IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

WILLIAM ERNEST KUENZEL, Petitioner, - against - RICHARD F. ALLEN, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents.	Case No. 1:00-cv-316 (IPJ) (TMP) **AFFIDAVIT OF DAVID A. KOCHMAN**

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

DAVID A. KOCHMAN, being duly sworn, deposes and states the following to be true and correct under the penalty of perjury:

1. I am an attorney of the law firm Reed Smith LLP, and am counsel to William Ernest Kuenzel ("Kuenzel"), petitioner in the within action. I am over the age of eighteen. I make the following statements freely, and, if called to testify, would testify consistently with all of the facts contained herein. I submit this Affidavit in support of Kuenzel's reply memorandum of law in further support of his motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), and in support of his motion for permission to transcribe by videotape.

The March 26 Conference

2. On March 26, 2010, this Court held a telephonic conference to discuss Kuenzel's 60(b) motion (the "March 26 Conference"). In attendance were Judge Putnam, counsel for Kuenzel – Messrs. Kochman, Glen, and Burgess – and counsel for the State – Mr. Crenshaw.

3. At the outset of the call, the Court asked Mr. Crenshaw why he required 60-days to file a response to Kuenzel's 60(b). Mr. Crenshaw offered three reasons. First, Mr. Crenshaw stated that he planned to offer an "evidentiary presentation," and needed some time to compile affidavits and other evidence. Second, Mr. Crenshaw stated that he needed some time to brief the reasons why April Harris's grand jury testimony did not warrant granting of the 60(b) motion. Third, in response to Mr. Kochman's request that the State produce the entire case file relating to the investigation and prosecution of both Kuenzel and Venn for the murder of Linda Jean Offord, Mr. Crenshaw stated that he also needed 60-days to respond in order to permit the State time to file a written opposition to turning over any information from the DA's files.

4. Mr. Kochman again requested that the State produce the prosecution's entire case file, arguing that the recently-disclosed documents create a reasonable inference that the State remains in possession of additional, relevant, yet unproduced materials.

5. Mr. Crenshaw responded, stating that certain of the affidavits he intended to introduce would seek to challenge the statements made by Crystal (Floyd) Moore. Mr. Crenshaw further stated that, apart from the two documents the State produced in March 2010, there are no other statements by Ms. Moore in the prosecution's files.

6. Responding to Mr. Crenshaw, the Court stated that while it was not reaching any judgment at this point, it found the State's disclosure, 22-years into this litigation, of something that arguably could be Brady material at the time of trial, "worrisome." Continuing, the Court stated that the State's failure to disclose these materials until now raises the question of what else may exist in the State's files.

7. Mr. Crenshaw did not offer any apologies. Instead, he flatly stated that he "only recently read the DA's file." Mr. Crenshaw also stated that, in his view, there is nothing else in

the DA's files that is favorable or exculpatory. Mr. Crenshaw stated that he read April Harris's grand jury testimony, found it to be favorable to Kuenzel, and turned it over. But Mr. Crenshaw again reiterated that he would like to brief why there should be no discovery of the prosecution's files, and that the Court could make a determination based on that submission.

8. The Court then confirmed the dates on which the State and Kuenzel would file their respective briefs, and stated that if any substantial issue remained, the Court would determine how next to proceed. Following a question from Mr. Kochman regarding whether Kuenzel may respond to the State's evidentiary presentation by identifying additional discovery he would like to request, the Court responded in the affirmative, stating that the Court would like to see what Kuenzel believes he needs to obtain to fully and fairly flesh out what is going on. Mr. Kochman confirmed that Kuenzel's response would include such requests.

9. Mr. Burgess next asked Mr. Crenshaw whether he could describe the substance and volume of the materials contained in the State's files regarding the investigation and prosecution of Kuenzel and Venn. In response to Mr. Burgess's question, Mr. Crenshaw re-affirmed that he would like the opportunity to brief that issue for the Court.

The State's Response and Kuenzel's Motion for Permission to Transcribe by Videotape

10. For the past 22 years, Kuenzel has, in his own words, "merely existed." Yet, as he has said to me, the punishment of incarceration is a distant second to that inflicted by the daily knowledge that he may be put to death for a crime he always has claimed he did not commit. What I find shocking is that he is neither angry nor spiteful: he is hopeful. He is hopeful because he knows that he is innocent, and he believes strongly in our judicial system.

11. Accompanying the State's response to Kuenzel's 60(b) is an "evidentiary proffer" that purports to call into question Kuenzel's new evidence. In support of its claim that Crystal Moore is not credible, the State offers the affidavit of its lead counsel, Clay Crenshaw. Mr.

Crenshaw attempts to submit as "evidence" his personal, subjective observations regarding Ms. Moore based on a surprise cross-examination he conducted with her, during which he showed to her documents that never before have been produced in this case.

12. Mr. Crenshaw's personal observations should not be taken as representative of what a reasonable jurist would conclude from Ms. Moore's testimony because Mr. Crenshaw, the head of the Alabama Capital Litigation Unit ("ACLU"), has a well-documented bias against death row petitioners. He believes that no miscarriages of justice have occurred in any of Alabama's death row cases. See Exhibit A, BBC News, "Alabama's fierce death row battle," October 21, 2007, available at www.newsvote.bbc.co.uk (last visited May 23, 2010). Mr. Crenshaw re-affirmed this belief before the Alabama Senate Judiciary Committee, stating that "No innocent people have been executed in Alabama." See Exhibit B, Associated Press, "Death penalty bills spark debate between senators, activists," January 25, 2006, available at www.demaction.org (last visited May 23, 2010). Mr. Crenshaw also believes that attorneys that get involved with death penalty appeals tend to be profoundly against the death penalty, and their sole cause is to delay the process by clogging the courts with motion after motion. See Exhibit C, Andalusia Star News, "Action needed to speed executions," August 25, 2005, available at www.andalusiastarnews.com (last visited May 23, 2010). By his actions in this case, Mr. Crenshaw demonstrates his inability to distinguish between Mr. Kuenzel and other death row petitioners, like, James Callahan, whom Mr. Crenshaw referred to a "piece of trash" that "deserves to die." See Exhibit D, The American Prospect, "The Judge as Lynch Mob," May 6, 2001, available at www.prospect.org (last visited May 23, 2010). While that opinion may be defensible for Mr. Callahan, based upon his actions in this case, Mr. Crenshaw adopts that opinion too broadly.

13. As discussed above, during the March 26 Conference, Mr. Crenshaw callously justified the fact that now produces six new documents upon the fact that he "only recently" looked at the DA's files. The fact that the State has presented arguments to this Court challenging Kuenzel's new evidence, while it remained in the exclusive possession of evidence that would directly challenge the validity of those positions, coupled with the State's failure to make any apologies for its conduct, or the consequences that conduct has had upon a man incarcerated on death row who claims that he is innocent, all support the granting of Kuenzel's motion.

14. In light of ACLU's conduct in this specific case, Kuenzel's motion requests transparency. Following the untimely death of Kuenzel's prior counsel, I took over as lead counsel for Mr. Kuenzel in the Summer of 2006. At the time I took over, this case was on appeal from a second denial and dismissal of Kuenzel's first *habeas* petition — in fact, the parties were in the middle of briefing for the Eleventh Circuit.

15. Given my relative inexperience at the time as both a lawyer, and certainly as a *habeas* practitioner, I was deeply worried that I would not be able to provide Mr. Kuenzel with the same high level of representation that he was afforded by his prior counsel. For this reason, I asked a friend of mine, Eric Forman, if he would be willing to document the events in this case, and the other stories surrounding Mr. Kuenzel's life. My only purpose for making this request – and one that I expressly communicated to Mr. Forman – was to provide Mr. Kuenzel with footage for use in a clemency petition should I fail to persuade the courts on the merits of Kuenzel's *habeas* petition. Since that time, Mr. Forman, and a colleague of his, Jessica Beck, have been conducting an independent investigation into this case, and the other stories surrounding Mr. Kuenzel's life.

16. While I am not knowledgeable about the full extent of their work, I am aware that they have a videotape recording of an interview I conducted with Carolyn Lewis-Gibbons, and an interview I conducted with William Willingham. I also am aware that, in 2009, Mr. Forman interviewed Crystal Moore at her home. I note that the affidavit of Kyle Clark (at ¶ 10) incorrectly states that I interviewed Ms. Moore on this occasion. At the time of Mr. Forman's interview, I had not communicated in any substance with Ms. Moore for over a year. I did not meet with Ms. Moore prior to the interview, and was not present while the interview was being conducted — in fact, I was meeting with Kenneth Brasher at the time (see Reply at p. 33). Moreover, I did not consult with Mr. Forman prior to that interview regarding either the topics he intended to discuss, or any specific questions he intended to ask of her.

17. Further, I am not in the possession of any videotaped interviews with any witnesses created by Mr. Forman or Ms. Beck. It is my understanding that these videotapes are in Mr. Forman's and Ms. Beck's possession. Because Kuenzel does not maintain ownership of or control over any videotaped interviews with witnesses, he cannot independently produce them to the Court. However, Kuenzel invites the Court to inquire of Mr. Forman and/or Ms. Beck, and request the *in camera* production of any tapes the Court believes would be helpful to its consideration of this case.

18. If the Court grants Kuenzel's motion to permit videotape transcription with the specific restriction that such videotapes not be released beyond the Court and the Parties until the close of this case, I believe that Mr. Forman and Ms. Beck would be suitable persons to conduct this recordation.

19. In its response to Kuenzel's 60(b), Mr. Crenshaw implicitly and necessarily suggests that Kuenzel's only other post-conviction counsel, David Dretzin, an esteemed attorney

who died in 2006, is guilty of gross impropriety. This insinuation is all the more insulting considering that the State has inexplicably lost ***both*** the gun they claim to be the murder weapon, and Venn's bloody pants. Kuenzel is willing to have, and respectfully requests that, the merits of his claims and allegations like this by the State be resolved and documented in full view on videotape.

Dated: May 24, 2010

David A. Kochman

Sworn to before me
this 24th day of May 2010

Notary Public

DAUNE PIZZICARA
NOTARY PUBLIC, State of New York
No. 60-02KE4745848
Qualified in Putnam County
Certificate Filed in New York County
Commission Expires June 30, 2013

EXHIBIT A

BBC NEWS

Alabama's fierce death row battle

By Matt Wells
BBC News, Alabama

If most politicians in Alabama had their way, Tommy Arthur would have been executed more than 20 years ago.

The 65-year-old, whose death sentence was overturned twice before a third jury convicted him in the early 1990s, is alive on the state's death row - but only just.

Although no physical evidence placed him at the scene, he was convicted of shooting Troy Wicker in his bed after being paid $10,000 by the victim's wife, with whom he had had an affair.

The twists and turns of the case, and the tangled relationships involved, are worthy of a grim detective novel. But ultimately the jury, and state law, dictated Arthur should die.

He missed his last appointment with a lethal-injection syringe by only a few hours at the end of last month.

Alabama's governor has made it clear he wants Arthur to die as soon as possible, and that the current furore over the chemicals used to deliver the ultimate punishment is an annoying distraction.

Although many death penalty abolitionists are viewing the US Supreme Court's decision to review the constitutionality of the existing chemical cocktail with hope, the fact is that states like Alabama guard their rights very carefully - and few more so than the right to execution.

'I want justice'

The founder of Alabama victims' rights group VOCAL (Victims of Crime and Leniency), Miriam Shenane, is more than just irritated by Arthur's latest stay of execution.

> " **Putting them to death, even with the electric chair, is not nearly as horrible as what they did to my daughter** "
> Miriam Shenane
> Victims of Crime and Leniency

She says the governor has traumatised the victim's family, and others all over the state.

"What do we have to do? Put a mask over them and just take away their oxygen? I want justice," she said, in her office in the state capital, Montgomery.

The white walls are covered in photographs of "angels" - the word she uses to describe all the innocent people who have been murdered in Alabama.

Her own daughter was raped and murdered by three men, one of whom has been executed.

She would feel much better if the other two followed him. "Putting them to death, even with the electric chair, is not nearly as horrible as what they did to my daughter."

'Murder my father'

Tommy Arthur's daughter, Sherrie Arthur Stone, was still a teenager when her father was first sentenced to death.

For years, she thought he was probably guilty, and deserved the jail time he spent earlier in his life.

But now she is convinced of his innocence, fuelled largely by her disillusionment with a judicial system she views as callous and incompetent in Alabama.

Articulate and earnest, but clearly scarred by years of legal and emotional battle, she stopped living in the state a long time ago.

"I was basically told by investigators, if I didn't leave the state, I'd be found dead on a back road," she told the BBC.

"They clearly want to murder my father, which is what this is going to be. It's not going to be an execution, it's going to be a murder."

Amnesty International supports her argument that DNA testing of the evidence - which has yet to take place - could exonerate Arthur.

Tool of justice

The state is equally adamant that they will not allow that to happen - even if Arthur's family pays for the DNA testing.

"There have been three federal judges now... they have all agreed that the results of DNA testing would not show that Arthur is innocent," said Clay Crenshaw, Alabama's deputy attorney general in charge of capital cases.

It might strike many as a paradox, but Mr Crenshaw believes that in a culture that values human life above all, the right to take that life away is an essential tool of justice.

"The reason to have the death penalty is to keep those people who commit these violent acts off of the street, and hopefully prevent other people from committing those type of crimes," he added.

He believes that the unofficial moratorium on executions in many states over the lethal injection issue is not the beginning of the end for the death penalty in states like Alabama.

"To me it appears the opposite is happening," he said, arguing that states that make use of the death penalty are determined to cling on to it by whatever means necessary.

Historic injustice

Less than a mile from the rather shabby state government buildings in downtown Montgomery is the office of the Equal Justice Initiative, which is home to a clutch of lawyers who are determined to close death row down.

Executive director Bryan Stevenson says the entire prosecutorial system in his home state is riddled with incompetence and not-so-latent racism, that perpetuates an historic injustice between black and white in the entire Deep South.

Sitting on top of that system is the death penalty, he says.

"It's impossible to disconnect that history from this punishment," says the young black professor, who teaches for part of the week in New York.

"We've had, in Alabama, 25 cases reversed after proving intentional racial discrimination in jury selection... We have 19 appellate court judges in Alabama, all of whom are white."

Mr Crenshaw denies all of the charges levelled at the system he represents, and believes that no miscarriages of justice have occurred in any of the state's death row cases.

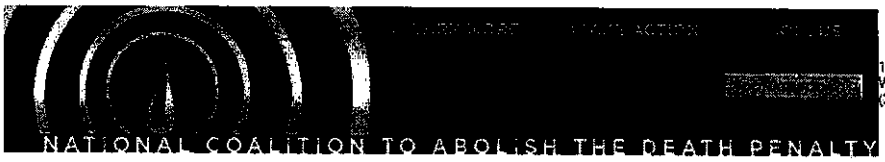
Mr Stephenson says politicians and officials are in denial - and that there is a larger price to pay.

"Alabama wants to be the place where every European business comes to invest, and build their companies and factories, but we have an horrific human rights record."

Story from BBC NEWS:
http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7045909.stm

Published: 2007/10/21 11:10:38 GMT

EXHIBIT B



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Death penalty bills spark debate between senators, activists

Associated Press January 25, 2006

A series of bills to apply new safeguards in capital punishment cases sparked a heated debate Wednesday among pro-death penalty activists and state senators backing the measures, with one lawmaker accusing a state prosecutor of sounding "heartless."

The bills, sponsored by Sen. Hank Sanders, D-Selma, would prevent judges from overriding jury recommendations on death penalty cases, authorize DNA testing for death row inmates, ensure that mentally retarded inmates are not executed and impose a 3-year moratorium on executions while a special committee examines Alabama's capital punishment system.

Assistant Attorney General Clay Crenshaw, the head of the state's death penalty appeals office, told the Senate Judiciary Committee that Alabama's capital punishment laws are sound.

"No innocent people have been executed in Alabama," he said at the committee's public hearing.

In a heated exchange, Sen. Vivian Figures, D-Mobile, said Crenshaw couldn't possibly know for sure whether innocent people were executed. The prosecutor stood by his statement with an "I do know that."

"You're just so adamant," Figures told Crenshaw. "You sound so heartless and so close-minded."

Sanders and Figures both stressed that capital punishment disproportionately hurts blacks, pointing out that half of the inmates on Alabama's death row are black, while blacks only make up about 25 percent of the overall state population. They said a moratorium would allow time to investigate such disparities.

"If you're poor, your chances of ending up on death row increase dramatically," Sanders said. "If you're black, your chances of ending up on death row increase dramatically."

Both victim's rights advocates and supporters of the four bills also made impassioned pleas to the committee, which will vote on the package at a later date.

"This is not a black-white issue — this is about wrong versus right," said Shelley Linderman, a member of Victims of Crime And Leniency. "The only person who does not have a choice is the victim."

Linderman said judges should have a right to override jurors who recommend life sentences if they believe the case warrants the death penalty. While she and death penalty supporters said they wouldn't staunchly oppose DNA tests, they did stand against a moratorium, saying it would prolong the appeals process.

"When are we going to have closure for our victims?" said Miriam Shehane, executive director of VOCAL.

Crenshaw agreed, saying, "We have a moratorium in this state — it's called a 10-step appeals process." He added that in his experience, death row inmates waited until after their execution dates are set before asking for DNA tests.

Esther Brown, who works with an anti-death penalty group, said the proposed moratorium is gaining support around the state. Her group has persuaded 37 local governments, largely in rural areas with mostly black and poor residents, and about 550 businesses, churches and other organizations, to call for a moratorium, she said.

Willie Mae Whitlow, who said she has a relative on death row, told the committee that the bills were crucial to prevent the wrongful killing of the innocent.

"It is better that a guilty person go free or at least get life in prison than an innocent person to get executed," she said.

Sanders, who has unsuccessfully introduced similar legislation over the past five years, said he was confident that the bills would gain momentum during this session. He said he became more hopeful after the state's largest newspaper, The Birmingham News, recently took a stand against capital punishment.

"I feel like support is growing across the state of Alabama and that growing support will impact the support in the Alabama Legislature," he said.

Source: Associated Press

EXHIBIT C

Action needed to speed executions

Posted on Thursday, August 25th, 2005 at 12:00 am.

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It's far too obvious, looking at the numbers, that something should be done about the length of time it takes to execute a convicted killer. According to Clay Crenshaw, who heads the Capital Litigation Division of the Attorney General's office it takes 13 and-a-half years from the time a killer is sentenced until the sentence is executed and the killer put to death for his or her crimes.

To us, that's too long. The reality is that with prison overcrowding and funding the way it is, something should be done to speed the appeals process and let the sentence be carried out.

Crenshaw stated that, generally, the attorneys that get involved with death penalty appeals tend to be profoundly against the death penalty and their sole cause is to the delay the process by clogging the courts with motion after motion. That is wrong and doesn't take in to account the victim's rights. We're sure the killer or killers were not thinking about the victim at the time of their crimes, why should our court system give them extra time on this earth when they didn't grant their victims the same wish?

As we see it, if a jury of their peers found them guilty and sentenced them to die for their crimes, or a judge did the same, then they should be granted an appeal and, if the appeal is denied or they are found guilty again, the sentence should be swiftly carried out.

While we feel everyone should be given a chance, and in this case these killers are being given a chance, the justice system should adopt a more even-handed approach to the appeals process and if they cannot police themselves, then the legislature should get involved.

The victims of these killers deserve no less.

Comments

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Poll

For whom do you plan to vote for governor of Alabama?

- Dr. Robert Bentley
- Bradley Byrne
- Artur Davis
- Tim James
- Bill Johnson

EXHIBIT D

The Judge as Lynch Mob

KEN SILVERSTEIN | *May 6, 2001*

As any student of the death penalty in America knows, the chance that a person charged with a capital crime will live or die depends greatly on race, social class, and--perhaps most important--where the alleged crime was committed. First and foremost is the question of whether the defendant comes to court in one of the 38 states where capital punishment is on the books. If he (or occasionally she) does, the outcome will differ greatly state by state and county by county, depending chiefly on the quality of the local defense bar, the trial judge, and the district attorney, who alone decides whether to seek capital punishment. For all these reasons, the odds on death are particularly high in Alabama, especially in the port town of Mobile, and most of all in the courtroom of Judge Ferrill McRae.

Though rarely mentioned in the national media's treatment of the death penalty, Alabama has the largest number of people per capita on death row. Its criminal defense system is the worst in the country, as rated by the American Bar Association (ABA). And Alabama is one of only a few states where judges can ignore a jury's recommendation of life without parole and unilaterally impose the death penalty. Thirty-two individuals, about one-sixth of the current population of Alabama's death row, were sent there by judges who overruled the jury. Judges can also reduce a jury's death sentence to life without parole, but in a state where capital punishment is hugely popular and judges run for office, that rarely happens.

Ferrill McRae sentenced his first man to die in 1981 and has sent many others to the electric chair since then. In six cases, more than any other Alabama magistrate, he's employed "override"--six times he has, as the quaint local lexicon has it, "enhanced" a jury's call for life without parole.

On a brutally hot morning last September, I passed through the metal detectors in the lobby of Government Center, a huge, modern building in downtown Mobile, and rode the elevator to Judge McRae's chambers on the sixth floor. The courtroom is lined by seven rows of benches for spectators, who on this day are exclusively African Americans. So, too, are the defendants. All the lawyers and prosecutors--as well as the judge--are white.

The first case on today's docket involves a young woman seeking a restraining order against her estranged husband, who recently beat her up. "Why didn't you pick up something and hit him in the head?" McRae asks, nodding toward her short, stocky husband, who's also standing before the bench.

"He's too big," she replies weakly.

"He doesn't look too big to me," says McRae. "He looks like he's been drinking a case of Budweiser every night." Using, at length, the metaphor of King Solomon, he lectures the two about the division of marital property before granting the restraining order.

Next up is a young mother caught stealing $2,000 worth of goods from a Target store where she worked. The district attorney is willing to plead her out, reducing a 10-year sentence to 30 days for time served. McRae tells the woman she's getting off easy but ratifies the proposal. "Be good and be gone," the judge admonishes. "You don't want to see me again. If you do, bring your toothbrush." Now comes a teenager charged with robbery, who arrives in the company of his court-appointed attorney. McRae notes that the accused has previously

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been busted for smoking pot, which in McRae's view "is the worst drug you can put in your system--worse than heroin... . Marijuana will eat away your brain, like termites to wood." McRae accepts a plea bargain that lets the teen off for time served but sets up a periodic drugtesting schedule. One slip up, he warns, and "you are gone." *More...*

This is the kind of folksy moralism that might earn the 66-year-old judge his own TV show. Yet according to local attorneys, this is Ferrill McRae on his very best behavior. When an African American in his courtroom wears a noticeable cologne, Judge McRae has been known to sniff the air and exclaim, "Ahhhh, evening in Prichard"--the name of a poor, predominantly black city outside of Mobile. One young attorney, who didn't want to be identified for fear of incurring McRae's wrath, recalled needing the judge's signature on a client's bail-reduction application. McRae first wanted to know the client's "color." When informed that he was black, McRae supposedly told the attorney that he "shouldn't try too hard because we need more niggers in jail." According to another Mobile trial judge, Joseph Johnston, McRae once queried Johnston's court reporter on the matter of whom she'd "been fucking lately," and asked a female attorney in his own courtroom if she was wearing her "trial tits." In newspaper accounts, McCrae has denied making such comments; but Johnston and others stand by their stories and locals, both friend and foe, say the judge is famous for his salty language.

All this would be bad enough in probate or small-claims court; in this criminal courtroom, where the stakes can be life or death, Judge McRae's views are especially alarming. And legal authorities in Alabama are well aware of McRae's antics: *TAP* has learned that the state's Judicial Inquiry Commission has been investigating the judge since last summer--but has thus far taken no action against him.

At a quarter past 11, McRae adjourns, as he needs to attend a friend's funeral. When I approach the bench and introduce myself, the judge is affable. He orders three courtroom employees to stick around for our conversation and then starts talking before I can pull a list of questions from my back pocket. "If I were you," he begins, "I'd ask why one person should be able to override what 12 citizens do. The answer to that question is rather simple. Judges are better able to determine if everyone is being treated fairly. Do you know anything about fixing a transmission? Neither do I--but I do know something about criminal law. If the defendant shows no remorse, I see that over the course of two or five or 10 days."

During the next 30 minutes, Judge McRae expounds on everything from historical precedents for the death penalty ("Throughout the Bible it states that death is permissible") to Alabama's status as one of just a few states to conduct executions using the electric chair exclusively ("I'm not sure lethal injection is more humane. With 7,000 volts of electricity, you're dead that quick"). On the subject of judicial override, McRae might be mistaken for a bleeding-heart liberal. "Let's say 12 rednecks find somebody guilty and give him death that quick," he says. "Shouldn't the judge have the power to reduce the sentence if it's not appropriate? If anybody thinks it's easy to tell a man that he'll get death by electrocution, it is not. It's a traumatic experience, one any judge would like to leave in the jury's hands. When a judge reduces it from death to life, I guarantee you he's happy."

McRae sounds fair, racially impartial, above politics--all of which is inconsistent with his record. Five of the six men the judge has sentenced to die via override are African American, and he's never substituted a life sentence for a jury verdict of death--even when an all-white jury condemned a retarded black man who couldn't read the confession that he signed. And despite his insistence to the contrary, McRae's colleagues seem far happier to override for death (which has occurred 70 times) than for life (eight times). Indeed, Alabama judges have overruled juries to condemn the deranged, the young, the retarded, and dozens of others--

including the innocent--to die in the arms of "Yellow Mama," the state's garish yellow electric chair.

Life in the Death Belt

In 1972 the U.S. Supreme Court ruled in *Furman v. Georgia* that the death penalty was unconstitutional because sentencing discretion given to juries and judges in imposing capital punishment made the entire process arbitrary and irrational. Four years later, after a number of states prepared new statutes designed to reduce such discretion, the Court reinstated capital punishment. Since then, as of this writing, 705 individuals have been executed nationally--392 of them in the past five years.

Popular and political support for capital punishment is strongest in the South--defense attorneys call the region the "death belt"--where more than 80 percent of all executions are carried out. In Alabama, 188 inmates are awaiting execution and, according to the Alabama Prison Project, an anti–death penalty group based in Montgomery, some 300 defendants have capital cases pending in the state's courts. Twenty-three individuals have been executed in Alabama since the reinstatement of capital punishment--as many or more than in all but six states--and the pace of killing is likely to increase: Last summer the state's supreme court gave itself the prerogative of passing on what was previously an automatic review of all death sentences.

As elsewhere, Alabama's death row occupants are overwhelmingly poor--95 percent are indigent--and minority. Blacks make up 26 percent of Alabama's population but 46 percent of death row, just higher than the national average of 43 percent. In the United States, about two-thirds of all murders involve victims who are black--yet more than 80 percent of those who are executed are sentenced for killing whites. Of the 23 persons executed in Alabama since 1976, 17 murdered whites. And the lingering effects of Jim Crow on the state judiciary are obvious: There are few black trial judges in Alabama, the Court of Criminal Appeals is all white, and the only two African Americans on the Alabama Supreme Court were both voted out last November.

Alabama's criminal defense system is abysmal. Those who face the death penalty are often saddled with incompetent lawyers who expend little energy pursuing their cases. To take just one of the worst examples: Judy Haney was convicted in 1988 for hiring a hit man to kill her husband, who routinely beat her and her children. It's rare for women who kill an abusive spouse to get the death penalty, but Haney's attorney came to court so drunk that the judge halted the proceedings and sent him to jail overnight to dry out. When the trial resumed the next day, Haney was sentenced to die. Bad lawyering is a primary reason that capital trials are so swift in Alabama, frequently running just a few days. In many states, jury selection alone can take weeks.

States have no obligation to provide counsel during the appeals process, and many don't. In Alabama judges can *choose* to appoint an attorney during the appeals process, but only after the condemned files a petition claiming to have found new evidence or procedural flaws at trial--a step beyond the ability of most death row inmates. Alabama caps pay for defense counsel at the appeals level to $2,000, which--given that a properly handled case requires about 500 hours of pretrial preparation--works out to $4 per hour. Defendants can also seek help from the Equal Justice Initiative in Montgomery or the ABA's pro bono death penalty project. Demand, though, far outstrips supply. Currently, 30 individuals on Alabama's death row are watching the clock tick down to their execution date without the aid of a lawyer.

Even if defendants do have lawyers, they face one of the nation's toughest capital statutes. While jurors must vote unanimously to convict, only 10 of 12 must agree on a death sentence. Even worse is the provision that allows judges to ignore the jury's sentence altogether, a power shared only by their colleagues in Delaware, Florida, and Indiana.

Yet Delaware judges are appointed, not elected, which is probably why they overwhelmingly use override to spare a life rather than take it. In Florida judicial overrides for death outnumber those for life, but not nearly as dramatically as in Alabama's 9-to-1 ratio. Indiana judges have overridden 19 jury verdicts, 10 for death and nine for life. Indeed, override is rarely employed anymore in Indiana or Florida, because the supreme courts in those states frequently reject its application--something that has never happened in Alabama. Indiana and Florida also require a judge to meet formal, written standards to set aside a jury's sentence, which is to be "given great weight." Alabama judges are supposed to balance aggravating circumstances, such as a prior record of violent crime, against mitigating ones--a history of mental illness, for example--but are otherwise free to do as they please. In 10 cases, a judge overrode a jury's unanimous, 12–0 recommendation for life.

Max Brax and the Black Death

Defense attorneys complain that a number of Alabama judges appear to have a predisposition toward the death penalty. Recently retired Mobile Judge Braxton Kittrell, who meted out five death overrides, was known by insiders as "Max Brax" owing to his tendency to impose the maximum sentence. Over baked salmon and spinach au gratin one Sunday evening, Kittrell told me that when he killed a leopard during a safari in Zimbabwe, "It broke my heart." He spoke more easily of sentencing prisoners to death, saying of one of the men he sent to the electric chair, "You could look in his eyes and see he was evil incarnate."

Judge Charles Price, an African American from Montgomery, portrays himself as a prudent advocate of capital punishment. "I'm a product of the civil rights movement and the era of unfairness of the system," Price, a big man with a bushy mustache, told me in his chambers. "I look for examples of unfairness." That would come as a shock to defense attorneys, who have nicknamed Price "the Black Death." Judge Price overrode a jury's life sentence in the case of William Knotts, a white teenager who murdered a black woman, and then rejected Knotts's appeal, including the assertion that his defense had been incompetent. In this he ignored that Knotts's two lawyers did not call a single witness during the guilt phase, and that during his closing argument co-counsel Paul Lowery--who slept through part of the trial--said, "I'll have to compliment the prosecution... . They certainly have an abundance of evidence."

Death penalty opponents have long sought to do away with override, arguing, among other things, that judges who run for elected office feel undue pressure to impose capital punishment. In 1995 lawyers with the Equal Justice Initiative convinced the U.S. Supreme Court to review override in the case of *Harris v. Alabama*. The appellant, Louise Harris, had been convicted of conspiring to kill her husband. The jury spared her life--Harris was a churchgoing mother of seven who held down three jobs--but the judge overruled the verdict and ordered her death. In an 8–1 decision, the Supreme Court ruled for the state and remanded Harris to death row, where she currently awaits execution. "Judges who covet higher office--or who merely wish to remain judges--must constantly profess their fealty to the death penalty," Justice John Paul Stevens wrote in dissent. "The absence of any rudder on a judge's free-floating power to negate the community's will ... renders Alabama's capital sentencing scheme fundamentally unfair."

By now, professing fealty to the death penalty is a well-established feature of judicial

elections in Alabama. A few years ago, Alabama Supreme Court candidate Claud Neilson boasted in a campaign ad that he'd "looked into the eyes of murderers and sentenced them to death." Another candidate for the state's highest court, incumbent Kenneth Ingram, ran a TV ad that opened with grainy videotape footage from inside a convenience store where, 20 years earlier, a teenager had murdered the owner. Here, said the ad's narrator, "a 68-year-old woman, working alone, was robbed, raped, stabbed 17 times, and murdered. Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die." The victim's daughter then appears on screen to give her personal endorsement. "It was my mother who was killed, and Judge Ingram gave us justice. Thank heaven Judge Ingram is on the supreme court."

Less Apt to Rule on Sympathy

The State Building in downtown Montgomery lies a few blocks away from the Dexter Avenue King Memorial Baptist Church, where Martin Luther King, Jr., once preached. There, in a fourth-floor office, Clay Crenshaw currently heads the attorney general's capital-litigation division. His secretary's office door is covered with *Far Side*–style cartoons. In one, two guards stand watch over a man in an electric chair, which sits in the prison yard during a rainstorm. As the guards wait for a bolt of lightning to hit the chair, one says to the other, "These darn cutbacks have gone too far." Upon spotting me reading the cartoons, Crenshaw, a tall, balding man, chuckles and says, "We've got a little gallows humor here. Whatever helps you do a better job."

But Crenshaw doesn't seem to need much help getting up for his job. Speaking about the case of James Harvey Callahan, who raped and strangled a college student, Crenshaw says, "She was a person who would have contributed to society, and this piece of trash kills her. He deserves to die."

Crenshaw expresses the same certainty when it comes to the question of deterrence. "If criminals know that if they go to a 7-Eleven store and kill the woman there for $50, that they are going to forfeit their life--they aren't going to do that as often," he says. Even if that's true, I say, what's the justification for override? After all, anyone who opposes the death penalty is summarily dismissed from the jury pool for capital cases, a practice that results in especially conservative panels. If a "death-qualified" jury comes back with a life sentence, it surely had good reasons. Not so, replies Crenshaw. "A jury may base its decision on emotion, a crying mother or sister. A trial judge will rule on the law and is less apt to rule on sympathy."

In preparation for my visit, Crenshaw had printed out summaries of some of the most gruesome murders in Alabama's recent history. One he hands me concerns Judy Neelley, who helped her husband kidnap and sexually brutalize a 13-year-old girl. When they finished, Judy--who was 18 at the time--tried to kill the girl by injecting her with Drano and, when that failed, shot her in the back. On his last day in office in 1999, Governor Fob James commuted Neelley's sentence to life without parole--the only commutation given by an Alabama governor since the death penalty was reinstated.

Crenshaw's summaries don't mention the testimony and evidence that can lead juries to opt for life sentences. To learn about that, I drove a mile across town to the old pink Victorian that houses the Alabama Prison Project, where I spent the afternoon sitting on the floor examining a stack of files on former and current death row inmates. Since Crenshaw had flagged the Neelley case, I made sure to examine her dossier. According to her clemency petition, Neelley's father died when she was nine and the family fell into poverty. She had no encounters with the law until she met her husband, who was 11 years her senior, when she was 15. During the trial, it emerged that Neelley's husband regularly beat her. He told her

that if she ever left him he'd kill her family. Once, after accusing her of infidelity, he raped her with a plunger handle and urinated in her mouth. Yet Crenshaw labeled Governor James's commutation of Neelley's death sentence "a travesty of justice and a great disservice to the state of Alabama."

Neelley's story is one of hundreds stored in five battered filing cabinets that nearly occupy an entire wall. Another Prison Project file tells the story of Walter McMillian, one of two men sentenced to die by judicial override only to be exonerated later, before they were put to death. McMillian, sentenced to life imprisonment by a jury for the alleged murder of a white teenage girl, had no prior felony record and produced 12 alibi witnesses. Judge Robert E. Lee Key, Jr., condemned McMillian to the electric chair, citing the "vicious and brutal killing of a young lady in the first full flower of adulthood." After McMillian had spent six years on death row, his attorney discovered that the state's principal witness, a career criminal, had avoided a capital murder charge by falsely testifying against him.

Over the course of the afternoon, I found a number of cases in which judicial override was implemented in a manner that's hard to see as anything but arbitrary. Robert Lee Tarver was sentenced to die for the murder of a storekeeper. The only evidence against him came from co-defendant Andrew Lee Richardson, who secretly got a break from the prosecution in exchange for testifying. Tarver denied committing the crime, and an appeals court would later concede that "very little evidence made Tarver a better candidate than Richardson to be found to be the actual killer."

Whatever the issues with his conviction, Tarver had a compelling case at sentencing. For instance, his grandparents had taken him in after his mother abandoned him, and years later he returned the favor when they were too feeble to care for themselves. But none of his good deeds were introduced at trial, because Tarver's attorney spent just four hours preparing for the penalty phase. Judge Wayne Johnson--who overrode the jury's life sentence--learned of Tarver's better side five years later, when an out-of-state lawyer recruited by the ABA presented it on appeal. Johnson promptly ruled that Tarver's original defense had been constitutionally deficient, said he'd never have ordered him to the electric chair if he'd known all the evidence, and scheduled a new sentencing hearing. The state went to the Alabama Court of Criminal Appeals, which ruled that Tarver's defense had been sufficiently capable and that it was too late for Johnson to change his mind.

At the bottom of Tarver's file, I found a letter sent by his daughter, Clissie Rogers, to Alabama Governor Don Siegelman. "Is life without parole possible for the father and grandfather of those pictured above?" she asked in words typed below a photo of herself and her two beaming kids. Alas, it wasn't. Tarver was executed last April 14.

Taurus Carroll is one of 14 Alabama inmates sent to death row as a juvenile and one of four sent there via override. Carroll, along with a teenage companion, robbed a Birmingham dry cleaner in 1995 when he was 17. Before fleeing with $90, Carroll shot--the gun went off accidentally, he claimed, and there was no direct evidence to show the contrary--and killed the owner, Betty Long. The jury at Carroll's trial found him guilty of capital murder. During the penalty phase, the panel heard that Carroll's mother had kicked him out of the house at the insistence of her drug-abusing husband and that his grandmother raised him in one of Birmingham's worst slums. Several members of Betty Long's family asked that Carroll's life be spared. "When he took Betty's life, he destroyed mine," her mother testified. "[But I] do not want to see him dead, because if Betty was standing here instead of me, she would say the same thing. åDon't kill him, but make him pay for the suffering that he has caused me.'" The jury voted 10–2 for life, but Judge Alfred Bahakel ordered Carroll to the electric chair.

Death in Mobile

Capital-defense attorneys hate to end up in court in Mobile, partly because death penalty zealots have frequently occupied the local district attorney's office. Charlie Graddick, who served during the 1970s, pledged that on his watch he would "fry murderers until their eyeballs pop out." After the Court of Criminal Appeals tossed out a death sentence that DA Chris Galanos had won at trial, Galanos, who served until 1994, described its members as "the five dumbest white men in the universe."

Mobile judges tend to be cut from the same cloth. Ferrill McRae, one of five locals who has employed override, was born in Irvine, Kentucky, a railroad town in the foothills of Appalachia. His parents moved to Mobile when he was a child, taking along Ferrill and his nine siblings, including the judge's twin brother, Merrill.

McRae's judicial career dates to 1965, when Governor George Wallace--still in his "Segregation forever!" phase--appointed him to the bench just four years after McRae graduated from the University of Alabama's law school. McRae heard domestic cases during his first five years on the bench, but he's been handling criminal cases ever since. He's lost track of the number of capital trials he's presided at, other than to say there have been "a lot."

In at least six death penalty cases, McRae has issued findings that were ghostwritten by the attorney general's office. He's also pursued an open-door policy with a number of local district attorneys, especially Chris Galanos. Mike Odom, a lawyer who formerly worked on Galanos's staff, recalls two unspoken rules worked out between the DA and McRae. "The first was that there should always be at least one pretty woman on the jury so that the judge had something nice to look at during trial. The second was never to strike a juror who came from the 36608 zip code, because that's where the rich white locals live."

Like the rest of the South, Alabama turned increasingly Republican after Lyndon Johnson introduced civil rights legislation in 1964. Last year, a local lawyer named Charles Miller filed to run against McRae as a Republican, and the judge, a lifelong Democrat, deftly switched party affiliation so he could face him in the GOP primary. Miller crushed McRae in a pre-election poll conducted by the Mobile Bar Association--it was the first time an incumbent had failed to win the local bar's endorsement--but the judge squeaked out a narrow victory on primary day.

Though his views on the subject are well known, McRae ran TV ads to highlight his support for capital punishment. In one he is shown on the bench while an announcer notes that the judge has "presided over more than 9,000 cases, including some of the most heinous murder trials in our history." Meanwhile, the names of notorious convicted murderers whom McRae sentenced to death flash on the screen: "Singleton, Murdered Catholic Nun" and "State Trooper Martin, Murdered and Burned Wife."

Cornelius Singleton, a mentally retarded black man, got death from an all-white jury. He signed a confession--with an X--that he couldn't read; later he said he thought he was admitting to stealing laundry off a neighbor's clothesline. The confession was extracted before Singleton had a lawyer and after the police told him that the murder charge carried a maximum sentence of life in prison and allowed his girlfriend to sit on his lap in exchange for waiving his right to silence. Singleton's court-appointed attorney refused to meet with him and didn't tell the jury that his client was retarded. McRae allowed prosecutors to make inflammatory final arguments to the jury--one called the defendant a "creature [that] I can't

refer to as a person or a human being"--and at sentencing dismissed the testimony of four defense psychologists while crediting a prosecution expert who said that Singleton was intellectually limited but not retarded. Singleton went to the electric chair in 1992. His IQ--in the range of 55 to 67--was lower than that of anyone executed in the United States during the past quarter-century.

George Martin, a former state trooper, was convicted last spring of killing his wife for insurance money. His attorney, Dennis Knizley--who has handled a score of capital cases and has only two men on death row, both McRae overrides--feared that with the primary election against Miller coming up, the judge would exploit Martin's case. "He'd given plenty of continuances to me in the past, but this time he refused" to extend the May 1 trial date, Knizley said over drinks at a local hotel. "I don't know if he was politically motivated, but I do know that he had the opportunity to be on TV and in the newspapers every day." What's especially noteworthy is that when the campaign ad ran, the jury had convicted Martin but voted to spare his life. McRae had not yet rendered his decision, though the ad all but announced that he planned to give Martin death--which he soon did.

When asked about such cases, McRae isn't the least bit defensive. "I never enter into a decision hurriedly--I always put it off at least five or six days," he told me in his courtroom. "After I've imposed it, I've never felt like I made a mistake." And what about Singleton, I asked a few months later, after learning details of the case. McRae faxed back: "Do I think Singleton received a fair trial? The answer is yes. There is no such thing as a perfect trial, but his comes close to it."

McRae disputes that race is a factor in the imposition of the death penalty. "It's the most overrated thing in the world," he lectures me from the bench when I mention *Batson v. Kentucky,* the 1986 Supreme Court ruling that prevents prosecutors from striking African Americans from the jury on the basis of race. "I'm taking up for blacks now, I'm not speaking badly of them. The idea that a black will stick up for a defendant just because he's black ought to offend every black. I would be offended by the attitude I hear from the lily-whites, that blacks are softer on crime."

Meanwhile, McRae's override of the Martin verdict sparked a small backlash. The conservative *Mobile Register* editorialized soon afterward that "no one man should be empowered, on his own, to sentence another to death." Last December, Hank Sanders, an African-American state senator from Selma, called for a three-year moratorium on executions, saying that override is one of his chief concerns. It's doubtful, though, that any significant change is on the horizon. Sanders's appeal was greeted with a chorus of catcalls from top state officials. "I'm not interested in a moratorium," Governor Siegelman replied. "That's another way of saying let's look at an alternative to the death penalty, and that's not a discussion I'm willing to engage in."

Judge McRae doesn't believe lawmakers will heed Sanders's call--nor should they. "Some say some judges are more prone to give the death penalty than others," he tells me in his courtroom before departing for his friend's funeral. "There's no question about that. But if it's based on what's fair in the case, I have no problem with that."

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