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THE DEATH PENALTY IN THE UNITED STATES

Response to the Periodic Report of the United
States to the United Nations Committee on the
Elimination of Racial Discrimination

February 2008

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RACISM AND THE DEATH PENALTY

The United States has failed to take any measures since the last CERD report in 2000 to address the substantial body of evidence that the race of the accused (black) and race of the victim (white) increases the percentage of blacks charged with death eligible offenses and substantially increases the percentage of cases where the jury imposes death. It has even disavowed and ceased any further development of the United States Department of Justice's significant study of racial disparity in the death penalty in Federal cases.¹

In 2001, the CERD Committee urged the United States to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted persons.² In the 2007 CERD submission, the United States avoids any reference to the issue of race and the death penalty, while highlighting positive aspects of the reductions in the use of the death penalty, all of which do not address the racial disparity issue.³ The United States 2007 report merely identifies the racial statistics of the death row population. "Of the inmates in prison under sentence of death, 56 percent were white and 42 percent were African American. Of the inmates whose ethnicity was known, 13 percent were Hispanic."⁴

This is in stark contrast to the 2000 United States CERD submission where there was at least a statement on the racial disparity problem and the public debate over its causes in the application of the death penalty in the United States. In that report the United States acknowledged:

"The public debate over capital punishment in the United States includes claims about the incidence of racial and ethnic bias and discrimination. Blacks are disproportionately more likely to be sentenced to death and executed than other racial or ethnic groups. From 1977 (the year after the Supreme Court upheld the constitutionality of revised State capital punishment laws) to 1998, a total of 5,709 persons entered prison under a sentence of death. During this period, the U.S. general population was approximately 10-12 per cent Black; however, among those entering prison under a death sentence during this period, 2,347 (41 per cent) were Black. Of the 500 persons executed during these 22 years, 178 (36 per cent) were Black."⁵

¹ Survey of the Federal Death Penalty System (1988-2000), United States Department of Justice, Sept. 12, 2000.

² Concluding observations of the Committee on the Elimination of Racial Discrimination; United States of America. 14/08/2001. A/56/18, para 396, Fifty-ninth session, 30 July – 17 August 2001

³ Periodic Report of The United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, paras., 167-170, 328-329, April 2007

⁴ Id. At 169.

⁵ Periodic Report of The United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, para., 322, 21 September 2000.

According to the Annual Demographic supplement to the March 2002 Current Population Survey (CPS), 36.0 million people in the United States, or 13 percent of the civilian non-institutionalized population, were Black,⁶ and 37.4 million Hispanic in the United States, representing 13.3 percent of the civilian non-institutionalized population.⁷ The statistics on minorities in prison under sentence of death the end of 2006 shows no improvement by the United States in racial disparity of Blacks. According to readily available demographic data, the death row population as of January 1, 2007 was Black 1,397 or 41%, Hispanic 359 or 10.7%, White 1,517 or 45.3% and Other 77 or 2.3%.⁸ The statistics for persons executed since 1976 demonstrate an equally disturbing racial disparity for Blacks in the United States with Blacks representing 34% of those executed.⁹

In the 2000 United States CERD submission the United States advised the Committee of the U.S. Supreme Court decision in McClesky v. Kemp, 481 U.S. 279 (1987). In that decision:

“[T]he U.S. Supreme Court considered the implications of a study indicating that the death penalty in Georgia was imposed more often on Black defendants and killers of White victims than on White defendants and killers of Black victims. The Supreme Court held that this study failed to establish that any of decision makers in the defendant’s case acted with discriminatory purpose in violation of the Equal Protection Clause. The Court further held that, at most, the study indicated a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial bias affecting Georgia’s capital sentencing process; therefore, it did not establish a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁰

In the six years that have passed since the last United States CERD report, the United States has not taken a single step to understand the racial disparity, instituted a moratorium until the disparity is better researched or taken any steps to challenge the McClesky decision so that the Courts of the United States can take evidence and expert opinion on the issues of this racial disparity. This is a particularly glaring and intentional denial of the seriousness of this issue taken in light of the United States efforts during the prior reporting period to legitimately research the obvious disparity.

At the time of the 2000 United States CERD report the United States Department of Justice was publishing a detailed survey of the Federal Death Penalty System. This report found significant racial and geographical disparity in the application of the Federal Death Penalty System. The United States Government’s response to its own data in 2001 was to instruct the Department of Justice to conduct further analysis, which led to the following determination:

“While the Department’s review of existing federal death penalty procedures has produced no evidence of bias against racial or ethnic minorities, it has suggested that changes could be

⁶ <http://www.census.gov/prod/2003pubs/p20-541.pdf>

⁷ <http://www.census.gov/prod/2003pubs/p20-545.pdf>

⁸ <http://www.deathpenaltyinfo.org/article.php?scid=5&did=184#deathrowpop>

⁹ Id.

¹⁰ Periodic Report of The United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, para., 324, 21 September 2000.

made to promote public confidence in the process's fairness and to improve its efficiency. For example, as noted above, consideration of the broader universe of potential capital cases reinforced the findings of the Sept. 12 study which tended to refute any assumption of bias against racial or ethnic minorities. However, obtaining information about this broader class of cases required an extraordinary effort because the existing review procedure does not regularly obtain information about cases in which a capital charge is factually supportable, but the U.S. Attorney office decides to charge (or accept a plea to) a noncapital crime. Hence, in the future, U.S. Attorneys will be required to submit information, including racial and ethnic data, about potential capital cases, as well as those in which a capital offense is actually being charged. This should help to maintain public confidence in the fairness of the process by making more complete racial and ethnic data available for both actual and potential federal capital cases on a continuing basis.¹¹

A recent update demonstrates the widening disparity in the federal death penalty system.¹² Since 1988, of the total of 374 defendants against whom the Attorney General has authorized the government to request the death penalty, 99 or 26.47% have been White, 64 or 17.11% Hispanic, 16 or 4.28% are Asian/Indian/Pacific Islander/Native American, 3 or 0.08% Arab and **193 or 51.60% African-American**.¹³ In its aggregate, 276 of the 375 defendants approved for a capital prosecution are non-White, 26 of the 44 defendants now on federal death row under active death sentences, or 59%, are non-White.¹⁴

On its face this represents a serious issue of racial discrimination but the United States government continues to deny that any racial intent or acts are evidenced by the data.

Non-governmental Studies

A number of studies by scholars and non-governmental actors have documented and validated the racial discrimination in the United States death penalty system. Independent research and commentary by former Federal prosecutors provide keen insight into the sources of racial discrimination in the Federal system and offer some suggestion (as yet unheeded) for the Federal government to address the racial bias in the capital punishment mechanisms.

A recent publication, but within the time for consideration by the United States CERD reporting team, titled *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former US Attorneys*, provides a summary report on themes from November 2005 Brennan Center for Justice and the National Institute for Law and Equity focus group of 12 former US Attorneys. The purpose of the group was to draw on their experiences to explore ways in which individual USAO offices might mitigate the effects of racial disparities in law enforcement.¹⁵

¹¹ <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>

¹² <http://www.deathpenaltyinfo.org/DOJ%20Responses%206-07.pdf>

¹³ <http://www.deathpenalty.org/index.php?pid=Federal>

¹⁴ Id.

¹⁵ *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former US Attorneys*, Levingston, Federal Sentencing Reporter, v.19, no.3, Feb 2007

The former US Attorneys, those closest to the process resulting in racial disparity, concluded that unwanted racial disparities result from both overt and unconscious stereotyping. One US Attorney recalls having an assistant US Attorney who wanted to drop gun charges because, “The gun [the accused] had with him was a rifle. He is a good ol’ boy, and all the good ol’ boys have rifles, and it’s not like he was a gun-toting drug dealer.” The US Attorney refused, and it turned out that the accused “was a gun-toting drug dealer, exactly.”¹⁶ Strong national policies to reduce racial disparity in the criminal justice system may not be effective in individual offices and smaller, local communities. Local implementation requires assistance from local enforcement, which may not always be easy to get. As one US Attorney noted, “Local law enforcement makes decisions to put their cars in the black community and not the suburbs ... “if you are getting a disproportionate number of people of color, what can you do?”¹⁷ However, the former United States attorneys agreed that there was something that could be done - trainings held by United States Attorneys’ in local offices to address racial disparities in law enforcement did work by raising awareness and knowledge of potential problems caused or influenced by race.¹⁸

This issue is by no means limited to the Federal death penalty system. In a recent series of newspaper investigations and publication, a team of Atlanta Journal Constitution reporters reviewed Georgia murder cases between 1995 and 2004 that could have qualified the killer for the death penalty.¹⁹ They found that in many cases, the final sentence was affected more by geography, the prosecutor’s personal politics (In Georgia the district attorney’s have sole discretion to decide when to pursue the death penalty), or the victim’s race, rather than the nature of the crime or its relative brutality. Key findings from the newspaper’s investigation include: A murderer in Clayton County, Georgia is 13 times more likely to face the death penalty than a murderer in Fulton County, Georgia and the judicial circuits with the fewest murder cases sought death twice as often as circuits with the highest volumes. Statewide, prosecutors were twice as likely to seek the death penalty when the victim was white. Demonstrating the power of the race of the victim controlling who gets death is the finding that white killers were actually more likely to face capital prosecution and receive a death sentence in Georgia, because white killers are more likely to kill white people. In rural southwest Georgia, two-thirds of the victims in armed robberies were black or some other minority, but nine out of ten armed robbery murders prosecuted as death penalty cases involved white victims.²⁰

Legal analysis by the American Bar Association (ABA) also brings to light many of the failings in state death penalty systems.²¹ The focus of the ABA report was on recommendations for reform in Georgia following the McCleskey decision. On February 1, 1993, five years after the Court’s decision in McCleskey, the Georgia Supreme Court established the Commission on Racial and Ethnic Bias in the Court System to study racial bias in court system & administration of justice. The Commission, ultimately renamed the Georgia Commission on Access and Fairness in the Courts,

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ *Death Penalty Unfair, Must be Abolished: Georgia sentences arbitrarily driven by race, politics, geography*, Atlanta Journal Constitution, Published 9/27/07

²⁰ Id.

²¹ ABA Report, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report, An Analysis of Georgia’s Death Penalty Laws, Procedures, and Practices*, January 2006

made several recommendations to address and mitigate racial bias in the courts. The ABA article discusses Georgia's attempted implementation of the Commission's findings.²²

An original recommendation of the Commission was for Georgia to investigate and evaluate impact of racial discrimination in the criminal justice system and to develop strategies to eliminate racial discrimination. The ABA report found that Georgia is only in partial compliance with this recommendation because it has investigated evidence of racial discrimination but not done any strategizing to eliminate such discrimination. The report finds that the State of Georgia is not currently collecting or maintaining data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases at all stages of the proceedings, as recommended by the Commission.²³ The ABA investigation also found that the State of Georgia is not currently collecting and reviewing all valid studies already undertaken to determine the impact of racial discrimination on the death penalty nor is it identifying and carrying out any additional studies that would help determine discriminatory impacts on capital cases. One of the Commission's key recommendations that has not been adopted was to allow racial discrimination claims to be raised for first time at any stage in death penalty procedure, despite the current state procedural rules that any claim not raised at trial is procedurally barred from being raised in later stages of the case.

One source of the racial disparity in the United States death penalty system is the use of the jury selection system to get a jury panel that will be more racially antagonistic to the Black defendant. While this is not always overt or conscious to the jury panel, prosecutors are well aware of it and frequently seek to avoid the confines of non-biased jury selection while selecting a biased jury. The inherent and subconscious bias of a white jury has been well documented. In "*On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*," the authors detailed an empirical study on how racial diversity affects and influences group decision-making.²⁴ A summary of their finding shows that diverse juries deliberated longer & considered wider range of issues, but not just because:

"Black participants added unique perspectives to the discussions. Rather, White participants were largely responsible for the influence of racial composition, as they raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group. Moreover, the influence of racial diversity was not limited to processes of information exchange, as Whites' pre-deliberation judgments also varied by group composition. This conclusion that there are multiple processes through which racial diversity is influential is a novel contribution to the investigation of group composition and decision making."²⁵

The racial disparity is further compounded by the systemic effects of slavery and the destructive ghost of racial stereotypes. In "*Looking Deathworthy: Perceived Stereotypicality of Black Defendants*

²² Id.

²³ Id.

²⁴ *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, Samuel R. Sommers, *Journal of Personality and Personal Psychology*, 2006, Vol. 90, No.4, 597-612.

²⁵ Id.

Predicts Capital-Sentencing Outcomes,” the article explains the process and results of a study that concluded, in death eligible cases involving white victims, the more stereotypically black a person is perceived to be, the more criminal that person is perceived to be. In other words, in cases with white victims, a black defendant’s physical traits functioned as a “significant determinant of death-worthiness.”²⁶ However, the effect was not seen when victims were also black. The data used came from the highly regarded 1998 Baldus study which also statistically controlled for differences in criminal histories among black defendants.

Prosecutors know these issues as well as anyone and they often seek ways to use the racial biases to their advantage. Seldom however do we get actual evidence of this conduct, but when it is found it is quite startling and disgusting.

In *Wilson v. Beard*,²⁷ the District Court for the Eastern District of Pennsylvania granted the petitioner state prisoner a writ of habeas corpus, relying on a widely publicized videotape to find an apparent Batson violation. In the videotape, the prosecutor who handled the prisoner's case repeatedly advocated the use of peremptory strikes to keep certain categories of African-Americans from serving on criminal juries. His instructions included the following:

Avoid blacks from low-income areas because they resent law enforcement & authority.²⁸

“In selecting blacks, you don’t want the real educated ones.”²⁹

Avoid black women, because “they're downtrodden on two respects, they got two minorities, they're women and they're and blacks, so they're downtrodden in two areas.”³⁰

You don’t want all-white jury. Count the blacks & whites in jury when they first walk in room so you can keep track of how many are left as you strike them. Mark down reasons you can articulate for striking as you question them: “[L]et's say . . . the defense attorney makes an objection saying that you're striking blacks. Well, you're not going to be able to go back and say, oh--and make something up about why you did it. Write it down right then and there. . . . So sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.”³¹

This brings us back to the recommendation of the 2001 CERD Committee urging the United States to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers, or as a result of the economically, socially and

²⁶ *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson, *Psychological Science*, Vol. 17, No. 5, 2006

²⁷ 426 F.3d 653 (3d Cir. 2005)

²⁸ *Id.* at 657.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 658.

educationally disadvantaged position of the convicted persons.³² This key recommendation ignored with silence is also supported by the American Bar Association, which has recently renewed its call for a moratorium on executions in the United States.

The American Bar Association, working with in-state teams, assessed the fairness and accuracy of eight state death penalty systems. Their goal was to eliminate the impact of race in death penalty administration. The project stated that the ways in which race infects the system must be identified, and strategies must be devised to root out the discriminatory practices.³³ After examining eight states (Alabama, Florida, Indiana, Pennsylvania, Arizona, Georgia, Ohio, & Tennessee), the following themes emerged:

Every state studied appears to have significant racial disparities in its capital system, particularly those associated with the race of the victim. Even in states with acknowledged racial disparities, little, if anything, has been done to rectify the problem. Generally, states are not keeping the data necessary to conduct the sort of analysis necessary to quantify any problem with bias and identify its causes, making the process of conducting analysis difficult, if not impossible.³⁴

Yet, unless the Federal government is willing to recognize the great body of evidence clearly demonstrating the sources, methods and effects of racial bias in the death penalty system at all levels, and provided the leadership to systematically address racial discrimination in the death penalty system, there is little the individual defendant or their lawyer can do to combat the systemic prejudices.

³² Concluding observations of the Committee on the Elimination of Racial Discrimination; United States of America. 14/08/2001. A/56/18, para 396, Fifty-ninth session, 30 July – 17 August 2001

³³ *ABA Death Penalty Moratorium Implementation Project; State Assessments Key Findings on Racial and Ethnic Minorities*; Oct. 29, 2007, <http://www.abanet.org/moratorium/>

³⁴ *Id.*