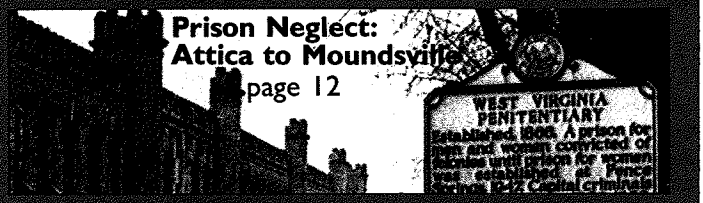
JOURNAL

THE NATIONAL PRISON PROJECT



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Florida Death Penalty Appeals Office Opens

Jan Elvin

The men and women of death row have one thing in common—they are all penniless. "Capital punishment," said Clinton Duffy, long-time Warden of San Quentin, "is the privilege of the poor."

Larry Helm Spalding and his staff at the newly formed Capital Collateral Representative (CCR) office in Tallahassee, Florida, are now giving these inmates the one thing that they all need and none can afford: a good lawyer.

In the face of a "crisis of counsel" in Florida, CCR was created in the summer of 1985 by statute and out of necessity to represent indigent death row prisoners in post-conviction proceedings. With 239 people on death row, Florida reigns as the nation's "capital punishment capital." Prior to the formation of CCR, the Florida Clearinghouse on Criminal Justice, a non-profit agency whose task was to locate and assist volunteer attorneys in handling post-conviction matters, simply could not get enough attorneys. Among the small number of attorneys willing to take these cases, only a very few had the knowledge and experience to do so adequately. And, while volunteer attorneys in death cases are often required to contribute from their own resources for printing of legal briefs and for travel expenses, they receive no money for these difficult cases, most of which would generate in excess of $100,000 if they were billable to a fee-paying client.

"We're flat running out," the Attorney General told legislators in April of 1985. "They [the lawyers] are just not coming forward the way they used to." And the cases continued to increase at an alarming rate of two a month. The problem of inadequate representation had reached crisis proportions in Florida, where there were significant numbers of death-sentenced inmates whose state court appeals were over, and whose cases were at the stage of federal habeas corpus proceedings. These habeas proceedings are usually the last opportunity to raise questions of fairness and due process.

CCR attained the odd and singular distinction of being supported by both pro- and anti-death penalty groups. Death penalty opponents were at last able to rest easy in the knowledge that each inmate would have the best representation possible. They recognized as

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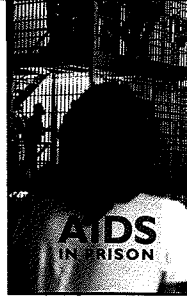

Balanced Response Needed to AIDS in Prison

Urvashi Vaid

The occurrence of Acquired Immunodeficiency Syndrome (AIDS) in prison has sparked a variety of questionable responses. Mandatory testing programs have been instituted by a handful of states and are being considered by others. Prisoners with AIDS, ARC and HTLV-III antibody positive status are routinely isolated, although this is medically unwarranted. The conditions of confinement and medical treatment of prisoners suffering from this illness may be inadequate and unconstitutional.

Some Facts About AIDS

Before turning to the unique problems posed by the prison context, it is useful to remember some facts about AIDS. The disease was first identified in

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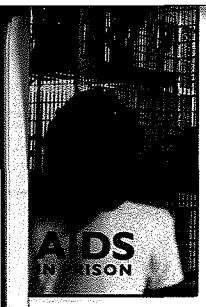
In the last issue of the JOURNAL (Winter 1985), we reported the results of a National Prison Project survey of state corrections systems which sought to identify both the scope of AIDS in prison and what states were doing to manage its occurrence. The NPP survey, "NPP Gathers the Facts on AIDS in Prison," found that at the end of 1985 a cumulative total of at least 420 state prison inmates had been diagnosed with AIDS. A joint National Institute of Justice (NIJ) and American Correctional Association (ACA) survey done at the same time as the NPP study found a total of 455 state and federal inmates diagnosed with AIDS. The NIJ/ACA study also found that an additional 310 cases of AIDS had been diagnosed in 32 of the nation's largest jails. (AIDS in Correctional Facilities: Issues and Options, January 1986). In this article we will provide some medical background about AIDS, discuss and evaluate two of the major policy questions facing corrections administrators today: whether to screen inmates for HTLV-III antibody, and whether to segregate inmates with AIDS related conditions, and broach some of the emerging legal issues.



Persons who test positive face denial of insurance coverage, job and housing discrimination, and a variety of other stigmatizing experiences.

the United States in 1981. AIDS is characterized by an extreme weakening of the immune system which leaves the body vulnerable to debilitating attacks by a host of opportunistic infections and diseases. The virus, which is believed to be the cause of AIDS, was isolated by a team of French scientists in 1983 (who labelled it LAV—Lymphadenopathy Associated Virus), and in 1984 by American researchers (who labelled it HTLV-III - Human T-Cell Lymphotrophic Virus Type III).

Full-blown, or "end-stage," AIDS is defined by the Centers for Disease Control (CDC) as the combination of an "underlying cellular immunodeficiency" whose cause is unknown, except for the presence of HTLV-III infection, and the presence of one or more opportunistic infections.[1] As of February 24, 1986, 17,741 persons in the United States were diagnosed as having AIDS.[2]

People who do not have full-blown AIDS, but exhibit symptoms which indicate that their immune system has been compromised are identified as having AIDS Related Complex (ARC). ARC is defined by the CDC and the National Institutes of Health (NIH) as that condition which consists of any two symptoms from a list which may include swollen lymph nodes and dramatic weight loss, plus any two laboratory abnormalities from a list which includes the presence of depressed helper T-cell ratios in blood.[3] While current studies indicate that 10 to 30% of persons with ARC will go on to develop full-blown AIDS in five or more years,[4] it remains clear that the majority will not.

The relationship between infection with the HTLV-III virus and the development of ARC or full-blown AIDS is another aspect of the medical background. Although it is clear that infection with the virus is a causative factor in the development of AIDS, not everyone who harbors the virus goes on to develop the drastic immune system disruption which characterizes AIDS. Recent studies which monitor the health of persons with HTLV-III infection have found a wide range of variation in the number who go on to develop AIDS over time. Experts estimate that from 5 to 35% of those who have HTLV-III infection will go on to develop full-blown AIDS.[5]

A final aspect of the medical picture lies in the significance of antibodies to HTLV-III in the blood. There is no test for AIDS itself. Many people confuse the Enzyme Linked Immuni-Sorbent Assay (ELISA) test, which detects the presence of antibodies to the HTLV-III virus, with a test to determine if a person has AIDS itself. The ELISA test was developed as a simple way to screen donated blood and to protect the blood supply by rejecting any which reflected the presence of antibodies to the virus (seropositivity).

Although the ELISA test does not detect the presence of the HTLV-III virus itself, the CDC counsels all seropositive persons to assume that they harbor the live virus. This advice is based on studies which show that virus can be cultured from most seropositive people. However, there have also been reported cases of persons who test antibody negative, yet who have had virus cultured from their blood.[6]

Medical experts debate the reliability and usefulness of the ELISA antibody test. In our last issue, Dr. Robert Cohen, Medical Director of Montefiore Rikers Island Health Services, noted that the ELISA test, when done on its own upon a sample of low-risk individuals, results in a very high number of false positive results, as well as a significant number of false negatives.[7] The consensus in the medical community is that an ELISA test that is performed twice and confirmed by a Western Blot test will produce an accurate detection of antibody status. The Western Blot is a more specific test for the HTLV-III antibody, which is often used as a follow-up for the ELISA. It is both more difficult and more costly to perform.

It may be argued that knowledge of one's antibody status is meaningful for three reasons: first, to the extent it can predict if a person is going to develop AIDS; second, to the extent that it informs them of the importance of changing their behavior; and third, to the extent that it can help someone identify if and when antibody-conversion has occurred from negative to positive or vice versa. However, the test results do not "predict" or help identify which persons will develop AIDS or ARC. Nor can the test enable medical personnel to distinguish those who are infectious from those who are not. There is also valid concern and some evidence that knowledge of antibody status alone does

In the last issue of the *JOURNAL* we reported the results of a nationwide survey on incidence of AIDS in prison. It should have been reported that Connecticut *does* use the Western Blot confirmatory test after the ELISA test.

[1]Centers for Disease Control, "The Case Definition of AIDS Used by CDC for National Reporting," August 1, 1985.

[2]CDC Weekly Surveillance Report, February 24, 1986.

[3]The NIH/CDC definition of ARC is being revised to include HTLV-III infection as a diagnostic element.

[4]See, e.g., "AIDS in the Future: Experts Say Deaths Will Climb Sharply," by Phillip M. Boffey, *New York Times*, January 14, 1986, p. C9.

[5]*Id.*

[6]*Groopman, J.E., Hartzban, P.I., Shulman, L., et al., "Antibody Seronegative Human T-Lymphotrophic Virus Type III (HTLV-III)-infected Patients with Acquired Immune Deficiency Syndrome or Related Disorders," Blood* 1985; 66: 742-744.

[7]*NPP JOURNAL*, Winter 1985, p.6.

The National Prison Project of the American Civil Liberties Union Foundation
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The National Prison Project is a tax-exempt foundation-funded project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities by using existing administrative, legislative and judicial channels; and to develop alternatives to incarceration.

The *JOURNAL* is scheduled for publication quarterly by the National Prison Project. Materials and suggestions are welcome.

The National Prison Project *JOURNAL* is designed by James True.

not result in the avoidance of unsafe behavior.[8] On the contrary, significant behavioral changes have been reported among members of high-risk groups through the use of targeted education and counseling, without antibody testing.[9]

Finally, since the methodology of the test is far from foolproof, and since the test only measures antibody status at a particular point in time, the information it provides about antibody status may even be counter-productive. The test may give seronegative persons a false sense of security; at the same time, it may greatly endanger the civil liberties of persons who test seropositive (whether falsely or correctly). Persons who test positive face denial of insurance coverage, job and housing discrimination, and a variety of other stigmatizing experiences. Even those who test negative may face repercussions for simply having taken the test.[10] All these factors have contributed to the decision *not* to make the test mandatory for the general public.

Facts About AIDS, ARC and Seropositivity in Prisons and Jails

The NIJ/ACA report indicates that as of December 1985, there were about 144 diagnosed cases of AIDS among state and federal inmates. Detection of the true rate of AIDS among jail inmates is made more difficult by the short incarceration time for most jail inmates, but the NIJ/ACA survey found that there were 35 cases of AIDS among 32 responding county and city jails.[11]

Data on the rate of seropositivity among prison and jail inmates is available only for the two systems which have gathered this information through testing programs: Nevada and Maryland. Nevada tested all of its more than 3800 prisoners and reports a seropositive rate of 2.5%[12] Maryland is conducting two studies designed to determine the incidence of seropositivity among new inmates and to determine the rate of seroconversion among both long term and new inmates. The system anonymously tested all inmates entering two institutions from April to July 1985. A total of 748 men and 39 women were tested. Fifty-two men (7%) and six women (15%) were confirmed to be seropositive (using two ELISA tests and a Western Blot). This inmate sample will be re-tested periodically to determine seroconversion ratios. In the second study, 137 long-term inmates (who had been incarcerated for seven years or more) were voluntarily tested. Two (1.5%) were confirmed as seropositive.[13]

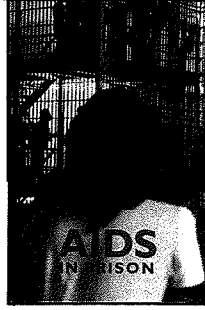
It is unclear if corrections systems which are routinely testing prisoners for HTLV-III antibody are using both the double-ELISA test and the confirmatory Western Blot, as the CDC recommends. The NIJ/ACA survey revealed that 90% of the state and federal systems use the antibody test for some purpose.[14] The majority of these states (77%) use the test only to assist in the diagnosis of AIDS and ARC. Four states (8%) have instituted mass screening programs for all inmates.[15]

Should Prisoners Be Screened for the HTLV-III Antibody?

Why is it important to determine the antibody status of all prisoners? Will testing and segregation actually have an impact on the transmission of virus among prisoners? Do mandatory testing and the segregation of seropositive persons violate the due process or Eighth Amendment rights of prisoners? Although these fundamental questions have yet to be answered by the courts, mass testing has already become the reality in five states and in the Federal Bureau of Prisons (all pregnant women inmates are tested).

Calls for the mandatory testing of inmates for HTLV-III antibody are medically unwarranted and legally impermissible. Indeed, in January of 1986, the National Association of State Corrections Administrators voted against mandatory testing. When fears about AIDS are set aside, two facts remain: first, the HTLV-III virus is not spread by casual contact; and second, testing for antibodies to the virus will not halt its spread even if all seropositive prisoners are segregated.

A recent study has shown that persons in very close, day-to-day contact with persons with AIDS did not "catch" the virus. Those studied shared houses, dishes, beds, meals, even toothbrushes with diagnosed AIDS patients and did not seroconvert from antibody negative



A proper classification system ought to identify violent inmates and house them accordingly, rather than penalizing all inmates who happen to be seropositive.

to positive.[16] Since the HTLV-III virus cannot be spread through casual day-to-day contact, the public health justification for screening all inmates at intake or while they are incarcerated is questionable. Unlike tuberculosis, which can be airborne, or hepatitis B which can be transmitted through saliva, the HTLV-III virus has only been shown to be transmissible through blood products and semen. Intake screening would only serve to create a class of persons stigmatized throughout their incarceration by their antibody status.

Mandatory testing will not halt the spread of AIDS in prison. There is a continuing risk that the virus may be passed along even if all confirmed seropositive inmates are separated from the general population, given the significant number of false negatives and false positives engendered by the ELISA test; given the fact that there is a gestation period between infection with the virus and the generation of antibodies; and, given the fact that seronegative persons who assume that they are "safe" will continue to engage in high-risk activities. A credible argument can also be made that mandatory testing will increase the development of AIDS among prisoners who are confirmed to be seropositive and housed with other seropositive people. The current medical evidence indicates that while a single exposure to the HTLV-III virus does not result in infection, multiple exposures enormously increase the chance of a person getting the virus. By housing all antibody positive prisoners together, prisons only increase the chance that these inmates will be exposed to the virus.

Proponents of mandatory antibody testing are motivated largely by the fact that sexual activity, both consensual and forced, does take place in prison. The argument is made that since prison systems have been notoriously unable to control sexual assault, much less consensual sex, mass antibody testing and segregation of all seropositives would at

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[8]The New Jersey Department of Public Health voluntarily tested 600 intravenous drug users. A number of persons who were told of positive test results increased drug use behavior, attempted or committed suicide, or acted out in other ways.

[9]See e.g., Research and Decisions Corporation, *"Designing an Effective AIDS Prevention Strategy for San Francisco: Results from the Second Probability Sample of an Urban Gay Male Community,"* (Prepared for the San Francisco AIDS Foundation, June 1985).

[10]Colorado law requires the reporting of names of all persons taking the test to state health officials.

[11]NIJ/ACA survey, p. 17.

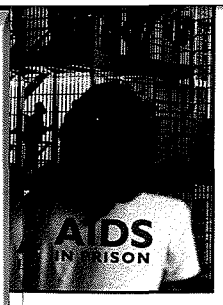
[12]NIJ/ACA survey, p. 50. The state had no diagnosed cases of AIDS as of February 1986.

[13]*Id.*, pp. 23-24.

[14]*Id.*, pp. 60-62.

[15]The four states are: Nevada, Colorado, Iowa, and Nebraska. South Dakota has also begun mass testing of current and new inmates as of March 1986.

[16]Friedland, G.H., Saltzman, B.R., Roger, M.F., Kahl, P.A., Lesser, M.L., Mayers, M.M., Klein, R.S., "Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS Related Complex with Oral Candidiasis," *The New England Journal of Medicine,* February 6, 1986, pp. 344-349. *See also,* Sande, Merle, "Transmission of AIDS: The Case Against Casual Contagion," *The New England Journal of Medicine,* February 6, 1986, pp. 380-383.



Do mandatory testing and segregation of seropositive persons violate the due process or Eighth Amendment rights of prisoners?

least help assure that no prisoner involuntarily acquired HTLV-III infection.

The fundamental problem with mandatory testing is that it will have little impact upon the incidence of either consensual sexual activity or sexual assault. Administrators concerned about the spread of HTLV-III infection through consensual sex would be better served by initiating well-designed, on-going educational campaigns geared at informing inmates about how the virus is transmitted.[17] Given the great concern most feel about contracting AIDS, there is every reason to believe educating prisoners about safe sex practices would have an impact on their behavior.

Sadly, the real obstacle to the distribution of risk-reduction materials in prison lies not with their lack of effectiveness, but with a dilemma peculiar to prisons. Many states have criminalized any sexual activity among prisoners. In other states, sodomy itself is a crime. Prison officials interested in disseminating safe-sex or risk-reduction information may find themselves in the awkward position of discussing practices which they are supposed to punish. By asking state health agencies or outside groups to produce and conduct educational sessions, officials may be able to ease their dilemma. In any event, the discomfort of prison officials should not be the deciding factor in the availability of invaluable educational information. The reality of long term incarceration is that some prisoners will have consensual sex. At a minimum, the prison has an obligation to inform inmates how the AIDS virus is and is not transmitted.

Prison rape is a by-product of the inhumanity and perversity endemic to our prison system's treatment of prisoners' sexual needs. This underlying and largely unaddressed problem has been given a new dimension by the fact that AIDS is sexually transmitted. The American prison system has helped institutionalize the phenomenon of prison rape by: prohibiting prisoners from conjugal visits with their loved ones; prohibiting even basic contact visits; by banning and criminalizing consensual sex; and enshrining the values of total domination and control. Mandatory screening for the HTLV-III antibody will not decrease prison rape, nor will it eliminate the possibility that a victim of sexual assault might be infected. The flaws inherent in the antibody test suggest that prisoners with the virus will escape detection and could continue to spread the virus to others. A proper classification system ought to identify violent inmates and house them accordingly, rather than penalizing all inmates who happen to be seropositive.

Increased staffing, the isolation of violent offenders, the elimination of unsupervised dormitory housing, and an unhesitating commitment by security staff to not tolerate rape are among the solutions prison officials must implement. One of many ironies of prison life is that weaker inmates are identified and separated into more restrictive custody settings, while predatory and more traditionally macho inmates remain in general population, with even greater freedom to coerce sexual favors. If prisons are concerned about seroconversion among previously seronegative inmates, the policy of testing victims of sexual assault after an attack would be a far less intrusive option to mandatory testing.

Mandatory testing represents an overreaction on the part of correctional administrators who are quite reasonably concerned about the disease. It represents precisely the kind of inappropriate and irrational response to otherwise legitimate penological objectives which the Supreme Court noted in *Bell v. Wolfish*[18] would violate the due process clause. Most of the concerns voiced by proponents of testing could be adequately dealt with through the development of educational programs and materials aimed at changing an inmate's behavior. The concern most prisoners have about contracting AIDS would only serve to augment the effectiveness of such educational programs.

Segregation of Inmates

The only medical basis justifying the segregation of inmates with AIDS, ARC or HTLV-III seropositivity, would be if the individual prisoner's condition medically warranted such isolation (if he or she could not control bodily secretions or was so weakened as to require intensive care). Since the virus cannot be transmitted through casual contact, prisoners who encounter either seropositive inmates or those with ARC or AIDS in the general population are not at any extra risk of contracting the virus. Nevertheless, segregation of all three categories of inmates is common among state systems. Segregation of inmates with AIDS is the policy of 42% of the state and federal systems (21 out of 51). Of these 21 systems, 18 (36%) also segregate inmates with ARC, and another 8 (16%) segregate seropositive inmates as well.[19] Only two states reported that they do not segregate any inmates because of AIDS or AIDS-related conditions.

The primary justification offered for the isolation of these inmates is that they might be assaulted in general population. This argument for segregation stems from the fact that there is no confidentiality of medical information in most prisons. Corrections staff and inmates are very likely to be aware of which persons are seropositive, or have ARC. Invariably, rumors (both true and false) will circulate about a prisoner's illness being AIDS-related, and that individual may become the target of threats and serious attacks. Certainly prison administrators would be justified in removing an individual who is being threatened from general population. But selectively placing individuals on protective custody status is markedly different from a policy of wholesale segregation of all prisoners with AIDS-related conditions.

A number of states, including Nevada which has tested all its inmates, house seropositive inmates in general population, unless their condition medically warrants another type of confinement. The threat to the welfare of seropositive inmates is likely to be related to the amount and quality of education a prison system provides. New York State, for example, which has had the highest number of prisoners with AIDS, does not segregate prisoners diagnosed with ARC.

To date, only a handful of lawsuits have been filed to challenge prison policies regarding the segregation of inmates with AIDS-related conditions. *Cordero v. Coughlin,*[20] which was discussed at length in the last issue of the *JOURNAL,* involved a challenge to New York's policy of segregating inmates with AIDS. The court held that such segregation was reasonable and that the conditions of confinement did not violate prisoners' Eighth Amendment rights. More recently, at least two cases have been filed by asymptomatic prisoners who are antibody-positive and are being segregated under allegedly unconstitutional conditions.[21] The evidence gathered by the National Prison Project about the conditions under which most inmates with AIDS and AIDS-related illnesses are being confined suggests that many more lawsuits addressing conditions will be

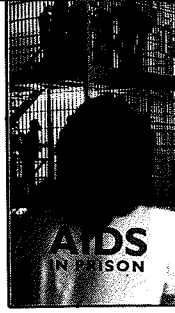
[17] *See generally,* NIJ/ACA study, pp. 30-50. The CDC is planning a study involving prisoners and non-prisoners to test the effectiveness of targeted educational efforts.

[18] 441 U.S. 520 (1979).

[19] NIJ/ACA study, p. 80.

[20] 607 F.Supp. 9 (S.D. N.Y. 1984).

[21] *Farmer v. Levine, et al.,* C.A. No. HM 85-4284 (D. Md. Amended Complaint filed March 6, 1986); Powell v. Department of Corrections, C.A. No. unavailable (N.D. Okla., filed August 10, 1985).



forthcoming. Prison officials should remember that while the decision to segregate may be reasonable under the circumstances, conditions of confinement in segregation must be constitutionally adequate.

It is the Prison Project's position that if segregation is imposed, it must be akin to protective custody, and not punitive or administrative detention. Like protective custody inmates, prisoners segregated because of AIDS-related conditions must be provided access to programs, jobs, recreation, visits, exercise and adequate out-of-cell time.[22]

Medical and Mental Health Care

Potentially the most litigation-prone area involving prisoners with AIDS-related conditions involves the provision of medical and mental health care. While there is no cure for the underlying immune deficiency caused by infection with the HTLV-III virus, medical treatment for many of the opportunistic infections experienced by AIDS patients is available. Neither the NPP survey nor the NIJ/ACA study evaluated the nature and quality of the medical care that is being provided to prisoners with AIDS and ARC. The anecdotal information we have gathered through inmate correspondence and our general experience with medical care in prison suggests that serious shortfalls are likely to exist.

Medical care of prisoners with AIDS-related conditions must meet the standard set forth in *Estelle v. Gamble,* and subsequent cases. The *Estelle* court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain', . . . proscribed by the Eighth Amendment."[23] The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical, mental health and dental care with competent staff. Reasonable and speedy access to outside facilities must also be available for services not provided within the prison. Inmates must be able to make their problems known to medical staff. Adequate facilities and staff to handle medical emergencies must be provided.[24] Mental health counseling is especially important to deal with an inmate's reaction to a diagnosis of AIDS or a positive antibody test.

Medical experts debate the reliability and usefulness of the ELISA antibody test.

Conclusion

It is critical that prisoners' rights advocates do not accept at face value the justifications for mandatory screening and wholesale segregation put forward by some in the corrections community. Alternative remedies must be developed which protect inmate and staff health and also protect prisoners' rights to privacy, due process and freedom from cruel and unusual punishment. ■

[22] See e.g., *Cody v. Hillard,* 599 F.Supp. 1025 (D. S.D. 1984); *French v. Owens,* 538 F.Supp. 910 (S.D. Ind. 1982); *Wojtzak v. Cuyler,* 480 F.Supp. 1288 (E.D. Pa. 1979); *Lamaan v. Helgemoe,* 561 F.2d 411 (1st Cir. 1977).

[23] 429 U.S. 97, 104 (1976).

[24] See generally, *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980); *Capps v. Atiyeh,* 559 F.Supp. 894 (D. Ore. 1982); *Balla v. Idaho State Bd. of Corrections,* 595 F.Supp. 1558 (D. Idaho 1984); *Todaro v. Ward,* 565 F.2d 48 (2d Cir. 1977).

Florida Death Row Inmates Finally Assured of Representation

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well that no one could guarantee that the courts would continue to grant stays solely on the basis of lack of counsel.

Death penalty advocates, a clear majority among the citizenry and the legislature of Florida, were pleased because they hoped that between CCR's creation and the recently streamlined two-year review process, executions would begin to happen more often. Attorney General Jim Smith and Governor Graham realized as well that genuine legal, ethical and perhaps political ramifications would follow from the execution of individuals who were denied the right to counsel in post-conviction proceedings.

Both sides agreed that it was past time to resolve the crisis in legal representation.

The History of the Crisis of Lack of Counsel

In March of 1985, the Florida Supreme Court was confronted for the first time with review of decisions by trial courts which had issued orders to stay execution warrants because the death-sentenced indigents did not have counsel for the post-conviction proceedings.

The Florida Supreme Court continued the stays, without written opinion. In doing so, it implied it would not lift a stay granted by a trial court, where the inmate was without counsel between the time the Supreme Court denied the initial appeal and the scheduled execution date.

Efforts to ease the crisis date back to 1982, when Judge John C. Godbold, along with other judges, initiated the Florida State/Federal Judicial Council. Composed of judges from federal and state courts, the Attorney General, representatives from the state prosecuting attorneys and the Public Defender office, the Council attempted to address the unique problems and conflicts developing around capital post-conviction cases. Hoping to reduce that conflict, and concerned about last-minute stays, they initially sought to adopt rules or make recommendations for speedier resolution of these cases. Meanwhile, they began to take a closer look at how the cases were handled, and soon they came to understand that the real problem was simply not enough lawyers. In the course of their meetings, Judge Godbold, Judge Roney and others sitting on the 11th Circuit directly confronted the Florida Bar about the problem. Why were out-of-state lawyers always coming to Florida to take these cases at the last minute? The Florida Bar was certainly large enough to handle them.

Why were out-of-state lawyers always coming to Florida to take these cases at the last minute? The Florida Bar was certainly large enough to handle them.

In response to their concern, the Bar formed the Special Committee on Representation of Inmates in Collateral Proceedings, which in turn formed the Volunteer Lawyers' Resource Centers at Florida State University and Stetson University. Spurred on by the pressure brought to bear by the Florida State/Federal Judicial Council, the Bar decided that lawyers could be recruited from the large civil law firms. The big firms had the financial resources to handle what experience had indicated were costs of $5,000-20,000 plus billable hours which could easily approach $100,000 or more per case. Mark Olive, former Director of the Volunteer Lawyers' Resource Center, and currently Legal Director at CCR, termed the whole notion of recruiting lawyers from large civil firms "bizarre at most, and novel at the very least," since in many cases, while these attorneys were willing and generally competent, they simply did not have any experience in the handling of such highly complex cases.

The Resource Center was founded on the premise that the volunteer lawyers would be able to handle the monumental caseload with the Center's

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assistance. As Director of the Resource Center, Olive often assisted the volunteers, in conjunction with Scharlette Holdman, then Director of the Florida Clearinghouse. With too little time and too little money to assist in all phases of the cases, they were able to help mainly *after* Graham signed the execution warrant. "Certainly not the ideal, but the reality," says Olive.

"Then the Florida Bar [after founding the Resource Center] came to discover how hard these cases were, and decided they wanted out. The Bar was doing a good job," says Olive, "and is still doing a good job. They just saw the writing on the wall." And, he contends, the Bar made the problem known to the legislature, the Florida Supreme Court, the Governor and the Attorney General.

He acknowledged, as had Larry Spalding, that he thought it would be at least two years before the bill to authorize CCR was signed.

It is due largely to the support of Attorney General Jim Smith, an avid supporter of capital punishment, that CCR emerged (after speedy authorization by the legislature) from the Volunteer Lawyers' Resource Center to become the nation's first state-funded death penalty defense group, separate from a state public defender office.

Florida Attorney General Supports CCR Bill

When word got out that the Attorney General had told the legislature that without CCR, there might well be no more executions, and that "if you're opposed to the death penalty, you should oppose this bill," some palms sweated and mouths went dry among those opposed to the death penalty in the South. According to Spalding, "anti-death penalty people were being told this is a good office, a fine thing, and then you have the Attorney General saying this is a *wonderful* thing. People were backing off, saying, 'If *he* wants it so bad, what's wrong with it?'"

I see collateral appeals as desperate attempts to frustrate the criminal justice system and prevent the will of the people. If I were a Florida taxpayer, I would object.

Paul Kamenar, *Executive Legal Director, Washington Legal Foundation.*

Political allies were evidently available on the fairness/due process aspect of capital punishment that were not available on the abolition issue. In testimony before the legislature in the spring of 1985 on the "CCR bill," Attorney General Smith said, "I think the reality is that either the Florida Supreme Court or certainly federal courts are not going to allow any inmate on death row to be executed if they do not have the benefit of counsel to guide them through collateral relief."

He added, "In the old days, collateral relief was meaningless. Rarely did death row inmates receive benefit of federal review after a state court conviction. Frankly, we thought the Spinkelink execution would set a precedent where there would not be exhaustive review by the federal system of the final judgment in the state courts which related to death cases. The fact is, we now have a long experience . . . it has been institutionalized, and there will be exhaustive federal review through collateral relief."

In fact, Smith compares this era to the pre-*Gideon* era. In *Gideon,* (1963), the Supreme Court ruled that all indigent felony suspects have the right to legal counsel funded by the state. The Supreme Court, he believes, will one day order that counsel be provided during the collateral review process for indigent death row inmates because it has become common practice.

Speaking of the Attorney General, Spalding says, "There are different images of Jim Smith. I think he's a very honest, decent person. He's very pro-death penalty, but he does not believe we should execute people without due process. I think he's going to aggressively pursue that policy."

Spalding is afraid that some executions will happen sooner than they might have without CCR. Jim Smith hopes they will.

"I believe that the death penalty is a deterrent, but not if you have people waiting 10 years to be executed. We have people who've had their 10th anniversaries on death row," says Smith.

What Difference Will CCR Really Make?

"I think there will be fewer executions because we are here," says Larry Spalding.

David Bruck, a South Carolina attorney recognized as a leading death penalty opponent, says, "It was sold by the Attorney General's office on the grounds of speeding up executions. But it will also speed up the granting of relief on meritorious claims, and will insure that fewer cases fall through the cracks."

"I think, without CCR, people on death row would have deliberately fired their attorneys in order to bottle up their cases in the courts," charged Attorney General Smith. "I believe that either the federal courts, or the Florida Supreme Court, would not have allowed executions to continue if people were not provided counsel."

In two cases last year which went before the Florida Supreme Court, Attorney General Smith sat in the courtroom both times and looked across the room at an empty defense counsel's table. Neither inmate had representation, and death warrants had been signed.

"Jim Smith was honestly embarrassed by that," contends Spalding.

"I would not, as a lawyer, have been comfortable," says Smith, "executing people without counsel. I just don't believe that it's right, and it would have been a black eye for Florida to have done so. I say this even though we have no legal obligation to provide counsel in the collateral stage."

Staff at CCR Brings Experience, Dedication

The entire staff at CCR is committed to the people on death row and

Models in Other States

Experience elsewhere supports the idea of centralizing collateral appeals representation. California has eight years of experience with two different models. The State Public Defender originally set up a central capital defense center, funded by their regular state budget. Governor Deukmejian slashed their budget, forcing the office to close for a time, but it reopened after being taken over by the California Bar. The present office, called the California Appellate Project (CAP), is supported by the Bar and the California Supreme Court. Operating in a similar manner to CCR's predecessor, the Volunteer Lawyers' Resource Center, CAP recruits lawyers to represent indigent death row clients in collateral appeals. Unlike the Volunteer Lawyers' Resource Center, however, CAP is able to pay attorneys $75 per hour.

In Kentucky, the State Public Defender has set up a capital punishment project for the 27 people on death row.

"By centralizing within a state, a function that requires a large degree of specialization, you wind up with more professional representation for defendants and more efficient administration of the entire process. That is in everyone's best interest -defendants, prosecutors, legislators, and the public," commented Anthony Amsterdam. "The central facility does not, however, foreclose the involvement of volunteer attorneys and others. It means that they will have a backup center to go to for help." ■

to stopping executions. "The Florida operation has attracted a very high quality staff of lawyers and others. It should be a super-stellar operation," commented Anthony Amsterdam, New York University law professor and the nation's leading capital punishment theoretician.

One of Larry Spalding's first acts as Director of CCR was to hire Scharlette Holdman.

"Hiring her was the smartest thing I've done," says Spalding. "I think it was a good message to the people on death row who were concerned about this office. It was also a good message to the people around the state. They knew Scharlette wasn't going to be part of a sellout.

"People are worried about her stopping some executions. *That's* what I hired her for."

"I will go to bat for CCR in the legislature," says the Attorney General, "as long as I am convinced that they will act in a professional manner."

Smith is referring to what he calls "shenanigans" by Holdman while Director of the Florida Clearinghouse. The Attorney General recalled the time she sent him a birthday cake adorned with black candles. Coincidentally, his birthday fell on the same day as the execution of John Spinkelink by the state of Florida. On the first anniversary of Spinkelink's death, the Attorney General and his staff were greeted by a group of children (Holdman's and others) bearing the birthday cake and singing, "Happy Death Day to You . . . ."

Holdman brings with her a reputation as a tireless, extremely effective, fiercely dedicated worker on behalf of death row inmates. Well aware that working at CCR on a state salary means the "shenanigans" are over, she still feels that that kind of dramatic public protest is important and hopes that someone else will take on the task.

Larry Spalding received both his undergraduate and law degrees from Vanderbilt University. After clerking for U.S. Circuit Court of Appeals Judge Irving Goldberg in Dallas, he practiced law in Tennessee. In 1971 he joined a private law firm in Sarasota, Florida, and in 1973 became a partner in Lewis & Spalding, where he practiced until his appointment as Capital Collateral Representative. His private practice was in criminal law, family law, appellate and federal civil rights litigation. He has worked on numerous ACLU cases during his career, and two years ago was elected President of the Florida ACLU.

Spalding represented Howard Virgil Lee Douglas, who has spent 13 years on Florida's death row, the longest to date. Recruited by Scharlette Holdman while she was at the Florida Clearinghouse, he picked up the case at the clemency stage. Douglas was thought to have a better than average chance at clemency because the jury had recommended a life sentence. The jury voted for first degree murder, while unanimously recommending a life rather than a death sentence. The judge overrode the jury's recommendation, sentencing Howard Virgil Lee Douglas to death. After Spalding took over the case, he won a new trial for Douglas, and, once again, the judge overrode the jury's recommendation for life, sentencing him to death a second time.

The representation of people under sentence of death cannot be consigned to charity forever.

David Bruck, *attorney in South Carolina.*

Under the statute which created CCR, the State Public Defender Association acted as the nominating commission for the directorship, and they sent three names to Governor Graham for consideration. Spalding, the clear favorite of anti-death penalty groups, was chosen. Why would Graham choose an outspoken death penalty opponent and the president of the state ACLU? "[Gov.] Graham wanted to diffuse the charge that he was setting up a paper tiger," says Spalding. "He can say, look, I got you the president of the most vocal anti-death penalty group in the state of Florida."

CCR has attracted people from all over - Ohio, Utah, Tennessee, and North Carolina. "People are coming

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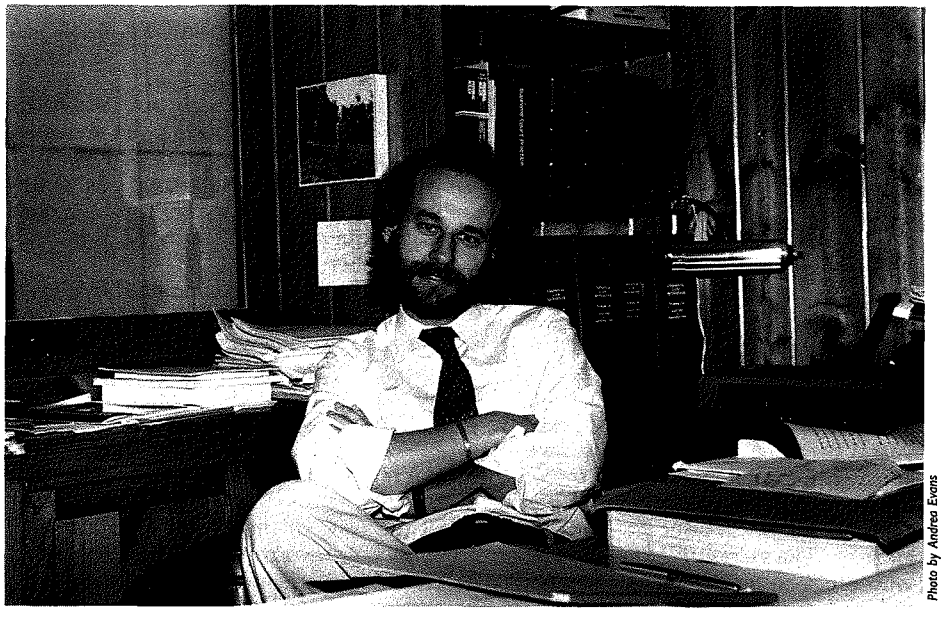

Photo by Andrea Evans

George Kendall, Staff Attorney for the new ACLU Death Penalty Resource Center for the 11th Circuit.

ACLU Opens Two Death Penalty Resource Centers in South

The ACLU has recently established two Death Penalty Due Process Litigation Centers, one in each appellate court circuit in the deep South. The first is located in Atlanta, where the United States Court of Appeals for the Eleventh Circuit sits. This covers the states of Florida, Georgia, and Alabama. The second is located in New Orleans, where the United States Court of Appeals for the Fifth Circuit sits, covering the states of Mississippi, Louisiana, and Texas. These Centers are providing, on a smaller scale, the help that CCR provides in Florida.

The focus during the next two years must be in the South, and particularly in those states covered by the 5th and 11th Circuits, since that is where nearly half the death-sentenced inmates are imprisoned.

The functions of the Centers are to:

1. handle post-conviction habeas cases;
2. screen post-conviction records;
3. generate informational materials for trial and habeas lawyers; and
4. conduct a public education program designed to advance the establishment of publicly-funded post-conviction offices, like CCR.

The Centers have been established as two-year programs. ■

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from everywhere to help out," said Legal Director Mark Olive. "We have gotten some very bright, sharp people for very little money." Spalding is worried about his staff working so hard on such emotionally draining cases, and over the holidays at the end of 1985 he ordered everyone out of Tallahassee, because, as he says, "We won't breathe until August."

Friends worry also. George Kendall, staff attorney of the ACLU Death Penalty Resource Center for the 11th Circuit, said, "When Florida heats up, there will be one or two executions a month. It's overwhelming."

Steve Bright, Director of the Southern Prisoners' Defense Committee in Atlanta, expressed concern about having all the habeas cases handled by one office, for the same reasons. "I'm afraid the Florida Bar will now drop its responsibility of finding volunteer lawyers, leaving the CCR staff to bear the entire burden."

Indeed, Spalding is afraid that he will be forced to take the cases which are presently being handled by volunteer attorneys who were recruited by the Bar's Special Committee on the Representation of Inmates in Collateral Proceedings. "If the cases that are out are dumped on the program, it's going to sink in a hurry."

The Time Limit on Claims

Although they failed to convince the Florida Supreme Court to consider striking down a recent amendment which provides a statute of limitations (two years) on some claims by death row inmates, CCR successfully petitioned the Court to extend a time limit on a procedural rule which affected some 30 inmates. The rule mandated that inmates whose direct appeals were affirmed before January 1, 1986, had only until

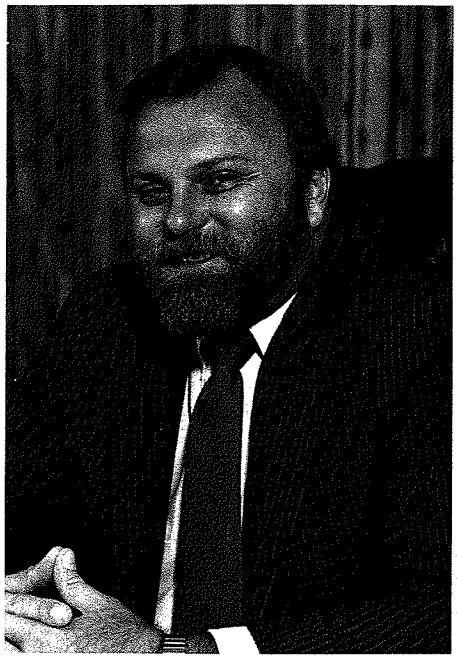


Photo by Bob O'Lary

Larry Spalding, Capital Collateral Representative in Florida.

that date to initiate their post-conviction challenges. It would have been impossible, claimed CCR's petition, to investigate and file proper pleadings for those individuals within that time limit. According to the petition filed by CCR in November 1985:

1. Spalding was appointed by Governor Graham on August 1, 1985, but the appointment was not to take effect until October 7, 1985 to give Spalding 60 days to close his law practice in Sarasota;

2. Of the 21 positions funded by the legislature (11 attorneys, five investigators, five support staff) at the time of the filing of the petition, Spalding had hired only two attorneys, two investigators, secretarial personnel and an office administrator;

3. Within the first eight days of CCR's operation, Governor Graham signed four death warrants;

4. On November 4 he signed two more.

The two-year time limit provision had been enacted originally to address "real or perceived problems" of delay in capital post-conviction litigation. It was adopted in November of 1984, eight months before legislation creating CCR gave at least statutory right to counsel in capital post-conviction proceedings. With the right to counsel comes the right to effective assistance, which could not be provided under a procedural rule of time limitation.

When the time limitation provision was proposed by the Attorney General, no analysis or research had been done by the Florida Bar prior to its adoption. Since CCR was the agency most affected by it, Spalding asked to be able to analyze the data and "submit a formal presentation on the impact of the rule on capital post-conviction litigation, and to recommend changes, if any, in the specified time-limitation period to the Florida Bar and this Court."

The request was denied.

They were granted a one-year extension of the rule, affording more time to cope with the 30 immediate cases, but were denied the re-examination of the two-year limit. The Attorney General's office had supported the extension, and opposed the rule change.

"People in my office put in long hours to do their jobs. Spalding's people will have to do the same," said Smith when told of Spalding's concern over the time crunch. The reason for the time-limitation rule, according to Smith, is that without it attorneys will abuse the system.

"Basically, what they're asking is impossible," sighed Spalding. "In one case, they wanted us to research the

The Jury Override

I shall ask for the abolition of the punishment of death until I have the infallibility of human judgement demonstrated to me.

Lafayette, speaking to the French Chamber of Deputies, 1830.

"We don't talk abolition here anymore," says Larry Spalding. "What we need to address in Florida now are the executions of juveniles and the jury override."

Legislators in three states (Indiana, Florida and Alabama) have provided the jury override to allow judges to impose a life sentence in cases where a jury might have inappropriately recommended death. Intended to insure more uniform penalties across the state and thus afford an advantage to the accused, the result in Florida has been just the opposite: judges, instead of showing more mercy than juries, have shown markedly less. Almost one-third of the men on death row are there due to an override, in which the judge imposed death *after* the jury had recommended life.

Supreme Court Justice John Paul Stevens, speaking at the Florida State University Law School, called the override "a defect in your statute." He added: "A procedure that was probably intended by the legislature to provide the defendant with two chances to obtain mercy actually seems to have provided the prosecutor with two chances to obtain the death penalty."

Ironically, when the Florida Supreme Court in 1973 upheld the state's new death penalty law, the justices wrote, "To a layman, no capital crime might appear to be less than heinous but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case . . . . Thus, the inflamed emotions of the jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."

Unfortunately, not all judges are of a like mind. Judge Ellen Morphonios, who recently overrode a jury and imposed a death sentence where they had recommended life, says she did so because people become "more cautious" after being sworn in as jurors. Is it wrong to be cautious in choosing between life and death? ■

case (in the original appeal they give you 180 days for this part), get experts, be in the trial court, write an appeal, and be ready for argument in two weeks. *Two weeks.*

"Either we do a sloppy job, and we really *do* grease the skids, or the whole thing falls apart. The people we have here are willing to work 20 hours a day, seven days a week, but they are *not* willing to grease the skids. If they have a fighting chance . . . .

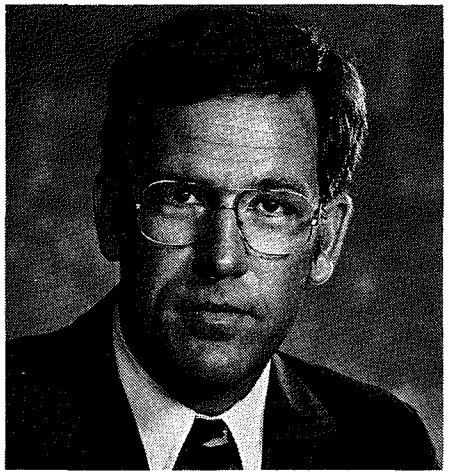
"There will be executions here this year, no doubt. We can accept that, if we have had time to develop the case, have done everything we can do, and feel like at least the courts have listened to us.

"But if we get to the point where the courts are saying, 'We don't care if you're ready, just be here,' then we are not going to be able to get lawyers to do that.

"I'm not going to do that."

Pressure from the courts, as well as case backlog and limitations on time are going to sorely test the CCR staff. Right after CCR was created, Spalding received a letter from Florida Chief Justice Joseph A. Boyd, Jr., congratulating him for undertaking the representation of indigents on death row. Last-minute appeals for collateral relief, he observed, have caused much frustration. "This resulted in part because attorneys were often serving without compensation and were unaware of the need for their services until a few days before the anticipated dates of execution.

"One of the main reasons,"



"I believe that the death penalty is a deterrent, but not if you have people waiting 10 years to be executed," said Attorney General Jim Smith.

asserted the Chief Justice, "for using tax funds to create and support your office was to prevent delays in collateral capital matters . . . . Simply stated, we will expect cases to be handled in an orderly and timely manner, and, will not tolerate unreasonable delays by anyone, anytime, for any purpose."

Conclusion

"The CCR office can serve as a model for other states which have a progressive strain even though they continue to kill people," says Steve Bright.

When asked to comment on CCR, Judge Godbold responded, "Public officials of Florida, the legislature, and the Florida Bar, working together, have made legal counsel available to Florida prisoners under sentences of death. Americans have differing views about capital punishment, and whether habeas corpus cases should be reviewed for constitutional error in Federal courts in addition to state court review. But whatever one's opinions on these questions, the fact is that without attorneys, habeas cases for death sentenced prisoners are delayed in filing or delayed in disposition.

"Florida has acted courageously to make attorneys available."

The numbers of men and women on death row in the United States will inevitably, and tragically, continue to grow. If the promise of access to the courts is to become a reality, state-funded death penalty defense groups will be a necessity. There is no doubt that state governments must take responsibility for adequate representation of death row inmates, unless we are to see a flood of executions of people who have not been fairly tried. Even for those who do not oppose the death penalty, that is, or should be, unconscionable.

"We have recognized for a long time that this dark night will not pass quickly," said David Bruck.

At least in Florida, a light now shines into that dark night. ■

A conference on "Imprisonment: Its Effects on the Black Family and Community" will be held June 6 and 7, 1986 at the Shiloh Family Life Center in Washington, D.C. The ACLU National Prison Project is cosponsoring this conference with approximately ten other civil rights, prisoners' rights and church organizations in the D.C. and Baltimore area. June 6, 1986 will be "Youth Day," where young people from the metropolitan D.C. area, Baltimore and Richmond will come together to discuss alternatives to imprisonment. The June 7, 1986 sessions will be open to people of all ages. The purpose of the conference is to convince people in the community that imprisonment is not the answer to the crime problem. Participants will be urged to embrace the concept of alternatives to imprisonment and to become a lobbying force with local legislatures to ensure that effective alternatives are developed and utilized. For further information, contact Adjoa Aiyetoro at (202) 331-0500. ■

10th National Conference on Correctional Health Care

The 10th National Conference on Correctional Health Care will be held at the Washington, D.C. Hilton on October 30-November 1, 1986. The conference is sponsored by the National Commission on Correctional Health Care and the American Correctional Health Services Association.

The 10th National Conference, "Reasonable Health Care: What Is It? How Much is Enough?", will address practical, cost-effective, and efficient methods of providing health care and medical services, and will focus on clinical descriptions and treatment regimens for acute and chronic diseases frequently found by medical practitioners in correctional facilities. The Commission's 1986 revised standards for health services in prisons and jails will also be featured.

The National Commission on Correctional Health Care is a not-for-profit organization dedicated to improving health care in our nation's jails, prisons, and juvenile confinement facilities through the accreditation of facilities that comply with standards for health care and medical services originally developed by the American Medical Association. The Commission's Board of Directors is composed of representatives from twenty-eight professional medical and correctional associations.

The American Correctional Health Services Association is an organization of professionals concerned with health care and medical services in corrections.

A call for papers has been issued. Abstracts not exceeding 150 words should be submitted to the National Commission on Correctional Health Care, 333 East Ontario Street, Suite 2902B, Chicago, Illinois 60611. For further information, contact Jodie Manes at (312) 440-1574. ■

California Project Stands Up for Women in Prison

Rebecca Jurado

In 1984, the ACLU of Southern California announced the formation of the Women Prisoners Rights Project. Funded through private donations, the Project was established to address the constitutional rights and concerns of women incarcerated in the California prison system, which has just passed explosive population levels. In order to fulfill these goals, Project attorneys Rebecca Jurado and Susan McGreivy provide information to inmates and the public, and have filed various suits on behalf of female inmates.

The California Institution for Women (CIW), the only state facility that houses female felons, is, at over 205% of capacity, the most overcrowded of California's 13 prisons. As a result of this overcrowding and the lack of sufficient alternative facilities, female inmates are subjected to more oppressive housing arrangements than otherwise required by their crimes or state regulations and guidelines. This has led CIW to establish its own classification, disciplinary, medical, vocational and educational systems.

To address this situation, the Women Prisoners Rights Project first began by interviewing and corresponding with CIW prisoners. Out of these contacts numerous problems have been identified. Each of these has been investigated and evaluated as subjects for litigation. To date, five suits have been filed.

The first, *Whisman v. McCarthy,* filed in August 1984, challenges the failure of both the California Department of Corrections (CDC) and the Department of Health Services to require state licensure of the health care facilities within CIW. The suit also questions the limited, inadequate physical and mental health care facilities available to women prisoners.

Rios v. McCarthy, filed in June 1985, puts two points at issue: the failure to fully implement a unique program of mother-infant care established by the legislature and the failure to fulfill this mandate in the limited implementation seen so far. Under the Mother-Infant Care Program, qualified women are allowed to serve their sentence in community-based facilities with their preschool aged children. Despite specific statutory language, CIW and CDC have failed to do the two things required:

A corrections officer peers through the tiny window of a cell in the Administrative Segregation Unit at the California Institute for Women.

provide notice and process applications in a timely manner. As if to justify this, the defendants have further undermined the Program by misleading eligible women or misusing their discretion by substituting their own criteria for that contemplated. For a potential pool of 1000 eligible women, 27 MIC Program beds are in use statewide—only .27% of need. This issue has attracted so much attention that in late December the Legislature's Joint Committee on Prison Construction convened to investigate conditions and policies relevant to the MIC Program and to assess the Program's value in alleviating the present overcrowding. It should be noted that state Senator Presley stated for the record that an additional 100 beds should be immediately put to use by this Program.

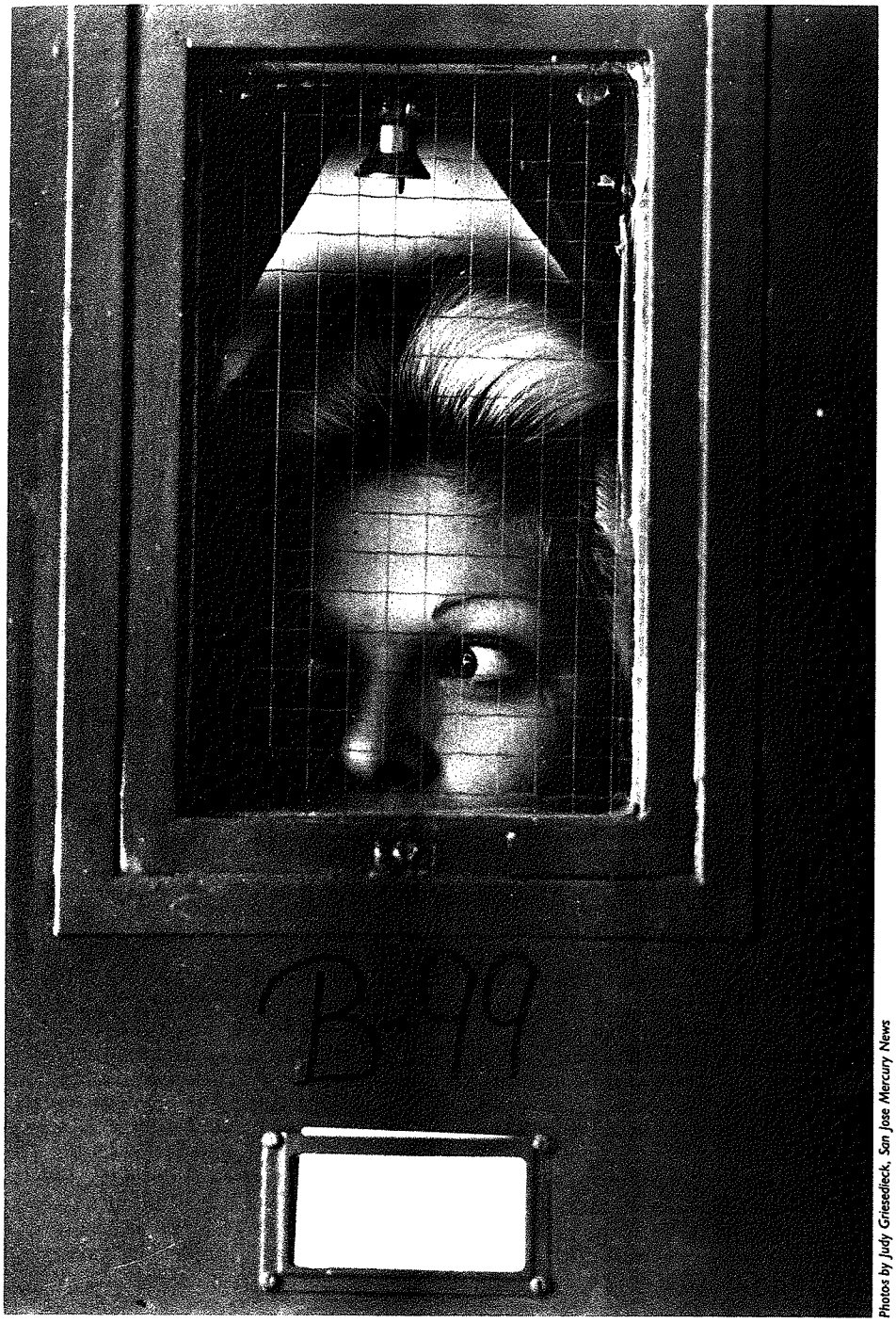
Scrape v. McCarthy, filed in October 1985, concerns an incarcerated woman's right to timely pregnancy testing so that she can receive a state-funded abortion within the initial twelve-week pregnancy period arbitrarily set by CIW. This period is intentionally more restrictive than the twenty-week period set forth in California's Therapeutic Abortion Act. Although a woman's right to an abortion is not denied by this "twelve-week" policy, the availability of an abortion as a "medical procedure" (as opposed to an "elective procedure") is denied if the inmate is informed of her pregnancy after this period has run. This means the inmate must pay both the cost of the procedure and the prison staff who must accompany her for security reasons. The cost quoted to this plaintiff was $5,000. Accordingly, in granting a TRO, the Court found that CIW's eight-week delay in informing the plaintiff of her pregnancy, some six weeks beyond the CIW-imposed twelve-week period, constituted negligence. CIW and CDC were ordered to pay the costs of the medical procedure and all required security. This suit hints that the experience of this plaintiff was the result of Governor Deukmejian's personal mission to outlaw all abortions.

Kozeak v. McCarthy, filed in October 1985, puts at issue the constitutional rights of inmates who are placed or retained in administrative and disciplinary segregation units. The suit charges that these rights are violated by the denial of fair hearings prior to relocation to these units and by living conditions after relocation. These units, basically prisons within the prison, separate inmates from the general population for reasons the prison terms administrative, disciplinary or otherwise. Although justified by prison officials as necessary for the "safety and security of the institution," the intention and effect are plainly punitive. Identical issues have been addressed by a chain of litigation commencing with *Wright v. Enomoto,* 462 F.Supp. 397 (N.D. Cal. 1976) and continuing through *Toussaint v. McCarthy,* 597 F.Supp. 1388 (N.D. Cal. 1984). These cases establish specific due process rights and living conditions for inmates in segregation units. CIW, however, refuses to comply with these court-mandated and CDC-adopted principles and regulations.

This suit hints that the experience of this plaintiff was the result of Governor Deukmejian's personal mission to outlaw all abortions.

In *Jentry v. Alexander,* filed in November 1985, injunctive relief was sought to enjoin the conversion of a 24′ × 34′ kitchen into a 16-bed dormitory. The court denied plaintiffs' application for a TRO despite clear evidence that the room was never meant for human habitation: the room did not meet fire safety requirements (applicable to inhabited areas) and failed to provide minimal sanitary facilities. Further evidence was presented that the area surrounding the kitchen conversion could not even accommodate the 250 inmates already housed there. The conversion of this and other kitchen areas was the first step in CIW's plan to deal with overcrowding, the final steps being the conversion of all recreation facilities into living units. Additional conversion will include the auditorium, the law library, the mailroom, and the space where religious services are held.

Having begun by addressing a female



Photos by Judy Griesedieck, San Jose Mercury News

A prisoner looks out of her cell during lockup at the California Institute for Women.

prisoner's right to adequate medical care, statutorily-mandated alternatives to incarceration, timely pregnancy testing, due process rights and constitutional remedies to overcrowding, the Women Prisoners Rights Project has touched on only a few of the most vulnerable areas of prisoners' rights. The list of concerns is endless. Central to any improvement is CDC's response to the needs of the ever-increasing population. At its present growth rate of 25 inmates per week, CIW absorbs the facility's original design capacity every nine months. Despite voter-approved prison construction bonds totaling $795 million, CDC, in its ever-present shortsightedness regarding women, has allotted only 450 beds for women, out of the 19,400 beds to be constructed.

The myopia of CDC's administration and allocation of funding has caused CIW (often referred to as the "Disneyland of CDC") to place first in the rate of overcrowding and to experience a rise in the level of violence, assaults and drug use well ahead of similar statistics at men's institutions.

The Women Prisoners Rights Project is committed to investigating, monitoring and, where appropriate, promptly litigating questionable responses to overcrowding and numerous other serious, unconstitutional conditions which have become an intolerable fact of life at CIW. But more importantly, the Project has communicated relevant constitutional rights to these women and they have responded by acting on their own to protect their rights. ■

Although justified by prison officials as necessary for the "safety and security of the institution", the intention and effect are plainly punitive.

Rebecca Jurado is a staff attorney with the Southern California ACLU, hired to research and litigate the conditions of women's imprisonment in California.

The Pretrial Services Resource Center announces a series of five regional seminars to be held during 1986 to address the problem of jail crowding. The executive seminars will be organized to assist teams of officials from selected local jurisdictions in planning systemwide strategies to alleviate crowded jail conditions. The series is sponsored by the U.S. Department of Justice's Bureau of Justice Assistance (BJA), and preference will be given to local governments receiving BJA block grant funds to reduce crowding through population-reduction techniques. However, other sites are also encouraged to apply.

The 2-day seminars will focus on local jail population management groups and their potential for addressing the crowding problem, jail use planning as a problem-solving technique, jail population and system information needed for analysis of crowding causes, and programs and procedures that have been used to safely reduce jail populations and alleviate crowding. Teams will be assisted in developing action plans for their respective jurisdictions, including timetables and assignment of responsibilities.

Jurisdictions interested in participating in one of these seminars should contact Andy Hall at the Pretrial Services Resource Center, 918 F Street, N.W., Suite 500, Washington, DC 20004-1482, or phone (202) 638-3080, as soon as possible. ■

Neglect of Prisons Reaps High Costs for Society

Riots are the voices of the unheard.

—Martin Luther King, Jr.

Alvin J. Bronstein

Why shouldn't people in penitentiaries be taken out and shot down like dogs - which is the West Virginians' philosophy?

I was asked that question in Charleston, West Virginia, on a previously scheduled speaking tour about ten days after the January 1-2, 1986, uprising at that state's penitentiary in Moundsville. In an interview for their "Perspective" feature, the Editor of the Charleston *Gazette* asked me that tongue-in-cheek and provocative version of the question I am most often asked: Why should we care about prison conditions?

From Attica to Moundsville, prison conditions have been the root cause of prison riots. Since the fall of 1985, there have been at least ten major prison disturbances in Oklahoma, Indiana, Tennessee, Virginia, West Virginia, Michigan and the District of Columbia, resulting in the loss of at least four lives, scores of injuries and millions of dollars in damaged property. The common theme has been that prisoners became tired of terrible living conditions, tired of unkept promises of change, and tired of being treated like animals. The fragile order that is maintained in most prisons explodes into a riot; an inexcusable yet understandable response to the frustration and anger caused by years of neglect. Most people believe that prisoners, after all, have broken the law, and get what they deserve. Most people do not care if prison conditions are harsh or even unconstitutional, until perhaps a friend or family member goes to prison. To say that Moundsville was unconstitutional, having been declared so by a state court judge in June of 1983, puts it in the abstract. I would rather say that the conditions in Moundsville which led to the uprising were simply uncivilized. In his June 21, 1983, opinion, Judge Arthur Recht, Circuit Court of Marshall County, West Virginia, found, among other things:

The only common theme has been that prisoners became tired of terrible living conditions, tired of unkept promises of change, and tired of being treated like animals.

- that two prisoners were confined to a 35-square-foot cell (the size of a large closet) for 17-18 hours a day and that all but 14 square feet were taken up by bunks, a sink and an open toilet;
- that the entire facility was infested with rats, lice, fleas, maggots and roaches and "the living areas included a proliferation of rat feces and dead rats with lice and fleas;"
- there was raw sewage in the living areas and broken plumbing; the absence of hot water was the rule rather than the exception;
- the heating and ventilation systems were so antiquated and inadequate that the temperature in some cells was 110 degrees in the summer and 28 degrees in the winter;
- the medical, dental and mental health care was grossly inadequate, much of it being provided by inmates;
- the entire institution was a fire hazard and totally out of compliance with state fire codes;
- the food was unsanitary and inadequate - the only utensil provided was a plastic spoon, forcing inmates to eat much of their food with their hands.

The cumulative result of those conditions is an unconstitutional prison. It is also an uncivilized prison and if we treated zoo animals in a similar manner the public would be outraged. United States Senator Jeff Bingaman, at the time Attorney General of New Mexico, wrote in his official report on the tragic 1980 riot at the Penitentiary in Santa Fe:

If state officials persist in running an illegal prison, it ought to be closed as well.

Throughout its history, the Penitentiary has suffered from neglect. The New Mexico prison has always waited at the end of the line for public money, and elected officials have turned their attention to the ugly problems of the Penitentiary only when the institution has erupted in violence and destruction.

* * *

The Penitentiary can be repaired and even a bureaucracy can be repaired. But the men who, day by day for year after year, have to look over their shoulder for the man with the knife, who lack enough opportunity to make decisions in their daily lives that they forget how to decide - these men cannot be repaired. They are forever broken by a system designed to correct them.

There is considerable evidence that prison is a dehumanizing experience which serves to debilitate the imprisoned. For the vast majority who will eventually return to society, the prison experience isolates and alienates, making reintegration as a useful citizen difficult. As a result of this terrible treatment while in prison, the ex-offender often returns to society more dangerous and more hostile than when he or she went in, which serves no one's interest.

"The medical, dental and mental health care was grossly inadequate, much of it being provided by inmates."

Prison is, after all, the largest power that the state exercises in practice on a regular basis over its citizens. If we claim to be a civilized and democratic society, we should care about prison conditions because it is only fair and just. The Constitution does not only offer its protection to rich people or white people or law-abiding people. It says *all* people and that is what it means. If we are to be a law-abiding and lawful society, then the protection of the law must be afforded to everyone. When we deprive people of liberty, we ought to do it rationally, we ought to do it lawfully, and we ought to do it with a sense of justice. How else can we condemn prison riots?

The penitentiary at Moundsville has been an unconstitutional and therefore illegal institution for years. If someone runs an illegal gambling establishment or an unsafe theater, we close it down. If state officials persist in running an illegal prison, it ought to be closed as well. The prisoner sitting in a dank, rat-infested and filthy cell understands that we apply the law one way for private citizens, especially if they are poor, and another way for state officials. How can he not be frustrated and angry?

With good cause, prisoners perceive that West Virginia Governor Arch Moore and former Governor Jay Rockefeller were just as responsible for the rioting and deaths at Moundsville as the prisoners, and just as guilty of being law violators as those they locked up for breaking the law. How will they learn to obey the law when the return to the free world?

Attorney General Bingaman answered well the question of why we should all care when he concluded his report on the Santa Fe riot by saying:

If New Mexico's heritage of rich and deep familial and community roots is to be realized, communities must play a part in housing, resocializing and accepting persons who have violated the community's laws. If New Mexico does not dramatically change its philosophy and practices about how to deal with criminals, there will be more tragedies and the need for more reports by Grand Juries, by Citizens' Panels, and by the Attorney General. Ultimately, there will be more bureaucracy, more waste of taxpayers' money for architects and buildings, more crime and more human waste.

AP/Wide World Photos.

The West Virginia Penitentiary at Moundsville, built in 1866.

The real question for us is whether this country, as the richest society in history, will take steps within its means to rectify a festering and dangerous situation in its prisons, or whether it will pay an even heavier price, sooner or later, for neglecting it. ■

Execution for Juvenile Crime Raises Questions of International Law

Mary E. McClymont

Another prisoner has been executed in the United States, raising the state-sanctioned blood bath to a total of 51 since the death of Gary Gilmore in 1977. This time, there was a special ugly twist to the death. This time, a young man, convicted of a capital crime while he was still a juvenile under 18 years of age and too young even to vote, was killed in the state of South Carolina. This time, the United States committed a violation of international human rights law by permitting an execution that would have been found illegal by many of our allies and by governments whose human rights records the U.S. frequently condemns—the Soviet Union, South Africa, Poland, Libya, and Iraq, to name only a few.

James Terry Roach was executed in the electric chair at 5 a.m. on January 10, 1986, while a handful of South Carolina citizens and one of Roach's lawyers looked on. Along with two co-defendants, Roach was convicted of two murders in 1977, at the age of 17. One of his co-defendants, Ronald Mahaffey, was a boy of 16 and the other, J.C. Shaw, an adult. At the time of the crimes, Roach had experienced no more than minor skirmishes with the law; his worst offense was taking his father's car to visit a brother in Florida. The other boy, Mahaffey, turned state's evidence and received a life sentence. Roach, however, was not so lucky. He was sentenced to death along with Shaw, and fought his conviction while sitting on South Carolina's death row.

Sadly, the flood gates appear to have been reopened, and the sickening brutality has begun anew.

There was an almost childlike air about Terry at the end as he told ABC's Nightline reporter—"I don't want to die"—and expressed concern for the victim's family. In his final statement he reiterated his remorse and hoped that he had been forgiven.

The execution of Roach is an even greater travesty of justice because of two simple facts: Roach was borderline mentally retarded and, like his mother, likely suffered from Huntington's Chorea, a degenerative brain disease. Thus, recent evidence showed that although his chronological age at the time of the crime was a youthful 17, he in fact functioned at the mental age of an 11 or 12 year old. There was uncontroverted evidence that Roach and Mahaffey were clearly led by Shaw; furthermore, the identity of the actual "triggerman" was never clearly established.

At this writing, 31 other young people in 15 states await execution, condemned to death like Roach for crimes they committed while children. Until Roach, no juvenile offender had been executed in the U.S. on an involunary basis since an execution in Texas in 1964.[1] According to Victor Streib, a Cleveland State University law professor, 270 juvenile offenders were executed in this country between 1642 and 1961.

Sadly, the flood gates appear to have been reopened, and the sickening brutality has begun anew. In the denial of Roach's final stay request, the Supreme Court could offer no more than two dissenting opinions. The vengeful murders of youthful offenders by the purported moral leader of the world simply runs contrary to the practice of

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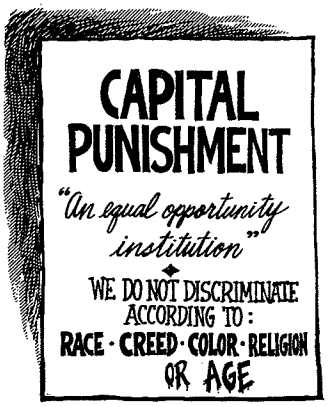
[1]Charles Rumbaugh was killed in September of 1985 by the state of Texas for a crime he committed while a juvenile. He, however, had prohibited his lawyers from pursuing his appeals.

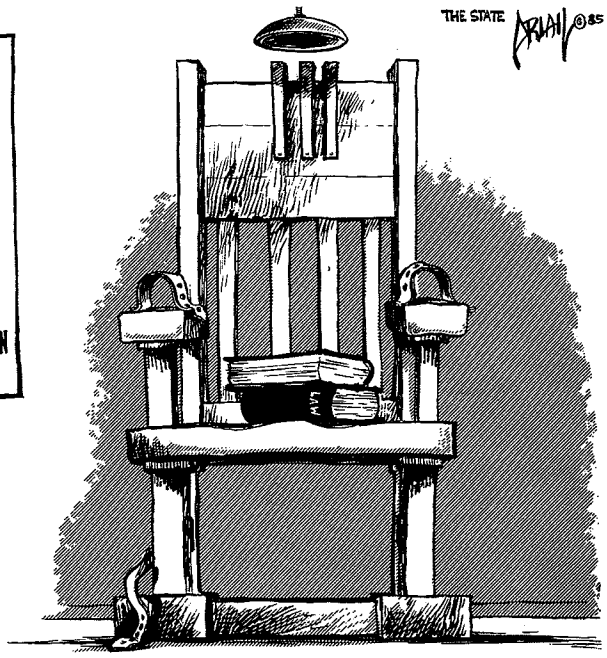
—continued from previous page
many civilized and not-so-civilized nations.

According to data collected from various sources by Professor Joan Hartman of the University of Washington and by Amnesty International, 28 countries have abolished the death penalty worldwide. An additional 18 permit the use of the death penalty only for exceptional—such as military—crimes, thereby excluding juveniles. Among the countries reporting to the United Nations which still retain the death penalty, as many as 41 explicitly forbid the execution of persons who committed crimes as juveniles. They range in political cultural diversity all the way from the Soviet Union and Poland, to Morocco and Libya, to South Africa and Japan.

The U.N. further reports that an estimated 81 nations performed executions between 1973 and 1982; however, only two of the persons killed were juveniles. Amnesty International reports that, since 1979, although over 11,000 persons were executed in 80 countries, only six juveniles were executed in only four nations, including the U.S. This data evidences a consistent practice among nations that these youthful deaths will not be tolerated by law-abiding countries.

Significantly, three major international human rights documents explicitly prohibit the execution of persons who commit crimes while under 18 years of age. The debates accompanying the development of two of the documents, the International Covenant on Civil and Political Rights and the American Convention on Human Rights, reveal that these documents served only to codify an already established customary international law norm—that juvenile offenders who commit crimes while under 18 years of age are not to be executed. Although the documents do not necessarily prohibit the death penalty *per se*, they unambiguously forbid the execution of juveniles like Terry Roach.[2] Hence, about two-thirds of the nations of the world either prohibit the death penalty through their laws or have ratified these two conventions which prohibit juvenile executions. It is also worth noting that various U.N. resolutions make clear that executions for offenses committed under 18 are impermissible in the modern world.[3]





Robert Ariail/The State, Columbia, S.C.

As of December 2, 1985, it was clear that the U.S. courts were unwilling to provide relief for Terry Roach. His lawyers, J. Michael Farrell and Grady Query, had strenuously pursued all avenues of appeal and had petitioned and been foreclosed by the U.S. Supreme Court three times. They had been assisted in their efforts by lawyer David Bruck, a leading expert on death cases from South Carolina who has written widely on juvenile capital cases, and by another South Carolina lawyer, John Blume.

Realizing hope was dim in the domestic courts and after discussions with a number of experts in human rights law and capital cases, we decided to try a new approach. David Weissbrodt, an international law professor at the University of Minnesota and a leading human rights law expert, and I filed a petition on Roach's behalf with the Inter-American Commission on Human Rights, an official branch of the Organization of American States. The Commission is charged with promoting the observance of human rights throughout the Americas and has jurisdiction over the U.S. as a member of the O.A.S.

Hence, about two-thirds of the nations of the world either prohibit the death penalty through their laws or have ratified these two conventions which prohibit juvenile executions.

We alleged in our complaint, filed in early December, that the U.S., by executing Roach, would violate the American Declaration on the Rights and Duties of Man, as it is informed by customary international law. The Declaration, in part, guarantees the right to life, and incorporates a provision on the special protection of children in the American countries. In our view, the Declaration should be interpreted and informed by the customary law norm that, as evidenced in the above discussion, we believe clearly exists and prohibits juvenile executions. Our claims have been publicly supported by such groups as the American Civil Liberties Union, Nobel

[2]As with so many other human rights documents, the U.S. has signed but not ratified these two covenants. However, there is evidence that even the U.S. reprsentatives working on the development of these documents insisted that the U.S. would never allow the killing of juveniles or pregnant women.

[3]Even in the U.S., such prestigious, established organizations as the American Bar Association and the American Law Institute publicly oppose imposition of the death penalty for crimes committed while minors. At least seven jurisdictions in the U.S. as of this writing set 18 years as a limitation on the exercise of the death penalty. Fifteen additional states set other, but lower, limits on the use of the death penalty. Ironically, a bill has been introduced in the South Carolina legislature forbidding executions for crimes under 18. If it passes, it will obviously be too late for Terry Roach.

Peace Prize laureate, Amnesty International, and the International Human Rights Law Group.

Because of the imminent execution, we asked the Commission (which will likely not decide our claims before its regular session in April) to issue provisional relief. Prompt action was taken. Cables were immediately sent by the Commission on several occasions to Dick Riley, Governor of South Carolina, and George Schultz, Secretary of State, urging that the Roach execution be stayed pending the Commission's decision on our claims.

These and other vigorous attempts by Roach's lawyers and many others fell on deaf ears. None less than the U.N. Secretary-General, Mother Teresa, the O.A.S. Secretary-General and former President Jimmy Carter made appeals on Roach's behalf. The Governor decided against both clemency and a reprieve, despite the pending international claims and new evidence about the Hunting-

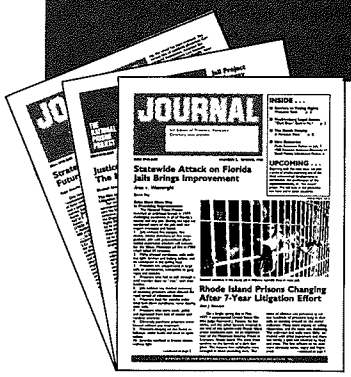
None less than the U.N. Secretary-General, Mother Teresa, the O.A.S. Secretary-General, and former President Jimmy Carter made appeals on Roach's behalf.

ton's disease. The courts, including the U.S. Supreme Court, once again refused Roach, denying his final request for a stay of execution only 7 hours before his death. Justices Brennan and Marshall were alone in their dissent.

Even now, we plan to pursue our international claims. Considerable criticism from the international community over this death has not abated. The campaign to raise the consciousness of the American public to rectify this inglorious display of vengeful arrogance will continue.

We hope that one day soon it can be said that Terry Roach was not killed in vain. We further hope that the time will soon come when this country will refuse to add further to the barbarity which, by definition, surrounds capital crimes, and will roundly condemn any state-sanctioned killing of its people, especially of its adolescents. ■

PUBLICATIONS



The National Prison Project JOURNAL, $15/yr. $2/yr. to prisoners. Back issues, $1 ea.

The Prisoners' Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. NEW 7th Edition, published April 1986. Paperback, $20 prepaid from NPP.

Offender Rights Litigation: Historical and Future Developments. A book chapter by Alvin J. Bronstein published in the **Prisoners' Rights Sourcebook** (1980). Traces the history of the prisoners' rights movement and surveys the state of the law on various prison issues (many case citations). 24 pages, $2.50 prepaid from NPP.

The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists only cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia). Periodically updated. $3 prepaid from NPP.

Bibliography of Women in Prison Issues. A bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in jail, the problem of incarcerated mothers, health care, and general articles and books. $5 prepaid from NPP.

A Primer For Jail Litigators is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. Relevant case citations and correctional standards. 1st edition, February 1984. 180 pages, paperback, $15 prepaid from NPP.

The **Jail Litigation Status Report** gives a state-by-state listing of cases involving jail conditions in both federal and state courts. The **Report** covers unpublished opinions, consent decrees and cases in progress as well as published decisions. The **Report** is the first nation-wide compilation of litigation involving jails. It will be updated regularly by the National Jail Project. 1st Edition, published September 1985. $15 prepaid from NJP.

ACLU Handbook, The Rights of Prisoners. A guide to the legal rights of prisoners, pre-trial detainees, in question-and-answer format with case citations. Bantam Books, April 1983. Paperback, $3.95 from ACLU, 132 West 43rd St., New York, N.Y. 10036. Free to prisoners.

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HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since December 31, 1985. Further details of any of the listed cases may be obtained by writing the Project.

Black v. Ricketts—This case challenged the conditions of confinement in the Administrative Segregation Unit at the Arizona State Prison in Florence and was settled with a consent decree in June 1985. Our claim for attorneys' fees, costs and expenses was settled and paid in November. In December, the defendants attempted to bar NPP lawyers from the prison claiming we were no longer needed because there was a compliance monitor in place. We quickly obtained an order enjoining the defendants from interfering with our access to prisoner clients.

Cody v. Hillard—This case deals with a variety of conditions at the South Dakota State Penitentiary. The state appealed that part of the previous favorable decision which prohibited double-celling. At the end of September, the Eighth Circuit denied defendants' request for a stay of the overcrowding order. The appeal was argued in January 1986.

Canterino v. Wilson—This case successfully challenged conditions at the Kentucky Correctional Institution for Women. We recently received the final payment of attorneys' fees.

Palmigiano v. Garrahy—This case challenges conditions in the entire Rhode Island prison system. After a 3-day compliance hearing held in December, the court granted our motion to immediately enjoin triple-celling of detainees at the Intake Center and reserved decision on the balance of the issues.

Whitley v. Albers—Our role in this case was to draft and file an amicus brief in the Supreme Court on behalf of the Pennsylvania Prison Society and the Correctional Association of New York dealing with the legal standard to be applied where deadly force is used in a prison emergency. In March, the Court held that prison officials were justified in using deadly force in a riot situation, on the facts in this case.

Shapley v. O'Callaghan—This case challenges conditions of confinement at the Nevada State Prison. In December we filed motions to gain access to the institution (after being denied by defendants and the magistrate) and to extend the settlement period and monitor for another year.

Jerry M. v. D.C.—This case deals with conditions in the District's juvenile facilities. Recently the court certified the class, denied defendants' motion to dismiss the case and set a trial date for July 1986.

Inmates of D.C. Jail v. Jackson—By late fall, the District of Columbia reduced the jail population to the numbers required by the August consent decree. However, the crisis continues because the District has failed to develop alternatives to incarceration and has already exceeded the population cap on one occasion. To avoid exceeding it again, the Department has resorted to keeping prisoners on buses parked outside the jail. ■

Alleviating Jail Crowding: A Systems Perspective, written by Andy Hall of the Pretrial Services Resource Center for the National Institute of Justice, provides an in-depth discussion of the range of options available to criminal justice professionals who can help alleviate jail crowding while safeguarding public safety. The experience of many jurisdictions demonstrates that such options can be effective in addressing the jail crowding problem. The report provides information to guide data collection efforts, identifying what information is needed, how it should be collected and how it should be analyzed to support the decision-making process. Additional suggestions concerning the implementation of jail population reduction strategies are also provided. "It's really the first good piece for local governments to use to solve their population management problems short of new construction," said Ed Koren, Director of the National Jail Project.

The report is available from the Pretrial Services Resource Center, 918 F Street, N.W., Washington, DC 20004-1482, (202) 638-3080, for $3.

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New Prisoners' Assistance Directory Available From NPP. Seventh edition.
See PUBLICATIONS, p.15.