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£UNITED STATES OF AMERICA
@Open letter to the President on the death penalty

Dear Mr President:
There is now ample evidence that death sentences are imposed disproportionately on the poor, on minorities, on the mentally ill or retarded and - perhaps most crucially of all - on those without adequate legal counsel. This shameful state of affairs is a matter for the US federal authorities to investigate and remedy with the utmost urgency. The US Supreme Court can no longer be relied on to redress the inequities of the state system. State clemency authorities cannot be relied on to grant mercy in even the most deserving cases. The US federal administration is the last resort for US citizens convicted of serious crimes whose constitutional and human rights are being violated by state governments.
Amnesty International is therefore calling on you to establish a Presidential Commission to examine and report on all aspects of the use of the death penalty in the United States of America today. As a worldwide human rights organization, Amnesty International is deeply concerned at the increasing use of the death penalty by individual US states and by moves to reintroduce the death penalty in federal law and restrict state prisoners' access to federal appeal courts.
Past US administrations with which the organization has sought dialogue on this subject have argued that the death penalty is primarily a state, not a federal matter. The federal government's passive acquiescence regarding the actions of individual state authorities needs urgently to be reassessed in light of many states' disgraceful record in their use of the death penalty. There is now abundant, well-documented evidence that the death penalty in its application is arbitrary, unfair and racially discriminatory. US citizens have been deprived of their lives at the hands of state governments following legal proceedings that were seriously deficient and in violation of the safeguards enshrined in international human rights instruments and the US Constitution. Amnesty International urges the federal government to recognize its constitutional responsibility for ensuring that all US citizens are afforded equal protection of the law, in the field of capital punishment. This is a matter for serious and urgent action now.

In 1976, the US Supreme Court, in *Gregg v. Georgia*, sanctioned the reintroduction of the death penalty under a system of "guided discretion" for juries. Additional judicial safeguards were introduced: a separate sentencing hearing at trial and an automatic review of death sentences by the highest state court of appeal. The Supreme Court considered that these provisions promised to eliminate the arbitrariness seen in death sentencing under the old laws and the three state statutes upheld in *Gregg* have served as models for other states. Seventeen years on it is apparent that local prosecutors and juries in particular have not been adequately "guided." **The procedural safeguards are not working** and the same injustices which led the Supreme Court in *Furman v. Georgia* (1972) to overturn all the state death penalty statutes as unconstitutional are still occurring today.
The establishment of a Presidential Commission on the death penalty to study all aspects of the issue would serve as an example both for the states within the United States and for other countries which still retain the death penalty. Such a study would serve to remove the issue of capital punishment from the political and emotional climate which presently surrounds it. The Commission's report and recommendations could provide federal and state officials, legislators and the public with an objective body of information to guide decisions on this issue.[1] Such a study would reaffirm the commitment of the

1Several study commissions on the death penalty have been established in other countries since the Second World War. Among

United States to international human rights standards at the highest level of government.
There can be no more serious act of government than the deliberate killing of a human being. At the time of writing, more than 2,750 men, women and juvenile offenders are currently under sentence of death in the USA. More than 223 have been executed since 1977 - at least 35 during 1993 alone. Now is the time for the US government to examine at the highest level all the information available on the social impact, constitutionality and desirability of such a penalty.
Amnesty International urges that such a Presidential Commission be empowered to gather and examine information on all aspects of the death penalty. Amnesty International would be pleased to meet the Commission and testify before it, and hopes other non-governmental organizations would also have an opportunity to testify. The Commission should be encouraged to examine the following areas of concern:

the death penalty and international human rights; equal protection under the law; execution of the mentally ill and retarded; the death penalty and juvenile offenders; prosecutorial discretion in seeking the death penalty; ineffective assistance of counsel at trial and on appeal in capital cases; federal *habeas corpus* relief; the risk of executing the innocent; executive clemency; the cost of the death penalty versus deterrence; public opinion regarding the death penalty.

1. The Death Penalty and International Human Rights.

There is a serious conflict between retention of the death penalty and the United States' formal pledges and commitments to international human rights standards.

The resumption and increase in executions under US state laws, as well as proposals to extend the use of the death penalty under US federal law, are clearly contrary to the principles contained in international treaties and standards. In a general comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR) the United Nations Human Rights Committee said in 1982 that "...all measures of abolition should be considered as progress in the enjoyment of the right to life." This makes clear that the intent of the article was to encourage abolition, not extension of the death penalty.
The US government ratified the ICCPR in June 1992. However it entered a large number of reservations to non-derogable articles including Article 6 on the right to life. The protections enshrined in this article are so fundamental to the enjoyment of all the other rights contained in the ICCPR that Amnesty International strongly believes the reservations should be considered null and void. The attitude of the US Government in its ratification of international human rights treaties has become that of ratifying only after making reservations that seek to ensure that no change in existing US practice is required. If all nations were to act in this spirit the international framework of human rights protection would become meaningless.
A number of individual executions carried out in the USA in recent years have violated minimum international standards. Many cases have violated the specific standards applying to the death penalty,

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them were the Royal Commission on Capital Punishment in Great Britain, whose report was published in 1953; the Canadian Joint Committee of the Senate and House of Commons on Capital and Corporal Punishment and Lotteries, whose report was published in 1956; the Ceylon Commission of Inquiry on Capital Punishment, whose report was published in 1959; and the Jamaican Committee on Capital Punishment and Penal Reform (the "Fraser Committee"), whose report was completed in 1981 and submitted to the Jamaican Senate in 1987. Each succeeded in collecting and publishing new information on the administration of the death penalty in their respective countries. Each report constituted an authoritative record of the national experience of capital punishment and was used in subsequent deliberations on death penalty legislation.

including the United Nations ECOSOC guidelines[2]. The US government has described these standards as "nonbinding", however they are an important measure of a country's compliance with minimum international standards. In some cases US state laws **directly conflict** with minimum international standards, for example in the cases of under-18 year-old offenders sentenced to death and the execution of prisoners who are severely mentally impaired.

2. Equal protection under the law.

Amnesty International believes that the death penalty is disproportionately imposed on the basis of race. Racial disparities in death sentencing are particularly evident in some individual judicial circuits in states with a long history of discrimination.

More than 20 years after the US Supreme Court held that the death penalty in its practice was unconstitutional - largely because of racial discrimination - examination of the cases of prisoners now under sentence of death and those executed since 1977 reveals disturbing and pervasive evidence of continued racial discrimination. The Equal Protection clause of the Fourteenth Amendment to the US Constitution may operate in the realms of housing, employment and education but this vital safeguard is not protecting those facing execution at the hands of state governments. This is another grave charge which the federal authorities and Congress are duty-bound to remedy.

More than 40 percent of prisoners now on death rows across the USA are black, even though black people comprise only 12 percent of the US population. The percentage of black prisoners on death row in some individual states is far higher. However, the most marked disparities in death sentencing are seen on examining the race of the murder victim. **Eighty-four percent** of the prisoners executed since 1977 were convicted of murdering white victims (as were the large majority of those still on death row). This is despite the fact that blacks and whites are the victims of homicide in roughly equal numbers. Numerous research studies have shown that murders involving white victims are far more likely to result in death sentences than those involving black victims, after other legally relevant factors have been taken into account. Studies have also shown that blacks who kill white victims are significantly more likely to receive the death penalty than whites who kill whites.

In the Chattahoochee Judicial Circuit (where the largest proportion of Georgia's death sentences have been imposed), between 1973 and 1990 prosecutors sought the death penalty in 34.3 per cent of white-victim homicides and only 5.8 per cent of black-victim homicides - a difference which could not be explained by non-racial factors such as the presence of aggravating circumstances, additional felonies or multiple victims. In a trial where this evidence was presented, relatives of black murder victims testified that prosecutors had shown little interest in following up their cases, in contrast to their vigorous prosecution of cases involving white victims. County prosecutors had consistently used their peremptory challenges (the right to reject potential jurors without explanation) to exclude blacks from trial juries in capital cases. More than half of the black men sentenced to death in this district were tried before all-

2Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the United Nations Economic and Social Council (ECOSOC) in 1984 (Resolution 1984/50). These, among other things, prohibit the execution of offenders aged under 18 at the time of the crime. A further resolution (1989/64), adopted in May 1989 by ECOSOC, recommends "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence."

white juries.[3]

Many black prisoners were convicted and sentenced to death by all-white juries after prosecutors had deliberately and systematically excluded blacks from the jury pool. In 1986 the US Supreme Court ruled in *Batson v. Kentucky* that prosecutors may **not** exclude jurors solely on the basis of race, but this decision did not apply retroactively to prisoners whose convictions had already been upheld on direct appeal. Other prisoners have been unable to benefit from the *Batson* ruling because their trial lawyers were unaware of it and failed to make a timely objection to the exclusion of black jurors, thereby waiving the right to raise this important issue on appeal. The practice of underrepresenting blacks in jury pools reportedly continues today, despite *Batson*, with prosecutors in numerous southern states now giving spurious non-racial reasons for excluding black jurors which are routinely accepted by the state courts.[4]

Cornelius Singleton, a mentally retarded black man, was executed in Alabama in November 1992. He was tried by an all-white jury which was given no information about his IQ of between 58 and 69 before voting to sentence him to death. Other black prisoners executed in the past year who were sentenced to death by all-white juries include Walter Blair in Missouri, and juvenile offenders Curtis Harris in Texas and Frederick Lashley in Missouri. Earlier cases include juvenile offender Dalton Prejean in Louisiana (executed in May 1990). He was convicted and sentenced to death by an all-white jury after the judge changed the trial venue to a predominantly white area and the prosecutor then excluded all prospective black jurors. Leo Edwards, executed in Mississippi in 1989, was tried by an all-white jury in an area that was 34 per cent black. The prosecutor in his case later admitted to habitually excluding all blacks from jury pools in the district.

The US Supreme Court has failed in its duty to protect US citizens from constitutional violations. In a key ruling in 1987, *McCleskey v. Kemp*, the Court narrowly rejected a claim that the death penalty as applied in Georgia violated the US Constitution by discriminating against defendants on grounds of race. Detailed evidence was presented to show that defendants convicted of killing white victims in Georgia - especially black defendants - were more than four times more likely to receive a death sentence than similar cases involving black victims. The vote was five to four, with the majority acknowledging "a discrepancy that appears to correlate with race." However they held that "apparent disparities in sentencing are **an inevitable part** of our criminal justice process" [emphasis added]. The four dissenting judges found the risk of racial discrimination in the operation of Georgia's death penalty statute clearly violated the Constitution and was, in the words of one judge, "intolerable by any standard."

It is deeply troubling that a level of racial discrimination is tolerated in the US criminal justice system that would undoubtedly no longer be allowed in the realms of employment, housing or education. Where would the United States be today if, in 1954, the US Supreme Court had ruled in *Brown v. Board of Education* that school segregation was an "inevitable part" of the US educational system? To deny a remedy on the issue of racial discrimination on the assumption that racial disparities are "inevitable" or too difficult to sort out is to either pretend that the problem is not there or to give up on solving it. The US Supreme Court and, by extension, the US federal government, lose credibility when they refuse to acknowledge and remedy racial discrimination that is apparent to everyone.[5]

3Chattahoochee Judicial District: The Death Penalty in Microcosm, published by the Death Penalty Information Center, Washington, DC, (1991).

4See "Racial Discrimination and the Death Penalty," testimony of Stephen B. Bright to the Subcommittee on Civil and Political Rights, Committee on the Judiciary, US House of Representatives, 10 July 1991.

5The General Accounting Office (GAO), an independent agency of the US federal government, conducted its own review of the research studies regarding racial discrimination in the application of the death penalty. In February 1990 it announced its finding that the race of the murder victim did indeed influence the likelihood that a defendant would be charged with capital murder and receive the death penalty if convicted. The GAO identified a "race of victim" influence **at all stages** of the criminal justice process with the strongest bias during the early stages of a case when state prosecutors had discretion over whether or not to

3. The mentally ill and retarded.

Many mentally ill and retarded inmates are on death row and others have been executed in the absence of any comprehensive definition of insanity and mental incompetence for execution. It is highly questionable whether these prisoners can be considered among the "morally most culpable" for whom the death penalty was intended.

A large number of mentally ill and mentally retarded prisoners are under sentence of death and many have been executed in the USA. Although US law provides that an insane person may not be executed, the standard of competency in most states is extremely low.[6] Only nine states prohibit the imposition of a death sentence if the defendant is mentally retarded, and several of these nine states stipulate an IQ far lower than that agreed on by the American Association on Mental Retardation in 1992.[7]

Amnesty International has documented the cases of more than 50 prisoners suffering from serious mental impairment (including mental retardation, brain damage or a history of mental illness) who have been executed since 1982 in contravention of the United Nations ECOSOC Resolution 1989/64, adopted in May 1989, which recommends "...eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence."[8]

Recent cases include Johnny Frank Garrett, a juvenile offender, executed in Texas in February 1992. He was convicted of the rape and murder of an elderly nun in October 1981 when he was 17. Chronically psychotic and brain-damaged, Garrett had a long history of mental illness and was severely abused as a child, both physically and sexually (the jury which sentenced him to death was not made aware of this significant mitigating evidence). A psychiatrist who examined him while on death row described him as "one of the most psychiatrically impaired inmates" she had ever examined, and he was described by a psychologist as having "one of the most virulent histories of abuse and neglect...encountered in over 28 years of practice." Clemency was denied despite appeals from nuns belonging to the convent of the murdered nun, and from other religious leaders including the Pope.

Nollie Martin, executed in Florida in May 1992, had an IQ of 59 and was further mentally impaired as a result of several serious head injuries he had received in childhood. He, too, had been physically and sexually abused from infancy. His medical history included psychosis, suicidal depression, paranoid delusions and self-mutilation. He was sentenced to death in November 1978 for the kidnap, robbery and murder of a white woman. Largely incoherent, Martin spent more than 13 years on death row rocking back and forth on the floor of his cell. He required constant medication for his mental illness and

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charge a defendant with capital murder and whether or not to proceed to trial rather than to plea-bargain.

6The standard for competency to be executed in most states is merely that the prisoner be aware that she or he has committed a crime and is about to be executed.

7The AAMR defines mental retardation as measured intellectual functioning (IQ) of approximately 70 to 75 (or below), with onset before the age of 18. However, North Carolina has prohibited imposition of the death penalty only where defendants are found to have an IQ of 60 or below. Arkansas has introduced a rebuttable presumption of mental retardation when a defendant has an IQ of 65 or below.

8A Presidential Commission has recommended abolishing the death penalty for mentally retarded defendants. The President's Committee on Mental Retardation (a standing committee in the Department of Health and Human Services) presented its report in 1991 but no action was taken on it by the Bush administration. The report was distributed to federal and state law enforcement agencies and the judiciary early in 1993. The report gives special attention to the need to identify mentally retarded defendants. It stated, "Accused persons with mental retardation who are not identified as having mental retardation are severely disadvantaged in arranging fair and appropriate legal representation...Their legal rights are less likely to be protected and an appropriate and fair disposition of the case may not be made. They are unlikely to be aware of their right to remain silent or to refuse to answer incriminating questions."

hallucinations. He beat his head and fists against the cell wall and would mutilate himself, apparently in remorse for his crime.

Ricky Ray Rector was executed in Arkansas on 24 January 1992 after you, Mr President, as Arkansas' Governor, refused his plea for clemency. Rector was convicted in 1982 of the murder of a white police officer. After shooting the officer, Rector attempted to take his own life by shooting himself in the head. The bullet wound, and subsequent surgery to remove the bullet from Rector's head, resulted in the loss of a three-inch section of his brain - a frontal lobotomy. Thereafter, Rector's mental capacity was severely limited. He had no memory and could barely speak. He could not assist his lawyers in any meaningful way. Justice Thurgood Marshall dissented from the Supreme Court's refusal to consider Rector's final petition. In his opinion the Court should have granted review of the case in order to decide a comprehensive definition of insanity and mental incompetence for execution. He concluded, "Unavoidably, the question whether such persons can be put to death once the deterioration of their faculties has rendered them unable even to appeal to the law or the compassion of the society that has condemned them is central to the administration of the death penalty in this Nation."

One might well ask what possible interests of justice were served by executing these three severely impaired human beings?[9]

4. Juvenile offenders.

The USA is almost alone in executing people who were under-18 at the time of the crime, in defiance of international standards. This is a human rights scandal. Amnesty International's own research has shown that many juveniles convicted of capital crimes in the USA were deprived of even basic standards of fairness. In some cases the defendant's youth itself was not presented as a mitigating factor. And in some states there is no individual assessment for determining whether juveniles should be allowed to stand trial as adults.

The USA stands **almost alone in the world** in still executing offenders who were under-18 at the time of the crime.[10] The USA has carried out more executions of juvenile offenders than almost any other country in the world, and it probably has the most juvenile offenders on death row.[11] The USA is one of **only six** countries worldwide reported to have carried out such executions in the past five years. The other countries are: Nigeria, Pakistan, Iran, Iraq and one in Saudi Arabia (although Islamic law forbids the execution of under-18-year-old offenders).

In October 1991 Amnesty International published the results of its own research, *USA: The Death Penalty and Juvenile Offenders*. Examination of 23 cases of juveniles under sentence of death revealed that many juveniles convicted of capital crimes in the USA have been deprived of even basic standards of fairness.[12] The majority came from acutely deprived backgrounds; many had suffered gross physical or sexual abuse as children; most were of below-average intelligence and many suffered from mental illness or brain damage. Race appears to be a factor in juvenile death sentencing in some states. Eight of the nine juveniles on death row in Texas are black or Hispanic, as were the two juveniles executed in that state

9Other severely mentally impaired inmates executed in the recent past include Cornelius Singleton, executed in Alabama in November 1992, and Robert Sawyer, executed in Louisiana in March 1993.

10At least 72 countries which still retain the death penalty have laws specifically setting a minimum age of 18 (they include South Africa, Syria, Paraguay and Libya).

11Eight juvenile offenders have been executed since 1985 (five in Texas alone). At least 31 juveniles were under sentence of death in 11 states, as of October 1993.

12*USA: The Death Penalty and Juvenile Offenders*, (AMR 51/23/91), published by Amnesty International in October 1991.

over the past year (Curtis Harris and Ruben Cantu).[13]

Many juvenile defendants had been inadequately represented at their trials, with lawyers failing to investigate their backgrounds or present mitigating evidence at the sentencing hearing. In some cases the defendant's youth itself was not presented as a significant mitigating factor at the sentencing hearing. This appears to contravene the US Supreme Court's ruling in *Eddings v. Oklahoma* that "the chronological age of a minor is itself a relevant mitigating factor of great weight" that must be considered at the sentencing hearing in a capital case.[14]

Amnesty International found that in some states minors charged with capital crimes are automatically tried in the adult criminal courts, with **no individual assessment** of the case or the accused's competency to be tried as an adult. In other cases, lack of facilities for long term custody within the juvenile system, rather than the individual maturity of the defendant, appears to have been the main reason for waiving juvenile jurisdiction.[15]

Amnesty International is particularly disturbed at the situation in Texas which has the largest number of juvenile offenders on death row. On 24 June 1993 the US Supreme Court denied the appeal of Texas death row inmate Dorsie Johnson. Johnson had challenged the constitutionality of the Texas law in force from 1976 until 1991, under which he was sentenced to death, because it did not allow a defendant's youth to be considered as a separate mitigating circumstance at the sentencing phase of the trial. The ruling, by a narrow 5-4 majority, appears blatantly to contradict past US Supreme Court decisions that youth is an important factor to be considered at the sentencing phase of a capital trial.[16] Texas has changed its capital sentencing statute since September 1991 to allow the jury to consider any mitigating factor in deciding whether to impose life imprisonment or the death penalty. However, this new law does not apply retroactively to offenders who committed their crimes before this date and juvenile offenders sentenced under the old statute remain under sentence of death. Amnesty International finds it deeply disturbing that youthful offenders in Texas face execution when the law under which they were sentenced to death has been radically changed. We believe there are compelling grounds for granting clemency to all the juvenile offenders presently under sentence of death in Texas.

Overall, there appears to be little difference in the crimes committed by those relatively few juvenile offenders sentenced to death and others who do not receive the death penalty. In the 23 cases Amnesty International examined, few even had serious prior convictions: only one had a prior conviction for homicide. A number of others had no significant juvenile history of prior criminal activity. **If the US capital punishment system cannot provide adequate safeguards even in the cases of its most vulnerable young offenders, this must raise serious doubts about the system as a whole.**

In its 1989 ruling which maintained that it was acceptable to kill 16- and 17-year-old offenders, the US Supreme Court told the world that international standards were irrelevant and that what really counted were "American conceptions of decency." But should we not be aspiring to raise American conceptions of decency up to the level of well-established international human rights standards?

13Racial disparities in the sentencing of young offenders are particularly marked in Harris County, Texas, where many of the state's death sentences are imposed. Recent figures have shown that 56 per cent of all death row prisoners from Harris County are black and 35 per cent are white. However, of those death row prisoners who were **under 21** at the time of the crime, **86 per cent are black and only 14 per cent are white.**

14Ibid., page 66.

15See *Capital Punishment for Minors: An Eighth Amendment Analysis*, Helene B. Greenwald, Journal of Criminal Law and Criminology, Volume 74, No. 74, 1983.

16In a strong dissenting opinion, Justice Sandra Day O'Connor, joined by three other justices, said she would have allowed the appeal because the former Texas law ignored the most relevant mitigating aspect of youth: its relation to a defendant's "culpability for the crime committed." The dissent also noted that most other US death penalty states either specifically listed the age of the defendant as a mitigating circumstance or barred the execution of those under 18 at the time of the crime.

5. Prosecutorial discretion.

The evidence suggests that factors such as class, race, politics and the location of a crime can play a far more decisive role in determining who will receive the death penalty than the crime itself.
Prosecutors have considerable discretion in deciding when to seek the death penalty, and do so in very few homicide cases. There are no state-wide or national standards that govern when the death penalty is sought; each local district attorney sets his or her own policy in deciding which cases will be prosecuted as death cases.
This results, inevitably, in wide variation in the treatment of similar offenders even within states. A member of the Georgia Board of Pardons and Paroles has said that if you take 100 cases punished by death and 100 punished by life imprisonment and shuffle them, it is impossible to put them back in the right categories based upon information about the crime and the offender.
In cases involving multiple defendants, plea bargains are commonly offered to one defendant in return for testifying against a co-accused. A more culpable defendant most at risk of receiving a death sentence is likely to be more willing than others to testify for the state in return for a lesser sentence. A number of prisoners have been executed where the main evidence against them was witness testimony from a co-accused against whom there was at least equal evidence of guilt.[17]

6. Ineffective assistance of counsel.

Legal representation received by poor people accused of capital crimes is a disgrace to the US legal system; trial defence lawyers are frequently poorly qualified, inadequately compensated and denied funds for essential investigations and expert witnesses. The situation in Texas is cause for special concern. Numerous prisoners executed in recent years were represented at trial by lawyers who had never handled a capital case before.
The provision of free and effective legal counsel to indigent defendants is an important guarantee of the right to a fair trial. In capital cases a lawyer's competence may very well make the difference between life and death. It may prove impossible to remedy errors on appeal if the trial lawyer failed to identify and "preserve for review" constitutional violations. There are strict time limits for the presentation of new evidence discovered after trial. Thus, the competency of the initial trial lawyer has a vital impact on the entire outcome of the case.
Yet, many defendants in capital cases have been represented by lawyers who had **no knowledge of capital punishment law whatsoever** and may not even be experienced in criminal law. In many states where the death penalty is most frequently imposed (including Alabama, Georgia, Louisiana and Texas) there is no state-wide public defender system and indigent defendants are normally assigned court-appointed private attorneys who are paid extremely low fees and spend little time preparing cases for trial. Amnesty International has documented many cases of executed prisoners who received seriously inadequate trial representation, with court-appointed lawyers failing to investigate their clients'

17Warren McCleskey, executed in Georgia in September 1991, was convicted of the murder of a white police officer during a robbery carried out by four armed men. McCleskey admitted being one of the robbers but always denied being the one who shot the police officer. No witnesses could identify the gunman but, at his trial, one of the other accomplices testified that McCleskey had shot the officer. On appeal, US Supreme Court Justice Thurgood Marshall called the accomplice's testimony "self-serving and easily impeachable."

background or present important mitigating evidence at the sentencing hearing (a critical stage of the trial during which the judge or jury must decide whether the convicted defendant is to be sentenced to life imprisonment or death).

At least four prisoners executed in the past year were defended at trial by lawyers who had **never handled** a capital case before.[18] On 20 May 1992 Roger Coleman went to the electric chair in Virginia. His final words were "An innocent man is going to be murdered tonight. When my innocence is proved I hope Americans will realize the injustice of the death penalty as all other civilized countries have." Doubts were raised about his guilt of the murder and rape of his sister-in-law in 1981. Coleman was represented at trial by lawyers who had never handled a murder or rape case before and who failed to investigate many points of evidence, including Coleman's alibi. On appeal, Coleman's *pro bono* counsel inadvertently filed a notice of appeal one day late. The US Supreme Court in 1991 ruled that Coleman had lost his right to federal review of his conviction and death sentence because of his lawyers' unintentional procedural mistake.

In other cases inexperienced trial lawyers failed to object to such practices as striking members of their client's own race from the jury pool, thereby failing to preserve claims that would otherwise have been grounds for appeal. This occurred in the case of Curtis Harris, a black juvenile offender, executed in Texas in July 1993.

The situation in Texas is a cause for special concern. Texas has no state-wide public defender system, provides no state funding for indigent defence and is the only death penalty state to rely almost exclusively on appointed attorneys to handle capital appeals. A two-year comprehensive study of legal representation in capital cases in Texas concluded in 1993 that "The situation in Texas can only be described as desperate" and "We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty."[19]

Noting that Texas has more prisoners under sentence of death and has carried out more executions than any other state, the study found grave inadequacies in the system for appointing counsel at trial, on direct appeal and in state *habeas* appeals. It found there were **no statewide qualification standards or eligibility guidelines** for the appointment of counsel and the rate of compensation provided to court-appointed attorneys in capital cases was "absurdly low."

Defects such as these have long been recognized and criticized by senior members of the judiciary and by US bar associations. In 1985, US Supreme Court Justice Thurgood Marshall expressed concern at the "serious mistakes" made by inexperienced counsel at the guilt and sentencing phases of capital trials, stating that "The federal reports are filled with stories of counsel who presented no evidence in mitigation of their client's sentence because they did not know what to offer or how to offer it, or had not read the state's sentencing statute." In 1990, the National Law Journal conducted a six-month study of the legal representation of capital defendants in six southern states and concluded that "indigent defendants on trial for their lives are frequently represented by ill-trained, unprepared court-appointed lawyers so grossly underpaid they literally cannot afford to do the job...".[20]

Despite the errors made by inexperienced trial lawyers, the courts have often rejected capital defendants' appeal petitions alleging "ineffective assistance of counsel," suggesting that minimal standards of

18Joe Wise, executed in Virginia in September 1993; Ruben Cantu, executed in Texas in August, 1993; Frederick Lashley, executed in Missouri in July 1993; and James Clark, executed in Arizona in April 1993.

19"A Study of Representation in Capital Cases in Texas," prepared for the State Bar of Texas by The Spangenberg Group, March 1993.

20National Law Journal Vol. 12, No. 40, 11 June 1990.

competency are nowadays tolerated.[21] **These cases reveal that imposition of the death penalty has sometimes been not so much the result of how bad the crime or defendant was, but how bad the lawyer was. This is not a principled way to select offenders for execution.**

In 1991, Stephen Bright, director of the Southern Center for Human Rights, addressed the Annual Meeting of the American Bar Association on the subject of legal representation in death penalty cases. "It is time to acknowledge the fact that the quality of legal representation received by poor people accused of capital crimes is not just bad. It is a disgrace to our legal system, to our states, and to our society. I say this with great reluctance. I say it not to be rhetorical, but because it is obvious and undeniable and yet **no one is responding to a matter of such exceptional urgency to the integrity of the criminal justice system."** [Emphasis added][22]

7. Adequacy of counsel on appeal.

Indigent defendants have the right to a state-paid lawyer only for the trial and direct appeal to the state court. Although some funding is now provided for *habeas corpus* appeals in capital cases, many defendants rely on "volunteer" lawyers working without a fee and there is a serious shortage of lawyers prepared to take on such cases. As death row populations increase, a growing number of prisoners may be effectively deprived of the right to adequate federal review of their cases.

The problem is particularly acute in Texas, which has more than 360 prisoners under sentence of death. There is no provision for funding or appointment of counsel for the critical state *habeas corpus* appeal stage and the Spangenberg report noted: "While the results of the study are in many respects very discouraging at trial, direct appeal and certiorari to the US Supreme Court, the problems with representation at state *habeas corpus* are alarming."[23] At one point during 1993 nearly 50 prisoners on death row in Texas were reported to be without any legal representation. **Frequently lawyers are found only weeks or even days before a scheduled execution, leaving little time to review the record and prepare an adequate federal appeal. Sometimes important issues are discovered too late to be considered by the courts.**

An American Bar Association report in 1990 was deeply critical of the low quality of legal representation afforded to indigent capital defendants. The report concluded, "...capital litigation in the United States today too often begins with poor legal representation. Thereafter, the petitioner, the state, and society pay the price as each successive stage of the case becomes more complicated, more protracted, and more costly. Poor representation after the trial is also not uncommon, and it, too, imposes costs - in terms of both efficiency and fairness - at each successive stage of the litigation. The goals of better, more efficient, and more orderly justice can be achieved when the quality of legal representation at all stages of capital cases is improved."[24]

21The US Supreme Court has laid down rigorous standards for proving "ineffective assistance of counsel." In *Strickland v. Washington*, (May 1984) it held that, even if the trial counsel in a capital case were found to have erred, this would not merit a retrial unless the defendant could prove that the error had actually prejudiced the outcome of the case. Such proof is not easily established after the event.

22"Counsel for the Poor: The death sentence not for the worst crime, but the worst lawyer," address by Stephen B. Bright to the American Bar Association Annual Meeting, Atlanta, Georgia on 13 August 1991.

23Spangenberg Report (see footnote 19), page 96.

24*Toward a more just and effective system of review in state death penalty cases,* Ira P. Robbins, Project Reporter, American Bar Association, 1990.

8. Federal *habeas corpus* relief.

Federal *habeas corpus* plays a critical role in remedying errors in capital cases: however, recent US Supreme Court rulings have progressively narrowed the grounds on which relief may be granted; the result is already being seen in a number of unjust executions and possible miscarriages of justice.

Federal *habeas corpus* review has continued to provide an important remedy for injustices in capital cases. Some 40 percent of death sentences since the late 1970s have been overturned at this stage of the appeals for errors in violation of the US Constitution. These errors had not been remedied earlier by the state courts for a number of reasons including community pressure on elected state judges to uphold death sentences[25] and the sometimes incestuously close collaboration seen between state judges and the district attorneys and state attorney general's office. A practice documented in a number of southern states, particularly Alabama, is the verbatim adoption by the state courts of orders submitted to them by prosecutors or attorneys general. These ghost-written orders are not impartial findings of disinterested judges but the briefs of advocates, containing one-sided and exaggerated "findings" written for strategic advantage on appeal and in post-conviction review.[26]

Meanwhile, the US Supreme Court has in recent years progressively narrowed the grounds on which constitutional claims can be made in capital cases. For example, in *Herrera v. Collins*, a Texas death penalty case decided in January 1993, the Court set an almost impossible standard for federal review of late claims of innocence. In its rulings the Court appears no longer to concede that death as a punishment is different from imprisonment, requiring greater safeguards at all stages. The Court places great faith in the fairness of capital trials. There is now ample evidence to suggest that this faith may be misplaced.

There are now proposals to limit federal *habeas corpus* review to one round of appeals within a short time after the trial - a measure backed by the federal administration. This, in Amnesty International's view, would be an extremely dangerous, as well as a retrograde step and can only increase the possibility of error and injustice in capital cases. The state's interest in expediting appeals and executions cannot be allowed to take precedence over the rights of the individual to due process and a fair and reliable hearing of all claims pertinent to his or her case. The stakes are simply too high. Execution is irrevocable and the safeguards must be of the highest order.

9. The risk of executing the innocent.

Current legal safeguards to prevent and remedy errors in capital cases are inadequate; Amnesty International fears that serious miscarriages of justice in capital cases have already occurred and will do so again.

One of the most compelling arguments against the use of the death penalty is the risk that innocent people may be executed. When the state chooses who among its citizens it will execute it is making godlike decisions without divine infallibility. Execution is irrevocable and once a mistake is made it can never be rectified.

25Three justices were voted off the California Supreme Court in 1986 after the governor of that state had first publicly warned two justices that he would oppose their retention unless they voted to uphold more death sentences, and then carried out his promise.

26See statement of Stephen B. Bright concerning *habeas corpus* to the Subcommittee on Civil and Political Rights, Committee on the Judiciary, US House of Representatives, 20 May 1993.

Despite procedural safeguards built into the US criminal justice system, it would be naive to pretend that the system works perfectly. Innocent people have been sentenced to death in the USA. Some have been executed.[27] Eyewitnesses make faulty identifications; testimony is sometimes perjured (often by co-accused who are themselves at risk of prosecution); confessions may be coerced and other forms of police and prosecutorial misconduct can and do occur. As already mentioned, the US Supreme Court has now made it almost impossible for capital defendants to raise a claim of innocence based on newly discovered evidence after the expiration of state time limits for presenting such claims (normally no more than one year after the trial).[28]

Walter McMillian was released from an Alabama prison in March 1993 after spending nearly six years on death row for a crime he did not commit. He was exonerated after all three prosecution witnesses whose testimony provided the core of the evidence against him recanted (all three were themselves criminal suspects). Following his arrest in 1987, McMillian, who is black, was immediately put on death row, even before he was tried for the murder of a white female shopkeeper. His trial over a year later lasted two days, and the judge overruled the jury's sentencing recommendation of life-without-parole and sentenced him to death. **Four appeals to the Alabama courts were denied**, and it was a CBS television documentary about the case that drew attention to his innocence. The Alabama Court of Criminal Appeals finally threw out the conviction and the County District Attorney joined the defence in seeking to have the charges dismissed.[29]

Edward Earl Johnson was executed in Mississippi on 20 May 1987 for the murder of a white police officer in 1979. After the crime, Johnson - who was 18 and had no criminal record - was rounded up with other black men found in the area and brought before the only eye-witness, a woman who had known Johnson all his life. She stated that he was not the murderer. She described the man she had seen as heavily built with a full beard. Johnson was slim and had never worn a beard. According to Johnson, he was then taken away by police to some woods where they threatened to shoot him. He signed a confession under duress and did not see a lawyer until he was brought to court to be charged. He recanted his confession at the first opportunity. But the eye-witness, on learning of his confession, changed her story and identified him as the murderer.

Before his trial the prosecution offered Johnson a life sentence in return for pleading guilty to the crime. However, his trial lawyers apparently advised him (incorrectly) that he would be sentenced to life without parole if he accepted the offer. In fact, had he done so he would have been eligible for parole in 1986, the year before he was executed. According to defence lawyers who took over the last stages of his case, Johnson's many earlier appeals had been unsuccessful because of legal errors made by his first lawyers.

27See "Miscarriages of Justice in Potentially Capital Cases," by Professors Hugo Adam Bedau and Michael L. Radelet, Stanford Law Review, Vol. 40, No. 1, November 1987, (revised, updated and published as In Spite of Innocence: Erroneous Convictions in Capital Cases, Northeastern University Press, Boston, 1992). The research study found 350 cases between 1900 and 1985 of "wrong-person mistakes:" defendants wrongfully convicted in capital or potentially capital cases. The book adds 66 new cases up to 1991. The authors identified 23 wrongful executions over the period 1900 to 1991.

28In October 1993 a Congressional report by the House Subcommittee on Civil and Constitutional Rights listed 48 condemned men who had been freed from death row since 1972. The report blamed inadequate legal safeguards to prevent wrongful executions and listed numerous inherent flaws in the criminal justice system including racial prejudice, official misconduct, shoddy legal representation, inadequate post-trial review of innocence claims and the politicization of the clemency process.

29Other people recently released from death row after their innocence was demonstrated include Randall Dale Adams, freed in March 1989 in Texas after a film was made about his case. Clarence Brandley was freed in 1990 from Texas death row following a large public campaign on his behalf and the Texas Court of Criminal Appeals cited a "subversion of justice that took place during the investigation." John Skelton was released from Texas' death row in October 1990 after the Texas Court of Criminal Appeals found that there was no evidence to show that he had committed the crime. James Richardson was released from prison in Florida in 1989 after serving 21 years' imprisonment (four on death row). The judge blamed prosecutorial misconduct and perjured testimony for his wrongful conviction in the poisoning deaths of his seven children.

Johnson went to his death in Mississippi's gas chamber proclaiming his innocence. Further evidence has since been uncovered suggesting that his execution may have been a miscarriage of justice.

10. Executive clemency.

Clemency criteria have not been implemented in practice; clemency is a dead letter in some states; this traditional final safeguard against unjust executions has been abandoned for political reasons.

The power to commute death sentences to life imprisonment is an absolutely necessary safeguard in order to mitigate sentences which have been legally imposed by the courts but are unduly harsh. The US Supreme Court in *Gregg v. Georgia* (1976) reiterated that a system without executive clemency "would be totally alien to our notions of criminal justice." Any criminal justice system is liable to human error, and when the penalty to be imposed is death, the safeguards surrounding the process must be of the highest order.

Clemency authorities have the advantage of being able to consider all the circumstances of a case. Factors which may properly be considered grounds for exercising mercy include the prisoner's behaviour in prison; his or her background, family history and medical history; and the proportionality of a death sentence by comparison with other death sentences imposed in the state.

Yet there is a noticeable reluctance on the part of some state executive authorities to concede that the criminal justice system is liable to human error. Clemency has been granted only in the most exceptional cases in recent years. Some states are not conducting proper clemency reviews. In others, favourable clemency recommendations are being ignored by the executive. It is deeply troubling to note that those empowered to commute death sentences do not always appear to understand why clemency powers exist, what clemency means or the criteria by which it should be used. Some prisoners who might well have been granted commutations in an earlier era have been denied clemency in recent years and been executed.

This would seem to be in violation of international standards and safeguards. Article 6(4) of the ICCPR states "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." A similar provision is found in the United Nations ECOSOC safeguards protecting the rights of those facing the death penalty (Resolution 1984/50, Safeguard 7).

Texas requires mention, in particular, for its notable failure to comply with the spirit of the law as laid down in *Gregg* (above). The evidence suggests that executive clemency is a dead letter in Texas, with the Board of Pardons and Paroles simply rubber-stamping the judicial decisions of the courts without examining other factors that might justify reducing a death sentence to imprisonment on humanitarian or other grounds. The Texas Board of Pardons and Paroles has met only very rarely to consider clemency petitions; **it has never recommended clemency in a capital case** under present statutes and, as of the end of November 1993, 70 prisoners have been executed (more than in any other state). Some of those executed in Texas presented strong mitigating factors (see, for example, Johnny Frank Garrett's case described above).[30]

30A number of death sentences were reduced by executive clemency following two court rulings in the 1980s, but no death sentences have been commuted on other grounds in Texas. To Amnesty International's knowledge the Board has convened only

In Louisiana, the Board of Pardons and Paroles has held hearings to consider every clemency petition and has recommended clemency on at least five occasions in the past six years. However, two of the prisoners concerned were executed after the governor, who holds final authority to grant mercy, **refused to follow** the Board's recommendation.[31]

11. Cost and deterrence.

The cost of executing a prisoner in both monetary terms and in the impact on the criminal justice system and the correctional system is exorbitant; meanwhile, detailed research in the USA and other countries has provided no evidence that the death penalty deters crime more effectively than other punishments.

The death penalty is extremely expensive, both in monetary terms and in the amount of court time that must be spent reviewing capital cases, given the unique finality of the penalty. It costs between $2 and $3 million dollars, on average, to execute one prisoner: three times as much as it would take to keep that individual in prison for 40 years. A number of judges, prosecutors and other law officials oppose the death penalty on precisely these grounds. The enormous concentration of judicial services on a relative handful of cases (many of which will, in any event, result in life imprisonment) diverts valuable resources from other, more effective, areas of law enforcement and crime prevention.

Meanwhile, detailed research in the USA and other countries has provided no evidence that the death penalty deters crime more effectively than other punishments.

A report on the death penalty prepared for the United Nations Committee on Crime Prevention and Control in 1988 stated that "the fact that all the evidence continues to point in the same direction is persuasive *a priori* evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty."[32]

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twice in recent years: once in 1987 and once in 1992. It denied clemency to the individuals concerned on both occasions. Talbot D'Alemberte, a past president of the American Bar Association who has represented Texas death row inmates, reported finding the board uncommunicative. "When you send it something, you sometimes get the feeling that you are throwing your papers into a black hole. You may never get an answer except 'We received your papers.' Indeed, you may not learn that clemency has been denied until your client has been executed. There are a number of boards like that in other states." (Post-Gazette, Pittsburgh, 20 March 1993).

31The Board recommended in 1989 that clemency be granted to Dalton Prejean, a juvenile offender with a long history of mental illness. Governor Roemer refused to follow their recommendation and Prejean was executed in May 1990. The Board in November 1991 recommended clemency for Robert Sawyer, a mentally ill and mentally retarded inmate. Governor Edwards ignored their findings and recommendation. Sawyer was executed in March 1993 after Governor Edwards' newly appointed Pardons Board reheard the case and voted 3-2 against his request for clemency. A third inmate, Frederick Kirkpatrick, remains on death row and at risk of execution despite a 4-1 vote by the Board in February 1991 recommending commuting his sentence to life without parole. Kirkpatrick received seriously deficient legal representation at his trial in 1983 and a codefendant whom prosecutors agreed was equally culpable received a life sentence. A fourth inmate, Herbert Welcome, was recommended for clemency by the Board after the prosecuting attorney and the family of the murder victim supported his petition. Welcome is mentally retarded. Three governors in office have refused to sign the commutation and Welcome remains on death row.

32United Nations, *The question of the death penalty and the new contributions of the criminal sciences to the matter*, a report to the UN Committee on Crime Prevention and Control, United Nations Social Affairs Division, Crime Prevention and Criminal Justice Branch, Vienna, 1988.

12. Public opinion.

Although some polls have suggested that public support for the death penalty is strong, this can change when people are given the facts. The public want to be protected from violent crime; this can be accomplished using alternative penalties; studies suggest the public is ready to accept alternatives to the death penalty.

US politicians and elected leaders frequently point to alleged public support for the death penalty as a reason for continuing this practice. However, evidence suggests that the public has taken a very strong position on an issue about which people are uninformed. In fact, the country may now be ready to abandon capital punishment: polls show that the US public supports reasonable alternatives to the death penalty which seek to restore equilibrium and justice where it has been fractured in society.

A 1993 national opinion survey found that support for the death penalty drops to under 50 per cent when voters are offered a variety of alternative sentences.[33] The survey suggested that many people are unaware of the sentencing alternatives now available instead of the death penalty and there is a common misperception that convicted murderers will be released from prison in seven years unless executed. Most disturbingly, the study suggested that jurors serving in capital cases are also sometimes left uninformed as to the sentencing alternatives open to them. Juries in some states have consistently imposed the death penalty after trial judges **refused** their requests for information about parole eligibility. In fact, some 45 states impose life sentences of at least 25 years before parole eligibility or life imprisonment with **no possibility** of parole as alternatives to the death penalty.

Although 77 per cent of those interviewed said they favoured capital punishment in the abstract, support for the death penalty dropped to 41 per cent when the sentence of life without parole, coupled with a requirement of restitution, was offered as an alternative. The public is seen to have doubts about the death penalty: 58 per cent felt there was a danger of executing innocent people; 48 per cent believed it could be racially discriminatory; 46 per cent were concerned by the high cost of executions and 42 per cent doubted whether it had a special deterrent effect.

It is clear that capital murderers sentenced to imprisonment are not being released after seven years. Hundreds of millions of dollars and thousands of hours of court time would be saved by replacing the death penalty with alternative sentences. The money saved could be devoted to crime prevention measures which really do address the problems of crime and violence in society.

Some politicians who favour the death penalty have resisted stiff alternative sentences eliminating parole, principally because the death penalty is seen as a cheap, symbolic means of suggesting that one is "tough on crime." The perennial sponsor of death penalty reinstatement legislation in New York, Vincent Graber, reportedly admitted that his Senate colleagues opposed a life without parole bill because its passage would make the death penalty "**less of a campaign issue**."[34] It appears that some elected officials have manipulated this subject for their own ends, promulgating the myth that the US public unconditionally approves of the death penalty. The US state and federal authorities have done almost nothing to inform

33A bipartisan opinion poll conducted by the Democratic polling firm of Greenberg/Lake, and the Republican Tarrance Group. They interviewed 1000 registered voters in March 1993. See "Sentencing for Life: Americans Embrace Alternatives to the Death Penalty," a report by the Death Penalty Information Center, Washington DC, April 1993.

34Ibid., page 23.

public opinion about this complex issue or the alternative sentences now available. **Leadership is now urgently needed to educate the electorate about the death penalty in practice and available alternatives.**

Conclusions

Mr President: the concerns we have outlined above provide only a brief overview of the death penalty as presently practised across the USA. Over the years, since the death penalty was reinstated, Amnesty International has documented literally dozens of cases in which human rights standards in the application of the death penalty were violated. We believe there is now ample evidence to show that the death penalty should play no part in the penal system of any civilized society; that it is brutalizing to all those involved and to the society as a whole; that it does not serve the interests of the victims of appalling crimes who cry out for justice. There has to be a better way.

Amnesty International is well aware of the serious nature of the crimes committed by those now under sentence of death. Nevertheless, we oppose the death penalty in all circumstances, considering it a violation of the most fundamental human right: the right to life, and an extreme form of cruel, inhuman and degrading punishment. This penalty should not be on the statute books of any country as we approach the 21st century.

More and more countries across the world have abolished the death penalty altogether. Recent abolitionist countries include Croatia, the Czech and Slovak Republics, Hungary, Ireland, Mozambique, Namibia, Romania, Angola, Switzerland, Gambia and Hong Kong. By June 1993, 52 countries worldwide had abolished the death penalty for all offenses, and 15 for all but exceptional crimes. A further 19 countries, while retaining the death penalty in law, have not carried out any executions for at least ten years.

Amnesty International sincerely hopes that a Presidential Commission on the death penalty will be established, with a moratorium on all executions until it reports its findings. Based on its own extensive research on the issue, Amnesty International is confident that a Commission which examines the subject impartially and thoroughly will inevitably provide evidence that would support the country's leadership in moves to abolish the death penalty in the United States of America.

Yours sincerely

Pierre Sané
Secretary General