



OHCHR Global Panel: “Moving Away from the Death Penalty – Discrimination against marginalised groups”

United Nations Headquarters, New York
Conference Room 2
24 April 2014, 11.00 am – 1 pm

Introductory remarks

- **Keynote address by Mr. Ban-Ki Moon, Secretary-General**

Moderator

- **Mr. Ivan Šimonović**, Assistant Secretary-General for Human Rights

Participants

- Professor **Stephen B. Bright**, President, Southern Center for Human Rights, Atlanta, Georgia, United States; Yale Law School, New Haven, Connecticut
- **Dr. Usha Ramanathan**, Internationally recognized expert on law and poverty, India.
- **Ms. Alice Mogwe**, Executive Director of DITSHWANELO – The Botswana Centre for Human Rights, FIDH Deputy Secretary General and as an expert member of the African Commission on Human and Peoples' Rights Working Group on Death Penalty.
- **Dr. Arif Bulkan**, Faculty of Law, University of the West Indies, St Augustine Campus, Trinidad & Tobago.

Open discussion

Background

In 2012, 2013 and in January 2014 in New York, OHCHR held a series of events on the death penalty, focusing on national experiences in moving away from the death penalty, wrongful convictions, and deterrence and public opinion. These panel events drew on the experiences of senior officials and academic experts from various regions which, in recent years, have made progress through either outright abolition or the imposition of a moratorium, de facto or de jure, or through narrowing the basis for imposition of the death penalty. In addition, the failure of judicial review to capture error was deeply examined.

OHCHR, in cooperation with the **Permanent Missions to the United Nations of Chile and Italy**, is following up these events with a global panel event on the death penalty and discrimination, with a particular focus on the impact on marginalised groups. The objectives of the panel are to share experiences from countries in which persons or groups are discriminated based on race, poverty or for being member of a vulnerable group such as minorities, persons with mental or intellectual disabilities, LGBT persons and foreign nationals.

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The program will be webcast on webtv.un.org.

Imposition of the Death Penalty upon the Poor, Racial Minorities, the Intellectually Disabled and the Mentally Ill in the United States

STEPHEN B. BRIGHT¹

For Panel on “Moving Away from the Death Penalty – Discrimination against Marginalised Groups”

United Nations Headquarters, New York

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The death penalty is imposed in the United States upon the poorest, most powerless, most marginalized people in the society. Virtually all of the people selected for execution are poor, about half are members of racial minorities, and the overwhelming majority were sentenced to death for crimes against white victims. Many have significant intellectual disabilities or suffer from severe mental illnesses. Many others were the victims of the most brutal physical, sexual and psychological abuse during their childhoods and lived on the margins of society before their arrests. Some are innocent. They are subject to discretionary decisions by law enforcement officers, prosecutors, judges and jurors that are often influenced by racial prejudice. Because of their poverty, they are often assigned lawyers who lack the skills, resources and inclination to represent them capably in capital cases.

One does not need to look far for illustrative examples. Georgia plans to execute Warren Hill, an African American man, despite the fact that he is intellectually disabled, what was once called “mentally retarded.”² The United States Supreme Court has held that the Constitution does not allow the execution of a person who is intellectually disabled,³ but Georgia requires that a person facing death prove intellectual disability beyond a reasonable doubt. Although four experts testified that Hill was not intellectually disabled at the hearing on the issue, they all later changed their opinions when they reviewed additional information about Hill. As a result, all

1. President and Senior Counsel, Southern Center for Human Rights, Atlanta and Harvey Karp Visiting Lecturer, Yale Law School. See www.schr.org, www.law.yale.edu/faculty/SBright.htm, and www.secondclassjustice.com.

2. It is prevented from doing so until it resolves legal issues regarding the secrecy of its lethal injection procedures and obtains lethal drugs to carry out executions.

3. *Atkins v. Virginia*, 536 U.S. 304 (2002) (using the term “mental retardation”).

nine experts who have examined Hill have found that he is intellectually disabled. Nevertheless, the state and federal courts have held that they are powerless to prevent a patently unconstitutional execution.

The Supreme Court heard arguments in February in the case of Freddy Lee Hall, sentenced to death in Florida. Before the Supreme Court held that the mentally retarded could not be executed, a Florida court found that Hall had been “retarded all his life.” But Florida now argues that he is not retarded and can be executed because of an IQ score above 70.⁴ Other states have fashioned their own definitions of intellectual disability. Texas executed Marvin Wilson in 2012 even though he sucked his thumb and could not tell the difference between left and right.

Glenn Ford, a black man, was released last month after 30 years on death row in Louisiana’s notorious Angola Prison for a crime he did not commit.⁵ As a result of his poverty, Ford was assigned two lawyers to represent him at his capital trial – the lead attorney was an oil and gas lawyer who had never tried a case – criminal or civil – to a jury. The second attorney had been out of law school for only two years and worked at an insurance defense firm on slip-and-fall cases. As often happens in capital cases, the prosecutors used their preemptory strikes to keep blacks off the jury. Despite a very weak case against him, Ford, virtually defenseless before an all-white jury, was sentenced death.

Ford is just one of many people who were found guilty beyond a reasonable doubt in capital and non-capital cases, but were actually not guilty at all. States have already executed innocent people – like Carlos DeLuna⁶ and Cameron Todd

4. Andrew Cohen, *Supreme Court Case May Stop States That Still Execute Mentally Disabled*, The Atlantic, Feb. 28, 2014, <http://www.theatlantic.com/health/archive/2014/02/supreme-court-case-may-stop-states-that-still-execute-the-mentally-ill/283969/>.

5. Andrew Cohen, *Freedom After 30 Years on Death Row*, The Atlantic, March 11, 2014, www.theatlantic.com/national/archive/2014/03/freedom-after-30-years-on-death-row/284179/; Cohen, *Glenn Ford’s First Days of Freedom After 30 Years on Death Row*, The Atlantic, March 14, 2014, www.theatlantic.com/national/archive/2014/03/glenn-fords-first-days-of-freedom-after-30-years-on-death-row/284396/; Cohen, *The Meaning of the Exoneration of Glenn Ford*, Brennan Center, March 13, 2014, <http://www.brennancenter.org/analysis/meaning-exoneration-glenn-ford>.

6. James S. Liebman et al., *Los Tocayos Carlos*, 43 Colum. Hum. Rts. L. Rev. 711 (2012), and <http://www3.law.columbia.edu/hrlr/lrc/>.

Willingham⁷ in Texas – and will continue to execute innocent people so long as they have the death penalty.

Florida executed John Ferguson, a black man, who suffered from schizophrenia, last year even though he believed that he was the Prince of God and that after execution, he would be resurrected and return to earth in that capacity. The federal Court of Appeals in Atlanta treated this as nothing more than an unusual religious belief:

While Ferguson’s thoughts about what happens after death may seem extreme to many people, nearly every major world religion – from Christianity to Zoroastrianism – envisions some kind of continuation of life after death, often including resurrection. Ferguson’s belief in his ultimate corporeal resurrection may differ in degree, but it does not necessarily differ in kind, from the beliefs of millions of Americans.⁸

The court warned against treating unusual religious beliefs as proof of mental illness. But religious delusions and obsessions are frequent manifestations of mental illness. This was just an effort by judges to gloss over the fact that Florida and other states are executing people who are out of touch with reality.

I. Poverty and Poor Lawyering

Georgia hopes to execute Robert Wayne Holsey, an African American, this year even though he was represented at his trial by a lawyer who drank a quart of vodka every night of trial and was preparing to be sued, criminally prosecuted, and disbarred for stealing client funds. Holsey’s other court-appointed lawyer had no experience in defending capital cases and was given no direction by the alcoholic lawyer in charge of the case except during trial when she was told to cross-examine an expert on DNA and give the closing argument at the penalty phase. The lawyers failed to present mitigating evidence that might well have convinced the jury to impose life imprisonment instead of death: Holsey was intellectually limited and as a child had been “subjected to abuse so severe, so frequent, and so notorious that his neighbors

7. See David Grann, *Trial by Fire: Did Texas execute an innocent Man?* THE NEW YORKER, Sept. 7, 2009, www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true.

8. *Ferguson v. Secretary*, 716 F.3d 1315, 1342 (11th Cir. 2013).

called his childhood home ‘the Torture Chamber.’”⁹

Holsey was by no means the first person sentenced to death at a trial where he was represented by a drunk lawyer. Ronald Wayne Frye, executed by North Carolina, was represented by a lawyer who drank 12 shots of rum a day during the penalty phase of the trial. And there are other cases of intoxicated lawyers, drug-addicted lawyers, lawyers who refer to their clients with racial slurs in front of the jury, lawyers who sleep through testimony – three people were sentenced to death in Houston at trials in which their lawyers slept¹⁰ – lawyers who are not in court when crucial witnesses are testifying, and lawyers who do not even know their client’s names.¹¹ There are lawyers who have never read their state’s death penalty statute, lawyers who file one client’s brief in another client’s death penalty appeal without changing the names, and lawyers who miss deadlines that cost their clients review of their cases.

James Fisher, Jr., spent twenty-six-and-a-half years in the custody of Oklahoma – most of it on death row – without ever having a fair and reliable determination of his guilt. The lawyer assigned to represent Fisher tried his case and *24 others* during September 1983, including another capital murder case.¹² The lawyer made no

9. *Holsey v. Warden*, 694 F.3d 1230, 1275 (11th Cir. 2012) (Barkett, J., dissenting).

10. Even though George McFarland’s lawyer was snoring, the presiding judge took no action, saying, “The Constitution does not say that the lawyer has to be awake.” John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, Houston Chronicle, Aug. 14, 1992, at A35. McFarland’s conviction and death sentence were twice upheld by the Texas Court of Criminal Appeals. *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005); *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996). Carl Johnson was executed even though his lawyer, Joe Frank Cannon, slept during parts of trial. David Dow, *The State, The Death Penalty, and Carl Johnson*, 37 Boston College Law Review 691, 694–95 (1996). Cannon also slept during the trial of Calvin Burdine. The Texas Court of Criminal Appeals upheld the conviction and sentence, but the federal court of appeals set aside the conviction, holding, over a bitter dissent, that a sleeping counsel is absent from trial. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

11. See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 Yale Law Journal 2150, 2169-70 (2013), www.yalelawjournal.org/essay/fifty-years-of-defiance-and-resistance-after-gideon-v-wainwright; Kenneth Williams, *Ensuring the Capital Defendant’s Right to Competent Counsel: It’s Time for some Standards!* 51 Wayne Law Review 129 (2005); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 Nebraska Law Review 425, 455-62 (1996); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 Iowa Law Review 433 (1993).

12. *Fisher v. Gibson*, 282 F.3d 1283, 1293 (10th Cir. 2002).

opening statement or closing argument at either the guilt or sentencing phase and uttered *only nine words* during the entire sentencing phase.¹³ On appeal, the Oklahoma Court of Criminal Appeals pronounced itself “deeply disturbed by defense counsel’s lack of participation and advocacy during the sentencing stage,” but it was not disturbed enough to reverse the conviction or sentence.¹⁴

Nineteen years later, a United States Court of Appeals set aside the conviction and death sentence, finding that Fisher’s lawyer was “grossly inept,” had “sabotaged” Fisher’s defense by repeatedly reiterating the state’s version of events, and was disloyal by “exhibiting actual doubt and hostility toward his client’s case.”¹⁵ The Court of Appeals would not reach the same result today because Congress has severely restricted its power to review state court judgments and grant habeas corpus relief.¹⁶ Today, Fisher would probably be executed. And Robert Holsey’s death sentence would almost certainly have been set aside if the federal courts had considered his case before the restrictions were adopted.

James Fisher was assigned another bad lawyer for his retrial in 2005. The lawyer was drinking heavily, abusing cocaine, and neglecting his cases.¹⁷ The lawyer physically threatened Fisher at a pre-trial hearing and, as a result, Fisher refused to attend his own trial.¹⁸ He was again convicted and sentenced to death, but this time Oklahoma’s highest criminal court recognized the disgraceful incompetence of his

13. *Id.* at 1289.

14. *Fisher v. State*, 739 P.2d 523, 525 (Okla.Crim.App.1987)

15. *Id.* at 1289, 1300, 1308.

16. The Antiterrorism and Effective Death Penalty Act, adopted in 1996, restricts federal review of convictions and death sentences imposed in the the state courts in many ways. Among its provisions is one that provides that habeas relief may not be granted unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1) (2006). The Supreme Court has held that a “state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) ((quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Court added In *Richter*: “If this standard is difficult to meet, that is because it was meant to be.” *Id.*

17. *Fisher v. State*, 206 P.3d 607, 610-11 (Okla. Crim. App. 2009).

18. *Id.* at 610.

lawyer and set the the conviction aside.¹⁹ Prosecutors agreed to Fisher's release in July 2010, provided that he be banished from Oklahoma forever.²⁰

Juan Balderas was sentenced to death in Houston last month, on March 14. He was represented by Jerome Godinich, an attorney who missed the statute of limitations in two federal habeas corpus cases five years ago, depriving his clients of any review of their cases by independent, life-tenure federal judges.²¹ Both clients were executed. Yet, despite such gross malpractice, the Texas Bar took no action, nor did the Texas Court of Criminal Appeals. The trial court judges in Houston did not even stop appointing Godinich to defend poor people accused of crimes, or even stop appointing him to capital cases. He has been the lawyer in as many as 350 criminal cases at one time.

Micah Brown was sentenced to death last May, represented by Toby Wilkinson, who filed appellate briefs in two capital cases in 2006 that contained gibberish, repetitions, and rambling arguments. In one case, Wilkinson clearly lifted passages from one of his previous cases so that in places the brief discussed the wrong crime and used the wrong names. In the other case, Wilkinson included portions of letters sent to him by his client.²² No matter how egregiously a lawyer handles a capital case, Texas judges keep appointing them to represent others.

Lawyers have missed the statute of limitations in at least seven other cases in Texas. Earlier this year, the federal courts refused to consider an appeal in the case of Louis Castro Perez, who was sentenced to death in Texas, because his lawyer without telling Perez or other counsel on the case did not file a notice of appeal.²³ Judge Dennis dissented, pointing out that the lawyer's failure to file a notice of appeal was "an egregious breach of the duties an attorney owes her client" and that Perez had made a strong showing that he may have been sentenced to death in violation of the

19. *Id.* at 612-13.

20. Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. Times, Aug. 10, 2010, <http://www.nytimes.com/2010/08/11/us/11land.html>.

21. Lise Olsen, *Lawyers' late filings can be deadly for inmates*, Houston Chronicle, March 22, 2009, www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php.

22. Maro Robbins, *Convict's odds today may rest on gibberish*, San Antonio Express-News, August 24, 2006.

23. *Perez v. Stephens*, ___ F.3d ___ [2014 WL 739985] (5th Cir. 2014).

Constitution.²⁴ In Florida, lawyers assigned to represent condemned inmates have missed the statute of limitations in *over 30* cases, depriving their clients of any review of their cases by federal courts.

Many people are sentenced to death and executed in the United States not because they committed the worst crimes, but because they had the misfortune to be assigned the worst lawyers. Over 100 people sentenced to death in Houston, Harris County, Texas have been executed in the last forty years. The reason is no secret: Harris County judges appoint incompetent lawyers to represent people facing the death penalty²⁵ and, after they are sentenced to death, the condemned are assigned equally bad lawyers to represent them in post-conviction proceedings. There is not even the pretense of fairness.²⁶

United States Supreme Court Justice Ruth Bader Ginsburg has said, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.”²⁷ United States Circuit Judge Boyce Martin has pointed out that defendants with “decent lawyers” often avoid death sentences, while those assigned bad lawyers are sentenced to death.²⁸

It is disturbing how commonly courts and prosecutors are willing to overlook

24. *Id.* at 11, 14 (Dennis, J., dissenting).

25. For example, one lawyer repeatedly appointed by judges in Houston had 20 clients sentenced to death due largely to his failure to “conduct even rudimentary investigations.” Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, New York Times, May 17, 2010. Houston judges repeatedly appointed Ron Mock, who owned 11 bars; 16 of his clients were sentenced to death. Another favorite was Joe Frank Cannon who was known for trying cases like “greased lightning” and not always being able to stay awake during trials; ten people represented by Cannon were sentenced to death.

26. Stephen B. Bright, *Death in Texas; Not Even the Pretense of Fairness*, 23 *The Champion* 1 (1999), http://library.law.yale.edu/sites/default/files/death_in_texas_champion_99.pdf; Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 *Texas Law Review* 1805 (2000), <http://library.law.yale.edu/sites/default/files/electedjudges.pdf>.

27. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers who Care*, District of Columbia School of Law, April 9, 2001, http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-09-01a.html.

28. *Moore v. Parker*, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting).

the gross incompetence of counsel when it occurs, and how doggedly they try to defend the death sentences that result. Trial judges, who are elected in most states, are often the ones who appointed the incompetent lawyers. And they appoint them in case after case, as Texas judges have done with Jerome Godinich and Toby Wilkinson. Prosecutors have no incentive to demand that their courtroom adversaries be qualified and effective. The poor quality of counsel in capital cases is well known, but very little, if anything, is being done about it in many states.

II. Racial Discrimination

The death penalty is one of America's most prominent vestiges of slavery and racial oppression.²⁹ The death penalty was essential to the institution of slavery. Michigan abolished the death penalty in 1846, and other northern states repealed their death statutes or restricted the use of the death penalty before the Civil War. But that could not be done in the South. It could not be done in states that had a captive population. After the Civil War, the death penalty continued to be imposed on African Americans – some crimes were punishable by death depending upon the race of the offender and the victim – and slavery was perpetuated through convict leasing. Black people were arrested on minor charges-such as loitering, not having proper papers, theft-and then leased to the railroads, coal mines, and turpentine camps.

Today, the courts remain the part of American society least affected by the Civil Rights Movement of the 1950s and 60s. Many courtrooms in the South today look no different than they did in the 1950s. The judge is white, the prosecutors are white, the court-appointed lawyers are white and, even in communities with substantial African American populations, the jury is often all-white.

It is well known and well documented that a person of color is more likely than a white person to be stopped by police, to be abused during that stop, to be arrested after the stop, to be denied bail when brought to court, and more likely to receive a severe sentence, whether it is jail instead of probation or the death penalty instead of life imprisonment without the possibility of parole.

The two most important decisions made in every death penalty case are made by prosecutors – whether to seek the death penalty and whether to resolve the case through a plea bargain for a sentence less than death. Those decisions are often influenced by race. Some people who are intellectually disabled or mentally ill reject

29. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 Santa Clara Law Review 433 (1995), http://library.law.yale.edu/sites/default/files/discrimination_death.pdf.

plea offers with little or no understanding of what they are doing and are sentenced to death at trials.

Prosecutors continue to use their discretionary strikes to prevent or minimize the participation of racial minorities on juries. A Supreme Court decision purportedly preventing such discrimination by requiring prosecutors to give race-neutral reasons for their strikes is widely regarded as a farce. After calling the process a “charade,” one court described it as follows: “The State may provide the trial court with a series of pat race-neutral reasons [W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, ‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations.’”³⁰ And, indeed, just such a “cheat sheet” of pat race neutral reasons to be given when needed to justify the strike of any minority jury came to light in a North Carolina capital case.³¹ In that case, the court found that in capital cases in North Carolina “prosecutors strike African Americans at double the rate they strike other potential jurors.”³² The probability of such a disparity occurring in a race-neutral process is less than one in ten trillion.³³ The court found a history of “resistance” by prosecutors “to permit greater participation on juries by African Americans.” It continued:

That resistance is exemplified by trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.³⁴

30. *People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. 1996). A judge discusses the reluctance of judges to find that prosecutors intentionally discriminated and then lied about it by giving pretextual reasons for their strikes – the finding the Supreme Court requires to prohibit a strike motivated by race – in Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: the Problems of Judge-dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harvard Law & Policy Review 149 (2010).

31. *State v. Golpin*, Cumberland Co., NC, Superior Nos. 97 CRS 42314-15, 98 CRS 34832, 35044, 01 CRS 65079, at 77-81, ¶¶ 79-93 (Dec. 13, 2012).

32. *Id.* at 112-201, ¶¶ 171-393. The Court found that prosecutors statewide struck 52.8% of eligible black venire members and 25.7% of all other eligible venire members. *Id.* at 153, ¶ 254.

33. *Id.*

34. *Id.* at 4-5.

The Supreme Court has held that states must minimize the risk of race coming into play in the decisions that lead to imposition of the death penalty.³⁵ But this raises the question of how much racial bias is acceptable in the process through which courts condemn people to die? With the long history of slavery, lynchings, convict leasing, Jim Crow, segregation, racial oppression and now mass incarceration that has a much greater impact on racial minorities, surely states should eliminate any chance that racial prejudice plays any role. But there is only one way to do it, and that is by eliminating the death penalty.

III. Death for People with Intellectual Limitations and Mental Illnesses

There are other equally troubling questions. How much uncertainty is acceptable with regard to executing people of low intelligence and people who are mentally ill? Are juries able to measure precisely the degree of culpability of an intellectually disabled person? Are they able to discern whether people are so intellectually disabled – or “mentally retarded” – that they are exempt from the death penalty,³⁶ or not quite intellectually disabled enough so that it is acceptable to execute them? Is a jury capable of determining whether profoundly mentally ill people are so impaired that their culpability is reduced so that they should be spared the death penalty or so dangerous that they should be executed?

Different people on different juries make those decisions, but it is impossible for them to make them consistently or to know which ones are reaching the right conclusions. Intellectual disability cannot be precisely measured. Psychiatrists and psychologists do not fully understand mental illness and often disagree with regard to their existence, severity and influence on behavior. Capital cases are often influenced by the passions and prejudices of the moment, which distort the decision-making process.

As a result, there are many intellectually disabled and mentally ill people on death rows throughout the country. Among them is Andre Lee Thomas, sentenced to death in Texas. He suffers from schizophrenia and psychotic delusions and has gouged out both his eyes.

After engaging in bizarre behavior and attempting suicide, Thomas stabbed and

35. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Turner v. Murray*, 476 U.S. 28, 37 (1986).

36. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of the intellectually disabled, then called the “mentally retarded” violates the Eighth Amendment).

killed his wife and two children, acting upon a voice that he thought was God telling him that he needed to kill them using three different knives so as not to “cross contaminate” their blood and “allow the demons inside them to live.” He used a different knife on each one and carved out the children’s hearts and part of his wife’s lung, which he had mistaken for her heart, and stuffed them into his pockets. He then stabbed himself in the heart which, he thought, would assure the death of the demons that had inhabited his wife and the children.

After being hospitalized for his chest wound, he was taken to jail where he gave the police a very calm, complete, and coherent account of his activities and his reasons for them. In jail, five days after the killings, Thomas read in the Bible, “If the right eye offends thee, pluck it out.” Thomas gouged out his right eye. After being sentenced to death and sent to death row, he gouged out his left eye and ate it.³⁷

Scott Panetti, sentenced to death in Texas, suffered from schizophrenia, fragmented personality, delusions and hallucinations for which he was hospitalized numerous times before committing the crimes for which he was sentenced to death. He was unable to overcome his mental illnesses even though he took medication that could not have been tolerated by a person not suffering from extreme psychosis. One day, he dressed in camouflage, drove to the home of his estranged wife’s parents and shot and killed them in front of his wife and daughter. He was found competent for trial and allowed to represent himself. He wore a cowboy suit during trial and attempted to subpoena Jesus Christ, John F. Kennedy, and a number of celebrities, some dead and some alive to testify. His behavior at trial was described as “bizarre,” “scary,” and “trance-like,” rendering his trial “a judicial farce.”³⁸

Since his trial in 1995, the courts have debated whether Scott Panetti understands the relationship between his punishment and the crimes he committed, just as courts often wrestle with whether mentally ill people are capable of participating in a trial, cooperating with their lawyers, and making decisions in their cases. Some experts testify that they are capable and other experts testify they are not. The prosecution will always present an expert who says the person is malingering, even in cases in which long before any criminal behavior there was bizarre behavior, paranoia, delusions, treatment with psychotropic drugs, hospitalizations, electro-shock

37. Marc Bookman, *How Crazy Is Too Crazy to Be Executed?* Mother Jones, Feb. 12, 2013, www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas; *Ex Parte Andre Lee Thomas*, 2009 WL 693606 (Tex. Crim. App. March 18, 2009) (Cochran, J., concurring).

38. *Panetti v. Quarterman*, 551 U.S. 930, 936-37 (2007).

therapy, suicide attempts, and self-mutilation. Judges, if they are free from political influences in deciding the issue, try to comprehend the incomprehensible and parse legal concepts with manifestations of mental disorders. But, at best, their rulings are “a hazardous guess.”³⁹

The more fundamental question is why are people like Andre Lee Thomas and Scott Panetti, who are undoubtedly profoundly mentally ill, subject to the death penalty? Of course they committed horrendous crimes, took innocent lives that left others suffering and scarred for life, and they must be isolated to protect society. But through no fault of their own, they are tormented souls suffering from devastating afflictions that leave them unable to think and reason like people who are not so afflicted. That is greater punishment that any court can impose.

The intellectually disabled and mentally ill are at an enormous disadvantage in the criminal courts. Some have no family support and others have families afflicted with the same limitations or disorders that they have. Their court-appointed lawyers may know nothing about their disabilities, have no idea how to interact with them, and know nothing about conducting an investigation of the disability or which experts to consult. In many cases, they do not have adequate resources for expert consultation and any testing that is required.

The Alabama lawyers who represented Holly Wood did not even interview special education teachers who were right there where they practiced, and, as a result, did not present readily available testimony by the teachers who would have testified “that Wood’s IQ was probably ‘low to mid 60s,’ that Wood was ‘educable mentally retarded or trainable mentally retarded,’” “that all of the special education students, regardless of age or grade level, were placed in one room in a basement; the lighting was barely adequate; the room would flood when it rained a lot; and the students were known around school as the ‘moles’ that ‘lived in a mole hole,’” and that Wood even at the time of his trial could read only at the third grade level and could ““not use abstraction skills much beyond the low average range of intellect.””⁴⁰ Alabama executed Wood, a black man, in 2010.

39. *Ford v. Wainwright*, 477 U.S. 399, 412 (1986) (quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)).

40. *Wood v. Allen*, 542 F.3d 1281, 1324 (11th Cir. 2008) (Barkett, J., dissenting), *denial of relief affirmed*, 558 U.S. 290 (2010).

IV. Conclusion

The United States promises equal justice for all in its Constitution, its pledge of allegiance and above the entrance to its Supreme Court. Yet poverty, race and mental limitations or impairments influences the selection of those who will be subject to what Justice Arthur Goldberg called the greatest conceivable degradation to the dignity of a human being. Finality – not justice – has become the ultimate goal of the American legal system. Moving dockets – not competent representation, equal justice or protection of the most vulnerable – is the concern of most courts even in cases where life and death are at stake. Technicalities and procedural rules made up by the Supreme Court and Congress now prevent enforcement of the Bill of Rights in most capital cases, particularly those with bad lawyers.

However, there is growing recognition that this is not moral, just or right. Former President Jimmy Carter, who as governor of Georgia signed into law in March of 1973 Georgia's death penalty statute, called for an end to capital punishment on November 12, 2013, because it is being imposed on the poor, on racial minorities, and on people with diminished mental capacity.⁴¹ Justice John Paul Stevens, who voted to uphold the death penalty in 1976, observed before leaving the Court that there are fewer procedural protections for those facing death, a strong probability that race influences who is sentenced to death, and a “real risk of error” with irrevocable consequences. He concluded “that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’”⁴² The death penalty has recently been abandoned by Connecticut, Illinois, New York, New Jersey, New Mexico, and Maryland, and governors have declared moratoriums on the death penalty in Colorado, Oregon and Washington.⁴³ Perhaps there will be a reexamination of the death penalty before too much more damage is done.

41. *Remarks by former U.S. President Jimmy Carter at the National Symposium on the Modern Death Penalty in America*, https://www.cartercenter.org/news/editorials_speeches/death-penalty-speech-111213.html; American Bar Association, *National Symposium on the Modern Death Penalty*, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/national_symposium_death_penalty_carter_center.html (including videos of presentations by President Carter and others at the symposium).

42. *Baze v. Rees*, 553 U.S. 35, 83 (2008) (Stevens, J., concurring) (quoting Justice White's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

43. Executive Order of Governor John W. Hickenlooper of Colorado, <http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf>; Statement of Governor John Kitzhaber of Oregon, <http://www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions>; Statement of Governor Jay Inslee of Washington, <http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf>