

## **The Failures of the Death Penalty System Mandate a Moratorium Now!**

What our North Carolina Judges have to say about the death penalty:

- Former North Carolina Chief Justice Burley Mitchell, Jr. has been quoted as saying: "It has warped our court system. I think the time has come to decide whether it's worth the cost."<sup>1</sup>
- Former North Carolina Chief Justice James Exum has said: "No matter how we dress it up...it's still the ultimate, brutal act."<sup>2</sup>

These two justices have spent years as the very top judicial officers on the highest court in our state. Add to that the fact that Chief Justice Mitchell spent most of his career as a supporter of the death penalty and that gives you reason to pause and reconsider.

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During 2001, North Carolina's death row had eleven men who were sentenced to die. Of those eleven, four have had their death sentences commuted to life in prison, and two others have had their sentences stayed due to the fact they may be mentally retarded. In other words, more than half of the 11 have been removed from death row. Of the four men who are now serving life, two, Charles Alston and Robert Bacon, had their sentences commuted by Governor Easley. Of the other two, Sherman Skipper was found mentally retarded by a trial court, and a second trial court determined there were errors committed at the trial of Bobby Lee Harris. Of the five men that the State of North Carolina executed in the year 2001, close examination of their cases reveals legal errors that should have made them ineligible for the death penalty.

*"It has warped our court system."*

Since 1973 there have been 820 people executed in the United States. Of all people sentenced to death, 111 have been exonerated. Over the past 31 years, the number of people sentenced to die who have been exonerated (often just before their scheduled execution) has increased exponentially. Using these statistics, it can be calculated that for every seven or eight people executed in the United States, at least one innocent person has probably been executed under our current death penalty system. The conclusion that innocent people have been executed in this Country has recently been echoed by many proponents of the death penalty, in their criticisms of our current system of justice.

"More often than we want to recognize, some innocent defendants have been convicted and sentenced to death. ... If statistics are any indication, the system may well be allowing some innocent defendants to be executed."<sup>3</sup> Supreme Court Justice Sandra Day O'Connor (appointed by President Ronald Reagan) has been quoted as saying.

Conservative columnist George F. Will has written: "some numbers tell the most serious story; in the 24 years since the resumption of executions under Supreme Court guidelines, about 620 have occurred, but 87 condemned persons – one for every seven executed – had their convictions vacated by exonerating evidence. In eight of these cases, and in many more exonerations not involving death row inmates, the evidence was from DNA. One inescapable inference from these numbers is that some of the 620 persons executed were innocent. (emphasis added)"<sup>4</sup>

In 2001 the Constitution Project's Death Penalty Initiative published a report detailing eighteen reforms to the death penalty. Their conclusion was that these changes are necessary before the death penalty could be imposed fairly.<sup>5</sup> Making up this committee were supporters and opponents of the death penalty, both liberals and conservatives, former judges, prosecutors, and other public officials, as well as victim advocates, defense lawyers, journalists and scholars. The committee concluded the following:

- [T]he current system serves none of us adequately – not victims, not defendants, and not society. The system is replete with delays and mistakes that prevent victims from experiencing finality and that cost unjustly accused or convicted individuals years of their lives . . . .
- When we convict the innocent, we also fail to bring to justice those who are actually guilty, thus creating a continued threat to public safety and an enduring tragedy for the family of the murder victim.
- [The committee's members] understand that implementing these reforms will be difficult, but they believe such basic changes are essential to a death penalty system that has a claim on fairness and justice. The committee's members have broad experience in all aspects of this nation's justice system. It is this experience that leads them to state with confidence that the . . . . appropriate authorities must take these recommendations seriously and consider them expeditiously. . . . They can and must recognize that access to the courts is a fundamental right that protects the liberty of all of us, not just those who are accused or convicted of heinous crimes.<sup>6</sup>

*The conditions evidently pressuring counties and states to overuse the death penalty and thus increase the risk of unreliability and error include race, politics and poorly performing law enforcement systems.*<sup>7</sup>

North Carolina ranks fifth in the nation for people sent to death row. Recent studies of the death penalty indicate that we are paying a price for our aggressive use: the results of death penalty sentencing proceedings are overwhelmingly arbitrary and unreliable.

In September 2000, *The Charlotte Observer* completed a comprehensive study of capital cases in North and South Carolina. It found that:

- Juries are far more likely to impose death sentences when victims are white. In the past decade, just 40 percent of murder victims in the Carolinas were white, but in cases of inmates now on death row, nearly 70 percent of victims were white.
- The legal profession's worst attorneys represent some defendants. The high stress and low pay of capital trials limit the pool of lawyers willing to take them on. Some lawyers abuse drugs and alcohol, fail to investigate key evidence or do little to persuade juries to spare their client's life. Of the 15 people executed in North Carolina since 1977, three were represented by attorneys later disbarred or disciplined for unethical conduct.
- Location matters. Rural and suburban counties generally impose death sentences at a higher rate than urban areas. Mecklenburg County hands out one death sentence for every 50 people charged with murder, while Buncombe County – home of Asheville – imposes one for every five.
- Some prosecutors withhold evidence – even if it suggests they've charged the wrong person. Courts have overturned more than 25 death sentences because prosecutors hid evidence, made improper arguments, or broke other basic legal rules.<sup>8</sup>

In the past year, the *Observer's* findings have been confirmed by studies conducted at two of our country's most prominent universities.

A 2002 Columbia University study evaluating the occurrence of serious errors in death penalty cases nationwide determined that 70 percent of verdicts in death-penalty cases in our state are later invalidated because of serious errors at trial that could have affected the outcome of the case.<sup>9</sup> The study concluded that "[h]eavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur. The more often officials use the death penalty, the wider the range of crimes to which it is applied, and the more it is imposed for offenses that are not highly aggravated, the greater the risk that capital convictions and sentences will be seriously flawed. **Most disturbing of all, we find that the**

conditions evidently pressuring counties and states to overuse the death penalty and thus increase the risk of unreliability and error include *race, politics and poorly performing law enforcement systems*. Error is also linked to overburdened and underfunded state courts. . . . Imposing the death penalty in cases that are not the worst of the worst is a recipe for unreliability and error."<sup>10</sup>

The study also concluded that **“the more often and directly state trial judges are subject to popular election, and the more partisan those elections are, the higher the state’s rate of serious capital error.”**<sup>11</sup> Furthermore, [s]tate and federal judges cannot be relied upon to catch all serious trial errors in capital cases. Like trial judges, appeals judges are susceptible to political pressure and make mistakes. And the rules appeals judges use to decide whether errors are serious enough to require death verdicts to be reversed are so strict that egregious errors slip through."<sup>12</sup>

A University of North Carolina study completed in 2001 concluded that a defendant was 3.5 times more likely to receive the death penalty if he murdered a white person, rather than a person of color.<sup>13</sup> The Columbia University study determined that, nationwide, the closer the homicide risk to whites in a state comes to equaling or surpassing the risk to African-Americans, and the higher the proportion of African-Americans in a state, the more aggressively the government uses the death penalty, and the more likely it is that the death penalty will be imposed in error.<sup>14</sup>

*“(We need to) give elected officials and the general public the chance to take a hard look at the evidence to see whether the death penalty is serving its purpose.”*<sup>15</sup>

So Virginia Delegate Vincent F. Callahan, Jr. (R-McLean) a strong supporter for the death penalty has recently said in regard to a two-year moratorium for his home state. In North Carolina, according to a June 2001 public opinion poll, 70 percent of North Carolinians support a moratorium on executions. Furthermore, 66.8 percent of people surveyed believed that innocent people have been sentenced to death or executed in North Carolina in the past 25 years. The poll was conducted by Strategic Analysis and Messaging, a Raleigh-based public opinion research and consulting firm.

In July 2000, a Charlotte Observer-MBTV News Carolinas Poll found that 62 percent of Carolinians surveyed favored a moratorium on executions until the death penalty can be studied and determined to be fair.

Nineteen local governments in North Carolina have adopted resolutions calling for a moratorium on executions until policies and procedures can be enacted which ensure that death penalty cases are administered fairly and impartially and in accordance with basic due process, minimize the risk that innocent persons may be executed, and prevent the execution of people who were under the age of 18 at the time of their offenses. The local governments are:

Asheville; Carrboro; Cary; Chapel Hill; Charlotte; Cofield (Hertford County); Davidson; Dobbins Heights (Richmond County); Durham (city and county); Fayetteville; Garysburg (Northampton County); Greensboro; Hillsborough; Norlina; Orange County; Taylortown (Moore County); Thomasville; Winfall (Perquimans County); and Winston-Salem.

Over 502 churches, businesses and other organizations in North Carolina have called for a moratorium on the death penalty. The call for a moratorium encompasses congregations of many faiths, including Baptist, Methodist, Presbyterian, Lutheran, Jewish, Catholic and Episcopal dioceses, churches and temples throughout our State.

Additionally, more than 50,000 individuals have signed petitions calling for a moratorium on executions.

### *Comments on a broken system*

- On May 9, 2002, Maryland Governor Parris Glendening declared a halt to all executions in his state pending release and General Assembly review of a study of racial bias currently in progress at the University of Maryland College Park. The Maryland House of Delegates had passed a moratorium bill 82-54 last March, but a filibuster in the Senate precluded the anticipated majority vote in that house.

- Then-U.S. Attorney Janet Reno said too many death penalty cases are being handled by poorly prepared defense lawyers and that defendants should not be prosecuted for a capital offense “until they have a lawyer who can properly represent them, and . . . the resources necessary to properly investigate the charges.”<sup>16</sup>
- Paddy Lann Burwell, a death-penalty supporter and a member of the Texas Board of Pardons and Parole under then-Governor George W. Bush, has stated: “I worry that we may execute an innocent person. Any person would know that is a possibility. I think our system needs to be improved.”<sup>17</sup>
- A June 2000 editorial in the conservative *Washington Times* supported a moratorium on the death penalty:
 

[I]f this country is to have the death penalty, we must be as certain as is humanly possible that executions are restricted to the guilty. States should be encouraged to make sure that is the case. Even if 66 percent of Americans support the death penalty, it is no argument to say (as some conservatives have done) that the death of an innocent person here or there is not enough to reconsider what we are doing.

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During the moratorium, the state would keep its electricity and gas bills paid and its stockpiles of potassium chloride intact against the day when the moratorium ends and executions resume – presumably following improvements in the way convictions are produced. Surely no one could reasonably object to making sure we execute only the guilty.<sup>18</sup>
- Ernie Preate, former Attorney General of Pennsylvania, has testified in favor of a moratorium, citing the politicization of the death penalty and the weakened state and federal safeguards against wrongful convictions and stating, “[p]iece by piece, through state and federal statute and Supreme Court cases, both in Washington and (in Harrisburg), we have dismantled those protections that assured us of a mathematical certainty that an innocent man would not and could not be put to death in this state or in this nation.”<sup>19</sup>
- Former Florida Chief Justice Gerald Kogan, speaking about innocence and the death penalty:
 

[T]here is no question in my mind, and I can tell you this having seen the dynamics of our criminal justice system over the many years that I have been associated with it, prosecutor, defense attorney, trial judge and Supreme Court Justice, that convinces me that we certainly have, in the past, executed those people who either didn’t fit the criteria for execution in the State of Florida or who, in fact, were, factually, not guilty of the crime for which they have been executed. . . . [Y]ou have to ask yourself, how many persons did we execute prior to the arrival of DNA evidence who would have been released, had we had that tool working for us 25, 30, 40, 50 years ago?
- The *Orlando Sentinel*, a newspaper which has supported the death penalty for many years, recently called for a moratorium in Florida, stating in an editorial that:
 

Florida’s system of capital punishment clearly has problems. Florida leads the nation in the number of people – 22—whose death sentences were vacated because the defendants later were exonerated, or because of serious flaws in the way cases were handled. Those flaws included misconduct by police and prosecutors and by inept defense lawyers. During that same period, the state executed 51. The possibility of executing an innocent person should alarm any fair-minded person.<sup>20</sup>

- New Mexico's Governor Gary Johnson, who once introduced the idea of limiting death-penalty appeals to two years, now says that he is open to considering elimination of the death penalty and that he now believes limiting appeals would lead to the execution of innocent people. "I am convinced that has been done in the past, and it will happen in the future. I am convinced that in the future New Mexico will make a mistake."<sup>21</sup>
- Oklahoma Governor Frank Keating, a death penalty supporter, recently suggested that a "moral certainty" standard replace the "beyond a reasonable doubt" standard now needed for a capital conviction, stating "if you intend to take another person's life. . . the only way we who believe in it can ensure that it will survive is that no innocent person be mistakenly put to death."<sup>22</sup>
- Conservative Rod Dreher stated in the *New York Post*: "[w]e conservatives cannot afford to let our justified outrage at unrepentant killers like McVeigh make us morally indifferent to the deadly and irrevocable peril in which society places the truly guiltless on trial for their lives. At some point in this death-penalty debate, the sanctity of innocent life demands that men and women of conservative conscience have to say: Enough."<sup>23</sup>

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<sup>1</sup> "A Reasonable Doubt: Are there innocent people on North Carolina's Death Row," *Greensboro News & Record*, 1A (8/8/00)

<sup>2</sup> *Ibid*

<sup>3</sup> Associated Press, 7/2/01, StatePaper.com, 10/18/01

<sup>4</sup> *Washington Post*, April 6, 2000, page A23

<sup>5</sup> *Mandatory Justice: Eighteen Reforms to the Death Penalty*, The Constitution Project, 2001

<sup>6</sup> *Mandatory Justice*, p. xi

<sup>7</sup> Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, A-26 (2002)

<sup>8</sup> "Uncertain Justice," *The Charlotte Observer*, 1A (9/10/2000)

<sup>9</sup> Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, A-26 (2002)

<sup>10</sup> *Id.* at i-ii (emphasis in original)

<sup>11</sup> *Id.* at iii

<sup>12</sup> *Id.* at iv

<sup>13</sup> Unah & Boger, *Race & the Death Penalty in North Carolina – An Empirical Analysis: 1993-1997* (2001)

<sup>14</sup> *A Broken System* at iii

<sup>15</sup> *The Roanoke Times* (1/31/02)

<sup>16</sup> *USA Today* (6/16/00)

<sup>17</sup> *New York Times* (5/14/00)

<sup>18</sup> *Washington Times* (6/6/00)

<sup>19</sup> *Pittsburgh Tribune-Review* (3/1/00)

<sup>20</sup> *Orlando Sentinel* (2/10/02)

<sup>21</sup> *Santa Fe New Mexican* (10/28/01), *Albuquerque Tribune* (11/6/01)

<sup>22</sup> *The Oklahoman* (6/23/01)

<sup>23</sup> *New York Post* (5/15/01)