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## USA: Model criminal justice? Death by prosecutorial misconduct and a 'stacked' jury

The case of Reginald Clemons, 17 years on Missouri's death row

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*The [American Law] Institute concluded that we cannot devise a death penalty system that will ensure fairness in process or outcome, or even that innocent people will not be executed... The Institute could no longer play a role in legitimizing a failed system. How much longer can any of us?*  
President Emeritus of the American Law Institute, February 2010<sup>1</sup>

Half a century ago, the American Law Institute issued its Model Penal Code. Although written at a time of growing concern about the fairness of the USA's death penalty – culminating in the Supreme Court's 1972 decision (*Furman v. Georgia*) to overturn the country's existing capital statutes because of the arbitrary way in which death sentences were being imposed – the Institute expressed no view as to whether states should retain capital punishment. Instead, Section 210.6 of its model code sought to provide legislators in states which did retain the death penalty with rules aimed at maximizing fairness and reliability in capital sentencing. The 1976 Supreme Court decision which gave the green light for executions to resume under revised laws (*Gregg v. Georgia*) cited provisions of §210.6 in so doing.

It is incumbent on legislators, prosecutors, governors and other officials across the USA to reflect upon the decision in October 2009 of the American Law Institute to withdraw §210.6 "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment". It noted that §210.6 was "an untested innovation in 1962. Now we have decades of experience with the evolution of American capital punishment systems and capital punishment laws over the last half century".<sup>2</sup> Amnesty International welcomes the Institute's decision to withdraw its capital blueprint and not to replace it with another. The USA's foray into judicial killing over the past three decades is an experiment that has failed, as it was always destined to.<sup>3</sup> The death penalty can never be anything but incompatible with human dignity. And in the USA, discrimination, inconsistency and error remain hallmarks of this cruel and degrading punishment.

In assessing whether to withdraw §210.6, the American Law Institute had considered, among other things, the inadequacies of the US Supreme Court's constitutional regulation of the death penalty, the politicization of the death penalty, racial discrimination, systemic juror confusion in capital cases, the under-funding of defence counsel services, death sentences against the innocent, and the inadequacy of federal habeas corpus review. On this latter point, the background report provided to the Institute to inform its vote noted:

"Casual observers of the death penalty will likely regard the death sentences and executions that emerge from the current process to be the product of careful, extensive review by many courts.

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<sup>1</sup> The death penalty – it's unworkable. By Michael Traynor, Chair of the Council and President Emeritus of the American Law Institute. Los Angeles Times, 4 February 2010.

<sup>2</sup> Report of the Council to the Membership of The American Law Institute on the matter of the death penalty, 15 April 2009.

<sup>3</sup> USA: The experiment that failed: A reflection on 30 years of executions, January 2007, <http://www.amnesty.org/en/library/info/AMR51/011/2007/en>

The reality, though, is much different. States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become."<sup>4</sup>

A decade earlier, a landmark study had concluded that US death sentences are "persistently and systematically fraught with error". The study revealed that appeal courts had found serious errors – those requiring a judicial remedy – in 68 per cent of cases. It pointed to prosecutorial and police misconduct and inadequate defence representation as the principal causes of error. The study expressed "grave doubt" as to whether the courts catch all such errors.<sup>5</sup>

Reginald Clemons has been on death row in Missouri for 17 years, almost all of his adult life. His conviction and death sentence have been upheld by the state and federal courts. Scheduled for execution in June 2009, the execution was stayed by the Missouri Supreme Court which appointed a "special master" judge to examine the case after his lawyers raised doubts about the reliability of his conviction and questions about the proportionality of his death sentence.

Reginald Clemons was one of three African American youths sentenced to death at separate trials in St Louis City, Missouri, in 1992 and 1993 for the murder of two young white women in 1991.<sup>6</sup> Marlin Gray was executed in 2005. Antonio Richardson had his death sentence reduced to life imprisonment in 2003. A fourth co-defendant, Daniel Winfrey, white, pled guilty to a lesser offence in return for testimony against his three black co-defendants. He has since been released from prison. Charges against the original suspect in the case, Thomas Cummins, also white, were dropped and he became a key prosecution witness before suing the police for brutality against him during interrogation. Reginald Clemons – and Marlin Gray – independently made similar allegations of ill-treatment against the same police officers, allegations which remain an issue in efforts to prevent Clemons' execution.

Reginald Clemons was sent to death row as an accomplice to first-degree murder, rather than a principal actor, and was convicted primarily on the testimony of Cummins and Winfrey, and on his own allegedly coerced statement implicating himself in the crime. Concern about the limited foundations for this conviction is heightened by evidence that the jury that convicted him was likely even more prosecution than research show the average US capital jury to be. A federal judge ruled in 2002 that as a result of the improper exclusion of jurors Reginald Clemons should receive a new sentencing hearing or have his death sentence reduced to life imprisonment.<sup>7</sup> However, a three-judge panel of the Court of Appeals for the Eighth Circuit overturned this decision on the grounds that the claim had not been properly preserved for federal judicial review. One of the judges dissented against upholding the death sentence, however, pointing to the improper exclusion of a seventh juror. At the same time, both the District Court judge and the three judges on the Court of Appeals agreed that Reginald Clemons had been prosecuted by a prosecutor whose conduct at trial was "unprofessional", "abusive and boorish", but decided that this improper conduct – at least those few claims of such conduct that the federal courts decided had not been procedurally defaulted – had not prejudiced the defendant. The federal courts have also dismissed claims that Clemons' legal representation at trial was inadequate under the deferential lens federal appeal courts adopt under US law.

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<sup>4</sup> Report to the ALI concerning capital punishment. Prepared by Professors Carol S. Steiker (of Harvard Law School) and Jordan M. Steiker (of University of Texas School of Law), November 2008.

<sup>5</sup> *A Broken System: Error Rates in Capital Cases, 1973-1995*, conducted at New York's Columbia Law School by James S. Liebman, Jeffrey Fagan and Valerie West, published 12 June 2000.

<sup>6</sup> Marlin Gray was convicted on 21 October 1992, and sentenced to death on 3 December 1992. Reginald Clemons was convicted on 13 February 1993 and sentenced to death on 2 April 1993. Antonio Richardson was convicted on 25 March 1993 and sentenced to death on 2 July 1993.

<sup>7</sup> *Clemons v. Luebbers*. Memorandum and Order, US District Court for the Eastern District of Missouri, 1 August 2002 (Judge Catherine D. Perry).

Reginald Clemons is one of more than 3,200 prisoners on death row in the USA. More than 1,200 men and women have been put to death since executions resumed in the USA in 1977, more than 1,000 of them since 1993. Fifty-two men were put to death in 2009, and 15 more were executed in the first four months of 2010 with more being lined up for the death chamber in the coming weeks and months. This is a situation which continues to leave the USA on the wrong side of history. Today, 139 countries are abolitionist in law or practice. More than half of these countries have abolished the death penalty since the American Law Institute adopted its Model Penal Code in 1962.

Amnesty International urges the State of Missouri to commute Reginald Clemons' death sentences.<sup>8</sup> There is any number of reasons why the authorities should do so, even if they do not oppose the use of the death penalty per se. In this report, Amnesty International highlights the questions relating to alleged police misconduct and actual prosecutorial misconduct, and the questions surrounding the fairness of the jury selection process. Questions of race also arise in a case where the white defendant was allowed to plead guilty in exchange for a prison sentence and testimony against his black co-defendants charged with killing two young white women. As the most senior Justice on the US Supreme Court asserted in 2008, discriminatory application of the death penalty continues to play "an unacceptable role in capital cases", particularly in relation to "race-of-victim effect".<sup>9</sup> All but two of the jurors at Reginald Clemons' trial were white after a jury selection process in which blacks appear to have been disproportionately excluded.

Amnesty International calls on the state to impose a moratorium on executions and to move as swiftly as possible to enact legislation to abolish the death penalty. In so doing, it would be providing an example to elected officials across the USA who have shown too little inclination to provide the necessary human rights leadership to lead the country away from the death penalty. A punishment that is inherently cruel and degrading, and that carries with it the inescapable risk of irrevocable error and arbitrariness, should have no place in any criminal justice system that purports to be a model in the modern world.

#### THE CRIME AND ALLEGED POLICE ILL-TREATMENT OF SUSPECTS

*There are several troubling aspects to this case. Apparently Cummins, one of the alleged victims, initially made a confession to police that he had murdered his two cousins by pushing them off the bridge. After the four eventual suspects were caught, Cummins retracted and said that he had been mistreated by police and coerced into giving the confession.*

US Court of Appeals for the Eighth Circuit, 2004<sup>10</sup>

Julie Kerry, aged 21, and her 19-year-old sister Robin Kerry drowned on the night of 4/5 April 1991 after plunging from the Chain of Rocks Bridge, a disused road bridge spanning the Mississippi River in the city of St Louis on the border of Illinois and Missouri. Julie Kerry's body was found three weeks later. Her sister's body has never been found.

The police investigation into the case began after 19-year-old Thomas Cummins stopped a passing truck in the early hours of 5 April 1991 near the Chain of Rocks Bridge and asked the driver to call the police. Thomas Cummins told the police that he and his two cousins, Julie and Robin Kerry, had earlier gone to the bridge where they had met four youths, three black and one white. He said that the youths had raped

<sup>8</sup> Reginald Clemons received a death sentence for each of his two first-degree murder convictions.

<sup>9</sup> *Walker v. Georgia* (2008), Statement of Justice Stevens respecting the denial of the petition for writ of certiorari. See also USA: Death by discrimination - the continuing role of race in capital cases, Amnesty International, April 2003, <http://www.amnesty.org/en/library/info/AMR51/046/2003>. There have been 67 executions in Missouri since 1977. In 50 cases the prisoner was executed for a crime involving one or more white victims. Missouri has executed 10 African American men for crimes involving white victims, and one white man for a crime involving a black victim

<sup>10</sup> *Clemons v. Luebbers*, US Court of Appeals for the Eighth Circuit, 14 December 2004.

his cousins and robbed him before pushing the young women off the bridge and ordering him to jump in after them.

Police initially doubted Thomas Cummins' account, including because "his hair appeared to be dry and neatly combed", and there were questions about how he would have survived, uninjured, a jump from bridge to water estimated to be a distance of about 30 metres. In addition, the police noted inconsistencies in Cummins' statements about what had happened on the bridge, and a polygraph test recorded his responses as "deceptive".

Under further interrogation, Thomas Cummins implicated himself in the deaths of his cousins, apparently stating that he had tried to have sex with Julie Kerry, which had led to an argument during which he had pushed her off the bridge. He then apparently told the police that he thought Robin Kerry had either jumped off the bridge to try to save her sister or that he himself had pushed her off. Thomas Cummins was formally arrested after his interrogation on 5 April 1991 and was held in custody to face charges of first-degree murder. However, he was released two or three days later, after Marlin Gray, Reginald Clemons, Antonio Richardson and Daniel Winfrey were arrested. Police had obtained a statement from 16-year-old Antonio Richardson implicating himself and the three others in events on the bridge. Reginald Clemons, then 19, was picked up by police from his home on the afternoon of 7 April 1991. The police told Clemons' mother that her son did not need a lawyer.

A month later, according to the record, Thomas Cummins met with the prosecutor in the case for at least half an hour, following which he identified each of the four youths in police line-ups as the four he said he and his two cousins had encountered on the bridge on the night of 4 April. Also present at the identification were two police officers, including one who had led the interrogation of Cummins. On the same day as Thomas Cummins identified the four, charges against him were dropped.

On 2 April 1993 – the day on which Reginald Clemons was sentenced to death – Thomas Cummins filed a lawsuit against the St Louis City police department and the individual officers who had interrogated him. The lawsuit claimed that he had been denied access to a lawyer despite repeated requests for such access, that he had been threatened and physically assaulted, including by being struck and having his head and neck "twist[ed]...", thereby causing him bodily harm and injury", in an attempt "to coerce him into implicating himself in the crimes on the bridge". The lawsuit further claimed that there had been a conspiracy among police and others to "cover up their illegal acts" and that they had "fabricated false police reports".<sup>11</sup> In April 1995, a matter of days before the lawsuit was due to go before a jury, the case was settled out of court. The terms of the agreement remain confidential, but it subsequently emerged that the City of St Louis had paid the plaintiff US\$150,000 to settle the lawsuit.

The Cummins interrogation and lawsuit remain live issues in legal attempts to prevent the execution of Reginald Clemons. For on 9 April 1991, Clemons had himself independently complained to the police Internal Affairs Department that he had been mistreated by the same officers during his interrogation on 7 April 1991.<sup>12</sup> Marlin Gray likewise alleged that he had been subjected to police brutality during his interrogation on 8 April 1991.<sup>13</sup> In other words, according to Clemons's current lawyers, all three individuals – Cummins, Clemons, and Gray – made "virtually identical allegations against the very same police officers and did so without having had the opportunity to speak with one another".<sup>14</sup>

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<sup>11</sup> *Cummins v. Robbins et al.* US District Court for the Eastern District of Missouri.

<sup>12</sup> In September 1991, the police department dismissed Reginald Clemons' complaint of police ill-treatment as "not sustained", finding that there was "insufficient evidence to either prove or disprove the allegations of the complaint".

<sup>13</sup> Upholding Gray's death sentence in 2000, a federal District Court judge ruled that photographs taken and a medical examination conducted within days of his interrogation refuted Gray's claim that he had been assaulted.

<sup>14</sup> *Clemons v. Larkins*, Petition for writ of habeas corpus and suggestions in support, In the Supreme Court of Missouri, 12 June 2009.

Reginald Clemons told Internal Affairs that at the outset of his interrogation he had said to his two interrogators that he wanted to speak to a lawyer, a request that he alleged was met with being “slapped” in the back of the head. When he continued to ask for a lawyer, he said he was told to sit on his hands and that when he did so one of the officers “slammed my head against the wall... he grabbed me by the neck and slammed my head against the wall twice”. He said that the officers then proceeded to repeatedly hit him in the chest and head. After these alleged assaults, Reginald Clemons agreed to record a statement. He told Internal Affairs that:

“I didn’t want to get hit any more so I agreed to make the tape they wanted me to... they wanted me to agree to the fact that I killed these people and everything. They wanted me to say that I had pushed them off the bridge...”

Although the police had facilities available to videotape interrogations, they did not do so in this instance. Instead they made an audiotape. Reginald Clemons alleged that when they first started recording, after he again asked for a lawyer, his interrogators stopped the tape and one of the officers took it out of the recorder and left the room with it. After the officer returned to the room, Reginald Clemons says, the physical assaults continued. He told Internal Affairs that he then agreed to record a second statement “because I was being beaten. They were beating me up”. On tape, Clemons admitted to participating in the rape of Robin and Julie Kerry, but denied any involvement in their fall from the bridge.

A pre-trial evidentiary hearing was held on 1 February 2003 on a defence motion to suppress this statement as having been involuntarily made. Reginald Clemons testified that his interrogators had subjected him to physical assaults and threats to obtain the statement. The officers in question denied any such ill-treatment. A lawyer who had visited Reginald Clemons at the police station on 8 April 1991 testified that he had observed at that time that the right side of Clemons’ face was swollen. Clemons’ sister also testified that when she had seen him in police custody on 8 April, his face was “lopsided and it looked like it was swollen” and that her brother told her that he had been beaten. A counsellor at the jail testified that according to his records, the inmate’s face was swollen when he was brought to the jail on the evening of 9 April. However, an intake officer at the jail who would say after the trial that she had observed swelling on the teenager’s face when he was brought to the jail and had reported his injuries, was not called to testify at the suppression hearing because Clemons’ defence lawyers had not interviewed her or anyone else working at the jail that night.

On 9 April 1991, the judge presiding over Clemons’ arraignment had ordered that the defendant be taken to the emergency room of the hospital for an examination. There he had been diagnosed with muscle pain, muscle inflammation and a swollen right cheek. Reginald Clemons’ mother and some other family members also testified at the suppression hearing that when they saw their relative at the arraignment, they noticed that his face was swollen.

The trial judge, Judge Edward Peek, denied the motion to suppress, finding that the state had shown by a preponderance of the evidence that there had been “no official misconduct”. The defence urged Judge Peek to reconsider this ruling, to which he responded that he was “not taking a position as to whether or not the defendant suffered any injuries. There was testimony that his jaw was swollen. I’m not disputing that.” However, he explained that his ruling was based on the absence of credible evidence “to show how he got those injuries”. Reginald Clemons’ statement implicating himself in the crime was subsequently introduced at his trial.

In its 1997 ruling upholding Clemons’ death sentence, the Missouri Supreme Court considered the issue “in the light most favourable to the trial court’s ruling” and upheld Judge Peek’s decision to deny the suppression motion. In August 2000, a federal District Court judge refused to hold an evidentiary hearing

on this issue, under the federal law standard of “substantial deference to the state court’s factual findings surrounding the confession”.

A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt.<sup>15</sup> Another is that no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.<sup>16</sup> As the US Supreme Court ruled more than half a century ago, the rationale for excluding coerced confessions is not just their unreliability. They should be inadmissible even if “statements contained in them may be independently established as true”, because of the fundamental offence the coercive treatment of detainees causes to the notion of due process and its corrosive effect on the rule of law.<sup>17</sup>

Amnesty International does not know if Reginald Clemons was subjected to the physical assaults he alleged. The organization is concerned, however, by the unresolved question of how he received the swelling to his face that was noted by his lawyer and others, and diagnosed at the hospital. It is also concerned by the consistency between the apparently independent allegations of ill-treatment made by three suspects in this case, one of whom became a prosecution witness and whose subsequent lawsuit against the police was settled after the trials of those against whom he testified. Moreover, the details of the settlement were not made available to the condemned prisoners whose conviction his testimony helped to secure.

The UN Guidelines on the Role of Prosecutors require that “when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods...”

Given the prosecutor’s conduct at Reginald Clemons’ trial, and at other trials, as outlined below, it perhaps could be considered unlikely that even if he had had reason to believe that Clemons’ taped confession had been coerced that he would have met his international obligation to reject it as evidence. For much of the remainder of the trial, he appears to have contravened the standard contained in the UN Guidelines that all prosecutors “as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession”, and shall “respect and protect human dignity and human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system”.

#### **A PATTERN OF PROSECUTORIAL MISCONDUCT**

*I don’t want you to blow this case. Understand, Mr Moss?... You should know better by now. And you’re going to poison the jury and blow this case if you don’t learn how to make an objection, state the legal grounds, and keep your mouth shut, is that understood?... You’re going to muddy up this record and wind up in a lot of trouble. Is that understood?*

Trial judge to prosecutor, during jury recess at the trial of Reginald Clemons, 1993

The US District Court judge who reviewed Reginald Clemons’ federal habeas corpus petition described the prosecutor’s conduct at the trial as “certainly unprofessional”. She found “considerable evidence of prosecutorial over-aggressiveness”, and a trial transcript that was “replete with admonitions from the trial

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<sup>15</sup> Article 14.3(g), International Covenant on Civil and Political Rights. Article 75.4(f) of Additional Protocol 1 to the Geneva Conventions.

<sup>16</sup> UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), 1992, par. 12, in UN Doc. HRI/GEN/Rev.7.

<sup>17</sup> *Rochin v. California* 342 U.S. 165 (1952).

judge to the prosecutor for improper questions, objections, and comments". The record of the case "show that the prosecutor was abusive and boorish, and that his tactics overall were calculated to intimidate the defense at every turn."

The prosecutor in the Chain of Rocks Bridge case was Assistant Circuit Attorney Nels Moss, who was employed by the St Louis City prosecutor's office from 1968 to 1999. At the time of the Chain of Rocks prosecution, a high-profile case in St Louis, Assistant Circuit Attorney Moss was campaigning for election as Circuit Attorney.<sup>18</sup> Whether this influenced his conduct at the Clemons trial is unknown, but given the recent decision of the American Law Institute to withdraw the death penalty provisions of its Model Penal Code, it is worth recalling a passage from the background report considered by the Institute prior to the vote:

"Capital punishment... is politicized *institutionally*, in that some or all of the most important actions in the administration of capital punishment are elected. At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for 'law and order' policies generally... [T]he symbolic politics of capital punishment is very much at play in the election of local prosecutors".<sup>19</sup>

The conduct of prosecutor Moss in criminal cases has been the subject of repeated criticism by state and federal courts. A study in 2003 found that his misconduct had led to the defendant's conviction being overturned in seven cases; in another 17 cases the courts found that he had engaged in improper conduct, but without reversing the conviction.<sup>20</sup> In 1979, the Missouri Court of Appeals overturned a conviction after finding that Moss had made a "thinly veiled attempt" to elicit non-admissible evidence and "evade the impact of a well known and fundamental rule of evidence", in 1985 did so again after finding that he had engaged in a "patent effort" to deprive the defendant of a fair trial" by seeking to "poison the minds of the jurors", and again in 1997 on the grounds that Moss had "attempted to inflame the passions and prejudices of the jury by references to facts outside the record".<sup>21</sup> The 1985 ruling noted that "the error is but one example of a consistent pattern of improper tactics reflected by other transcripts in cases tried by the same experienced prosecutor". At the federal level, in 1995, the US Court of Appeals for the Eighth Circuit found that Moss had "push[ed] the limits of zealous advocacy" in the case under review, and in another case the following year it wrote that it "strongly disapprove[d]" of comments he made at the trial which were "mean-spirited and unnecessary".<sup>22</sup>

In 2001, the Missouri Supreme Court upheld the death sentence of Walter Storey. It had twice – in 1995 and 1999 – reversed it and sent the case back for re-sentencing because of constitutional error (inadequate legal representation and improper jury instruction). Each time prosecutor Moss obtained a new death sentence. The third death sentence was upheld, but the Missouri Supreme Court noted that "the three trials of this case unfortunately exhibit a consistent attempt by the prosecutor to push the envelope of proper advocacy. We condone the prosecutor's strategy no more in this trial than in the previous two that were reversed". Nonetheless, it ruled that the prosecutorial misconduct had not prejudiced the defendant.<sup>23</sup>

<sup>18</sup> His campaign was ultimately unsuccessful.

<sup>19</sup> Report to the ALI concerning capital punishment, November 2008, *op. cit.*

<sup>20</sup> Harmful Error. Investigating America's local prosecutors. Center for Public Integrity.

<sup>21</sup> *State v. Browner*, 587 S.W.2d 948 (1979); *State v. Goodson*, 690 S.W.2d 155 (1985); *State v. Nelson*, 957 S.W.2d 327 (1997).

<sup>22</sup> *Culkin v. Purkett* (1995), and *Preston v. Delo* (1996).

<sup>23</sup> *State v. Storey*, 6 March 2001.

In the Chain of Rocks case, Prosecutor Moss was not faced with obtaining a death sentence three times against the same defendant, but with obtaining the death penalty against three defendants at three separate trials. The challenge was that the case was built principally upon the testimony of the original suspect and a co-defendant who had plea-bargained his way to a lesser sentence, as well as allegedly coerced statements from at least two of the capital suspects. There was no physical evidence introduced against Reginald Clemons linking him to the crime, no undisputed confession on his part, and no eyewitness testimony from anyone who was neither a co-defendant nor a former suspect. Prosecutor Moss chose to meet this challenge by resorting to arguments and tactics that flew in the face of international standards for the conduct of prosecutors.

In 2008, the senior Justice on the US Supreme Court, Justice John Paul Stevens, wrote of his concern about the US capital justice system.<sup>24</sup> Among other things, he noted that the detail of the crimes placed before capital jurors “provides the most persuasive arguments for prosecutors seeking the death penalty. A natural response to such heinous crimes is a thirst for vengeance”.<sup>25</sup> Of concern then – in addition to evidence that “death-qualified” jurors tend to be more conviction prone (see below) – is when these same jurors have inflammatory comments directed at them by prosecutors.

In his closing argument at the guilt phase of the Clemons trial, seeking to have the jury convict Reginald Clemons of two counts of first degree murder as an accomplice, the prosecutor resorted to making up a description of a crime. He described a hypothetical crime in which the two sisters were raped outside a room. At the outset of what was to become a gruesome and lengthy description, the defence lawyer objected on the grounds that the prosecutor was mischaracterizing the evidence that had been introduced at the trial. The judge overruled the objection and allowed the prosecutor to proceed. The defence lawyer offered no further objections as the prosecutor pursued his inflammatory story. In a hearing after the trial, the lawyer explained his failure to do so: “I think I was tired of objecting and being overruled”. Prosecutor Moss had displayed no such reticence at the trial in pursuing his description of the hypothetical crime:

“The rape is outside this room and then you send them into a dark room. Okay? All of these three – of these people into a dark room. And Mr Antonio Richardson goes into that dark room with a knife. And Mr Clemons goes in there with a knife, and Mr Gray and Mr Winfrey stand outside; and the door is closed; and it’s dark, nobody can see anything.

And when all is said and done, you open the door, and Tom Cummins is not dead, but he’s lying there knifed. And Julie Kerry is lying there dead, with ten stab wounds in her; Robin Kerry is laying there dead with ten stab wounds in her. Okay? What do you know? Tom Cummins can’t say, because it was dark, who put the ten stab wounds in Julie, who put the ten stab wounds in Robin, or who put the ten stab wounds in him.

But you know darn good and well the only two people who walked into that dark room with a weapon and the knives, you know, in fact, were him and the other guy. So what are you going to say? Okay? You got a bonus if you had a light bulb on, it would have made a difference. But we’re going to distinguish now because we don’t really know. It don’t piecemeal out like that, when these fellows work together like that”.

In the actual case before the jury, there had been no dark room and no stabbings. The two murder victims had died through drowning. There was no evidence of the defendants having carried knives on the bridge. Thomas Cummins was uninjured. Although rape was the alleged motive for the murders, there was no physical evidence of rape available to substantiate it. Indeed, after Reginald Clemons was

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<sup>24</sup> On 9 April 2010, Justice Stevens announced that he would retire at the end of the 2010 Supreme Court term. He is currently the second-oldest and fourth-longest serving Justice in the history of the United States Supreme Court.

<sup>25</sup> *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.



convicted of two counts of first-degree murder and sentenced to death, the charges of rape and robbery against him were dropped.

In 1997, the Missouri Supreme Court acknowledged that in his hypothetical description, the prosecutor had “failed to mention the necessity of the jury finding that both actors had the necessary mental state – deliberation” before the jurors could reach a verdict of first-degree murder. The state Supreme Court also acknowledged that the defence lawyer’s stated reason for failing to continue to object to the hypothetical – that he was tired of being overruled – was not “strategic”. However, it ruled that Reginald Clemons had not been prejudiced by either the prosecutor’s tactics or the defence lawyer’s failure to continue to challenge them.

The prosecutor’s closing arguments continued to push the boundaries of professional conduct and to risk inflaming the jury. For example, he urged the jurors to put themselves in the position of someone who was drowning, asking them what it would feel like. He pursued this theme even after Judge Peek sustained the defence’s objection to his emotive speculation. Prosecutor Moss read out a poem allegedly written by one of the Kerry sisters some time before the crime, irrelevant to the jury’s deliberations. He appealed to the religious sentiments of the jurors. He appealed to their possible general fear of crime and encouraged them to see themselves as the last line of defence against the criminal and as a bulwark against vigilantism:

“If it were not for you, the people of the city would have no one to come to when they have been victimized... Now there is a point where we as a city have to decide what we want to do here. We hear what goes on with drive-by shootings, and drugs, and all of his other stuff... Our fathers, our brothers, and uncles are going to get their shotguns.... We don't want it to be each person's responsibility that has a bigger gun, or a stronger arm, to remedy the pain that there people caused”.

During his closing arguments in the guilt phase, the prosecutor likened Clemons to two infamous individuals convicted of serial killing and sentenced to death: Charles Manson (California) and John Wayne Gacy (Illinois). Prosecutor Moss had been specifically ordered by Judge Peek not to resort to this tactic. He had done so in the trial a few months earlier of Marlin Gray, which is why Judge Peek anticipated the issue in the Clemons case. Flouting this court order, however, the prosecutor sought to detract from the mitigating evidence that at the time of the deaths of the Kerry sisters, Reginald Clemons was a 19-year-old with no criminal record. In his closing arguments at the sentencing phase, prosecutor Moss said that the fact that Clemons “has no significant history of prior criminal activity, you know, the same can be said of John Wayne Gacy, Charles Manson, the fellow that killed the seven” (thereby not only flouting the specific court order, but also mischaracterizing Clemons’ absolute lack of a criminal record as “no significant” prior criminal history).

While Reginald Clemons was prosecuted by an experienced official who seemed willing to push the boundaries of professional conduct in order to obtain convictions and death sentences, he was defended by two lawyers whose preparation appears to have been less than adequate.

The original defence lawyer, who had visited Clemons in police custody and represented him for the arraignment, withdrew from the case on the grounds that he did not have the necessary experience to take on such a case. Reginald Clemons was indigent, but the St Louis Public Defender’s Office could not represent him because it was already representing one of Clemons’ co-defendants. In October 1991, Clemons’ mother and stepfather hired two lawyers, Jeanene Moenckmeier and Robert Costantinou, using credit card advances to do so. Moenckmeier had little experience in criminal cases, having practiced mainly in the area of bankruptcy and civil litigation for prisoners. Costantinou’s law office practices and legal representation was the subject of a number of complaints, and he was publicly reprimanded by the

Missouri Supreme Court in 1995 and again in 1998. He was indefinitely suspended from law practice by the court in 1999.

Unknown to Clemons and his family, Jeanene Moenckmeier and Robert Costantinou had been married and had recently divorced. About six months before the trial, Moenckmeier moved to California where she started a new full-time job doing tax work for a private company. In an affidavit in 1998, she recalled:

“From the time I moved to California until the trial began, a period of six months, I estimate that I was in St Louis six times for a total of approximately 30 days. During my trips to St Louis I divided my time between Mr Clemons’ case and approximately 10 other cases, including a civil rights trial which I litigated in Federal Court with Mr Costantinou. Though my role on the trial team remained the same – I was to do the investigation and preparation for the penalty phase – conducting the investigation became difficult while I was in California. I am not aware of anything that Mr Costantinou did to compensate for my absence from St Louis with respect to the trial preparation”.

In mid-December 1992, a matter of weeks before the trial was due to start, Clemons’ mother retained on a part-time basis another lawyer to assist in her son’s case. In a sworn statement in 1998, this attorney recalled meeting the two other lawyers for the first time:

“At this meeting it was clear to me that Moenckmeier and Costantinou had not done the necessary investigation in preparation for the trial. They had collected no evidence and had done no investigation with respect to possible mitigation. In addition, Costantinou admitted to me that he had not even read the police reports.... Out of concern that he was in violation of his ethical and professional obligations as Clemons’ defense counsel, I considered lodging a complaint against Costantinou with the Missouri State Bar”.<sup>26</sup>

In her 1998 affidavit, Jeanene Moenckmeier stated that although the trial judge postponed the start of the trial from 11 January 1993 to 25 January 1993, this delay “did not give me or Mr Costantinou enough time to adequately prepare for trial”. She also recalled the prosecutor’s conduct at the trial and Judge Peek’s responses:

“Early in the trial and repeatedly throughout the trial, Judge Peek, speaking off the record, both in chambers and at side-bar, told Moss in my presence that Moss was ‘dangerously close’ to causing a mistrial. Judge Peek further warned Moss that if he persisted to conduct himself improperly during the trial that he would be constrained to declare a mistrial. These warnings occurred prior to Moss being cited by Judge Peek for criminal contempt as a result of his mention of famous serial killers, Manson and Gacy, in direct violation of a court order.”

Judge Peek had refused to declare a mistrial on this issue as the defence requested, merely telling the jury to disregard the comments on Manson and Gacy. After the trial, he held the prosecutor in criminal contempt for his reference to Charles Manson and John Wayne Gacy, behaviour which he said “was wilfully and deliberately committed, in disobedience of the court and in opposition to the authority, justice and dignity thereof” and which “tends to degrade and make impotent the authority of the court and to impede the administration of justice”. A week after Clemons was sentenced to death, Judge Peek fined the prosecutor US\$500.

## **A STACKED JURY?**

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<sup>26</sup> *Clemons v. Bowersox*. US District Court, Eastern District of Missouri, sworn statement by Marianne Marxkors, 27 May 1998.

*[V]acation of the death penalty is required when even one juror is improperly excluded. Here there were six...*

US District Court judge, 2002

Jury selection for the trial of Reginald Clemons began on 25 January 1993 and ended on 1 February 1993. The jury eventually selected may have been, if anything, even more pro-prosecution than research has shown the average US capital jury to be, due to improper jury selection.

In a state (as opposed to federal) capital trial in the USA, 12 citizens from the county in which the trial is held (the county where the crime is committed unless a change of venue is granted) are selected to sit as a "death qualified" jury. At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be "irrevocably committed" to vote against the death penalty can be excluded for cause by the prosecution, under the 1968 US Supreme Court ruling in *Witherspoon v. Illinois*.<sup>27</sup> In 1985, in *Wainwright v. Witt*, the Supreme Court relaxed the *Witherspoon* standard, thereby expanding the class of potential jurors who could be dismissed for cause during jury selection.<sup>28</sup> Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath".

A dozen years ago, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions had expressed concern that in the USA, "while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors".<sup>29</sup> The problem goes beyond this, however. There is evidence that a "death-qualified" jury is more conviction-prone than its non-death-qualified counterpart. This raises special concerns given the irrevocability of the death penalty. In 1986, the US Supreme Court acknowledged evidence from research that the "death qualification" of capital jurors "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries".<sup>30</sup> The Court had been presented with 15 published studies each finding that death-qualified jurors were more conviction-prone than excludable jurors. Three Justices referred to this "overwhelming evidence that death-qualified juries are substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve", adding that "death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defence, more mistrustful of defence attorneys, and less concerned about the danger of erroneous convictions".<sup>31</sup>

The three Justices went on to note that "the true impact of death qualification on the fairness of a trial is likely even more devastating than the studies show". They noted that the *Witherspoon* ruling, while limiting the state's "ability to strike scrupled jurors for cause", had said nothing about the prosecution's use of peremptory challenges to eliminate jurors who had less than absolute opposition to imposing the death penalty. There was "no question", the Justices added, "that peremptories have indeed been used to this end".

<sup>27</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

<sup>28</sup> *Wainwright v. Witt*, 469 U.S. 412 (1985). In 1992, in *Morgan v. Illinois*, the Court explicitly extended the *Witt* standard to include proponents of the death penalty. In other words, anyone whose support for the death penalty would "prevent or substantially impair" them from performing his or her duties as a juror can be dismissed for cause.

<sup>29</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Mission to the United States of America, UN Doc. E/CN.4/198/68/Add.3, para. 147. 22 January 1998.

<sup>30</sup> *Lockhart v. McCree*, 476 U.S. 162 (1986).

<sup>31</sup> *Ibid.* Justices Marshall, Brennan and Stevens, dissenting.

In 1998, a review of the existing research indicated that a "favourable attitude towards the death penalty translates into a 44 per cent increase in the probability of a juror favouring conviction".<sup>32</sup> Another expert review in 1998 concluded that:

"Death-qualification standards theoretically exist to ensure that capital defendants will be tried by impartial jurors. The research, however, demonstrates that there is a deep chasm between the law's intentions and the result of death qualification in practice. Rather than ensuring impartiality, the result can more accurately be envisioned as a stacked deck against the defendant: death-qualified jurors, regardless of the standard, are more conviction-prone, less concerned with due process, and they are more inclined to believe the prosecution than are excludable jurors."<sup>33</sup>

US Supreme Court senior Justice John Paul Stevens revisited this question in 2008:

"Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive".<sup>34</sup>

In 1987, the US Supreme Court ruled that a death sentence must be reversed even if only one juror that has been improperly excluded from serving on the jury.<sup>35</sup> In Clemons' case, the US District Court judge who considered his federal habeas corpus petition concluded that six prospective jurors had been improperly excluded and that as a result the death sentence against Reginald Clemons could not stand.

It was the conduct of prosecutor Nels Moss which again was the origin of this controversy. During jury selection, he had provided the prospective jurors with explanations of accomplice liability, as his aim was to secure Reginald Clemons' conviction for first-degree murder as an accomplice rather than as principal actor in the crime. Under Missouri law, in order to find an accomplice guilty of first-degree murder, the jury must find that the defendant must have "coolly deliberated" on the victims' death before they occurred. The element of deliberation may not be imputed by association alone.

The prosecutor asked prospective jurors if they could consider the death penalty against Reginald Clemons even if he had not been the person who had pushed the Kerry sisters from the bridge, as long as he did everything he could to help facilitate this outcome. By omitting any reference to the premeditation requirement, the prosecutor was effectively asking prospective jurors whether they could impose a death sentence in a scenario where state law would not allow it. When the prospective jurors indicated that they could not vote for the death penalty under these circumstances, as numerous of them did, the prosecutor dismissed them for cause as not "death-qualified", and was allowed to by the trial judge.

After reviewing the record of the jury section, federal District Court Judge Catherine Perry ruled in 2002 that six prospective jurors (venirepersons) had been improperly excluded. The six, she ruled,

"each indicated some hesitancy about whether they could impose the death penalty in an accomplice situation where the defendant did not actually push the victims from the bridge...

<sup>32</sup> Mike Allen, Edward Mabry and Drue-Marie McKelton, *Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment: A meta-analysis*. Law and Human Behaviour, Volume 22, No. 6, 1998, pages 715 to 731.

<sup>33</sup> Marla Sandys, *Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality*. In: America's experiment with capital punishment. Edited by James R. Acker, Robert M. Bohm and Charles S. Lanier. Carolina Academic Press, 1998.

<sup>34</sup> *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.

<sup>35</sup> *Gray v. Mississippi*, 481 U.S. 648 (1987)

[I]f the trial court is going to determine that jurors should be removed for bias against the death penalty, the jurors must be asked the correct questions...

The jury that sentenced Clemons to death was chosen by improperly excluding venirepersons because they expressed concerns about imposing the death penalty in a scenario where the law of Missouri does not allow the death penalty. This improperly excluded persons who expressed legally appropriate reservations, rather than excluding persons whose views would prevent them from performing their duties as jurors to apply the law".

Judge Perry ruled in August 2002 that Reginald Clemons should have a new sentencing hearing or else have his death sentence commuted to life imprisonment without parole. The state appealed and a three-judge panel of the Court of Appeals for the Eighth Circuit overturned Judge Perry's ruling on the grounds that the matter was procedurally barred from federal judicial review because the matter had not been properly preserved by Clemons' previous lawyers. Clemons's appeal lawyers argued to the Eighth Circuit that his death sentence should not be allowed to stand as a result of this inadequate legal representation. However, the Eighth Circuit dismissed the claim. Even if the performance of his previous lawyers had fallen below "a standard of objective reasonableness" in this regard, which the Eighth Circuit acknowledged it possibly had, this failure "cannot be said to have affected the outcome of the proceeding".

However, one of the three Eighth Circuit judges took issue with the exclusion of another prospective juror at the trial. Juror Doss had been dismissed by the trial judge as not "death-qualified". This juror had initially indicated opposition to the death penalty on religious grounds. However, upon further questioning, he said that this belief was not so strong that he could never vote for execution. Indeed, when prosecutor Moss asked him whether he could vote for the death penalty even if the prosecution could not prove that Reginald Clemons had pushed the victims off the bridge, juror Doss said that he could. According to Clemons' federal habeas corpus petition, Doss "unambiguously stated on six separate occasions that he could impose the death penalty".

However, the trial judge dismissed this prospective juror on the basis of the judge's own "recollection, or my notes" that Doss had said he would not be able to pass a death sentence against a first-degree murder accomplice. Yet the record shows that, in fact, Doss had said that he could pass a death sentence against an accomplice.

The two judges in the Eighth Circuit majority acknowledged that the trial judge had "mischaracterize[d]" Doss's statements regarding the death penalty for an accomplice. However, in upholding Clemons' death sentence the two federal judges ruled that "the trial judge was left with the firm conviction that Doss's religious beliefs would ultimately substantially impair his ability to act as a juror". This determination, they said, was entitled to "great deference at any level of review, especially in a federal habeas proceeding". The third judge dissented. Judge Michael Melloy said that it was clear from the record that it was the trial judge's "inaccurate recollection of Doss's statements on accomplice liability, and not Doss's religious beliefs, that led the court to exclude him". In addition, Judge Melloy continued, the other two Eighth Circuit judges had failed to mention that the trial judge "also misremembered Doss's statements on the standard of proof". While the trial judge had stated that Doss had said that "all doubt" would have to be removed before he could vote for the death penalty, in fact "Doss said from the beginning and multiple times that he would need to be firmly convinced". Judge Melloy rejected his colleagues' claim that "the trial court's firsthand impressions trump the cold record". This deference, he said, "may be overcome by clear and convincing evidence" that the trial judge had been wrong.

Research has shown that contrary to constitutional requirements that US capital jurors weigh mitigating and aggravating factors before deciding on sentence, "before the sentencing phase of the trial, many jurors think they know what the defendant's punishment should be". In addition,

"most who take such an early stand on punishment are 'absolutely convinced' of that stand, that early pro-death stands are prompted by graphic crime evidence presented at the guilt stage of

the trial, that such stands have roots in a predisposition to see death as the 'only acceptable punishment' for aggravated murder that many jurors bring to the trial, and that jurors' premature stands on punishment contaminate the guilt decision process".<sup>36</sup>

With this in mind, evidence that Reginald Clemons' jury may have been infected with prejudicial thinking during jury selection raises additional concerns. His federal habeas petition had raised a number of other claims about the jury selection process, but Judge Perry ruled that these had been procedurally defaulted and so did not consider them on the merits. Neither did the Court of Appeals. For example, most of the prospective jurors indicated that they had been exposed to media coverage of the case, including as a result of the coverage three months earlier of the trial in the same courthouse of co-defendant Marlin Gray. Furthermore, there were concerns that the jury may have been infected during the selection process by opinions prejudicial to the defendant held by some in the original jury pool. Clemons's trial lawyers had moved for jury selection to consist of individual questioning of prospective jurors outside of groups, in order to minimize the possibility of jurors being prejudiced by the views of others. The trial judge had denied this motion.

One prospective juror, in front of a group of "death-qualified" jurors from whom the eventual jury was selected, described as a "friend" one of the police officers, who would subsequently testify at the trial, and who had been one of the police officers who allegedly coerced the statement from Clemons (and Cummins) through ill-treatment, and described prosecutor Moss as "a fine man". Another prospective juror in this group, over defence objections, was allowed to assert that based on his own experience as an employee of the St Louis police department, he was more inclined to believe the testimony of police officers than that of other citizens. The wife of a retired police officer was also allowed to assert that the testimony of police officers should carry more weight than that of other individuals.

The federal habeas petition also raised the prosecutor's conduct in relation to a Mr Shy, a prospective juror, who had spent one of the mornings of jury selection with a group of fellow venirepersons from which it is believed at least four of the eventual jurors were drawn. It emerged that he had assisted prosecutor Moss in his investigations of the Chain of Rocks case. According to the habeas petition, the prosecutor "chose not to warn defence counsel of the danger of jury prejudice created by Mr Shy's participation in the [jury pool]. Instead, Moss resisted the inevitable striking of Mr Shy to the last, thus prolonging his presence in the jury pool. In response to a leading question, in front of a group of 20 prospective jurors, the prosecutor elicited the statement from Mr Shy that "whoever did this are dirty rotten people and they should get everything they've got coming to them".

Four jurors who eventually sat on the jury had been part of a sub-group of jurors in which two prospective jurors had said under questioning that they had already made up their minds about the guilt of the defendants in the case as a result of the pre-trial media coverage. While these two individuals were dismissed for cause as a result of their clear bias against the defendants, Clemons federal lawyers maintained that their remarks may have infected the four jurors from their group ultimately selected. A similar thing happened in another group from which two more of the eventual jurors were selected.

The original jury pool consisted of 159 individuals. Forty-four of them were dismissed on health or hardship grounds; 47 were struck for cause as not "death-qualified"; and 18 were dismissed for other reasons. This left 50 "death-qualified" individuals who went forward for the stage of peremptory challenges. The trial judge noted that in his past experience of trials in St Louis City, African Americans had been equally represented on juries (the population of the city is just under half white and half black). He also acknowledged that a disproportionate number of African Americans had been dismissed as not "death-qualified" during selection for the Clemons trial. All but two of the eventual jurors were white.<sup>37</sup>

<sup>36</sup> Bowers, William J., Benjamin D. Steiner, and Michael E. Antonio (2003). "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction." In James R. Acker, Robert M. Bohm, and Charles S. Lanier, (2nd Ed.) *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Second Edition). Durham, NC: Carolina Academic Press.

Research into the racial aspects of US capital jury decision making among other things points to black jurors being far more likely than their white counterparts to have lingering doubts about the defendant's guilt and being generally less confident that capital justice is error free.<sup>37</sup> In cases involving a black defendant and a white victim, white jurors were more likely than their black counterparts to see the defendant as dangerous.<sup>38</sup> In his 2008 opinion revealing his concerns about the US capital justice system, Justice Stevens wrote that "the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender".<sup>40</sup>

## CONCLUSION

Reginald Clemons was one of nearly 300 people sentenced to death in the USA in 1993, a time when support for the death penalty there was far stronger than it is today. Death sentencing would peak in the following two years – reaching just over 300 new death sentences in 1994 and 1995 – before beginning to decline. In 2007 and 2008, for example, there were 119 and 111 new death sentences respectively – each fewer than half of the 1993 total. It would seem that even US capital jurors, by definition death penalty supporters, are becoming less sure advocates of capital punishment. Factors contributing to their waning enthusiasm may include public knowledge of the number of wrongful convictions in capital cases, a diminished belief in the deterrence value of the death penalty, and the more general availability of the sentence of life imprisonment without the possibility of parole. If so, it would seem that a greater public awareness of the possibility of irrevocable mistakes, coupled with increased confidence that public security can be ensured by locking up defendants rather than killing them, has led to a greater reluctance among capital jurors to pass death sentences.<sup>41</sup>

Missouri reinstated the death penalty in 1975, three years after the US Supreme Court overturned the country's existing capital statutes because of the arbitrary and capricious way in which death sentences were being handed out. Missouri resumed executions in 1989, thirteen years after the Supreme Court passed revised capital laws, citing Section 210.6 of the American Law Institute's Model Penal Code in so doing. Now the American Law Institute has withdrawn its blueprint for capital laws, after deciding that the past three decades of the death penalty in the USA has shown the capital justice system to be unreliable and unfair.

What is needed now is for elected officials to recognize the failure of the USA's three-decade experiment with the death penalty. Officials in each state with the death penalty should impose a moratorium on executions, and then set about enacting abolition. The federal government should do the same.

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<sup>37</sup> In 1986, the US Supreme Court noted that "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected...The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray* 476 U.S. (1986).

<sup>38</sup> Among those wrongfully convicted and sentenced to death in the USA since 1976 was Joseph Amrine, an African American man convicted in Missouri by an all-white jury, see Joseph Amrine - Facing execution on tainted testimony, May 2002, <http://www.amnesty.org/en/library/info/AMR51/085/2002>. Joseph Amrine was eventually released in June 2003 after 17 years on death row.

<sup>39</sup> See Crossing racial boundaries: A closer look at the roots of racial bias in capital sentencing when the defendant is black and the victim is white. William J. Bowers, Marla Sandys and Thomas W. Brewer. *DePaul Law Review*, Vol. 53, 2004, pages 1497 to 1538.

<sup>40</sup> *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.

<sup>41</sup> A May 2006 Gallup Poll in the USA found that when given a choice between the sentencing options of life without parole and the death penalty, fewer than half – 47 per cent – of respondents chose capital punishment. This was the lowest percentage in two decades. 63 per cent of respondents said that they believed that an innocent person had been executed in the previous five years. 64 per cent disagreed with the notion that the death penalty deters murder. Polls in the 1980s and early 1990s indicated a majority believing that the death penalty deterred murder.

Meanwhile, the State of Missouri should commute the death sentence of Reginald Clemons. The authorities could take their pick from any of the many concerns that mark his case – claims of police and prosecutor misconduct, of inadequate defence representation, improper juror exclusion, and racial aspects – as a reason for the state to drop pursuit of his execution. Or they could just decide that there has been enough judicial killing in Missouri and that the time for the state to end the death penalty has come.

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