prison term "United States of America - Death by Discrimination: the continuing role of race in capital cases," (2003) available at: <http://www.amnesty.org/library/index/engamr510462003>.

<sup>75</sup> *Harris v. Alabama*, 513 U.S. 504 (1995).

<sup>76</sup> *Id.* at 526.

<sup>77</sup> See note 73.

<sup>78</sup> *Atkins v. Virginia*, 528 U.S. 304 (2002).

<sup>79</sup> *Id.*

<sup>80</sup> See Death Penalty Information Center at: <http://www.deathpenaltyinfo.org/getexecdata.php>.

<sup>81</sup> *Morrow v. State*, \_\_\_ So. 2d \_\_\_ (Ala. Crim. App. 2004). WL 1909275.

<sup>82</sup> *Id.*

<sup>83</sup> *Borden v. State*, Alabama Court of Criminal Appeals, No. CC-93-228.60, January 7, 2005.

<sup>84</sup> A more borderline case is that of James Donald Yeomans, who was sentenced to death for the murder of his wife and her parents on Nov. 22, 1999. The jury recommended death by a vote of 11-1. The defense presented evidence that Yeomans had had a terrible childhood with abusive parenting. He had attended special education classes throughout his schooling. He had tested in the borderline range for intelligence on IQ tests. The standardized IQ tests that Yeomans had taken placed his IQ at 76 and 78. Many experts oppose using a raw IQ score as a determination of retardation. IQ tests vary greatly and even when administered properly there is still a six-point margin of error. However, seventy is often considered the cut-off point for mental retardation. *Yeomans v. State*, 898 So. 2d 878 (Ala. Crim. App. 2004).

<sup>85</sup> "The Death Penalty and People with Mental Illness," National Mental Health Association, February 6, 2004.

<sup>86</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>87</sup> *Hocker v. State*, 840 So. 2d 197 (Ala. Crim. App. 2002).

<sup>88</sup> Carla Crowder, "Faced with Son's Execution, Mother Has Only Sad Keepsakes," Associated Press, September 29, 2004. Available at: <http://www.ledger-enquirer.com/mld/ledgerenquirer/news/local/9791235.htm>.

<sup>89</sup> *Weeks v. State*, 456 So. 2d 395 (Ala. Crim. App. 1983).

<sup>90</sup> Kate Randall, "The death penalty in the US: a rising toll of state executions. Part 5 in a series of articles on Amnesty International's report on human rights abuses in the US," November 19, 1998. Available at: <http://www.wsws.org/news/1998/nov1998/amn-n19.shtml>.

<sup>91</sup> Rick Bragg, "A Killer Racked by Delusions Dies in Alabama's Electric Chair," NY TIMES, May 13, 1995, at A7.

<sup>92</sup> *Id.*

<sup>93</sup> *Ford v. State*, 515 So. 2d 34 (Ala. Crim. App. 1986).

<sup>94</sup> Canadian Coalition to Abolish the Death Penalty website available at: <http://www.ccadp.org/pernellford.htm>. These facts were verified by multiple new services, reports available at: <http://www.clarkprosecutor.org/html/death/US/ford639.htm>.

<sup>95</sup> *Roper v. Simmons*, 543 U.S. \_\_\_\_ (2005).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> "Facts and Figures," Juvenile Justice Center, American Bar Association," available at: <http://www.abanet.org/crimjust/juvjus/dparticles/factsheetfactsfigures.pdf>.

<sup>99</sup> See Alabama Department of Corrections Website at: <http://www.doc.state.al.us/inmsearch.asp>.

<sup>100</sup> Equal Justice Initiative website available at: <http://www.eji.org/race.html>.

<sup>101</sup> See Alabama Judicial System's Website at: <http://www.judicial.state.al.us/civil.cfm>.

<sup>102</sup> "United States of America - Death by Discrimination - the continuing role of race in capital cases," Amnesty International, 2003, available at: <http://www.amnesty.org/library/index/engamr510462003>.

<sup>103</sup> Beyond the News, "The Role of Race and the Death Penalty," a conversation with Bryan Stevenson available at: [http://www.thirdway.com/btn/capital\\_punishment/04.asp](http://www.thirdway.com/btn/capital_punishment/04.asp).

<sup>104</sup> *Id.*

<sup>105</sup> Stephen Bright, "Capital Punishment on the 25th Anniversary of *Furman v. Georgia*," Southern Center for Human Rights, (1997), available at: <http://schr.org/reports/docs/furman3.pdf>.

<sup>106</sup> B. Stevenson and R. Friedman, "Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice," 51 WASH. & LEE L. REV. 509, 522 (1994).

<sup>107</sup> *Miller-El v. Dretke*, 545 U.S. \_\_\_\_ (2005).

<sup>108</sup> See note 14.

<sup>109</sup> *Id.*

<sup>110</sup> *Pace v. State*, 714 So.2d 320 (Ala. Crim. App. 1996).

<sup>111</sup> *Id.*

<sup>112</sup> *Acres v. State*, 548 So. 2d 459 (Ala. Crim. App. 1988).

<sup>113</sup> *Madison v. State*, 545 So. 2d 94 (Ala. 1987).

<sup>114</sup> Ala. Code 13A-5-40 (c) (1975) and Ala. Code 2-23 (1975).

<sup>115</sup> Database.

