Going into the trial, I wasn't sure where I stood on the death penalty. Today, knowing what I know about wrongful convictions and the kinds of problems that result in putting innocent people's lives on the line, I would no longer vote for a death sentence. . . . I don't think many jurors feel comfortable playing Russian Roulette with people's lives. Jurors are recognizing that life in prison is perhaps the only responsible way to vote.

-Kathleen Hawk Norman, founder, Jurors for Justice

My uneasiness about the verdict in the Amrine case has to do with the fact that the defense attorney [] gave us very little to work with. . . . I got the impression that when he was presenting the defense case, he was meeting his witnesses for the very first time.

-Larry Hildebrand, death penalty juror—defendant later exonerated

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

-McGautha v. California, U.S. Supreme Court, 1971

BLIND JUSTICE:

JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH

How Death Penalty Jurors are Unfairly Selected, Manipulated, and Kept in the Dark

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BLIND JUSTICE:
JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH

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BLIND JUSTICE: JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH

Executive Summary

[Jury selection in death penalty cases] creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant.

-Justice John Paul Stevens, 2005

Blind Justice, the most recent report to be released by the Death Penalty Information Center (DPIC), is the first to focus on the problems of the death penalty from the perspective of jurors. While jurors have always occupied an esteemed position in the broader criminal justice system in the United States, in capital cases the responsibility of jurors is even more critical as they decide whether defendants should live or die. Even with this unique authority in capital cases, they are treated less than respectfully. Frequently, they are kept in the dark regarding key information about the case and are often barred from serving based on their beliefs or their race.

Deciding guilt beyond a reasonable doubt is not easy. But there is clarity in that task and 225 years of tradition to support it. Judging whether a person should be condemned to die is far more daunting and the difficulty is compounded by a complex formula that even many lawyers and judges do not understand. The modern death sentencing system was adopted by the Supreme Court in 1976, and the results have been disturbing.

This report examines the ways in which the death penalty fails jurors and, in turn, fails as a system of justice. It looks at the distorted way jurors are selected in capital cases. It describes how critical information is often withheld from jurors, and how the evidence they do hear is often unreliable. It describes how the complex rules of death sentencing procedures ensure a sense of frustration and emotional pain as jurors are asked to make one of the most difficult choices of their lives.

As ***Blind Justice*** discusses in detail, jurors are manipulated in capital cases in many ways:

- Their deeply held personal views on capital punishment are picked apart and used as a litmus test of their ability to serve as member of the jury. Those adhering to beliefs preventing a death sentence will be rejected, even though those beliefs are well within the mainstream of public opinion.

- Jurors' color and gender will often play a key role in whether they are chosen for a death penalty trial. In recent Gallup Polls, far more blacks and women oppose the death penalty than white males, making it more likely that they will be excluded from capital juries. Similar considerations work against those with certain religious beliefs.

- Jurors in capital cases are not representative of the population as a whole. Those allowed to serve will be more pro-prosecution and conviction-prone than those who are excluded.

- Those jurors who are selected might expect a high-quality pursuit of justice on a level playing field, but the truth will often be hidden from them: prosecutors may withhold critical evidence and defense attorneys may fail to investigate basic facts. Junk science, jailhouse informants and overly confident eyewitnesses will be offered as if they reliably established the defendant's guilt.

- Since 2000, 37 people have been freed from death row after they were exonerated. In 62 percent (23) of these cases, state misconduct in misinforming the juries played a significant role in the wrongful convictions.

- Far beyond their traditional role of determining guilt and innocence, jurors are instructed to weigh the terrible aspects of the crime against any redeeming qualities of the defendant. From such an abstract comparison they are expected to arrive at a decision with life and death consequences.

- Jurors' emotions will be acutely played upon as the most gruesome aspects of the crime are displayed in graphic detail, and as the victim's family is pitted against the defendant and his family. They will be told nothing about more heinous cases in the same jurisdiction where the death penalty was not even sought, much less imposed.

- Once their decision is made, jurors will be largely ignored. If they have second thoughts after learning new facts, it will be too late. In many cases, their work will be for nothing – their decisions overturned because of errors by others beyond their control.

Slowly, jurors are beginning to react to the flagrant flaws in this system. Some have offered affidavits to judges and governors about what they would have done had they known the whole truth. In increasing numbers, they are voting for life sentences, given what they have seen and heard about abuses in the system. As one juror in Louisiana said after sentencing someone to death who was later exonerated, "I don't think many jurors feel comfortable playing Russian Roulette with people's lives. Jurors are recognizing that life in prison is perhaps the only responsible way to vote."

Death sentences have dropped by over 50 percent in the past five years in the wake of so many inmates being exonerated of their crimes. The fundamental questions of whether the death penalty can be made to fit within our principles of equality, the protection of the innocent, and the appropriate limitation of governmental power are being openly raised by many judges, legislators, and the broader public.

Yet, the system continues with many of the same problems that have plagued it in the past. Those most likely to see the flaws in this system are the least likely to be chosen for the next capital case. Death sentences are handed down in isolation with little chance to explore the larger issues. Once imposed, the presumptions in favor of death become even stronger and harder to reverse.

The costs in terms of mistakes, the conviction and even execution of innocent people, are exceedingly great. But there is also a cost to the respect afforded our system of justice. Jurors are not the problem—rather the problem is in the failed attempt to twist a system designed to identify the clearly guilty into a system for weighing life and death. The stakes in these cases encourage bending the truth and the elimination of jurors who might question the process. There is much to emulate in our tradition of citizen participation in the criminal justice system, but its application to the death penalty has not served us well.

INTRODUCTION

America puts enormous trust in its jurors: it shoulders them with the ominous responsibility of deciding guilt or innocence, and then, in capital cases, asks them to choose between life and death. We are proud of the Constitutional protection guaranteeing defendants the right to a jury of their peers. The Supreme Court turns to the wisdom of jurors to measure society's "evolving standards of decency."[1] We call them the "conscience of the community," and many consider it both an honor and a duty to serve.

In death cases, however, this idealized picture of juries dissolves quickly as a "win-lose" mentality takes over. Instead of a jury of one's peers, jurors will have to pass a political litmus test on their capital punishment opinions. Some will even be stricken from serving because of their color.

Once selected, jurors in capital cases are often not given the whole truth they need to make their decisions. In these high-profile cases, evidence is chronically withheld, alternative suspects ignored, and questionable forensic evidence is presented as if it held scientific certainty.

Jurors are not told why their case was chosen for the death penalty while others, often involving more heinous crimes, take another route. Jurors are instructed to simply choose between life and death for the defendant, but then are given hopelessly complex instructions that have confused lawyers and the courts for decades. Not surprisingly, they often act in direct contradiction to what the court intended in explaining the labyrinth of death penalty law.

The trial and sentencing proceeding will be visually graphic and emotionally draining, probably like nothing they have experienced before. They can only hope that the defense lawyer was given the resources to conduct a thorough investigation of the defendant's past in order to counter-balance the horrors of the crime. In such a serious deliberation, jurors might expect that no corners were cut and that they have been presented with everything they need to render a decision, but that is rarely the case.

After their verdict, they will be dismissed, left to deal with the trauma of the trial on their own. If they complain that they were misled during the proceedings, they will probably be ignored. Many of their decisions will be overturned, typically not because of any mistake on their part, but because the prosecutors, defense attorneys, and judges did not do their jobs properly. Some cases will be retried, but many will be handled by the system of plea bargains and deals where juries and the conscience of the community carry little weight.

Our jury system, though never perfect, has been a noble experiment in democracy that has withstood the test of time for two and a quarter centuries. But in the death penalty area, the experiment has not fared well.[2] While most Americans never serve on a capital jury, everyone is affected by a system that fails to respect those who do serve and that falls woefully short of justice.

I. SKEWING THE JURY: REMOVING JURORS FOR PERSONAL BELIEFS

[B]ecause the prosecutor can challenge jurors with qualms about the death penalty, the process creates a risk that a fair cross-section of the community will not be represented on the jury.

-Justice John Paul Stevens, speech to the American Bar Association, 2005[3]

Jurors are treated with disdain as soon as they are seated as prospective candidates for a death penalty trial. Although many people are relieved when they are excused from jury service, for most it is both a privilege and a duty to serve. It is akin to voting, a right we sometimes exercise begrudgingly, but one that we would fight dearly to preserve. Yet most jurors in capital cases will be rejected because of their deeply held beliefs about capital punishment, not because they know the defendant or the victim. It is disturbing that in capital cases this quintessential hallmark of American citizenship is granted only to those whose conscience meets governmental approval.

Catholics who have heeded their Church's call to end the death penalty, believers of all stripes who find the death penalty immoral, conservatives who hold that the government should not be trusted with so much power, and liberals who will not apply capital punishment because it is not meted out fairly--all will be eliminated if they adhere to these views. They will not be able to serve even in the guilt-innocence phase of the trial, where one's view on the death penalty should be irrelevant. Still others may be prevented from serving on even more insidious grounds.

Race and Jury Selection

In death penalty cases, one juror can mean the difference between a sentence of life and death. In almost all states, death sentencing determinations are made by a jury rather than a judge.[4] Constitutionally, any juror who has serious doubts about his or her ability to impose a death sentence may be eliminated from the jury pool. But additional jurors can be excluded without any legal cause solely upon the discretion of the prosecution or defense attorney. A belief that members of some races, religions, or genders might generally be less inclined to impose a death sentence can influence the prosecution to allow as few of these types of jurors as possible.[5]

The Supreme Court has forbidden racial and gender discrimination in jury selection.[6] But the motivation behind eliminating a particular juror is often not easily discerned. The state may want to exclude a black juror so as to improve its odds of getting a death sentence, but when challenged for racial discrimination can offer other justifications for this exclusion, such as the juror's employment status. In a training session for new prosecutors, Jack McMahon of the Philadelphia District Attorney's office encouraged new recruits to eliminate young black women from their juries. To avoid the charge of discrimination, he urged them to "mark things down" about the undesired jurors so that when challenged they could offer a reason different from race for excluding them.[7]

McMahon practiced what he preached. In a 1988 capital murder trial, he eliminated 19 potential jurors, all black. When challenged, he claimed he struck some blacks because of their residing with their parents or because of their low level of education, even though he had accepted white jurors with similar characteristics. The defendant, William Basemore, was convicted and sentenced to death. In 2001, a Philadelphia court overturned the conviction and sentence, finding "a pattern of discrimination."[8]

In some prosecutors' offices, at least prior to the Supreme Court's condemnation of the practice, there were written manuals about excluding classes of jurors. A 1963 training manual for prosecutors in Dallas stated: "Do not take Jews, Negroes, Dagos, Mexicans, or a member of any minority race on a jury, no matter how rich or well educated."[9] This manual was exposed in a case that was argued recently in the U.S. Supreme Court.[10] Although the manual was no longer the stated policy at the time of Thomas Miller-El's trial in 1986, veterans of the prosecutor's office testified that at least some of the prosecutors continued to follow an unwritten rule to exclude blacks from the jury.[11]

"Do not take Jews, Negroes, Dagos, Mexicans, or a member of any minority race on a jury, no matter how rich or well educated."

-Dallas prosecutors' earlier training manual

In its 8-1 decision in favor of Miller-El, the Supreme Court wrote:

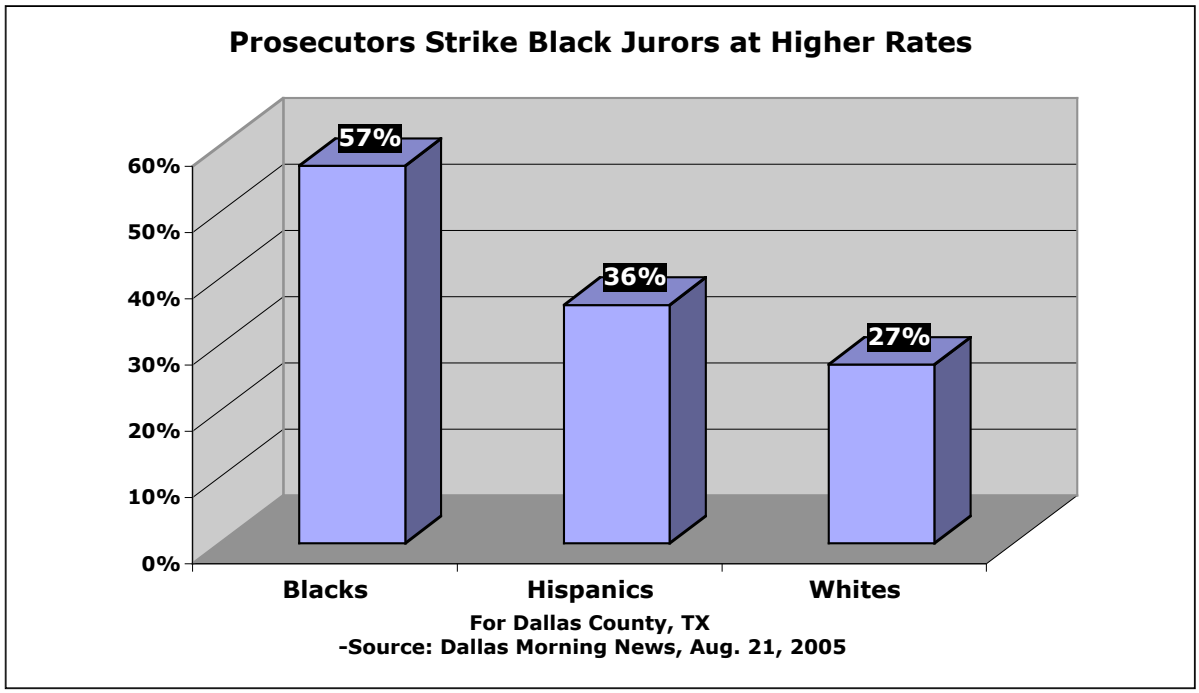
> Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.[12]

Suspicions of a pattern of discrimination were not just idle speculation. A *Dallas Morning News* study of 100 trials near the time of Miller-El's trial found that prosecutors had eliminated 92% of the potential African-American jurors. Ten of the eleven black potential jurors were eliminated in Miller-El's trial.[13]

Recently, the same paper repeated its earlier study and again found systematic exclusion of blacks from juries. In a two-year study of over 100 felony cases in Dallas County, blacks were dismissed from jury service by the prosecution twice as often as whites. Even when the paper compared similar jurors who had expressed opinions about the criminal justice system (a reason that prosecutors had given for the elimination of jurors, claiming that race was not a factor), black jurors were cut at a much higher rate than whites. Of jurors who said that either they or someone close to them had a bad experience with the police or the courts, prosecutors struck 100% of the blacks, but only 39% of the whites.[14]

Other recent accusations of biased jury selection come from a former prosecutor who admitted that he excluded Jews and black women from his death penalty juries. Jack Quatman was the prosecutor at Fred Freeman's capital trial in California in 1987. He recently testified, in support of Freeman's request for a new trial, that the judge in the case advised him that people of Jewish descent would never sentence a man to death. Quatman says he took the judge's advice, but that it was already common practice in his office to exclude Jews in capital cases.[15] Quatman also passed on this advice at a symposium for death row prosecutors in 1993.[16]

"The facts are there, the statistics are there," he said in defending his statements about the broader practice in Alameda County after a California court found his claims about the judge were not credible. He cited an independent study that found Jewish jurors were excluded in 93% of California death row cases in Alameda County and that the odds of that occurring by chance was 1 in 5 million.[17]



Indirect Impact on Race through Death Penalty Views of Jurors

The jury in a death penalty case can be deprived of minority members even if no racial bias occurs. Because political and moral views can determine eligibility for service on capital juries, there will be fewer blacks and fewer women on a death penalty jury than in a non-capital case because blacks and women are more likely to oppose the death penalty than the general population.

For example, in a Gallup Poll analysis for the years 2001-2004, 23% of men opposed the death penalty, but 32% of women opposed it, and fully 49% of blacks opposed it.[18] Some of these minority and women jurors will be removed because the court finds they oppose the death penalty. Others whose views are less clear-cut will be removed at the prosecutor's discretion. A prosecutor who only concentrated on the death penalty views of potential jurors and not on their race or gender, could still end up with a jury that did not look like a cross-section of America. A jury study in California found that while minorities accounted for 18.5% of the people in the jury pools, they represented 26.3% of those excluded through the death-qualifying process.[19] An earlier study in North Carolina found 55% of potential black jurors excluded during the death-qualifying process, but only 21% of the whites.[20] Of course, more liberals and Democrats would likely be eliminated for the same reason, as would those belonging to certain religious groups.

Juries Tilted Towards Guilt

A death-qualified jury is more likely to favor the prosecution's point of view even beyond death sentencing. A series of studies over many years has shown that jurors selected to serve in capital cases are more prone to *convict* than other jurors. Research by Professor Craig Haney of the University of California, Santa Cruz, and others found that death qualification:

1. Compromised the representative-ness of capital juries because higher levels of death penalty opposition among minorities and women meant they were more likely to be excluded from participation,

2. Created juries that were composed of persons who were "prosecution-prone" in their general criminal justice beliefs and points of view,

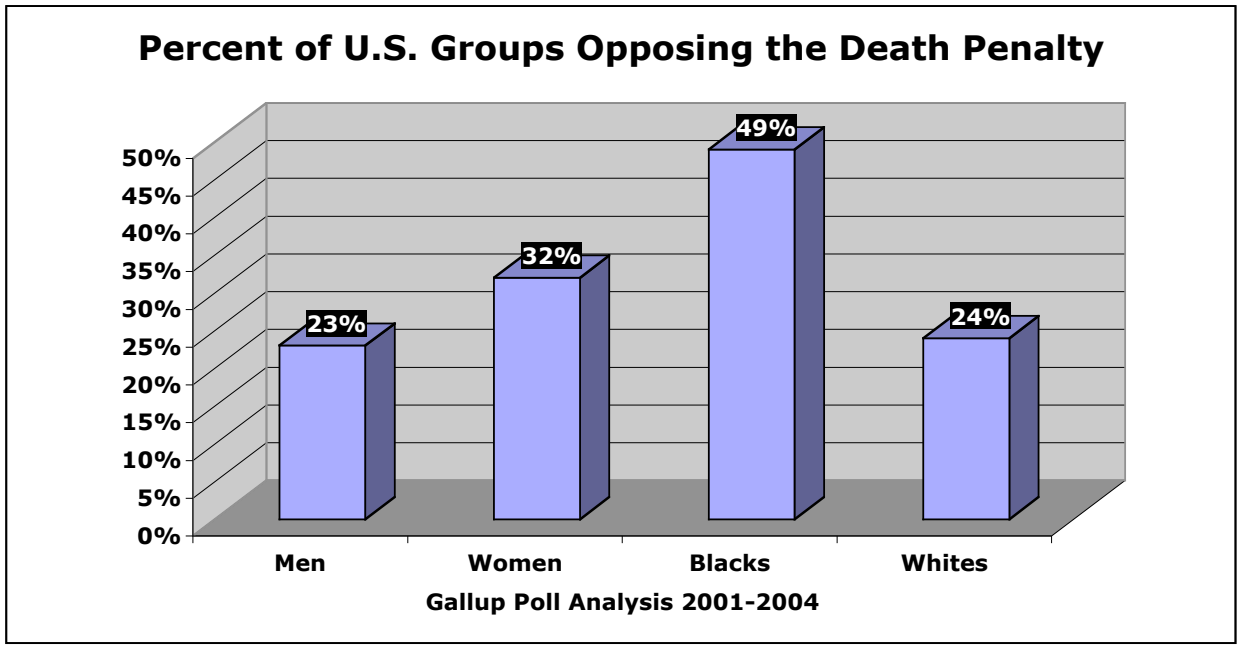
3. Resulted in juries consisting of persons who were "conviction-prone," or more likely to convict than non-death-qualified juries on the basis of the same facts and circumstances, and

4. Exposed all jurors to a *process* of selection that further increased their likelihood of convicting capital defendants by, among other things, implicitly suggesting that the defendant was guilty.[21]

A 2004 study by sociologist Robert Young at the University of Texas found that death penalty supporters were more worried about freeing the guilty than convicting the innocent. He also found that such supporters were about a third more likely to have prejudiced views against blacks.[22] Such views mean that death penalty juries will be less accurate when it comes to determining the guilt of the defendant.

The U.S. Supreme Court considered this issue in 1986 in *Lockhart v. McCree,* a case in which the defendant was given a life sentence. His appeal focused not on his sentence but on the fact that the prosecution's *seeking* of the death penalty enabled the prosecution to seat a jury that was more likely to find him guilty. The defendant offered studies that supported his contention. The Court assumed the validity of the studies, but nevertheless held that there was no intention to bias the jury, only to select a jury willing to follow the law of the penalty trial. The alternative of using separate juries for the guilt and sentencing phases of the trial was not justified by the evidence offered, according to the Court.[23]

One of the criticisms of the studies proffered in *Lockhart* was that they involved mock juries, rather than jurors in actual death penalty cases. The Capital Jury Project, a research program funded by the National Science Foundation, met that



objection by interviewing actual jurors. The Project studied more than 1,200 people in 15 states who had served on death penalty juries. They, too, found that these jurors were more likely to find the defendant *guilty* than other jurors,[24] raising important questions about the defendant's Sixth Amendment right to a jury of his peers. These recent, in-depth studies, coupled with the rash of wrongful convictions in death penalty cases, might some day cause the Court to revisit this issue.

Supreme Court Justice John Paul Stevens recently commented on this problem in a speech before the American Bar Association. He noted that the emphasis on the death penalty in jury selection creates an atmosphere in which guilt is presumed:

Justice John Paul Stevens

> In case after case many days are spent conducting voir dire examinations in which prosecutors engage in prolonged questioning to determine whether the venire person has moral or religious scruples that would impair her ability to impose the death penalty. Preoccupation with that issue *creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant*. More significantly, because the prosecutor can challenge jurors with qualms about the death penalty, the process creates a risk that a fair cross-section of the community will not be represented on the jury.[25]

The most obvious person to suffer from this skewed jury-selection process is the defendant. Not only will his right to live be determined by a group that has been purged of those most likely to spare him, but even his guilt or innocence will be decided by a jury more favorable to the prosecution than if he had been tried without being subject to a death sentence.

Beyond the defendant, the integrity of the jury system suffers as well. Close to 50% of the American population now believe that life without parole is the appropriate punishment for all first-degree murders.[26] That growing segment of the public are ripe for exclusion from jury service. A whiter, more male-dominated jury will stand in for the jury of one's peers. Such a system is unfair on its face and a slap in the face to those who are excluded.

Excluding the Majority

A blatant example of how far the jury selection process can be separated from its constitutional moorings occurred recently in Puerto Rico. The Commonwealth does not have a death penalty law, and, in fact, forbids it in its constitution. Nevertheless, Puerto Rico is subject to U.S. federal law, which does allow for capital prosecutions. As on the mainland, those who reject imposing the death penalty are eliminated from the prospective jury. As an indication of the degree of opposition on the island to the death penalty, death penalty trials have resulted in protest demonstrations, and the Governor publicly condemned this federal intrusion as contrary to the will of the people. [27]

But such oppositional views would not be represented among the jurors chosen for the federal trials. Moreover, only people fluent in English are allowed to serve as jurors in federal trials. This requirement excludes over two-thirds of the island's residents.[28] Despite these factors making

the juries in federal capital trials unrepresentative of the populace, Puerto Rico was listed as one of the top five jurisdictions in the country in terms of U.S. Attorney recommendations for seeking the death penalty in a Justice Department study.[29]

Similar problems arose when the federal government sought the death penalty in Washington, D.C., a predominantly minority-based jurisdiction that voted 2-to-1 against the death penalty in a 1992 referendum. In the federal capital trial of Tommy Edelin, more than 350 potential jurors were excused, including about 175 who said they were so opposed to the death penalty they could not impose a death sentence.[30] Edelin was eventually sentenced to life, but whether the jury represented the people of Washington, D.C. is questionable.

II. WHAT JURORS ARE NOT TOLD: WITHHELD EVIDENCE AND FAILURES TO INVESTIGATE

The fact that the jury chosen in a capital case will be more likely to find the defendant guilty than a typical jury is permitted under current Supreme Court decisions. But death penalty trials continue to be plagued by practices that the Court has found clearly unconstitutional. Two-thirds of the death penalty trials reviewed by appellate courts between 1973 and 1995 contained serious violations of law.[31] In 121 cases through 2005, the conviction itself was thrown out, the inmate was exonerated of all charges, and freed from death row.[32] All of those defendants lost precious years of their lives, some were permanently disabled by the experience, and many came perilously close to execution. The costs of these mistakes are incalculable.

Even when the defendant was not found innocent, the jurors in these cases could rightly conclude that their time was wasted. Each of the jurors spent weeks or months engaged in trial, perhaps sequestered from family and work, and through no fault of their own their effort was discarded.

The Pressures of Death Penalty Cases

One of the root causes of mistakes in capital cases is the high-stakes, competitive nature of death penalty prosecutions.[33] Death penalty cases involve grisly crimes. Reputations of police chiefs and prosecutors are on the line to make arrests, secure convictions and harsh sentences, and to reassure the public that order has been restored. A case that is presented in shades of grey, admitting the existence of alternative suspects or theories, or allowing uncertainty regarding the evidence presented is feared as a potential recipe for acquittal. Prosecutors rarely pursue a capital case against someone they know to be innocent deliberately. But they may emphatically portray a defendant as clearly guilty and deserving of death, when the facts indicate otherwise.

Jurors cannot be expected to arrive at an accurate verdict if vital evidence is withheld from their view. There is an inherent tension in death penalty prosecutions. Lawyers are trained to be advocates in an adversarial process. As such, they want to win. That can affect who gets picked for the jury, what the jury hears, and what they do not hear. These pressures to win are in direct competition with the obligation the state has to seek the truth and to provide defendants with all the information they need to defend themselves. As one former federal prosecutor remarked:

> We must reform a system that provides less information to a person accused of a crime than a party would get if sued for a $200 bad debt in civil court. And we must reform the notion that a criminal prosecution is some sort of sport that is all about winning a conviction, rather than doing justice.[34]

The temptation to hold back can be great. Few murderers are caught in the act by the police. Convictions have to be won against defendants through the presentation of circumstantial evidence and by witnesses who may be less than certain about what

they saw or heard. Many cases are grey—not black and white.

In a case where only the Supreme Court's intervention stopped the execution of an innocent man, the prosecution was asked before trial to hand over any evidence that might have lessened the likelihood of the defendant's (Curtis Kyles) guilt or supported a sentence less than death. The state responded that it had no such evidence. In fact, it possessed the following: contradictory eyewitness statements; information about changes and credibility gaps in an informant's statements; the fact that the *informant* possessed the victim's car; he identified himself with four different names in talking to the police, told the police where to look for evidence incriminating Kyles—places that he, the informant, had access to ahead of time; and the fact that the informant himself had been implicated in similar crimes in the same area, including a murder.[35]

Surely a juror would want to know that information when evaluating the credibility of the state's case. But none of it was made available to the defense or to the jury. Fortunately, this evidence was discovered after the trial. Kyles' conviction was overturned by the Supreme Court, and eventually the prosecution dropped all charges. But as Justice Scalia indicated in his dissent, it would be foolish for the public to believe that the Supreme Court is checking up on every prosecution to ensure against such wrongful convictions and compliance with the rules of basic fairness.[36]

In another capital case involving an innocent defendant, prosecutors in North Carolina withheld statements from

Death Row Inmates Exonerated 2000-2005 After Official Misconduct

Defendant	State	Exoneration	Grounds
Derrick Jamison	Ohio	2005	Withheld eyewitness statements
Ernest Ray Willis	Texas	2004	Faulty scientific evidence
Dan Bright	Louisiana	2004	Suppressed impeachment evidence
Laurence Adams	Massachusetts	2004	Unreliable witness
Gordon Steidl	Illinois	2004	Faulty police work
Alan Gell	N. Carolina	2004	Withheld statements
Nicholas Yarris	Pennsylvania	2003	Jailhouse informant
Joseph Amrine	Missouri	2003	Lying witness
Timothy Howard and Gary James	Ohio	2003	Withheld evidence
John Thompson	Louisiana	2003	Withheld evidence
Aaron Peterson	Illinois	2003	Tortured confession
Madison Hobley	Illinois	2003	Tortured confession
Leroy Orange	Illinois	2003	Tortured confession
Stanley Howard	Illinois	2003	Tortured confession
Ray Krone	Arizona	2002	Faulty scientific evidence
Juan Melendez	Florida	2002	Withheld evidence
Charles Fain	Idaho	2001	Faulty scientific evidence
Jeremy Sheets	Nebraska	2001	Jailhouse informant
Joaquin Martinez	Flordia	2001	Improper police evidence
Gary Drinkard	Alabama	2001	Improper state evidence
Peter Limone	Massachusetts	2001	Lying witness
Oscar Lee Morris	California	2000	Withheld statements

witnesses who saw the victim alive *after* the time the defendant supposedly committed the murder. They also did not reveal statements from the two key eyewitnesses who had implicated the defendant, Alan Gell, in which they said they had to "make up a story." The trial court had specifically ordered the prosecutors to turn over such evidence. Fortunately, the statements were found by the new defense attorneys on appeal. Gell's conviction was thrown out and he was acquitted at a re-trial. The state attorney general called Gell's original trial a "travesty."[37] The original prosecutors, despite being responsible for the near death of an innocent man, received the lightest possible punishment from the State Bar and continue to practice law.[38]

One might hope that such egregious behavior in the most critical cases in our criminal justice system would be extremely rare, but this report lists 23 cases just since 2000 where official misconduct led to convictions and death sentences for innocent men. (See Appendix for a longer description of cases since 2003.) And it is probable that there are other such cases, given the difficulty in discovering withheld evidence.

Jurors' Reactions

Kathleen Hawk Norman, who served as a juror on one of these cases, was so frustrated with the deception that she decided she could no longer support the death penalty:

> Going into the trial, I wasn't sure where I stood on the death penalty. Today, knowing what I know about wrongful convictions and the kinds of problems that result in putting innocent people's lives on the line, I would no longer vote for a death sentence. . . . I don't think many jurors feel comfortable playing Russian Roulette with people's lives. Jurors are recognizing that life in prison is perhaps the only responsible way to vote.[39]

Alan Gell – Exonerated from death row in North Carolina

Norman filed an amicus brief on behalf of Dan Bright in Louisiana, whom she had helped to send to death row, and has formed an organization called Jurors for Justice.

Other jurors have also tried to undo the wrong they felt responsible for after learning of new evidence. Eight of the 12 jurors from the trial of Abu-Ali Abdur'Rahman in Tennessee filed affidavits expressing their frustration and saying they would not have sentenced the defendant to death had they known of exculpating evidence not revealed at trial.[40] In Indiana, all 12 jurors from the trial of Darnell Williams signed affidavits supporting an order of DNA testing from the state Supreme Court.[41] Their request was denied, but Williams was granted clemency by the governor. Still others are simply voting for life sentences, contributing to the 50% drop in death sentences in the last 5 years.

Some experts believe that the problem of jurors not receiving the facts necessary for their informed decision-making is an inherent flaw in the death penalty and necessitates its exclusion as a punishment. John Dunne served as a New York state senator for 23 years and then as an assistant attorney general in the U.S. Department of Justice. He voted 12 times for death penalty legislation in New York. But eventually he changed his mind about capital punishment, in part because he believed the fallibility of the principal actors in death penalty cases *guaranteed* that there would be mistakes:

> [T]he last decade taught me that you cannot tinker with the death penalty. . . . It is unfair to ask jurors to choose with certainty between life and death, given the stress, pressure, media clamor and confusion surrounding their weighty decision. We cannot expect our police to pursue all reasonable lines of inquiry once a suspect is ID'd. And prosecutors are unable to oversee the police in every case. Judges are neither always free of bias nor intellectually capable in every case. These are the issues that must be addressed.[42]

Other Information the Jury is Not Told- Prosecutorial Discretion

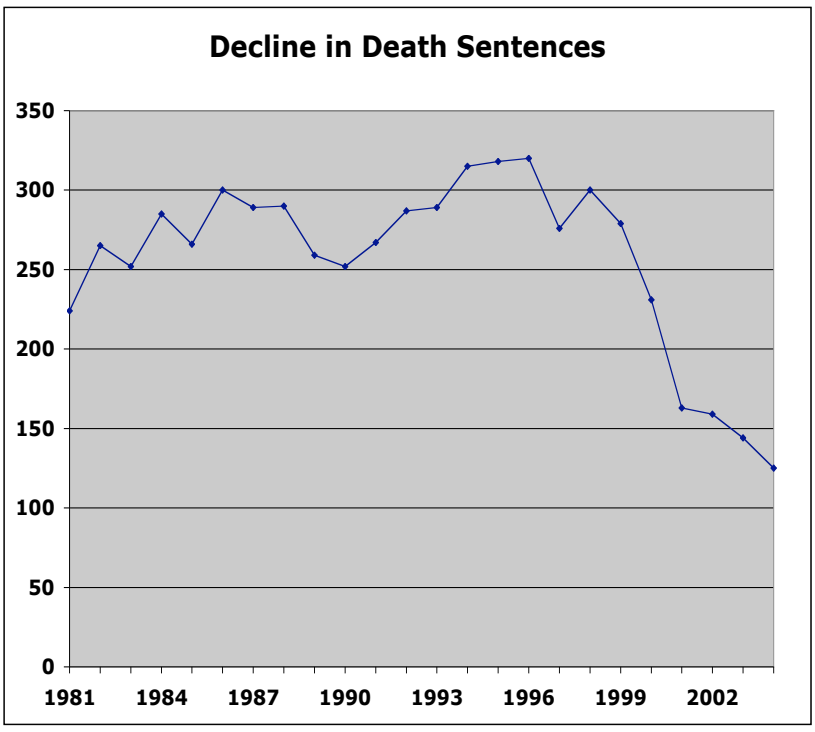
Jurors are asked to decide only one case- not to compare the defendant at trial with other defendants who may have committed similar or worse crimes but against whom the death penalty was not sought. Jurors are not told about the enormous discretion that prosecutors have to seek the death penalty, and about how arbitrary factors such as geography, race and a prosecutor's willingness to plea bargain are much greater factors in determining who will be sentenced to death than the judgment of jurors. They are typically misled with the often-used closing argument, "if ever there was a crime that merited the death penalty, this is it."

When the death penalty was overturned in 1972, it was because of the risk that jurors without any guidance would impose the death penalty in an arbitrary and capricious manner. The theoretical solution to this dilemma was the creation of a complex framework that separated capital trials into two jury trials, requiring the jury to find specific factors that distinguished the most heinous crimes and criminals.[43] Although the new structure was challenged as one in which the risk of arbitrariness was simply transferred from the jury to the prosecutor, the Court found that prosecutorial discretion has a long history in our system and that it would be wrong to assume that this power would be abused. This has meant that the prosecutor's decision to seek the death penalty is essentially unreviewable, despite strong evidence that this discretion has been used unfairly.

Geographical Disparities

Even when exercised with the best of intentions, the prosecutor's discretion can lead to an unequal application of the death penalty on both a state and national basis. Some prosecutors never seek the death penalty, while others, like Lynne Abraham of Philadelphia have pursued it in almost every eligible case.[44]

About a third of Texas' death row comes from Houston, which represents less than 10% of the state population. Twenty-five percent of Ohio's death sentences come from the Cincinnati area, even though only about 9% of the state's murders occurred



there.[45] Such disparities are common throughout the country and run through the federal death penalty as well.

Many prosecutors do not seek the death penalty simply because their county cannot afford the high costs of such a prosecution. These variances occur throughout the criminal justice system, but when the decision is between life and death, the resulting arbitrariness is jarring.

Racial Disparities

The darker side of prosecutorial discretion is that it can lead to racial disparities in the death penalty. As Justice William Douglas said in *Furman v. Georgia*, arbitrariness is "pregnant with discrimination."[46] In the absence of careful guidance, subconscious racial preferences can affect the way the death penalty is administered. This is generally not a case of selecting a minority defendant solely because of his race. Rather, what has plagued the death penalty at least for the past 30 years is that it favors white-*victim* cases. A defendant who kills a white person is much more likely to receive the death penalty than a defendant who kills a black person.

Prosecutors are often in contact with the victim's family prior to trial; they may need members of the family to provide "victim impact" testimony at trial. Cases that get the attention of the media are more likely to result in the spectacle of a death penalty prosecution. Chief prosecutors in death penalty jurisdictions are almost all white (a national study published in the Cornell Law Review found that 97.5% of such prosecutors were white[47]); they are also subject to elections. All these factors may contribute to the fact that about 80% of death penalty cases involve white victims, even though whites are victims in only about 49% of the murders committed.[48] Somewhere along the line from arrest to indictment, through trial and sentencing, the death penalty system is selecting more white-victim cases, and leaving more black victim cases for lesser prosecutions.

Research indicates that racial disparities are widest in those cases in which there is the most discretion.[49] Shocking crimes with multiple victims will likely result in the death penalty regardless of the race of the victims. At the other end of the spectrum, barroom fights will rarely result in the death penalty. But in the vast middle ground of cases, where the prosecutor has wide discretion to seek either the death penalty or a life sentence, the result is most often the selection of white-victim cases.

Race and discretion distort the framework of the death penalty system. The jury and the public are led to believe that the death penalty punishes the "worst of the worst" offenders. But the system does not work that way. Instead, factors like race, costs and geography play the major roles. Juries only get to pick from among the cases they are offered.

Plea Bargaining

Plea bargains are prevalent throughout the criminal justice system, but they play a special role in capital cases. In Ohio, an Associated Press study covering 21 years found that nearly half of the capital cases ended in a plea bargain.[50] In New York over eight years (1995-2003), prosecutors designated 50 cases for capital prosecution. Twenty-three resulted in plea bargains to lesser sentences.[51] In the federal system, between 1995 and 2000, the Attorney General authorized seeking the death penalty in 159 cases. With some cases still pending at the time of the report, 51 of those cases ended in plea agreements.[52]

Plea bargaining can depend on many factors, some proper, some arbitrary: county budgets, the workload of the prosecutor's office, media attention, the prominence of the victims, the proximity of the next election, are just some of the considerations. But even assuming bargains are only struck for legitimate reasons, the process certainly does not leave only the *worst* cases facing the death penalty. Consider the following recent cases:

- Gary Ridgway in the state of Washington pleaded guilty to killing 48 women and was given a life sentence.

- Stephen "The Rifleman" Flemmi confessed in federal court to 10 mob killings, including the murder of a young girl, and was given a life sentence.

- Charles Cullen, a nurse in New Jersey, received a plea bargain for killing at least 17 patients.

- Eric Rudolph pleaded guilty to four bombings, including one at the Olympics in Atlanta and another at a doctor's office in Alabama, in which two people died and others were injured, and was given a life sentence in federal court.

- On the other hand, David Hocker was executed in Alabama in 2004. He suffered from bi-polar disorder and was often suicidal. He killed his employer. His trial lasted one day. He refused to let his attorney put on any mitigating evidence, and he waived all of his appeals. Whether he received a fair trial or whether he was deserving of the death penalty was never reviewed by the Alabama Supreme Court, much less subjected to a full review of constitutional issues.

Perhaps to the jury that recommended a death sentence for David Hocker, this was the worst crime they had ever heard about. But they were never asked to compare his case with many other murders in Alabama that were more heinous. Whatever the merits of the plea bargaining system, it does not involve the careful and rational exercise of the conscience of the community to select who should live and who should die.

Failures of the Defense to Present the Whole Story

No part of the legal process is immune from the criticism that the death penalty has distorted the criminal justice system and put jurors in untenable positions. Lawyers for capital defendants are a key component of the justice system. They are charged with protecting the lives of their clients. But lazy defense lawyers, substance-abusing lawyers, absent lawyers, and inept lawyers hoping to launch a new career bear a direct responsibility for disservice not only to their clients but to the justice system as well. Jurors in capital cases too often do not hear the "whole truth" because defense lawyers did not investigate it and present it at trial.

The responsibility for challenging the credibility of vague eyewitnesses or jailhouse informants, the exposing of "junk science" and the presentation of all mitigating evidence that might affect the jury's ultimate decision, falls primarily on the defense. The Supreme Court has even allowed the admission of highly speculative testimony by "experts" at death penalty trials that has been shown to be more often wrong than right because it assumes vigorous defense attorneys will expose the truth to the jury.[53] But there is often a huge gap between the assumed ideal and lawyers in practice.

Sleeping Lawyer Still Allowed

Despite the shock expressed about sleeping lawyers in recent years, the problem persists. Just recently the Texas Court of Criminal Appeals upheld the conviction and death sentence of George McFarland, even while acknowledging that his chief lawyer slept through significant

George McFarland

parts of the trial.[54] The Court reasoned that there was no constitutional violation because McFarland had a second, though far less-seasoned, attorney who stayed awake. But two lawyers in capital cases is the standard of practice almost everywhere in the country, and the second attorney is an integral part of the team, not a substitute for his sleeping partner.

If half of the surgical team slept during an operation, or indeed, if half of the judges on an appellate court slept during an argument, no one would say that an adequate job was done by the half that was awake. Jurors in capital cases overwhelmingly give stronger marks to the preparation and presentation of the prosecution than to the defense.[55] The state's acquiescence to incompetent representation can only exacerbate that perception.

Failure to Investigate

In some cases, the lawyer's failure occurs before the trial ever begins. In 2003, the U.S. Supreme Court overturned the death sentence of Kevin Wiggins in Maryland because:

> [The court-appointed attorneys] abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.
> . . .
>
> The mitigating evidence counsel failed to discover and present in this case is powerful. . . . Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case.
> . . .
>
> Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.[56]

Clearly, the chief injustice was done to Kevin Wiggins and that was the Court's main concern. But the original jury in this trial was also poorly served. They had to make an excruciatingly difficult decision about his fate without knowing the most crucial elements of his life. If Wiggins was executed, it would have been their responsibility.

Reaction of Jurors

Many jurors have raised just such concerns to courts after learning new information about the defendant revealed only after the trial. Joseph Amrine spent 17 years on Missouri's death row after a jury returned a death sentence with no reasonable doubts about his guilt. But new evidence discovered by his appeal lawyers pointed to his innocence. After seeing the new information, one juror remarked:

> My uneasiness about the verdict in the Amrine case has to do with the fact that the defense attorney [ ] gave us very little to work with. . . . I got the impression that when he was presenting the defense case, he was meeting his witnesses for the very first time.
> . . .
>
> I was surprised to see that Poe's (one of the state's witnesses) description of the crime is completely different from Ferguson's. . . . This

discrepancy gives me substantial doubts about whether Poe and Ferguson were telling the truth. In addition, I was not really aware that Terry Russell (another state witness) was initially a suspect in Barber's slaying. Had I known, I would have had no difficulty believing that Russell implicated Joe Amrine in order to avoid being prosecuted for Barber's murder. *If the defense lawyer had effectively challenged the testimony of the three inmates, I think Joe Amrine would have been acquitted. The jury never even discussed the possibility that Amrine was innocent*, or that Terry Russell might have been the real killer.[57]

Disbarred Lawyers

The issue of ineffectiveness of counsel is an extensive one that has been dealt with thoroughly in other publications[58] and it is not necessary to recount it here. It is probably the most frequent claim on appeal and one of the primary reasons that so many cases have to be tried a second time. Primarily, it is a problem of resources and standards. States have not provided effective lawyers for capital cases because they have been unwilling to supply the resources that such representation demands. Instead, in state after state the system has drawn many of its death penalty attorneys from among the very small percentage of lawyers who had been disbarred in the past or would be in the future. Consider the following studies of representation in capital cases:

- In Washington State, one-fifth of the 84 people who have faced execution in the past 20 years were represented by lawyers who had been, or were later, disbarred, suspended or arrested. Overall, the state's disbarment rate for attorneys is less than 1%.[59]

- In North Carolina, at least 16 death row inmates, including 3 who were executed, were represented by lawyers who have been disbarred or disciplined for unethical or criminal conduct.[60]

Joseph Amrine – Exonerated from death row in Missouri

- In Texas, about one in four death row inmates was defended by a lawyer who has been reprimanded, placed on probation, suspended or banned from practicing law by the State Bar.[61] Jose Medellin, a Mexican citizen, was represented by a lawyer whose license was in suspension *during* the trial.[62]

Jurors have every right to expect that the defense lawyers have made the best case possible for sparing their client's life, especially since a single juror's reservations could mean the difference between life and death . Yet in scores of cases the defense has put on *no evidence* for the jury even to consider.[63]

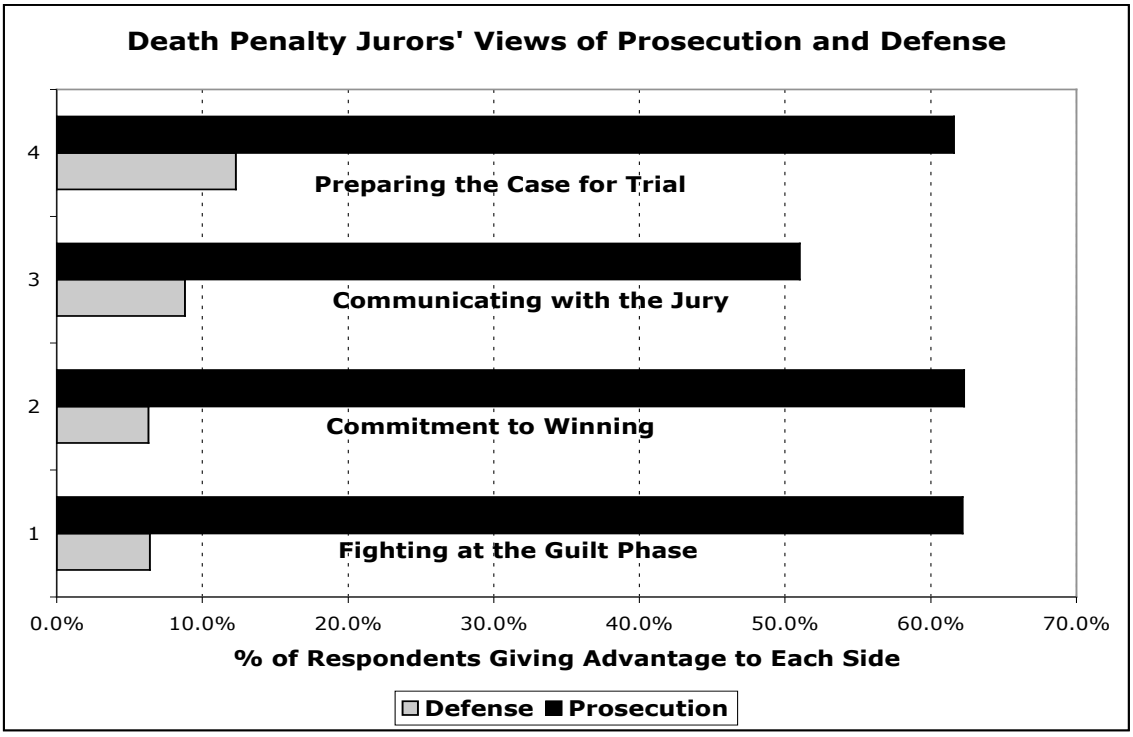
Jurors' Views of Prosecution and Defense

By significant majorities, most jurors who have served in capital cases believe that the prosecution made a better presentation than the defense. As indicated earlier, that can partly be due to the fact that a death-qualified jury is more prone to believe the prosecution. But it can also be

due to the simple fact that an unqualified defense attorney was no match for the skilled and experienced prosecution. The Capital Jury Project asked almost 700 capital jurors who had done the better job in the trial that they served on. The results were *five to one in favor of the prosecution*:

> Over one-half of the jurors (62.2%) believed that the prosecution had the advantage in preparing the case for trial, in communicating with the jury (62.3%) in commitment to winning the case (51.0%), and in fighting at the guilt phase of the trial (61.6%). Moreover, most jurors who gave the advantage to the prosecution, said that the prosecution's advantage was "great" rather than "moderate" or "slight.". . . One out of ten jurors, or fewer, said the defense had the advantage in any of these respects.[64]

These stark figures are a far cry from the level playing field presumed to exist by the Supreme Court and depended on by the public to uncover the truth through an adversarial process. They also dispel the misperception that some people have that capital defendants have high-priced, highly skilled lawyers who enable them to beat the charges. Most capital defendants get far less, and go to trial heavily out-gunned by the prosecution.



III. WHAT JURORS ARE ALLOWED TO HEAR

When prosecutors withhold critical information or when defense attorneys fail to investigate their case, jurors hear only part of the truth. But another source of misinformation comes from what they are presented as completely reliable evidence. One such source of information is the evidence offered by forensic experts from the state's crime lab. Testimony about fingerprints, bullet markings, hair and fiber identification, and especially DNA evidence, carry an air of certainty, enabling jurors to dispel their doubts about convictions or death sentences. But such ready reliance on the state's evidence is clearly misplaced.

The Gift and Curse of DNA

One of the most important discoveries in recent times has been the understanding of how DNA determines the characteristics of every living thing. Recently, DNA testing has had an enormous impact on the criminal justice system, resulting in both convictions in previously unsolved crimes and exonerations of people languishing in prison and on death row. For the public, DNA has become the "gold standard" of forensic evidence, spawning TV shows and Congressional legislation to promote its use.[65]

DNA evidence has been invaluable in exposing the fallibility of other forensic evidence that jurors often relied on as possessing scientific certainty. Ray Krone was sentenced to death in Arizona because an expert said his teeth matched bite marks on the victim. Ron Williamson went to death row in Oklahoma because his hair was said to match hairs found at the crime scene. Similar hair evidence also resulted in a death sentence for Charles Fain in Idaho. Blood tests helped send Robert Miller to death row in Oklahoma. All of these men were eventually exonerated with the help of DNA evidence that fortunately still existed in their case.[66] Still others who were convicted on the basis of faulty eyewitness testimony were freed because of DNA testing.

An employee's photograph of conditions at the Houston Police Department Crime Lab.

However, blind faith in DNA evidence would be a mistake. The science of DNA testing is only as reliable as the care of the police who collect the evidence, the expertise of the lab technicians who test it, and the reliability of the experts who testify about the results. If the evidence is contaminated or misinterpreted, the information the jury receives is doubly damaging. They have been given false information, *and* it comes clothed in the mantle of scientific certainty.

For death penalty cases, the worst scenario imaginable would be that the jurisdiction responsible for the most executions in the entire country has the worst crime lab. But that is arguably the case in Houston, Texas. The police crime lab there has been so fraught with problems that the data it has sent to the national databanks has been rejected. Multiple grand juries have been investigating the misconduct and the Texas Rangers have

been brought in to help sort through 280 boxes of re-discovered evidence at the lab. Rainwater leaked into the lab areas. Experts lied about their credentials in courtroom testimony. According to national standards, *none* of the analysts who worked at the Houston Police DNA lab were qualified by education to do their jobs.[67] Some were hired after stints at the local zoo, with no experience in human DNA testing.

Two men have already been released from prison after errors were discovered in their Houston cases. The mayor and the police chief have called for a halt to all executions in cases from the county. Chief of Police Harold Hurtt said, "I think it would be very prudent for us . . . to delay further executions until we've had an opportunity to reexamine evidence that played a particular role in the conviction of an individual that was sentenced to death."[68] Such entreaties have been ignored. Last year the Houston area again led the country in executions.[69]

Although errors by crime labs are legally attributable to the prosecution, individual prosecutors may be as blindsided by the incompetence of supposed "experts" as the jury. Joe Owmby, a prosecutor in Houston, expressed his dismay: "I could see somebody coming back and saying, 'The test we told you is conclusive is now inconclusive.' I could see that happening. What I did not envision, what I did not speculate could conceivably happen, is that they would say, 'We could tell [now] it's not him.' I did not see how that could happen."[70]

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Broader Problems in Forensic Labs

The problems with errors in forensic evidence are not limited to one local crime lab, or to DNA testing. In 2003, the Fort Worth, Texas police crime lab stopped conducting serology tests because of questions raised about contaminated evidence.[71] Serious problems have been reported in labs in Florida (DNA lab worker admitted to falsifying DNA data), Arizona (technicians made errors analyzing DNA evidence in 9 criminal cases under review), Maryland (480 criminal cases under review), West Virginia (Fred Zain testified in dozens of cases about forensic tests he never conducted; he then moved to Texas and continued his misconduct until he was fired), Illinois (accusations of false forensic evidence led to 4 exonerations), Oklahoma (police chemist Joyce Gilchrist was fired for incompetence; a death row inmate was exonerated after allegations of Gilchrist's false testimony; 23 defendants were sentenced to death in cases that she worked on, and 11 have already been executed).[72]

"The 1-in-100 estimate was without any scientific basis. The multiplying of probabilities was totally fallacious."

Sometimes these errors are caught when the results from one lab are reviewed by another lab. Recently, a defendant who spent 15 years in prison for rape was released in Montana after the FBI checked the work of the scientist who had been head of the state's crime lab. Arnold Melnikoff had testified that the chances that either set of hairs found at the crime scene were not the defendant's were 1 in 100, and because pubic hairs look different from head hairs, there was a "multiplying effect" making it "1 chance in 10,000."[73] The FBI performed DNA testing on the hairs and neither were from the defendant. Walter Rowe, a professor of forensic science at George Washington University, commented on the original testimony: "The 1-in-100 estimate was without any scientific basis. The multiplying of probabilities was totally fallacious."[74]

The FBI itself is not without error in this area. A 2004 report from the National Research Council found that the FBI's examiners in their court testimony sometimes overstated the reliability of the Bureau's method for comparing bullets and played down the likelihood of false matches.[75] Senator Charles Grassley of Iowa stated that the study, "raises serious questions about testimony given over the last 40 years. The FBI reached farther than the science supported."[76]

Jailhouse Informants

Perhaps the next best thing to scientific evidence "proving" a defendant's guilt is his own confession. Jurors bear a tremendous burden in deciding guilt and innocence, especially when a death sentence may follow. To have the defendant confess to the crime can clear their conscience and erase their doubts. But such confessions are not made by the defendant at trial. Instead, they are often alleged to have been made by the defendant while sitting in a jail cell to a cellmate. Prisoners who give information to the prosecution about a fellow prisoner usually want something in return, even if that reward is only implied. These arrangements have been the seed of many wrongful convictions.

A study at Northwestern University found that between 1972 and 2002, 97 death row inmates were exonerated nationwide. In 16 of those cases, the men had been wrongfully convicted partially or wholly on the testimony of jailhouse informants.[77]

Sometimes the prosecution will withhold information about the deal that was made with the informant. In Walter McMillian's trial for murder in Alabama, the state did not reveal the financial reward and preferential treatment that jailhouse informant Bill Hooks received for testifying against McMillian. Nor did Ralph Meyers, a convicted murderer, disclose that he had been pressured by the police to implicate McMillian. Fortunately, Meyers could not live with his lies and recanted, and the incentives that Hooks received were exposed on a *60 Minutes* broadcast. Walter McMillian was eventually freed, but it took one of the best lawyers in the country and national media exposure to undo the jury's reliance on such flimsy testimony.[78]

In other instances, the prosecution regularly uses the same informant, knowing that he has lied repeatedly, but nevertheless

Walter McMillian (left) freed in Alabama with Attorney Bryan Stevenson (EJI photo).

offering him as truthful to a jury that is unfamiliar with this practice. Tommy Dye had a 15-year criminal record with a dozen convictions and a dozen aliases. He had lied to judges and to grand juries. When he offered to testify about his cellmate, Stephen Manning, prosecutors knew his credibility might be doubted and provided him with a tape recorder to back up the conversations. Dye testified that Manning twice confessed to a murder, even though the murder confessions were somehow not on the tape recording. The prosecution was successful in securing a conviction and death sentence against Manning.

In return for testifying, Dye had his criminal sentence cut in half and he and his girlfriend were placed in the federal Witness Protection Program. Manning's conviction was overturned for other improprieties. An investigative report by the *Chicago Tribune* exposed the dangers of using jailhouse informants and particularly attacked the credibility of Tommy Dye. The state elected to dismiss all charges against Manning, though prosecutors continued to use Dye as an informant.[79]

Perhaps the most notorious jailhouse informant was Leslie Vernon White. He testified against a dozen California inmates, and in one 36-day period gave evidence in three homicide cases and one burglary, "all arising from what he claimed were fleeting jailhouse encounters during which inmates [purportedly] revealed critical details about their crimes to him."[80] He later put on a courthouse demonstration for the Los Angeles police of how he falsely implicated innocent defendants. He was only given the name of a suspect and a telephone. He managed to learn intimate details about the crime from various law enforcement officers whom he called. He then made up a confession allegedly from the suspect and arranged to have the court bailiff bring the suspect to the court's holding tank so it could be asserted that the two of them shared the same room.[81]

However, jurors know little of such skills by informants. A *Chicago Tribune* investigation found that 46 inmates in Illinois were sent to death row since 1977 in cases where prosecutors used jailhouse informants, and in about half of those cases the informant played a major role in the conviction.[82]

Victim Impact Evidence

[T]he admissibility of victim impact evidence that sheds absolutely no light on either the issue of guilt or innocence, or the moral culpability of the defendant, serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.

-Justice John Paul Stevens, 2005[83]

The death penalty decision-making process is further obscured by the introduction of powerful victim impact evidence. In almost every state, as the jurors are beginning to grapple with the difficult life-and-death question before them, the prosecution presents a series of witnesses who are relatives of the deceased victim. They describe the immense loss that has occurred in their own lives as a result of the defendant's murdering their loved one. For jurors torn between sparing the defendant's life and expressing outrage at

the crime that has been committed, victim impact evidence can tip the balance toward the state.

The voice of victims is an important one in our criminal justice system. Many states require the prosecution to keep the victim's family informed as their case progresses. Frequently, the will of the family with respect to seeking the death penalty plays a major role in whether the case will proceed as a capital case. But at sentencing, the emotional impact of their testimony can be overwhelming to the jury.[84]

In theory, criminal prosecutions involve the State versus the Defendant, since crime involves more than an individual victim, it is a violation of the community's norms. If, however, death penalty cases pit the defendant against the victim, *that* choice is an easy one for most jurors. A victim versus defendant model is a reminder of our long-discarded vigilante justice. In most criminal cases, the victims' sentencing preferences are not presented to a jury. Sentencing proceedings are before a judge, who is guided by minimum and maximum punishments.

Death sentencing proceedings, on the other hand, almost always take place before a jury. That group of jurors is probably hearing for the first time in their lives graphic details about the crime, the suffering of the victim, and how long it took for death to occur. In such an atmosphere, the well-articulated pleas of family members, especially those members with whom the jurors feel most in common, can overwhelm the careful weighing of aggravating and mitigating factors that is supposed to take place. In contrast, an obscure victim with no one to present the emotional impact of his loss, will likely be considered differently. Given the Supreme Court's approval of the use of victim impact evidence for limited purposes[85] and the recent shift in society generally toward victims' rights, it is unlikely that this kind of testimony is going to be eliminated. Nevertheless, some states have taken measures at least to instruct the jury about keeping such evidence in perspective.[86]

IV. JURORS' UNDERSTANDING OF THE SENTENCING PROCESS

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

-McGautha v. California, 1971[87]

Even if jurors were given all the appropriate information by the prosecution and the defense, they would have a difficult time determining who should live and die because it is an inherently inscrutable process. Jurors are typically told to consider all the aggravating evidence (i.e., those things the prosecution believes make *this* crime worse than an "ordinary" murder) and all the mitigating evidence (i.e., those things that the defense, assuming it has done a thorough investigation, believes lessen the severity of the offense). Based on that consideration, jurors are to decide whether the defendant lives or dies. This unique role for juries is based on the concept that jurors represent the "conscience of the community" in making life and death decisions. However, it is very difficult for ordinary citizens to understand the abstruse legal framework that the courts have constructed around the death penalty.

Craig Haney, a prominent psychologist in California, found that even well-educated people misunderstood the instructions to the jury. His research indicated that:

> California's entire penalty instruction is very poorly understood by upper-level college students, that these problems are not clarified in actual cases through attorney arguments, and that jurors who had served in actual capital cases were plagued by fundamental misconceptions about what the instructions meant.[88]

Interviews with those who served on death penalty juries by the Capital Jury Project found that:

- Approximately 50% of jurors interviewed decided what the penalty should be *before* the sentencing phase of the trial. This is before they have heard mitigating evidence from the defense or received instructions from the judge about how to make the punishment decision.

- The study found that 45% of jurors failed to understand that they were allowed to consider *any* mitigating evidence during the sentencing phase of the trial. In addition, two-thirds of jurors failed to realize that unanimity was *not* required for findings of mitigation. The law allows that even if only one juror finds a factor to be mitigating that finding is relevant for the whole jury.

- 44% of jurors said that they believed the death penalty was *required* if the defendant's conduct was heinous, vile or depraved. The Supreme Court has ruled that the death penalty cannot be required solely on the grounds that specific aggravating circumstances have been established.

- Most jurors grossly underestimated the amount of time a defendant would serve in prison if not sentenced to death, and the sooner jurors believed (wrongly) a defendant would return to society if not given the death penalty, the more likely they were to vote for death.[89]

Even in states that have life-without-parole in prison as the alternative to the death penalty, jurors believed that the inmates would serve only 20 years, or less, before release. In Alabama, a life-without-parole state, the jurors' estimate of the median time inmates would serve was 15 years; in California, the estimate was 20 years; and in Pennsylvania, the estimate was only 12 years.[90] In reality, life-without parole means just what it says. In California, for example, not a single inmate sentenced to life without parole has been released since the sentence was established in 1978.[91]

With respect to the sentencing process, jurors are typically told to weigh the aggravating and mitigating circumstances presented in the case, but they are not given any scale to perform this task. Assuming they understand the meaning of mitigation, and assuming the defense attorney has investigated the client's background for sympathetic facts, the jury is still faced with a decision that is unlike any other in the criminal justice system. The formula for weighing these factors is *not* a simple counting of how many factors of each type are proven. (For example, 3 aggravators and 2 mitigators do not necessarily equal a death sentence).

Jurors are told to weigh the aggravating and mitigating circumstances, but they are not given any scale to perform this task.

A juror could certainly be excused for thinking that this is the law. But, in fact, the constitution requires a different determination. At least some aggravators (but not all) must be proven beyond a reasonable doubt to the unanimous satisfaction of the jury. The finding of mitigating factors, on the other hand, need not be found unanimously and need not be proven beyond a reasonable doubt. Somehow these apples and oranges must be weighed and a proper sentence determined. Not surprisingly, this process produces unpredictable and arbitrary results. As much as anything, geography and the race of the victim are the best predictors of death sentences, not the severity of the crime or the record of the criminal.[92]

Lingering Doubt

To make matters more confusing, the most powerful mitigating factor for jurors who vote for a life sentence is one that most courts tell them not to consider: lingering doubt about the defendant's guilt. The Capital Jury Project found that 63% of jurors who said it was a factor in their case believed it was *very important* in making their punishment decision, greater than the importance of other factors like mental retardation, youth, or childhood abuse present in the case.[93]

Despite the importance of lingering doubt, however, defendants have no constitutional right to ask the jurors to consider this factor when making their sentencing decision.[94] Like many of the Court's decisions restricting defendants' rights in death penalty cases, this ruling came before the advent of widespread DNA testing and the spate of innocence cases that have resulted. The Illinois legislature recently considered breaking new ground with a death penalty reform that would forbid a death sentence unless the jury had *no doubt* about the defendant's guilt.[95] Given that much of the evidence that might lead to acquittal is hidden, it is debatable whether this provision would eliminate death sentences against innocent defendants. Nevertheless, the bill would at least allow jurors to consider this factor, which is already high on their list of concerns.

The Supreme Court has been unresponsive to the issue of jury confusion

in death cases. Its assumption, as expressed in a recent case, is that "a jury is presumed to follow [the judge's] instructions" and "to understand a judge's answer to its question."[96] This 5-4 decision upholding a death sentence was handed down despite the fact that the jury requested clarification from the trial judge about whether they were *required* to sentence the defendant to death (they weren't). The judge refused to enlighten them. They rendered their death verdict in tears.[97] The defendant was executed.

Another example of how jurors' confusion about their responsibility (as well as the intimidating effect of race) can have devastating results occurred prior to the execution of William Henry Hance in Georgia. Hance, a mentally impaired black man was sentenced to death despite the fact that one of the jurors said she did not vote for death. The only black person on the jury stated that she had voted for a life sentence because of Hance's mental condition, but her vote was ignored. In the courtroom, she was intimidated against speaking out, but she later revealed her vote and the strong racial overtones in the jury room. Another juror signed an affidavit confirming the black juror's story, but Mr. Hance was executed anyhow in 1994.[98]

Emotional Impact on Jurors

I couldn't understand how people sat in the same trial and didn't feel the same way. . . .It really broke my heart.

-Susan Schriever, a juror from the trial of Lee Boyd Malvo (Virginia)[99]

Perhaps because death penalty sentencing involves excruciatingly difficult decisions coupled with frustrating instructions, capital trials often leave jurors with emotional scars and resentment. For example, one of the jurors in the sniper trial of Lee Boyd Malvo in Virginia saw the relationships among jurors quickly break down during deliberations, and concluded that "I'm not sure I ever want to see them again."[100]

Other jurors are personally overwhelmed by the experience. Jackie Marhalik, a juror at the trial in which D.C.-area sniper, John Muhammad, was sentenced to death, said: "During the six weeks of the trial, I became very angry at the prosecution, because in trying to recreate the horror, they bombarded us with the most gruesome and painful photographs. The prosecutors were careful to point out where the brain matter had splattered on the ground. . . . I still wake up with nightmares."[101]

Alex Kotlowitz followed some of the jurors in the case of Jeremy Gross in Indiana for a *New York Times Magazine* article. As with all such jurors, these people agreed they could impose a death sentence in an appropriate case. But even though there was little doubt of the defendant's guilt, all voted for life. When they reached their decision everybody in the room started crying. They had to wait an hour before calling the bailiff to regain their composure.[102] Many of the jurors told the author that when they returned home family members and co-workers chastised them for not voting for death. One juror sank into deep depression and missed two months of work.[103]

In a national study of jurors entitled "Through the Eyes of the Juror: A Manual for Addressing Juror Stress," about a third of jurors experienced stress after their trial. But death penalty cases produced the most stress. "I think the majority of people come out of it disturbed," said Beth Bonora, founder of the National Jury Project.[104] Some courts are now having the jurors in high profile cases debriefed by a health professional after trial.[105]

V. THE SCOPE OF OFFICIAL MISCONDUCT

According to a Chicago Tribune investigation, 381 defendants in homicide cases have had their convictions thrown out because prosecutors either withheld critical evidence or presented evidence they knew to be false. Sixty-seven of the defendants had been sentenced to death.

Official misconduct in criminal cases is a broad problem that manifests itself in many ways. Jurors have no way of questioning during trial whether they are being given all the facts and whether witnesses are being truthful. Once the trial is over, jurors' views count for little, even if new information comes to light. One of the facts jurors may not know is the extent of misconduct in trials.

The Center for Public Integrity conducted a study of official misconduct in 2003 and reported the practice to be widespread. The Center studied 11,450 cases in which appellate courts reviewed allegations of prosecutorial misconduct and found 2,017 cases since 1970 in which courts cited this behavior as a factor when reversing sentences or dismissing charges. This does not count thousands of other cases in which the courts found prosecutorial actions inappropriate, but held it did not merit a reversal because the error was deemed harmless.[106] Thirty-two of the defendants in cases where misconduct was found were later exonerated.

A national study of prosecutorial abuse restricted to homicide cases was conducted by the *Chicago Tribune,* revealing the following findings:

- Since 1963 when the U.S. Supreme Court ruled that prosecutors must hand over relevant exculpatory evidence to the defense, 381 defendants in homicide cases have had their convictions thrown out because prosecutors either withheld such evidence or presented evidence they knew to be false. *Sixty-seven of the defendants had been sentenced to death.*
- None of the prosecutors involved in these cases was convicted of a crime nor barred from practicing law. Many subsequently became judges or district attorneys.[107]

Innocence and Official Misconduct

Official misconduct in death penalty cases presents a particularly serious issue. Since 2000, thirty-seven people have been freed from death row after their convictions and death sentences were dismissed either by the prosecution, through an acquittal at a re-trial, or by an absolute pardon based on innocence from the governor. In 23 (62%) of these cases, state misconduct played a significant role in the faulty original trials. These innocent defendants represent only a small portion of the 121 defendants who have been freed since 1973, many with similar evidence of prosecutorial misconduct.[108] A description of the 15 cases of defendants released since 2003 following findings of official misconduct appears in the Appendix.

The Supreme Court's growing concern with prosecutorial behavior in death penalty cases was underscored when they halted an execution in Texas just minutes before it was to take place in 2003. Despite the fact that Delma Banks' claim that vital evidence had been withheld by the prosecution was rejected by Texas courts and by the U.S. Court of Appeals for the Fifth Circuit, the Supreme Court agreed to hear his case and decided (7-2) that he was entitled to a new sentencing hearing.[109]

"A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

-Justice Ruth Ginsburg

In response to Texas' assertion that it was Banks' responsibility to find the hidden evidence, Justice Ruth Ginsburg, writing for the majority, stated: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."[110] Banks, a black man who was convicted by an all-white jury in 1980, is also appealing his underlying conviction.

In many similar cases, prosecutors' decisions to withhold evidence will never be challenged because the exculpatory material never comes to light. By definition, this evidence was not turned over to the defense. That will remain true after the trial and into the future unless it is independently, and often fortuitously, discovered. And no one takes responsibility for this miscarriage of justice: the prosecutor's withholding of evidence is termed a "judgment call," the defense (and the judge and the jury) will never hear about the evidence. Perhaps a new trial would have been granted, but no one will ever know. Jurors should know about the extent of this misconduct if they are to accurately render their decisions.

CONCLUSIONS

The death penalty in America has been rightly criticized for many problems: racial disparities, wrongful convictions and executions, and enormous costs, to name a few. But it also deeply affects the jurors who serve on capital cases. Rather than representing a cross-section of society, jurors are chosen because of their willingness to impose a death sentence. Statistically, such juries will contain fewer minorities, fewer women, fewer representatives of certain religious beliefs, and more jurors who are trusting of the state's evidence and prone to conviction. This cuts against the grain of our fundamental principles that those with minority views are no less citizens.

Those who do serve on capital juries will find themselves part of a confusing high-stakes battle in which justice is not always well-served. Evidence is withheld, the truth twisted, and emotions manipulated all in the name of winning a death sentence. Far too often, mistakes outside of the jury's control will be revealed, negating much of their painstaking work. Occasionally, the person upon whom the jury was asked to pronounce a sentence of death is later exonerated, leaving the jurors with enormous frustration and anger.

Our system of citizen juries and our criminal justice system generally have withstood the test of time and are often a model for other countries. But the death penalty has infected this system—its errors are too frequent, its inequities too blatant, its stakes too high, and its complexities too incomprehensible—to fit well within this tradition.

Appendix

Exonerated Death Row Inmates 2003-2005 with Findings of Official Misconduct

Although multiple reasons are often cited by courts in dismissing charges, the most recent exonerations from 2003 to 2005 illustrate the risks posed by overzealous prosecution in capital cases. For a description of exonerations prior to 2003, see the Death Penalty Information Center's Web site, http://www.deathpenaltyinfo.org, at "Innocence."

- In 2005, Ohio dismissed all charges against **Derrick Jamison**. The prosecution had withheld critical eyewitness statements and other evidence from the defense, resulting in the overturning of Jamison's conviction in 2002. One of the withheld statements involved an eyewitness to the robbery. Withheld police records showed that the eyewitness had identified two suspects, neither of which was Jamison. All charges were dropped and Derrick Jamison was freed.

- **Ernest Ray Willis** was sentenced to death in Texas for the 1986 deaths of two women who died in a house fire that was ruled arson. Seventeen years later, Pecos County District Attorney revisited the case after a federal judge overturned Willis' conviction. He hired an arson specialist to review the original evidence, and the specialist concluded that there was no evidence of arson. The prosecutor said that Willis "simply did not do the crime. ... I'm sorry this man was on death row for so long and that there were so many lost years."

- In 2004, the Louisiana Supreme Court reversed **Dan Bright's** conviction, holding that the state suppressed material evidence regarding the criminal history of the prosecution's key witness. The court noted that there was no physical evidence against Bright, and that the discredited witness's testimony was the only evidence that served to convict him. All charges were dismissed and Bright was freed.

- **Laurence Adams** left a Massachusetts prison 30 years after his conviction for the 1972 robbery and murder of a transit worker in Boston. Adams' conviction was overturned in 2004 because police had withheld important evidence. Adams had been convicted at age 19 on the testimony of two witnesses, both of whom had unrelated charges against them dropped after their testimony. The key witness testified that Adams had admitted to the offense in a discussion in a private home, but it turned out that the witness was actually incarcerated at the time that he alleged the conversation took place. Adams' sentence had been reduced to life; otherwise he might have been executed earlier. Instead, he was freed.

- **Gordon Steidl** was freed from an Illinois prison in 2004, 17 years after he was wrongly convicted and sentenced to die for two 1986 murders. An Illinois State Police investigation in 2000 found that local police had severely botched their investigation, resulting in the wrongful conviction of Steidl and his co-defendant.

- **Alan Gell** was arrested for a 1995 robbery and murder. The state's two key witnesses were Gell's ex-girlfriend and her best friend, both teenagers. The girls, who were at the victim's house and pled guilty to involvement in the murder, testified that they saw Gell shoot Jenkins on April 3, 1995. However, prosecutors withheld an audiotape of one of the girls saying she had to "make up a story" about the murder. Gell was acquitted at a re-trial and the prosecutors from the case were disciplined by the state bar.

- **Nicholas Yarris** was in jail in Pennsylvania on a minor charge in 1981. A fellow inmate made a deal with the D.A. and began exchanging false information about Yarris' involvement in a murder for conjugal visits and a reduced sentence. During the trial in 1982, the prosecution did not hand over 20 pages of documents that included other physical evidence and conflicting witness accounts. On appeal, a federal judge approved a motion by prosecutors to have evidence from the case tested in a lab in Alabama that was later revealed to have had no experience in DNA testing. This lab found no conclusive results to exclude Yarris or include anyone else. The DNA evidence was finally re-tested independently in 2000 by arrangement with the Pennsylvania Federal Defender Office, and the results of 3 tests excluded Yarris. He was then freed.

- **Joseph Amrine** was sentenced to death in 1986 in Missouri for the murder of a fellow prisoner. Amrine maintained his innocence, and investigators never uncovered any physical evidence linking him to the crime. He was convicted on the testimony of fellow inmates, three of whom later recanted their testimony, admitting that they lied in exchange for protection. Despite the state's argument that new evidence of innocence should have no bearing on the case, the Missouri Supreme Court found "clear and convincing evidence of actual innocence that undermines confidence" in Amrine's conviction. The local prosecutor then announced that he would not seek a new trial and Amrine was released.

- **Timothy Howard** and **Gary James** were arrested in 1976 for an Ohio bank robbery in which one of the bank guards was murdered. Both men maintained their innocence throughout trial. With funding from Centurion Ministries in New Jersey, Howard and James were subsequently able to uncover new evidence not made available to their defense attorneys at the time of trial, including conflicting witness statements and fingerprints. Charges were dismissed and they were freed in 2003.

- **John Thompson** was sentenced to death in 1985 following his conviction for a New Orleans murder. In 1999, just five weeks before his scheduled execution, Thompson's attorney discovered crucial blood analysis from a prior conviction of Thompson. The blood evidence, which had been improperly withheld by the state, cleared Thompson of a robbery conviction. It was that conviction that had kept Thompson from testifying on his own behalf at his murder trial. If he had testified, the prosecution would likely have cross-examined him about the robbery conviction. He was granted a new trial and acquitted in 2003.

- Before leaving office in 2003, Illinois Governor George Ryan granted four pardons based on innocence. The men pardoned, **Aaron Patterson, Madison Hobley, Leroy Orange** and **Stanley Howard**, were part of the "Death Row 10," a group of Illinois death row prisoners who claimed that they were the victims of police torture. The four pardoned men maintained that their confessions were given only after they were beaten, had guns pointed at them, were subjected to

electric shock, or were nearly suffocated with typewriter covers placed over their heads. In 2002, a special prosecutor was named to conduct a broad inquiry into the allegations from more than 60 suspects who, like the Death Row 10, claimed that they were tortured by former Chicago Police Commander Jon Burge or his detectives at the Burnside Area Violent Crimes headquarters in Chicago during the 1980s. Jon Burge was fired by the Chicago Police Board in 1993 for his role in the torture of another prisoner. Governor Ryan examined the cases of all the Illinois death row inmates and selected these four for pardons based on their coerced confessions and other information.[111]

In many of the of the above cases, a judgment call was made by the prosecutor that the evidence that was not handed over to the defense was either not "exculpatory" (i.e., it would not have lessened the likelihood of a guilty verdict or death sentence) or that the evidence was not "material" (i.e., the presence of this new evidence would not have undermined confidence in the outcome).[112] Both of these criteria leave a lot of room for subjective judgment. In the relevant cases above, a court determined that evidence should have been turned over to the defense and that the prosecution, either intentionally or mistakenly, made the wrong decision.

ENDNOTES

[1] . See, e.g., Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989) (noting the importance of juries in determining whether a national consensus has been reached in a case about executing people with mental retardation).

[2] . See generally, B. Fleury-Steiner, "Jurors' Stories of Death: How America's Death Penalty Invests in Inequality," (Univ. of Michigan Press, 2004).

[3] . Associate Justice John Paul Stevens, Speech before the American Bar Association's Thurgood Marshall Awards Dinner, Chicago, August 6, 2005, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

[4] . See Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002) (listing the states that entrust to juries the determination of death sentences).

[5] . These challenges to individual jurors are available to both sides in a capital case. From a juror's perspective, however, bias for being black or white, exhibited by the prosecution or the defense, are equally disturbing. And there is no guarantee that these two wrongs will balance out to make a "right."

[6] . See Batson v. Kentucky, 476 U.S. 79 (1986) and subsequent cases.

[7] . See DATV Productions, *Jury Selection With Jack McMahon,* transcript at 69-71 (1987) (on file with DPIC).

[8] . S. Duffy, "District Attorney's Video at Heart of New Trial in Philadelphia Murder Case," Legal Intelligencer, Dec. 21, 2001.

[9] . Editorial, "How Large a Fig Leaf?," Washington Post, Oct. 27, 2002, at B6.

[10] . Miller-El v. Cockrell, 537 U.S. 322 (2003). The lower court had denied Miller-El the opportunity to appeal the challenge he had raised to the jury selection process. The Supreme Court (8-1) said the appeal should have been heard. It was heard but this time denied on its merits. The Supreme Court took the case again, Miller-El v. Dretke, and reversed his conviction. See Miller-El v. Dretke, 2005 WL 1383365 (U.S.).

[11] . See Washington Post editorial, note 9 above.

[12] . Miller-El v. Cockrell, 537 U.S. at 347.

[13] . See Washington Post editorial, note 9 above.

[14] . S. McGonigle, et al., "A Process of Juror Elimination," Dallas Morning News, August 21, 2005. The cases studied were not death penalty cases.

[15] . D. Murphy, "Case Stirs Fight on Jews, Juries and Execution," N.Y. Times, Mar. 16, 2005, at A1.

[16] . C. Hensleigh, "Quatman Tells His Version of California Death Row Retrial Case," Whitefish Pilot, April 7, 2005.

[17] . Id.

[18] . Gallup Poll Press Release, "Who Supports the Death Penalty?," Nov. 16, 2004 (on file with DPIC).

[19] . D. Lindorff, Salon Magazine, Jan. 2, 2001.

[20] . Id.

[21] . C. Haney & D. Logan, "Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment," 50 Journal of Social Issues 75, 91 (1994).

[22] . R. Morin, "Bias in the Jury Box," Washington Post, March 21, 2004, at B5.

[23] . See Lockhart v. McCree, 476 U.S. 162 (1986).

[24] . See W. Bowers & W. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing," 39 Criminal Law Bulletin 51, 65 (2003)).

[25] . Associate Justice John Paul Stevens, Speech before the American Bar Association's Thurgood Marshall Awards Dinner, Chicago, August 6, 2005, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html (emphasis added).

[26] . See, e.g., CBS Poll, April 17, 2005 (Roper Center at Univ. of Conn., May 17, 2005) (public equally split on support for life-without-parole or death penalty as punishment for murder).

[27] . See J. Dahlburg, "Anger in Puerto Rico Over Death Penalty Case," Los Angeles Times, June 9, 2005.

[28] . See A. Liptak, "Facing a Jury of (Some of) One's Peers," N.Y. Times, July 20, 2003.

[29] . See "The Federal Death Penalty System: A Statistical Survey (1988-2000), U.S. Dept. of Justice (Sept. 12, 2000).

[30] . B. Miller, "D.C. Case Has Court Struggling for a Jury," Washington Post, April 29, 2001, at C1.

[31] . J. Liebman et al., "A Broken System: Error Rates in Capital Cases, 1973-1995," (2000).

[32] . See R. Dieter, "Innocence and the Crisis in the American Death Penalty," Death Penalty Information Center (September 2004), with updates on DPIC's Web site, http://www.deathpenaltyinfo.org.

[33] . See, e.g., S. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases,* 44 Buffalo L. Rev. 469 (1996).

[34] . John P. Flannery, Op-ed, Richmond Times-Dispatch, August 20, 2005.

[35] . See Kyles v. Whitley, 514 U.S. 419, 428-29 (1995).

[36] . Id. at 458 (Scalia, J., dissenting).

[37] . See J. Neff & M. Eisley, "N.C.'s Top Prosecutor Calls for Opening Files," News & Observer, March 2, 2004.

[38] . See Associated Press, "NC Prosecutors Reprimanded For Death Case," Sept. 24, 2004.

[39] . Press release, Death Penalty Information Center, Sept. 14, 2004 (on file with DPIC).

[40] . See M. Secours, "Is Tennessee Doomed to Repeat the Shame of Wrongful Execution?" The Tennessean, February 10, 2002.

[41] . See K. Reckdahl, "Jurors Dismissed,"(Louisiana) Gambit Weekly, December 16, 2003.

[42] . J. Dunne, "Put Death to a Vote?," N.Y. Daily News, April 11, 2005 (arguing for an end to capital punishment in New York).

[43] . See Gregg v. Georgia, 428 U.S. 153 (1976).

[44] . See T. Rosenberg, "The Deadliest D.A.," N.Y. Times Magazine, July 16, 1995, at 21 (noting the wide discretion among prosecutors in seeking the death penalty).

[45] See R. Willing, "Geography of the Death Penalty," USA Today, Dec. 20, 1999.

[46] . Furman v. Georgia 408 U.S. 238, 257 (1972) (Douglas, J., concurring).

[47] . J. Pokorak, "Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors," 83 Cornell Law Review 1811 (1998).

[48] . For race of victims in death penalty cases, see NAACP Legal Defense Fund's "Death Row USA," July 1, 2005. For race of victims of murders in the U.S., see U.S. Dept. of Justice, Bureau of Justice Statistics Criminal Victimization, 2003, (September 2004) (49% of the murder victims were white, 49% were black).

[49] . See, e.g., D. Baldus, et al., "Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia," 83 Cornell Law Review 1638, 1716 (1998).

[50] . A. Welsh-Huggins, "Death Penalty Unequal," Cincinnati Enquirer, May 7, 2005 (Associated Press 3-part series).

[51] . "Capital Punishment in New York State 1995-2003," a report by the Capital Defender Office (August 2003).

[52] . "The Federal Death Penalty System: A Statistical Survey (1988-2000), U.S. Dept. of Justice (Sept. 12, 2000).

[53] . See Barefoot v. Estelle, 463 U.S. 880 (1983) (allowing psychiatrists to testify about an inmate's "future dangerousness" even though such predictions are usually wrong).

[54] . See J. Elliott, "New Trial Is Denied Man Whose Lawyer Slept in Court," Houston Chronicle, May 19, 2005.

[55] . See W. Bowers, "The Capital Jury Project: Rationale, Design, and Preview of Early Findings," 70 Indiana Law Journal 1043, 1100 (1995).

[56] . Wiggins v. Smith, 539 U.S. 510 (2003) (citations omitted).

[57] . Affidavit of Larry Hildebrand in Amrine v. Luebbers, Exhibit to Petitioner's brief for a writ of habeas corpus in the Missouri Supreme Court, Oct. 15, 2001 (on file with DPIC) (emphasis added).

[58] . See, e.g., S. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," 103 Yale Law Journal 1835 (1994); see generally 31 Hofstra Law Review 903-1211 (2003) (articles on guidelines for the appointment and performance of defense counsel in capital cases).

[59] . See L. Olsen, Seattle Post-Intelligencer, Aug. 6-8, 2001 (3-part series on quality of representation).

[60] . See L. Chandler, "Lawyers, Indadequate Defense Cited in a Third of Death Case Reversals," Charlotte Observer, Sept. 11, 2000, at p.1A.

[61] . See D. Malone & S. McGonigle, "Defense Called Lacking for Death row Indigents," Dallas Morning News, Sept. 10, 2000.

[62] . See L. Greenhouse, "Supreme Court to Hear Case of Mexican on Death Row," N.Y. Times, Dec. 11, 2004 (defense lawyer's license suspended at time of trial for ethics violations).

[63] . See, e.g., R. Dieter, "With Justice for Few: The Growing Crisis in Death Penalty Representation," (DPIC 1995), available at http://www.deathpenaltyinfo.org/article.php?scid=45&did=544.

[64] . W. Bowers, "The Capital Jury Project: Rationale, Design, and Preview of Early Findings," 70 Indiana Law Journal 1043, 1100 (1995). Defense attorneys fared somewhat better in "fighting hard at the punishment stage of the trial," but even there the prosecution scored higher in the jurors' minds.

[65] . See H. Dewar, "Senate Approves Bill on Victims' Rights," Washington Post, Oct. 10, 2004 (noting House's earlier passage of similar bill including expansion of access to DNA testing).

[66] . See R. Dieter, "Innocence and the Crisis in the American Death Penalty," (DPIC report 2004), available at http://www.deathpenaltyinfo.org.

[67] . L. Olsen, "DNA Lab Analysts Unqualified," Houston Chronicle, Sept. 8, 2003.

[68] . S Moreno, "Police Lab's Troubles Grow," Washington Post, Oct. 2, 2004, at A3.

[69] . Eight of the executions in 2004 were of defendants from Harris (Houston) County (see Texas Dept. of Criminal Justice), not only more than any other county, but more than any other state except Texas.

[70] . "Crime Lab Scandal Leaves Prosecutor Feeling Betrayed," Houston Chronicle, Mar. 15, 2003.

[71] . D. Boyd, "Doubts Increase About Crime Lab," Fort Worth Star-Telegram, Aug. 26, 2003.

[72] . T. Maier, "Inside the DNA Labs," Insight Magazine, Washington Times, June 10-23, 2003, at 18-22.

[73] . A Liptak, "2 States to Review Lab Work of Expert Who Erred on ID," N.Y. Times, Dec. 19, 2002.

[74] . Id.

[75] . E. Lichtblau, "Report Questions the Reliability of an FBI Ballistics Test," N.Y. Times, Feb. 11, 2004, at A17.

[76] . Id.

[77] . "Informants Come Under Question," Newsday, Dec. 9, 2003.

[78] . See Statement of Walter McMillian to U.S. House Subcommittee on Civil and Constitutional Rights, July 23, 1993 (on file with DPIC); see also P. Applebome, "Black Man Freed After Years on Death Row in Alabama," N.Y. Times, Mar. 3, 1993, at p.A1.

[79] . See S. Mills & K. Armstrong, "The Inside Informant," Chicago Tribune, Nov. 16, 1999, at p.1.

[80] . B. Scheck, et al., "Actual Innocence" (Doubleday 2000), at p.128.

[81] . Id. at 128-29.

[82] . See Mills, note 79 above.

[83] . Associate Justice John Paul Stevens, Speech before the American Bar Association's Thurgood Marshall Awards Dinner, Chicago, August 6, 2005, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

[84] . See, e.g., W. Logan, "Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials," 41 Arizona Law Review 143 (1999). There has been little empirical analysis of the impact of such evidence in capital trials. One study in South Carolina using 63 cases found no correlation between the introduction of victim impact evidence and an increase in death sentencing, though the authors suggested that other variables might have affected the outcome. T. Eisenberg, et al., "Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases," 88 Cornell Law Review 306, 340 (2003).

[85] . See Payne v. Tennessee, 501 U.S. 808 (1991).

[86] . See J. Blume, "Ten Years of *Payne:* Victim Impact Evidence in Capital Cases," 88 Cornell Law Review 257, 275 (2003).

[87] . McGautha v. California, 402 U.S. 183, 204 (1971).

[88] . C. Haney, "Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice," in "America's Experiment with Capital Punishment," (Second Edit., edited by J. Acker, et al. 2003), at 476.

[89] . See W. Bowers & W. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing," 39 Criminal Law Bulletin 51, 56, 71, 73, 82 (2003).

[90] . W. Bowers & B. Steiner, "Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing," 77 Texas Law Review 605, 647 (1999), at Table 1.

[91] . See P. Blumberg, "Life, Without Parole," San Francisco Daily Journal, Dec. 11, 2000, at p.7.

[92] . See, e.g., D. Baldus, et al., "Racial Discrimination and the Death Penalty in the post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia," 83 Cornell Law Review 1638 (1998).

[93] . W. Bowers et al., "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making," 83 Cornell Law Review 1476, 1534 (1998).

[94] . See Franklin v. Lynaugh, 487 U.S. 164 (1988). The Supreme Court will hear Oregon v. Guzek, No. 04-928 in December 2005 and consider whether a defendant may present evidence related to his possible innocence at the sentencing phase of his capital trial.

[95] . See Editorial, "Leaving No Doubt," Chicago Tribune, Mar. 16, 2005, at p.22.

[96] Weeks v. Angelone, 528 U.S. 225, 234 (2000).

[97] . Id. at 248 (Stevens, J., dissenting). See also A. Berlow, "A Jury of Your Peers? Only if You're Clueless," Washington Post, Aug. 12, 2002, at B01.

[98] . See "Georgia Rejects Clemency for a Killer Who Says He's Retarded," N.Y. Times, Mar. 31, 1994, at A19.

[99] . T. Jackman, "Death Penalty Deliberations Tore Malvo Jury Apart," Washington Post, June 19, 2004, at B5.

[100] . Id. (juror James Wolfcale)

[101] . J. Marhalik, "The Trial After the Trial," N.Y. Times Magazine, Dec. 21, 2003 (juror in the trial of John Muhammad in Virginia).

[102] . A. Kotlowitz, "In the Face of Death," N.Y. Times Magazine, July 6, 2003, at 32, 50.
[103] Id. at 50.

[104] A. Trafford & J. White, "For Jurors, Stress of Capital Case Can Linger," Washington Post, Nov. 21, 2003, at A1.

[105] . Id.

[106] . S. Weinberg, "Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct," Center for Public Integrity, June 26, 2003 (on file with DPIC).

[107] . K. Armstrong & M. Possley, "The Verdict: Dishonor," Chicago Tribune, Jan. 8, 1999 (first in five-part series).

[108] . See R. Dieter, "Innocence and the Crisis in the American Death Penalty," (DPIC report, September 2004) (updates on DPIC's Web site: http://www.deathpenaltyinfo.org).

[109] . See L. Greenhouse, "Prosecutorial Misconduct Leads Justices to Overturn Death Sentence in Texas," N.Y. Times, Feb. 25, 2004, at p.A13.

[110] . Id.

[111] . See S. Mills & M. Possley, "Ryan to Pardon 4 on Death Row," Chicago Tribune, January 10, 2003.

[112] . See Brady v. Maryland, 373 U.S. 83 (1963).