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**UNITED STATES DISTRICT COURT**  
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 ERNEST DEWAYNE JONES,  
 12 Petitioner,

13 v.

14  
 15 KEVIN CHAPPELL, Warden of  
 16 California State Prison at San  
 17 Quentin,  
 18 Respondent.

Case No. CV-09-2158-CJC  
**DEATH PENALTY CASE**

**EXHIBITS IN SUPPORT OF  
 PETITIONER'S OPENING BRIEF  
 ON CLAIM 27**

**VOLUME 2**

## Exhibit 3

Declaration of Leonard Rice, *Andrew Lancaster et al., v. James E. Tilton et al.*,  
Northern District of California Court  
Case No. C79-01630 WHA, 2008

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ANDREW LANCASTER, et al.,  
Plaintiff,  
vs.  
JAMES E. TILTON, et al.,  
Defendant

Case No.: No. C 79-01630 WHA  
DECLARATION OF LEONARD  
RICE

I, Leonard Rice, declare:

**I. Introduction, qualifications, and methodology**

**A. Qualifications**

1. I am a Registered Sanitarian, with a Bachelor of Science degree in environmental health and a Master's degree in environmental science. I have worked in the environmental health field for more than forty years. I have completed environmental audits and inspections as an expert on behalf of both prison officials and prisoners. I

1 have conducted environmental audits in correctional facilities or jails in approximately a  
2 dozen different states since 1990.

3           2. I am a past president and remain a member of the National Environmental  
4 Health Association (NEHA). I also served for more than a decade on the executive  
5 committee of that organization, and for three years on the Technical Editorial Advisory  
6 Board of NEHA's Journal of Environmental Health. I am a member of the American  
7 Correctional Association and the American Jail Association. Since 1994, I have been an  
8 environmental consultant to the United States Department of Justice (USDOJ), Civil  
9 Rights Division, Special Litigation Section, and have conducted environmental audits for  
10 the USDOJ at numerous correctional facilities and jails. In approximately 2005, I started  
11 work for the Department of Homeland Security, Office of Civil Rights and Civil  
12 Liberties, inspecting correctional facilities. I have inspected three facilities and done  
13 document reviews for two additional facilities. I have also reviewed proposed standards  
14 for family detention centers for the Department of Homeland Security. A copy of my  
15 Curriculum Vitae is attached as Exhibit A.

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20           3. I have personal knowledge of the facts set forth below, and if called as a  
21 witness, could and would testify to the same.

22  
23           **B. Description of "Death Row" Units at San Quentin**

24           4. Condemned prisoners at San Quentin are housed in three housing units:  
25 North Segregation (North Seg), the Adjustment Center (AC), and East Block. There are  
26 68 cells in North Seg, 102 in the AC, and approximately 510 in East Block.  
27  
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1           5. All prisoners in these three units are single-celled. Each cell has a  
2 coverless toilet, sink, and bunk. The cells in East Block are 48 square feet; in the AC, the  
3 cells are 56 square feet. *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1394 (N.D. Cal.  
4 1984), *rev'd in part on other grounds*, 801 F.2d 1080 (9<sup>th</sup> Cir. 1986), *cert. denied*,  
5 *McCarthy v. Toussaint*, 481 U.S. 1069 (1987). Food from a central kitchen is placed on  
6 individual trays which are then delivered to prisoners on push carts; the trays are  
7 distributed to their tiers and then the cells. Order Re Motion for Contempt and Motion to  
8 Modify Consent Decree, June 21, 2007, 10:6-9.  
9

10  
11           6. East Block is a five-tier cell block. The block's key physical features and  
12 dimensions have been described previously by Judge Weigel and the Court-appointed  
13 monitor in this case. *Toussaint v. McCarthy*, 597 F.Supp 1388; Fourth Report of the  
14 Monitor, August 1, 1989 (Fourth Report), at 18-19. These descriptions, as well as my  
15 personal observations, form the basis for this and following two paragraphs. East Block  
16 has five rows, or tiers, of cells stacked vertically. *Toussaint*, 597 F. Supp. at 1394.  
17 "From a top view, the cells are arranged in two rows parallel to the center line of the  
18 building," separated by a service alley (also known as a pipe chase). Fourth Report at  
19 18:15-17. The two sides are referred to as "Bay Side" (for the tiers facing San Francisco  
20 Bay to the east) and "Yard Side" (for those that face the San Quentin upper yard to the  
21 west). In total, then, there are ten tiers of cells in East Block. Each tier is approximately  
22 280 feet in length (*id.* at 18:14-15), and I was told each contains approximately 54 cells.  
23 I saw that, at approximately the mid-point of each tier, cells have been converted to  
24 inmate showers. The cells on each side of the showers on each tier are referred to,  
25  
26  
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1 collectively, as the "front bar" and "back bar," with the former designation used for those  
2 cells closer to the block's front door. At the end of each tier is a "cart room," used for  
3 storage by staff. Above the fifth tier is an area referred to as the sixth tier. I was  
4 informed that this tier has no cells and is in part used for storage, including condemned  
5 prisoners' property and legal materials.  
6

7 7. Each cell in East Block has bars and a protective metal screen on its front.  
8 Outside the cells, except on the bottom floor, runs a walkway, also commonly referred to  
9 as the tier. The tier walkways are four feet, six inches in width. Fourth Report at 18:17-  
10 19. On the outer edge of the walkway, away from the cell front, the walkway is enclosed  
11 by metal railings and bars. *Toussaint*, 597 F. Supp. at 1394. On the ground floor of the  
12 block, a "broadway" roughly 15 feet wide occupies the area between the cell fronts and  
13 the outer wall of the building. Fourth Report at 18:19-22. On this Broadway, several  
14 holding cells (also known as holding cages), used for the temporary placement of  
15 prisoners, are aligned against the outer wall. The first tier also contains, in place of  
16 several inmate cells, staff offices and, on the yard side of the unit, rooms used for health  
17 care.  
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22 8. Across the open space from the tiers, on the inside of the outer walls of the  
23 building and opposite the cell fronts, are walking platforms called gunwalks or gunrails.  
24 *Toussaint*, 597 F. Supp. at 1394. The gunrails are three feet, three inches wide and are  
25 patrolled by armed correctional officers. Fourth Report at 18:22 - 19:2. The outer wall  
26 of the blocks opposite the cell fronts also contains windows and the ventilation units for  
27 the block. The cells themselves have no windows. *See Toussaint*, 597 F. Supp. at 1394.  
28



1 9. Condemned prisoners who use wheelchairs are usually placed on the Yard  
2 Side on the bottom tier, near the wheelchair accessible shower.

3 **C. Inspection of San Quentin State Prison and California State Prison -**  
4 **Solano's Laundry Facility**

5 10. On January 5, 2008, I conducted an inspection at San Quentin State Prison.  
6 From approximately 8:00 a.m. to 2:20 p.m. I inspected East Block. In East Block, I  
7 walked several tiers on the "Yard" and "Bay" sides. From approximately 2:20 p.m. to  
8 5:00 p.m., I inspected the Adjustment Center. I inspected most of the tiers in the  
9 Adjustment Center.  
10

11  
12 11. During my time at San Quentin, I reviewed written documents, including  
13 records of daily information that are used by the prison to document certain services  
14 provided to prisoners. I took photographs and measurements, as discussed below. I also  
15 spoke with prisoners and correctional officers. In total, I spoke to approximately 30  
16 prisoners. Nearly all of these prisoners were selected at random; I simply approached  
17 their cells and questioned them. I also spoke with a few inmates who called out to me or  
18 where I saw something I wanted to investigate further.<sup>1</sup>  
19  
20

21 12. On January 6, 2008, from approximately 9:00 a.m. to 11:25 a.m., I  
22 conducted an inspection of the Prison Industries Authority's laundry processing facility  
23 located at California State Prison- Solano (Solano). Mr. John Arnold, who was identified  
24

25  
26 <sup>1</sup>I did not tour the condemned prisoner housing in North Segregation because I did not  
27 have time to do so in the nine hours during which I was allowed access to San Quentin. I could  
28 not inspect the sixth tier on my tour of East Block because of a lead remediation project that is  
ongoing there. I was informed that the area is off-limits to those who are not working on this  
project and who are not authorized to be there.

1 to me as the Superintendent of Solano's laundry processing facility, accompanied me on  
2 my inspection.

3 13. Attached as Exhibit B to this Declaration is a list and description of the  
4 pictures I took at San Quentin on January 5 that I rely on in this declaration. Attached as  
5 Exhibits C through EEE are true and correct copies of those pictures, as listed in Exhibit  
6 B.  
7

8 **II. San Quentin's failure to provide the basic minimum of necessary cleaning**  
9 **supplies to prisoners in East Block and the Adjustment Center poses an**  
10 **unacceptable risk to these prisoners**

11 **A. Sanitation and hygiene requirements for prisoners' cells**

12 14. To ensure a minimum standard of health and to protect against the outbreak  
13 of infectious disease, every correctional institution should have clear, enforced  
14 requirements and standards for prisoners' hygiene and sanitation within their cells and  
15 should regularly and reliably provide adequate supplies for the prisoners to meet those  
16 requirements and standards.  
17

18 15. At the very least, prisoners should regularly be provided a disinfectant  
19 cleanser and some type of mop that can clean their cells' surfaces from the inevitable  
20 build-up of bacteria, dust, and filth. Bath soap or shampoo is not an acceptable  
21 alternative to disinfectant because it does not eliminate bacteria. Prisoners should be  
22 provided some type of sponge or scrub pad to use for surfaces, such as the toilet, that  
23 cannot be mopped. Prisoners should be given the means of removing dust and heavy dust  
24 build-up in their cells, including on their cells' vents. Gloves should be provided to  
25 protect prisoners, especially medically compromised ones, from the bacteria inevitably  
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1 encountered while cleaning. Depending upon the type of cleaner provided, a bucket or  
2 water-collection basin may be required for rinsing off disinfectant and soil. These are the  
3 most basic cleaning supplies that should be provided to all prisoners.

4  
5 16. Further, measures must be in place to ensure that prisoners are regularly  
6 provided these supplies and that they are replaced when depleted, worn out, and  
7 otherwise unusable. It is not acceptable to provide these supplies only on prisoners'  
8 requests. It is also unacceptable to make them only intermittently available. These are  
9 the basic minimum requirements: every correctional facility must take affirmative steps  
10 to ensure that basic cleaning supplies are consistently available and that they are reliably  
11 provided to prisoners. The American Public Health Association's Standards for Health  
12 Services in Correctional Institutions state, for example, that written policies and  
13 procedures must be in place and enforced to assure that inmates have cleaning supplies  
14 available to them on a regular basis and not less than weekly so that inmates may clean  
15 their cells.  
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19 17. Without such measures in place, condemned prisoners living in San  
20 Quentin are at significant risk from the constantly-circulating pathogens that are  
21 necessarily present when hundreds of individuals live together. While the risk is serious  
22 for all prisoners, it is that much more significant for medically-compromised prisoners  
23 such as diabetics, asthmatics, or other immunocompromised inmates who live in the  
24 housing units.  
25  
26

27 **B. The state of sanitation and hygiene at San Quentin makes cell**  
28 **sanitation and hygiene extremely challenging and the enforcement of**  
**standards critical**



1           18.    The abysmal level of general sanitation in East Block makes it crucial that  
2 hygiene and sanitation standards are enforced in prisoners' cells if even the most basic  
3 standards of public health and human decency are to be maintained. I cannot emphasize  
4 enough that the need to ensure prisoners are consistently provided with adequate cleaning  
5 supplies is made all the more critical in a housing unit such as East Block, whose general  
6 sanitation falls well below any acceptable standard for human habitation. The state of  
7 general sanitation in the housing unit is critical to understanding the health and safety  
8 risks currently faced by inmates with respect to the hygiene of their own persons and  
9 cells. General sanitation conditions in San Quentin's East Block are deplorable, well  
10 below contemporary standards of decency, and dangerous to the health of prisoners  
11 housed there.

12           19.    Structurally, the East Block housing unit is in significant disrepair in ways  
13 that make maintaining proper sanitation in the unit, and consequently in prisoners' cells,  
14 extremely difficult, if not impossible in some instances. The most glaring and shocking  
15 structural deficiencies in East Block are the showers, which collectively cause serious  
16 sanitation problems for the entire unit. Shower stalls are located in the middle of each of  
17 the tiers. On each of the tiers above the first tier, water flows out of the shower stall onto  
18 the tier and then cascades to the tiers below. The water then collects on the first tier,  
19 immediately adjacent to where East Block prisoners are seen for their medical  
20 appointments. On the first tier, the water flows directly into, among other places, the  
21 holding cages where prisoners are placed to wait for their medical appointments. *See*  
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1 Exh. Y. During my tour of East Block, water from the upper tiers fell as if it were a light  
2 rain of scummy, filthy water.

3 20. The bars on the tiers in front of the showers are extremely corroded and  
4 degraded from the cascading dirty shower water. Some of these bars are so corroded that  
5 it is impossible to clean them, even if cleaning were attempted. Mold and mildew  
6 populate the tier bars, floors, and ceilings in front of the showers. Congealed strands of  
7 muck and slime, composed of soap scum, hair, and bodily detritus dangle from the tier  
8 bars and ceilings. See Exhs. T, U, & V. It is readily apparent that these strands, like  
9 stalactites, have formed over a long period of time as water carrying shower debris has  
10 flowed over them. These slime stalactites are perfect breeding grounds for mold and  
11 bacteria.  
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15 21. The water that flows over the tiers is dirty shower water, made dirtier as it  
16 picks up particles from the tier floors and bars while flowing over them. At any given  
17 time, this water is likely to contain used soap and shampoo; body, head, pubic, and  
18 shaved hair; sloughed-off skin and detritus; blood particles from open sores and cuts,  
19 including those incurred while shaving<sup>2</sup>; and other bodily particles that are naturally  
20 carried away by shower water, such as saliva, mucus, and pus. The filth of this water is  
21 evident from stains on plastic sheeting, apparently hung in an unsuccessful effort to  
22 shield passers-by from the falling water. See Exhs. FF & EE.  
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27 <sup>2</sup>I was informed on my tour that condemned prisoners are allowed access to a razor only  
28 while they are showering. Shaving in the shower is therefore a regular and frequent occurrence.



1           22. This shower water spreads prisoners' viral and bacterial pathogens  
2 throughout the unit as it falls over the tiers. The pathogens are easily picked up and  
3 spread throughout the unit by individuals who walk through the water, as well as by  
4 physical implements, such as carts and filthy mops and buckets, that are pushed through  
5 it. During my tour of East Block, it was not possible to walk the length of the first tier  
6 without walking through water that had fallen from above. Additionally, like with a  
7 waterfall, the cascading water aerosolizes into a mist as it falls. This micro-mist  
8 circulates throughout the unit, further spreading pathogens.  
9  
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11           23. Based on the condition of the area in front of the showers, it is clear that  
12 this glaring problem has persisted for many years, with little effort to solve it. An old  
13 gutter system is in place in some areas, but it has obviously done nothing to help, much  
14 less solve, the problem.  
15

16           24. These conditions pose serious health and safety risks not only for the  
17 prisoners who live immediately adjacent to the showers on each tier, but to all the  
18 prisoners who eat, receive medical appointments, and are expected to maintain a basic  
19 level of personal hygiene and sanitation in the unit. These glaring conditions fall well  
20 below any conceivable standard of sanitation and hygiene. I am shocked that they are  
21 allowed to persist.  
22

23           25. In addition to this shocking, central feature of East Block, there is a litany  
24 of unsanitary conditions that render adequate cell sanitation extremely challenging. For  
25 example, water also flows out of the shower on the first tier of Yard Side, which is  
26 designed for the use of prisoners with disabilities. Dirty water from this shower pools  
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28

1 and collects nearby, and nearby gutters have caked debris and scum that is not cleaned.  
2 *See* Exhs. II-LL. Further, during my inspection, water persistently rained down on the  
3 first tier of Bay Side, coming from either outside the unit or from very leaky pipes. I  
4 observed water falling into, and pooling in the bottom of, a wall-mounted box that is used  
5 to collect written requests for medical care. Two medical request forms were under water  
6 in this box. Water in this area was also streaming over a light switch cover, creating a  
7 serious shock hazard. My strong impression was that it was actually raining inside the  
8 unit.  
9  
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11 26. Debris and garbage fall and collect on East Block's first tier. I saw this  
12 debris and garbage on and about the prisoner holding cages, on objects such as laundry  
13 carts that are kept on the ground floor, and in the plexiglass shields that cover some  
14 windows. *See* Exhs. S, MM-OO, SS-TT. The first tier, Yard Side staff bathroom,  
15 located next to a prisoner medical clinic and near prisoner cells, has printed signs stating  
16 "HEALTH HAZARD DO NOT ENTER" and warning of potential lead, asbestos, and  
17 mold. *See* Exh. X. There was no lock on this door and the door was ajar. *Id.* A  
18 ventilation fan grate on the outside wall of this tier was filthy, covered with much  
19 accumulated dirt, dust, and slime. *See* Exh. CC. As discussed below, there are also  
20 accumulations of bird feces in a number of locations in the unit.  
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24 27. In spite of this filth, I did not see many mops in East Block. Those that I  
25 did see were dirty, with dirty mop buckets. *See* Exh. DD.  
26

27 **C. The conditions of prisoners' cells at San Quentin makes sanitation and**  
28 **hygiene extremely challenging and the enforcement of standards**  
**critical**



1           28. In addition to the generally low levels of sanitation in East Block, there are  
2 specific conditions within and around prisoners' cells that exacerbate the challenge of  
3 maintaining a hygienic cell environment and underscore the need to ensure that proper  
4 cleaning supplies are distributed.  
5

6           29. First among these conditions is the apparent shortage of toilet paper in East  
7 Block. As I walked the tiers, I observed that homemade signs indicating a prisoner  
8 needed toilet paper were affixed to the outside of many prisoners' cells. Prisoners with  
9 whom I spoke and records that I reviewed confirmed that there are times when it is  
10 difficult for prisoners to get adequate amounts of toilet paper. If a prisoner cannot  
11 hygienically wipe himself after defecating in his cell, maintaining adequate sanitation in  
12 the cell will prove extremely difficult.  
13  
14

15           30. Second, the vents in prisoners' cells – both those that were clean and those  
16 that were filthy – exhibited significant dust accumulation. See Exhs. F, I & O. While I  
17 did not inspect East Block's ventilation system, this dust build-up indicates that there  
18 have been extended periods of time when the ventilation system was not properly  
19 maintained. The level of dust build-up that I witnessed would seriously aggravate the  
20 condition of an asthmatic or allergic prisoner. Also, given the prevalence of old bird  
21 feces in East Block, the dust build-up could pose health risks to prisoners because it could  
22 contain aerosolized pathogens from bird feces. See Section IV.A, below.  
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25           31. Third, I noted that the outside of prisoners' cells was often filthy. See Exhs.  
26 UU, GG, HH. Prisoners I questioned on the tour showed me that they could not reach  
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1 these areas to clean and, indeed, some of these surfaces were degraded to the point where  
2 they cannot be adequately cleaned. Dust particles from these filthy areas can be blown  
3 into cells, and aerosolized pathogens drawn in through air currents pose potential health  
4 hazards.  
5

6 32. Fourth, individual prisoners reported conditions in their cells that make  
7 maintaining hygiene extremely difficult, if not impossible. For example, one prisoner in  
8 the Adjustment Center called out to me with a complaint about his mattress and pillow. I  
9 observed that the plastic covering his mattress and pillow were cracked throughout,  
10 exposing the fill inside. *See Exhs. YY & ZZ.* I was informed by a correctional officer  
11 that this mattress and pillow had been used by the cell's previous occupant, before the  
12 current occupant moved in on December 21, 2007. This is completely unacceptable.  
13 Because of degradation and breakage to the plastic, this mattress and pillow are incapable  
14 of being cleaned and sanitized. No prisoner should be using such a mattress. That this  
15 mattress was used by two prisoners in succession presents a perfect scenario for the  
16 communication of viruses, fungi, and bacteria such as Methicillin-resistant  
17 *Staphylococcus aureus* or MRSA. *See Section III.A.I, below.*  
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22 33. In another example, a prisoner on the first tier of East Block's Bay Side told  
23 me that he had a persistent leak in his cell that he believed was the result of water seeping  
24 through the wall from the adjacent "pipe chase." I observed water pooling toward the  
25 back of his cell. When I inspected the adjacent pipe chase, I observed a significant  
26 amount of standing water. *See Exh. WW.* While I cannot identify the source of this water  
27 with certainty, I believe it comes from leaking plumbing that connects through the pipe  
28

1 chase and is therefore likely to contain fecal material from prisoners' toilets. The  
2 collection of sewage water in a prisoner's cell is an unacceptable health hazard.

3 34. Fifth, there is no regular cleaning schedule for condemned prisoners' cells.  
4 Nor does there appear to be any effort made by San Quentin to enforce minimum  
5 standards of hygiene and sanitation in prisoners' cells. From speaking to correctional  
6 officers, the only "rule" regarding the sanitation of prisoners' cells that seems to be  
7 actually enforced is that prisoners should refrain from cleaning the floors of their cells by  
8 flooding them with water until after 10:00 a.m. As was explained to me, this "rule" is in  
9 effect to minimize the dirty water that pours over the tiers during the hours when there is  
10 frequent prisoner and correctional officer movement on the tier.  
11  
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13  
14 **D. East Block prisoners cannot keep their cells acceptably clean because**  
15 **adequate cleaning supplies are not available to them**

16 35. I entered several of the "cart rooms" located on each tier in East Block,  
17 where records and supplies for that tier are kept. In one of these cart rooms, there was a  
18 fairly new-looking bucket of cleaning supplies, which included a small broom, a dust  
19 pan, sponge, spray bottle with a substance labeled "disinfectant," and a toilet brush.  
20 These buckets were not available in all the cart rooms I entered and some of the buckets  
21 did not contain all of the items listed above.  
22

23 36. It was clear to me that, despite the existence of these buckets in some of the  
24 cart rooms, condemned prisoners are not receiving adequate supplies to clean their cells.  
25 Even on the tiers that did have these buckets, the prisoners appeared to have absolutely  
26 no knowledge of their existence and consistently insisted that no supplies were made  
27  
28



1 available even after they had requested them. From my inspection of San Quentin and  
2 my questioning of staff and prisoners I have no doubt that, even when they ask for them,  
3 it is extremely rare for prisoners to receive even the most basic supplies.

4  
5 37. With very few exceptions, the consistent message I received from the  
6 approximately 30 prisoners I interviewed was that they did not receive cleaning supplies  
7 on any regular or reliable basis. I was consistently told by prisoners that if they ever  
8 received supplies to clean their cells it was because they had, out of dogged persistence,  
9 good luck, or a congenial relationship with a responsive officer, been able to get a  
10 correctional officer to track down some detergent or cleaning implement. Prisoners also  
11 consistently reported to me that it was their understanding that correctional officers  
12 whom they asked for supplies did not have any available for them to use. This was a  
13 nearly uniform message from the many prisoners with whom I spoke.  
14  
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16 38. This consistent message was corroborated in several ways. First, I  
17 witnessed several prisoners cleaning their cells. To scrub, they used rags cut from old  
18 towels or other clothing items, or wash-cloths that they purchased from canteen. As a  
19 cleaning agent, they used state-issued bath soap or a homemade slurry solution made  
20 from bath soap and detergent, if they could get it from the canteen.  
21  
22

23 39. Second, correctional officers corroborated prisoners' accounts.  
24 Correctional officers stated that they try to get inmates supplies when requested but that  
25 they are often hard to come by. One officer explained the frequent scarcity of  
26 disinfectant by stating that officers often keep San Quentin-issued bottles of disinfectant  
27 locked in their personal lockers, which are not accessible to other officers who might be  
28

1 looking for them. Another officer attempted to convince me that cleaning supplies are  
2 available by stating that when asked for supplies, he will "scrounge" around to locate  
3 them. Any system that depends on an officer "scrounging" for supplies will not be able to  
4 reliably provide those supplies that are regularly needed to maintain adequate sanitation  
5 in a housing unit.  
6

7 40. Third, I looked through dozens of filled-out forms entitled "Inmate  
8 Segregation Record CDC 114-A" that are kept for each prisoner in the tiers' cart rooms.  
9 This form states that it is a "Record of Daily Activity" and specifically states: "SUPPLIES  
10 - Cleaning and personal hygiene supplies shall be offered on a weekly basis to all inmates  
11 and provided on an as-needed basis. Record what was provided." I was informed by  
12 correctional officers that if the distribution of cleaning supplies were recorded, it would  
13 be on this CDC 114-A form. I looked at record after record and, with the exception of  
14 bath soap, I did not see any distribution of cleaning supplies logged on this form. I did  
15 not see any logging of the use of a cleaning supply bucket or kit. There were plenty of  
16 other notations on these forms, such as those indicating the provision of meals, showers,  
17 and exercise.  
18  
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22 **E. Adjustment Center prisoners cannot keep their cells acceptably clean**  
23 **because adequate cleaning supplies are not available to them**

24 41. In the Adjustment Center, both prisoners and correctional staff reported that  
25 the only cleaning supply that is available is a scrubbing powder that is doled out in small  
26 baggies and distributed to prisoners approximately once every two weeks. See Exhs.  
27  
28



1 AAA & BBB. Correctional officers specifically stated that scrub pads are not available  
2 to prisoners in the Adjustment Center.

3 42. A correctional officer showed me the tub from which he regularly doles out  
4 this powder. The tub is labeled "Just Clean" and reads: "DANGER: Harmful if  
5 swallowed. Contains sodium carbonate and sodium orthosilicate. Protect skin, eyes and  
6 mucous membranes from contact with this product or concentrated solution - Can  
7 produce burns." The tub's first aid indications state that for contact with skin, one should  
8 "Immediately flush skin with plenty of water." The tub's general directions state: "For  
9 normal cleansing, use 1 oz. per 1 gallon of water. Remove soil-laden solution from  
10 cleaned surfaces by flushing thoroughly with clear water using hose or thorough mopping  
11 and rinsing." At the bottom of the tub's label is written: "Gloves and goggles are  
12 recommended when using this product." See Exhs. AAA & BBB.

13  
14  
15  
16 43. This product is dangerous and completely inappropriate for distribution to  
17 prisoners at all, much less as their sole cleaning supply. Prisoners in the Adjustment  
18 Center have no ability to use this product safely because they lack gloves, goggles, the  
19 ability to flush the product off surfaces after cleaning, and training in the proper and safe  
20 use of this chemical. Adjustment Center prisoners are likely to receive burns and/or other  
21 serious abrasions through misuse of this product.

22  
23  
24 44. There are many effective disinfectants other than "Just Clean" that San  
25 Quentin could provide to Adjustment Center prisoners. There is absolutely no reason to  
26 provide this dangerous product to them as their sole cleaning supply.  
27  
28



1           **F. San Quentin has failed to take responsibility for the grave**  
2           **insufficiencies in inmate hygiene**

3           45. From both a public health and human decency perspective, it is  
4 unacceptable that San Quentin appears to take such minimal measures to ensure that  
5 condemned prisoners' cells are kept sanitary and hygienic. It is, of course, appropriate  
6 for San Quentin to put the onus of cleaning a prisoner's cell on the occupant. What is  
7 wholly inappropriate, however, is San Quentin's abdication of responsibility for ensuring  
8 that prisoners' cells are indeed clean and sanitary. There is simply no excuse for leaving  
9 this basic responsibility to the whim or ability of each condemned prisoner, much less for  
10 failing to ensure that cleaning supplies are provided to those who attempt to clean their  
11 cells. San Quentin appears to view basic hygiene and sanitation as an option, and not a  
12 requirement, for condemned prisoners.  
13  
14

15           46. I was appalled to see the very real consequences of the abdication of this  
16 responsibility in East Block. In East Block, while walking the Yard Side tiers, I stopped  
17 in front of one prisoner's cell because of the foul, sour bodily odors that emanated from  
18 it. Correctional officers accommodated my request to have the prisoner removed so that I  
19 could inspect the cell. What I found was extremely distressing. Indeed, the cell was  
20 repulsive and should not be inhabited by a human being. *See Exhs. G-Q.*  
21  
22

23           47. Food was strewn throughout the cell. The toilet was filthy, with an  
24 accumulation of a brown substance both inside and on the floor. The walls, especially  
25 around the toilet, were stained with a dark, streaked substance. There was significant dust  
26 accumulation throughout the cell, and heavy dust accumulation on the ventilation duct.  
27  
28

1 The prisoner's bedding was stained and filthy. An unidentified greyish liquid was pooled  
2 on the floor. *See id.* The odor inside the cell was pungent and very foul.

3 48. I spoke briefly with this prisoner and he reported that he did not know of  
4 any brooms with which to clean his cell and that he sweeps the floor with his bare hands.  
5 Like so many other prisoners with whom I spoke, he did not know of any scrub pad or  
6 cleaning agent that was available for him to use. He reported what was patently obvious—  
7 that he had not recently cleaned his cell.  
8

9 49. I witnessed similar abdication of responsibility in the Adjustment Center.  
10 As I was concluding my tour on the North Side of the Adjustment Center's first tier,  
11 prisoners asked me to investigate the fact that their cells were very cold and that they  
12 claimed to receive no heat. One prisoner got up from his bed to speak with me about the  
13 temperature and informed me that he had been under his blanket because it was so cold.  
14

15 50. Indeed, the tier felt chilled. I twice measured the temperature in a cell on  
16 this tier, once using a thermometer supplied by a correctional officer, and once using my  
17 own. The readings from the two instruments were within one degree of each other: the  
18 temperature was about 58° F. By contrast, the American Public Health Association's  
19 Standards for Health Services in Correctional Institutions require the maintenance of a  
20 least 68°F during the coldest winter months. 58° F is simply too cold for adequate  
21 habitation in the winter.  
22

23 51. I saw that two windows were open on the outer wall at the end of this tier.  
24 A correctional officer stated that there was nothing wrong with the unit's heating system,  
25 but that officers always leave the windows open on this floor of the Adjustment Center  
26  
27  
28



1 because the smell would be intolerable otherwise. To compensate for surrendering  
2 control on a sanitation issue as basic as the odor in the unit, correctional staff is freezing  
3 the prisoners.

4 **III. Laundry**

5 **A. San Quentin's institutional laundry process is broken.**

6  
7 52. Prisoners who use the institutional laundry service in East Block place their  
8 soiled items in mesh bags, which they tie and secure themselves, and then give to  
9 correctional officers. In the Adjustment Center, prisoners pass their soiled items through  
10 a slot in their doors. Correctional officers place these items in mesh bags, which they  
11 then tie and secure. Laundry from all units is loaded into locked carts where it is  
12 transported to the laundry processing facility at Solano.  
13  
14

15 53. If the process is running on schedule, laundry is collected from condemned  
16 prisoners on Monday and processed by Solano on Wednesday. After processing, it sits in  
17 locked carts at Solano for 24 hours. It is returned to San Quentin and distributed to  
18 prisoners on Thursday or Friday.  
19

20 54. The overwhelming majority of prisoners I spoke with reported that they  
21 either avoided the institutional laundry completely or only periodically sent certain items,  
22 like towels, to the laundry. They reported that they avoided the laundry for a variety of  
23 oft-repeated reasons such as that items or entire laundry bags were not returned and  
24 replacements were very hard to come by; laundry was returned dirty, dingy, and with  
25 strange odors; and laundry was returned wet or damp. More than one prisoner reported  
26 that when he does send out laundry, he habitually re-washes it upon return.  
27  
28

1           55. San Quentin's laundry process is plainly broken in ways that both threaten  
2 the health of condemned prisoners and compel them to rely on other, insufficient means  
3 of trying to get their soiled laundry clean.

4  
5                   **1. San Quentin perpetuates a potentially dangerous laundry system**  
6                   **that it knows returns soiled, wet, and unsanitary laundry to**  
7                   **prisoners**

8           56. From speaking with prisoners, correctional officers, and the chief of  
9 Solano's laundry facility, John Arnold, I have little doubt that laundry indeed returns  
10 dirty, dingy, and damp. As described in paragraph 15 of the Declaration of John Arnold  
11 In Support of Defendants' Motion to Terminate Consent Decree, when laundry bags are  
12 tied too snugly, causing the bag to be gathered in a tight ball of clothing and linens,  
13 laundry can neither be properly cleaned nor dried. Indeed, Mr. Arnold's Declaration does  
14 a fine job of describing exactly how one should *not* do laundry. I agree with Mr.  
15 Arnold's assessment, which he stated several times on the video made by Defendants of  
16 Solano's laundry processing facility ("Solano video"), that laundry bags that are too  
17 tightly packed or full are unlikely to get clean or dry in the laundry processing.  
18

19           57. To do an adequate cleaning and drying job, chemicals and heating agents  
20 must penetrate through every piece of laundry. When laundry is wadded into a tight ball,  
21 these chemicals and heating agents may not adequately penetrate the interior of the ball.  
22 In such cases, the interior laundry is wetted, but neither raised to the necessary  
23 temperature, adequately penetrated by cleaning chemicals, or ultimately dried. The result  
24 is a laundry bag whose interior retains any organisms and pathogens with which it went  
25  
26  
27  
28



1 into the process and is now also wet or damp. The moisture added to the mix helps these  
2 pathogens and organisms to breed and multiply.

3 58. Once these bags have been laundered, they are loaded and locked into carts,  
4 which are, in turn, loaded onto a truck. I am informed from the Solano video that this  
5 truck sits for 24 hours at Solano before returning to San Quentin. Confined in a locked  
6 cart with other laundry bags for many hours, a balled, damp laundry bag can now  
7 contaminate adjacent bags of laundry with pathogens and organisms that have survived  
8 and perhaps multiplied in the laundering process.

9  
10  
11 59. While this process is conducive to transmitting a host of pathogens, the  
12 transmission of Methicillin-resistant *Staphylococcus aureus*, or MRSA, stands out as a  
13 particularly serious danger. MRSA is a potentially fatal staph infection that is resistant to  
14 antibiotics. Sub-optimal laundering, especially of underclothing and towels, is a key  
15 factor for the continued spread of MRSA among prisoners. The laundering process  
16 described above – in which pathogen-laden, damp bags are packed in and allowed to  
17 contaminate “clean” bags – is just such an efficient means for transmitting MRSA.  
18  
19  
20 Laundering clothing in this way is dangerous to the condemned population.

21  
22 **2. The problems that create this unsanitary laundry process are easily solved**

23  
24 60. Although many condemned prisoners know not to tie their laundry bags  
25 into a wadded ball, I am confident that many do not know this very basic information.  
26 On the Solano video, I saw such bags being processed and heard Mr. Arnold report that  
27  
28



1 many bags coming from San Quentin will not be adequately cleaned because they are tied  
2 too tightly.

3 61. As I walked up and down the tiers speaking to prisoners, I was amazed to  
4 learn that no one at San Quentin appears to have taken on the very basic responsibility of  
5 educating prisoners about how to properly bag their clothing. Consistently, I was told  
6 that while correctional officers collect prisoners' laundry bags, they have never informed  
7 the prisoners on how to bag laundry to avoid it coming back soiled and damp.  
8

9  
10 62. I spoke with one prisoner who had been at San Quentin for about 20 years  
11 and regularly sends out his state-issued items for laundering. He reported that his laundry  
12 periodically is returned to him wet or soiled. I asked him to show me how he ties his  
13 laundry, and was not surprised to see that he tied it in a fairly tight ball. I then explained  
14 to him that his laundry would come back cleaner and drier if he tied it with more room in  
15 the bag. The prisoner informed me that in 20 years no one had ever given him this  
16 simple piece of advice. In the Solano video, Mr. Arnold implied that information about  
17 the proper bagging of laundry was available in the housing units at San Quentin. If this is  
18 true, he seems to be the only one aware of it.  
19  
20

21 63. What is more, under San Quentin's laundry system, not all prisoners tie and  
22 secure their own laundry bags. In the Adjustment Center, prisoners pass their dirty  
23 clothing through a slot in their doors and correctional officers tie and secure the bags. I  
24 asked one correctional officer who worked in the Adjustment Center to demonstrate how  
25 he ties prisoners' laundry bags. He did so for me and, not surprisingly, twisted the bag  
26 tightly, in a manner that would inhibit proper washing and drying.  
27  
28

1           64. I am mystified as to why San Quentin allows this problem to continue.  
2 Clearly, Mr. Arnold well knows that his facility is not adequately cleaning and sanitizing  
3 significant numbers of laundry bags that come from San Quentin. Clearly, the officers  
4 who pass out laundry notice that they are often returning damp laundry bags.  
5

6           65. This problem has a very simple fix: San Quentin could simply make sure  
7 that prisoners' laundry bags are tied properly or instruct Solano to move up the knots on  
8 prisoners bags. Instead, San Quentin allows the problem to persist.  
9

10                   **3. There are serious problems with how the laundry is handled**  
11                   **and managed at San Quentin**

12           66. Aside from those problems brought on by inappropriate tying and securing  
13 of laundry bags, there plainly are serious problems with the hygiene and effectiveness of  
14 San Quentin's laundry system that appear to stem, in large part, from how the laundry is  
15 handled and managed at San Quentin.  
16

17           67. For example, on the ground floor of East Block's yard side, I saw several  
18 carts that were identified by correctional officers as those used to hold and distribute  
19 clean laundry. I saw similar carts identified in the Solano video as the locked carts that  
20 arrive from San Quentin. Aside from the fact that these carts were coated in bird feces, I  
21 was disturbed to find that inside one cart was a dead mouse and a bird feather in plain  
22 view. In that cart I also saw a supply of blankets. I questioned an officer about the carts.  
23 He replied that he thought the carts were used for clean laundry. I later spoke to  
24 Correctional Officer Cuello, who confirmed that the laundry carts I saw did hold "clean"  
25 laundry to be distributed to inmates. *See Exhs. MM-PP.* There is no excuse for decaying  
26  
27  
28



1 rodents and bird detritus to be in a laundry cart and their presence reflects an extremely  
2 low level of oversight and care with respect to laundry.

3 68. Some of the laundry carts I saw at San Quentin did not have tops and were  
4 covered instead with sheets. These sheets had bird droppings, slices of bread, and other  
5 garbage on them. Some of the carts contained linens and two had loose whites. All were  
6 purported to contain clean laundry for distribution to inmates. *See* Exhs. MM-OO.  
7

8 69. Likewise, in the Solano video, both Mr. Arnold and another laundry  
9 supervisor stated that San Quentin's condemned laundry carts often arrive with a lot of  
10 "garbage" and "trash" inside that must be removed and weighed before laundering.  
11 There is no reason why laundry carts should be filled with garbage. Such a situation  
12 makes laundry that much more difficult to clean and sanitize.  
13  
14

15 70. In addition to these sanitation issues, San Quentin's management of the  
16 laundry process appears deeply flawed in ways that would seem to ensure the routine loss  
17 of prisoners' laundry. When I toured the Solano processing facility, Mr. Arnold stated  
18 that even though each locked cart arrives from San Quentin with an inventory of laundry  
19 bags, his staff always re-counts the bags because San Quentin's count is generally wrong.  
20 This means either that San Quentin has a consistently faulty record-keeping system  
21 and/or that San Quentin staff consistently loses or adds bags between the time that they  
22 count and record them and when they load them into the carts. Either scenario is  
23 unacceptable since both will prevent San Quentin from properly processing and returning  
24 bags to prisoners when they are received from Solano. Indeed, my review of "In and  
25  
26  
27  
28

1 Out" laundry records from East Block confirmed that San Quentin's numbers of bags  
2 going out of each tier often do not match the numbers of bags being returned there.

3 71. Additionally, from the Solano video and Mr. Arnold's Declaration, I  
4 learned that Solano regularly receives loose clothing and sometimes empty bags, in  
5 addition to full bags, from San Quentin. If condemned prisoners are on a "bag system"  
6 there is no reason that loose laundry should consistently be arriving in the condemned  
7 carts. Like with its faulty record-keeping, the fact that San Quentin regularly sends out  
8 loose clothing would seem to make it extremely difficult to properly process and return  
9 laundry to prisoners.  
10  
11

12 72. These management failures lend credibility to the many reports I heard  
13 from prisoners that, when they use the institutional laundry, they do not always get their  
14 linens and clothing back.  
15

16 **B. Because they do not trust the institutional laundry, condemned**  
17 **prisoners wash soiled items in their cells' sinks, buckets, and toilets**

18 73. Because of their complete lack of faith in San Quentin's laundry processing,  
19 many prisoners instead wash clothing and linens themselves in their cells. The  
20 overwhelming majority of prisoners I interviewed reported that they either avoided the  
21 institutional laundry completely or periodically sent only certain items, such as towels, to  
22 the laundry. In these prisoners' cells, I often saw laundry hung up on makeshift  
23 clotheslines. In other cells, I actually happened upon prisoners washing items in their  
24 cells.  
25  
26  
27  
28



1 74. Prisoners use state-issued bath soap and/or detergent bought from the  
2 canteen to wash their clothing. Not all prisoners can afford detergent and some must  
3 therefore rely exclusively on bath-soap.

4 75. Washing large items like sheets in the cell's sink is impractical due to the  
5 sink's small size. Buckets therefore must be utilized to wash larger items. Not all  
6 condemned prisoners, however, have buckets. For example, prisoners in the Adjustment  
7 Center are not permitted buckets.  
8

9 76. Some prisoners therefore use their toilets for laundering. I witnessed one  
10 prisoner washing clothes in his toilet with state-issued bath soap. See Exhs. CCC &  
11 DDD.  
12

13 77. Toilets are filthy places. They are even filthier on San Quentin's death row  
14 where adequate cleaning supplies are not available and where feces sits for periods of  
15 time in the bowl because prisoners are permitted only two flushes per hour. Under any  
16 standard of decency or health, people should not be washing clothing and linens in the  
17 toilet. That condemned prisoners are willing to do so says a tremendous amount about  
18 the degraded levels of sanitation and hygiene under which they live.  
19  
20

21  
22 **1. Given the conditions at San Quentin, prisoners' laundering of**  
23 **their own soiled items is an unacceptable means of maintaining**  
24 **basic hygiene**

25 78. Given the environment of death row at San Quentin, it is completely  
26 unacceptable for prisoners to wash clothing and linens in their cells as the means of  
27 keeping these items sanitary and hygienic. This is true even if prisoners are using their  
28 sinks and buckets, and not their toilets, for washing.

1           79. First, as has already been discussed, East Block is a very unsanitary place,  
2 and prisoners do not have adequate supplies with which to clean their cells. Thus, they  
3 are trying to get their laundry clean in an environment that is unsanitary to begin with.

4           80. Second, a critical component of sanitary laundering is the presence of  
5 temperatures high enough to destroy pathogens in soiled laundry. Sanitary laundries  
6 achieve these levels of heat through a variety of means, including through dryers and the  
7 use of water that is at least 140° Fahrenheit. Without the use of such temperatures, the  
8 bacteria, viruses, and fungi that live in soiled laundry cannot reliably be destroyed.  
9

10           81. However, because of the serious risk of scalding and burning, prison cells  
11 should never be plumbed with water that reaches these temperatures. (With 10-15  
12 seconds of exposure, 135°F water causes third-degree burns.) Correctional standards  
13 provide that plumbed cell water should never exceed 120°. Running 140°F water in  
14 prisoners' sinks would be unacceptably dangerous. If San Quentin follows this very basic  
15 correctional standard of 120°F, condemned prisoners should not have access to plumbed  
16 water that is hot enough to eliminate pathogens from their soiled laundry.  
17

18           82. To further exacerbate matters, most bath soaps, which prisoners use to  
19 clean their soiled items, do not totally dissolve in water that is less than 140°F. Thus,  
20 when prisoners use these to wash their laundry, fats, lye, and chemicals in the soap cling  
21 to their clothing instead of breaking apart completely. When cold water is used to rinse  
22 away the soap, these fats, lye, and chemicals further solidify, lodging themselves in the  
23 clothing and linens. The result is "clean" laundry whose pathogens have not been  
24  
25  
26  
27  
28



1 destroyed and which is now embedded with a residue of solidified fats, lye, and  
2 chemicals. These residues can result in persistent eczema, skin irritations, and itching.

3 83. Additionally, doing laundry in this manner is difficult on the institution and  
4 can only serve to exacerbate the sanitation challenges in San Quentin. When partially  
5 dissolved soap products are poured into a cell's plumbing, the solidified fats and lyes  
6 cling to the edges of drains and pipes, creating a layer of slime and muck. These slime  
7 collections are perfect breeding grounds for vermin like drain flies.  
8

9  
10 84. The upshot of condemned prisoners' laundering their own soiled items in  
11 San Quentin's abysmal conditions is that they cannot maintain very basic standards of  
12 personal hygiene. This inability to maintain a basic level of hygiene in their clothing and  
13 linen, and particularly with respect to prisoners' underwear and towels, further poses  
14 public health risks to the condemned population generally. These risks are particularly  
15 serious regarding the transmission of MRSA and should not be tolerated by the  
16  
17 institution.  
18

19 **IV. The infestations of birds, rodents, and vermin pose a significant risk of**  
20 **disease to condemned prisoners housed in East Block**

21 **A. Birds**

22 85. Based on my own observations and the information relayed to me by staff  
23 and prisoners, it is clear that birds currently exist in East Block and have for many, many  
24 years. Throughout the time I spent in East Block, I heard birds chirping and saw  
25 sparrows flying, perching on objects and tier bars, and hopping along the floor of the first  
26 tier. I also saw bird feces throughout the unit. I noted the accumulation of bird feces on  
27  
28

1 the fifth, third, and first tiers of East Block's Yard Side, among other places. While  
2 heavier on the fifth tier, there was a significant presence of bird feces on the third tier as  
3 well. *See* Exh. W. On the fifth and third tiers, the accumulation was concentrated on the  
4 tier bars. *See* Exhs. C-E.  
5

6 86. On the first tier, the feces accumulation was present on the floor and, more  
7 heavily, on objects located on the floor, such as: (1) a wheeled medical gurney; (2) the  
8 tops of laundry carts; and (3) an open box in which prisoners' razors were stored. The  
9 razor box also had feces surrounding it. It was placed on a sheet-covered locker that was  
10 covered in bird feces. *See* Exhs. QQ, RR, MM, OO, Z, AA, & BB. I was particularly  
11 disturbed to find the accumulation of feces on these objects, which are expected to come  
12 into direct contact with bare human skin.  
13  
14

15 87. Bird feces is also heavily caked on the floors and railings of the gun rails  
16 that are opposite the tiers. *See* Exhs. R & XX. Armed correctional officers patrol the gun  
17 rails. The heavy buildup on the gun rails is evidence of a feces accumulation over a long  
18 period of time.  
19

20 88. Birds are a sanitation concern because they spread disease, primarily  
21 through bacteria, viruses, and fungi in their feces. Sparrows in particular are implicated  
22 in the transmission of more than 25 diseases to humans and animals, including  
23 histoplasmosis (respiratory illness), psittacosis (fever, headache, and pneumonia-like  
24 symptoms), salmonellosis (gastrointestinal illness) and several forms of encephalitis  
25 (inflammation of the brain). The most significant disease threat is from salmonellosis,  
26  
27  
28



1 which is easily carried and transported in bird feces that stick to the bottoms of shoes and  
2 via insects and rodents.

3 89. Depending on the disease, humans may become infected through direct  
4 physical contact with feces on the skin, through the inhalation of aerosolized feces,<sup>3</sup> and  
5 through ingestion of bird feces that has contaminated food. Based on my observations,  
6 East Block presents an unacceptable risk of transmission of disease through all three  
7 forms of transmission.  
8

9  
10 90. Transmission of disease is most likely through direct contact with bird  
11 feces, such as might occur when a sick prisoner lies on a feces-coated gurney or when a  
12 prisoner nicks himself on a feces-coated razor. The risk for such occurrences is  
13 extremely high in East Block, as noted above. Direct contact with the feces-coated tier  
14 bars I observed throughout the unit can also transmit disease, if the feces on the clothes  
15 and hands ends up in the mouth (through food contamination or simply by touching the  
16 face with a contaminated hand) or is aerosolized and inhaled. Given the short distance  
17 between the tier bars and prisoners' cells, I expect officers and prisoners to routinely  
18 come into contact with the bars. During my tour, I noted that the Deputy Attorneys  
19 General who accompanied the tour periodically leaned up against and rested on the tier  
20 bars.  
21  
22

23  
24 91. Even without physical contact, the risk of transmission exists through  
25 inhalation of feces particles that have been aerosolized by, for example, correctional  
26

27 <sup>3</sup>Feces become aerosolized when they dry and become dust or powder that makes its way  
28 into a building's air flow.

1 officers pacing up and down East Block's feces-coated gun rails. When officers patrol  
2 the gun rails, dry, cracked feces are disturbed by their movements, resulting in  
3 microscopic particles of old feces being released into the air. This also releases disease-  
4 transmitting fungal spores that have grown and accumulated in the old feces. In some  
5 instances, such as with histoplasmosis, the older the feces, the more capable it is of  
6 transmitting disease. This is so both because fungal spores grow in older feces and  
7 because older feces are more easily aerosolized as they dry, crack, and break apart.  
8

9  
10 92. In addition, food contamination can occur if officers touch bird feces with  
11 their hands and then hand out food trays to prisoners without washing their hands or  
12 changing their gloves. Given the amount of feces on the tier bars, without serious  
13 vigilance devoted to avoiding contact with the bars and sanitizing one's hands (including  
14 changing of disposable gloves and/or hand washing), officers can readily contaminate  
15 prisoners' food with feces during food distribution.  
16

17  
18 93. Given the bird feces concentrations that have clearly built up over an  
19 extended period of time, there are clear and present risks of the transmission of disease  
20 from the feces to East Block prisoners.  
21

22 94. San Quentin has placed some bird netting over windows, but other  
23 solutions are clearly required, since birds still have ready access to East Block. Indeed, I  
24 saw and heard several in the few hours I spent there. In addition, windows with no  
25 screening were open in the Adjustment Center, where I saw bird feces accumulation on  
26 sills.  
27  
28



1           95. In addition to netting, San Quentin must seek out and cut off all access  
2 points to the interiors of these buildings by identifying birds' entry points and vigilantly  
3 controlling them. To this effect, window covers should be installed and all efforts made  
4 to ensure that doors do not stay open. If feasible, self-closing mechanisms on doors  
5 should be installed. Additionally, there must be a routine, enforced program going  
6 forward to ensure that netting, covers, and closures are operating effectively.  
7

8           96. At the most fundamental basic level, however, San Quentin simply must  
9 clean up and eliminate the bird feces accumulations that are present throughout East  
10 Block. I saw a lot of very old, dried bird feces during my inspection. These old  
11 accumulations are strong evidence that San Quentin has, for a long period of time,  
12 abdicated its responsibility for this very serious problem. A conversation I had with a  
13 correctional officer stands out as representative to me of this attitude of abdication: the  
14 officer justified the bird problem, implying that the birds' presence was the prisoners'  
15 fault because they feed the birds. I was surprised by this justification. Prisoners might  
16 feed birds, but they do not control the windows, doors, and openings. Nor do prisoners  
17 control San Quentin's obvious failure, over a long period of time, to take those necessary  
18 steps to eliminate the health risk posed by the birds. At the very least San Quentin must  
19 do that. From a public health and human decency perspective, the clean-up of bird feces  
20 in East Block is long overdue.  
21  
22  
23  
24

25           **B. Rodents and Vermin**  
26

27           97. Rodents and vermin are also present in East Block, with potential health  
28 consequences to prisoners housed there. See Memoranda, "Birds and Rodents in East

1 Block," from J. Zaragoza to R. Fox (Sept. 1, 2007; Sept. 15, 2007; Oct. 15, 2007; Nov. 1,  
2 2007) ("the 1<sup>st</sup> Watch staff has also reported issues with numerous rodents running  
3 around the unit").

4 98. A correctional officer in the third tier, Yard Side cart room told me that he  
5 sees cockroaches, ants, and spiders on the tier. My inspection of East Block is consistent  
6 with these reports. I saw a dead mouse in a laundry cart on the first tier of Yard Side.  
7 *See* Exh. PP. I saw old mouse droppings and urine.<sup>4</sup> I saw prisoners housed on the  
8 ground floor of East Block taking their own pest control measures, placing blankets and  
9 cardboard boxes against the floor in the front of their cells to keep out rodents and  
10 insects.  
11

12 99. Given the age and decrepit condition of much of San Quentin's physical  
13 plant, I would have been very surprised if there were not rodents, insects, and other  
14 vermin in East Block. There are three reasons for this: first, rodents and vermin are  
15 generally found in facilities that are as old as East Block and as riddled with cracks and  
16 gaps in the floors, ceilings, and interior and exterior walls, which allow them to find  
17 shelter and warmth. Second, the extremely poor level of sanitation in East Block,  
18 described in Sections II. B & C above, attracts rodents and vermin and provides them  
19 with food. Third, the water leaking and pooling around the housing unit also attracts  
20 rodents and vermin. *See* Exh. XX.  
21  
22  
23  
24  
25  
26

27 <sup>4</sup>I am not surprised that I did not see more rodents and vermin in my daytime inspection,  
28 since many of these are nocturnal creatures. Prisoners, who spend virtually all of their time in  
the facility, are the people most likely to see rodents and vermin



1           100. Rodents and insects, especially cockroaches, act as mechanical transmitters  
2 of infectious agents and spreaders of filth. In particular, they can facilitate disease  
3 transmission by spreading bird feces into prisoners' cells and even their food by picking  
4 up pathogens and infectious bacteria on their bodies as they move through East Block and  
5 carrying them wherever they go. Since they are attracted to food sources, they can easily  
6 carry infectious agents to prisoners' food in their cells. As noted above, salmonellosis is  
7 easily carried and transported in bird feces through insects and rodents.  
8

9  
10           101. A correctional officer in an East Block third tier, Yard Side cart room  
11 reported to me that he sees small black worms in the showers approximately three times  
12 per week. I also heard reports that prisoners complain about such worms in these  
13 showers. I am familiar with such "worms," which are the larval stage of small black flies  
14 (drain flies). Drain flies are a member of the *Psychodidae* family, small flies that include  
15 fruit flies and others. The flies lay their eggs in slime, and the eggs hatch as worms in  
16 drains. They are primarily a nuisance, but they have been associated with outbreaks of  
17 asthma and contemporary standards call for simple and effective steps to eradicate them.  
18 Chemicals such as chlorine bleaches are generally ineffective; adequate control depends  
19 on either the use of enzyme-based disinfectants or mechanical cleaning and flushing of  
20 the floor and shower drain to remove the organic slime layer, so that the flies cannot lay  
21 their eggs in a place that provides food for their larvae. San Quentin does none of these  
22 things, to my knowledge. In fact, the officer who described the worms related that he  
23 puts in work orders to try to address the problem, but it there is no regular maintenance to  
24 clean out the drain.  
25  
26  
27  
28





EXHIBIT A

RME411495

2703

**Curriculum Vitae**

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**EDUCATION**

Master of Environmental Science, 1970  
University of Oklahoma, Norman, Oklahoma

Bachelor of Science in Environmental Health, 1968  
East Tennessee State University, Johnson City, Tennessee

**PROFESSIONAL EXPERIENCE**

Rice Consulting Services, LLC, Principal Consultant, 1990-Present  
District Health Director, SC Dept. of Health & Environmental Control (SCDHEC), 1993-2000  
District Environmental Health Director, SCDHEC, 1975-1993  
Marketing Representative, General Environmental Equipment Company, 1973-1975  
District Environmental Health Director, SCDHEC, 1970-1973  
Environmental Sanitarian Supervisor, SCDHEC, 1966-1967  
Environmental Sanitarian, SCDHEC, 1964-1966

**PROFESSIONAL AFFILIATION**

Registered Sanitarian (RS), National Environmental Health Association, No. 83438  
National Environmental Health Association  
Executive Committee 1981-1993  
President 1991-1992  
Technical Editorial Advisory Board, Journal of Environmental Health, 1994-1997  
American Correctional Association  
American Jail Association  
SC Environmental Health Association  
SC Public Health Association

**PROFESSIONAL AWARDS/CITATIONS**

Charles E. Corley Award 1995  
South Carolina Environmental Health Association  
(Highest award given by SCEHA)  
Walter F. Snyder Award 1995  
NSF *International*/National Environmental Health Association  
Walter S. Mangold Award 1996  
National Environmental Health Association  
(Highest award given by NEHA)  
Alabama Environmental Health Association  
Honorary Member

RME411496



PROFESSIONAL AWARDS/CITATIONS. cont'd.

Canadian Institute of Public Health Inspectors  
Honorary Life Member  
Florida Environmental Health Association  
Honorary Life Member  
South Carolina Environmental Health Association  
Honorary Life Member

PROFESSIONAL CONSULTATION

NSF *International*, Ann Arbor, MI., Council of Public Health Consultants, 1990-2002, Chairman  
1999  
Centers for Disease Control (CDC), National Center for Environmental Health, Environmental  
Health Competency Project, 2001  
Texas A&M University System, National Emergency Response and Rescue Training Center,  
Adjunct Instructor, 2002-Present  
State of Michigan, Office of Attorney General and Department of Corrections, Consulting  
Sanitarian 1990-2000. **USA v. Michigan** and **Hadix v. Johnson**. Testified as Expert Witness in  
**USA v. MI**. Environmental Audits of Marquette State Prison, Michigan Reformatory, State  
Prison of Southern Michigan, Egeier Correctional Facility.  
U. S. Department of Homeland Security, Office of Civil Rights and Civil Liberties,  
Environmental Consultant, 2006-Present  
Dallas County Commissioners Court, Dallas, TX, 2007  
Law Offices of Janice V. Fisher, **Cuthbert v. Aramark**, 2007  
U. S. Department of Justice (USDOJ), Civil Rights Division, Special Litigation Section,  
Environmental Consultant, 1994-Present  
Environmental Audits performed for USDOJ (Partial):

Grimes Correctional Facility, AR  
McPherson Correctional Facility, AR  
Coffee Co. Jail, GA  
Dooly Co. Jail, GA  
Lee Co. Jail, GA  
Mitchell Co. Jail, GA  
Muscogee Co. Jail, GA  
Terrell Co. Jail, GA  
Cook Co. Jail, IL  
Plainfield Juvenile Correctional  
Facility, IN

Marion Co. Juvenile Detention Ctr., IN  
Baltimore Juvenile Justice Center, MD  
Baltimore City Detention Center, MD  
Detroit Police Department, MI  
Oakley Training School, MS  
Simpson Co. Jail, MS  
Sunflower Co. Jail, MS  
Cleveland Police Department, OH  
C. M. Tucker, Jr. Nursing Center, SC  
Dallas County Jail, TX  
Patrick Co. Jail, VA

COMMUNITY ACTIVITIES

Orangeburg County Development Commission  
1994-2004  
Chairman, 1997-2004  
Orangeburg County Chamber of Commerce  
Board of Directors 1995-1997  
St. George Baptist Church  
Men's Ministry, Chairman, 2006  
Deacon, 2006-Present  
Wolfon Volunteer Fire Department  
Chairman, Board of Directors 2006-Present

RME411497

## EXHIBIT B

RME411498

2706



**EXHIBIT B to Declaration of Leonard Rice: list of photographs**

- Exhibit C: Photograph of tier bars on the fifth tier of East Block's yard side, reflecting an accumulation of bird feces.
- Exhibit D: Photograph of the accumulation of bird feces on the fifth tier bars on the yard side of East Block.
- Exhibit E: Photograph of the heavy accumulation of bird feces on the bars and bird feces on the floor of the fifth tier on the yard side of East Block.
- Exhibit F: Photograph of a vent in a prisoner's East Block cell (fifth tier on the yard side), reflecting a significant accumulation of dust and debris.
- Exhibit G: Photograph of a prisoner's cell on the yard side of East Block, reflecting an unsanitary bed with multiple stains on the soiled linen and with packaged food on the mattress, on the bed beside the mattress, and tucked between the mattress and the bed.
- Exhibit H: Photograph of the same prisoner's cell on the yard side of East Block, reflecting dust and debris accumulated on the bars on the outside of the door and paper trash on the outside of the cell's door and on the ground in front of the door.
- Exhibit I: Photograph of the same prisoner's cell on the yard side of East Block, reflecting trash and food strewn across the floor; a sandwich wrapped in plastic on the floor, approximately less than one foot away from the toilet; trash inside the toilet; significant stains and filth in the toilet bowl; brown stains streaking down the walls close to the toilet; and brown dust and debris in the vent under the sink and near the toilet.
- Exhibit J: Photograph of the same prisoner's cell on the yard side of East Block, reflecting multiple brown stains streaked on the wall above the toilet, yellow and brown stains almost covering the walls near the toilet, a sink with brown stains in the basin, a dark substance in and around the crevice near the faucet of the sink, and white debris on the sink.
- Exhibit K: Photograph of the same prisoner's cell on the yard side of East Block, reflecting a sandwich wrapped in plastic on the floor, inches away from the toilet. The photograph also shows a filthy toilet with multiple dark brown

and yellow stains, trash inside the bowl, and white stains on the toilet seat. The photograph also demonstrates dark stains on the floor and medication, trash, and linen on the floor, only two to four feet away from the toilet. In addition, the photograph shows an air vent almost entirely clogged with dust.

- Exhibit L: Photograph of the same prisoner's cell on the yard side of East Block, reflecting linens on the stained, dusty floor and dust balls on the floor and on the edge of a brown paper bag.
- Exhibit M: Photograph of the same prisoner's cell on the yard side of East Block, showing dust, trash, and clothing on the floor.
- Exhibit N: Photograph of the same prisoner's cell on the yard side of East Block, showing dark brown and yellow stains inside the toilet bowl; trash inside the toilet bowl; white stains all over the toilet seat; brown, dark brown, and yellow stains on the floor next to the back of the toilet; multiple streaks of brown and yellow substances on the walls next to the toilet; and a sandwich wrapped in plastic on the floor, inches away from the toilet and from the vent covered with dust and stains.
- Exhibit O: Photograph of the same prisoner's cell on the yard side of East Block, demonstrating an unidentified clumpy, congealed, dark brown substance on the floor near the back of the toilet, within inches of a sandwich wrapped in plastic; a plastic soda bottle beneath the back of the toilet where it attaches to the wall; brown and yellow streaks on the wall next to the toilet; and a significant amount of dust accumulated on the vent.
- Exhibit P: Photograph of the same prisoner's cell on the yard side of East Block, reflecting multiple stains on the prisoner's bedding and a sandwich wrapped in plastic lying on the bed.
- Exhibit Q: Photograph of the same prisoner's cell on the yard side of East Block, demonstrating an unidentified grayish liquid pooled on the floor and brown stains on the floor.
- Exhibit R: Photograph of the gun rail on the yard side of the third tier of East Block, reflecting heavy accumulations of bird feces on the railing and the floor as well as a food condiment packet on the floor.



- Exhibit S: Photograph of holding cells on the first tier of East Block, reflecting paper and other trash on the tops of the holding cells and hanging from the barbed wire above the holding cells.
- Exhibit T: Photograph of the ceiling in front of a shower of the third tiers on the yard side of East Block, demonstrating extremely corroded and degraded bars and pipes, trash, and congealed strands composed of soap scum and hair and other detritus dangling from the tier bars and ceilings.
- Exhibit U: Photograph of the ceiling in front of a shower of the third tier on the yard side of East Block, reflecting extremely corroded and rusted bars, doors, and pipes.
- Exhibit V: Photograph of the bars of the third tier of the yard side of East Block, demonstrating bird feces on the bars and congealed strands of muck and slime and trash dangling from the bars.
- Exhibit W: Photograph of the bars of the third tier of the yard side of East Block, demonstrating a significant accumulation of bird feces.
- Exhibit X: Photograph of the staff restroom on the yard side of the first tier of East Block, demonstrating that the door to the bathroom was open, despite signs on the outside of the bathroom door stating, "HEALTH HAZARD. DO NOT ENTER. POTENTIAL LEAD, ASBESTOS, AND MOLD."
- Exhibit Y: Photograph of the area in front of the medical clinic on the first tier of the yard side of East Block, demonstrating streams of water from the holding cages leading to puddles on the floor.
- Exhibit Z: Photograph of a razor box on the first tier of East Block, reflecting bird feces on the sheet-covered locker on which the box was placed.
- Exhibit AA: Photograph of the sheet-covered locker on the first tier of East Block, on which the razor box was placed, reflecting a significant accumulation of bird feces on the sheet.
- Exhibit BB: Photograph of a razor box on the first tier of East Block, reflecting dust inside the razor box.
- Exhibit CC: Photograph of the ventilation fan grate on the outside wall on the first tier

of East Block, reflecting a significant accumulation of matted debris inside the vent and strands of congealed matter hanging from the grate.

- Exhibit DD: Photograph of a mop bucket on the first tier of East Block, reflecting a significant accumulation of brown grime inside the bucket.
- Exhibit EE: Photograph of the prisoners' restroom and area near the medical clinic on the first tier of East Block, reflecting a stained plastic sheet hung from the ceiling and touching a corroded pipe.
- Exhibit FF: Photograph of stained plastic sheet in front of the medical clinic on the first tier of East Block, below the run-off from the shower, reflecting multiple brown, black, and orange stains on the plastic sheet.
- Exhibit GG: Photograph of the filthy floor and bars in front of a prisoner's cell in East Block, reflecting degraded floor surface and a significant level of dust on the bar of the door.
- Exhibit HH: Photograph of the filthy floor and bars in front of a prisoner's cell in East Block, reflecting degraded floor surface and a significant level of dust on the bar of the door.
- Exhibit II: Photograph of the ramp leading from the accessible shower to the ground on the yard side of the first tier of East Block, reflecting a large pool of grayish water on the floor abutting the ramp that on one side extends beyond half the width of the ramp, indicating that a wheelchair user would have to roll through the water.
- Exhibit JJ: Photograph of the ramp leading from the ground of the first tier to the same accessible shower on the yard side of the first tier of East Block, taken from the opposite direction, reflecting the large pool of grayish water on the floor, which is on the ground in front of the ramp and extends from the ground to the left of the ramp to the ground that meets a point beyond the mid-point of the ramp, indicating that a wheelchair user would have to roll through the water.
- Exhibit KK: Photograph of a gutter drain on the first tier of East Block, reflecting debris in the drain that spreads from one side of the gutter to the next and showing a wheelchair wheel just next to the gutter drain.



- Exhibit LL: Photograph of a gutter drain cover next to the gutter drain on the first tier of East Block, reflecting debris on the drain cover, almost completely clogging it, which would inhibit drainage through the cover.
- Exhibit MM: Photograph of the top of the laundry cart on the first tier of East Block, reflecting a slice of bread on a sheet covering the cart, which is covered with bird feces and littered with debris.
- Exhibit NN: Photograph of the top of a different laundry cart on the first tier of East Block, reflecting a sheet covering the cart that is covered with bird feces, littered with debris, and has two slices of bread and crumbs on it.
- Exhibit OO: Photograph of the top of yet a different laundry cart on the first tier of East Block, reflecting a metal cover on which there is a heavy accumulation of bird feces, dust, and debris.
- Exhibit PP: Photograph of a dead mouse in a laundry cart on the first tier of East Block. Staff reported that this laundry cart carried clean laundry (blanket and what appears to be a sheet).
- Exhibit QQ: Photograph of a medical gurney on the first tier of East Block, reflecting bird droppings on top of the gurney's railings and mattress.
- Exhibit RR: Photograph of the same medical gurney on the first tier of East Block, reflecting bird droppings on top of the gurney's railings and mattress.
- Exhibit SS: Photograph of a pile of trash and debris on a window sill in East Block.
- Exhibit TT: Photograph of laundry carts covered with food and bird feces and blocking the box containing a fire extinguisher.
- Exhibit UU: Photograph of the area around the lock to the door to a prisoner's cell on the first tier of the bay side of East Block, reflecting dust, dirt, and degraded surfaces around the lock.
- Exhibit VV: Photograph of the same area around the lock to the door to the same prisoner's cell on the first tier of the bay side of East Block, reflecting dust, dirt, and degraded surfaces around the lock.
- Exhibit WW: Photograph of standing water in the pipe chase on the first tier of East



Block, reflecting a significant amount of pooled water (enough see reflections of light in the water) and trash on the floor.

- Exhibit XX: Photograph of a broken pipe on the gun rail opposite the third tier on the yard side of East Block, reflecting heavy accumulations of bird feces on the tiers and bars and on the floor where the officer patrols.
- Exhibit YY: Photograph of a prisoner's mattress and pillow in the Adjustment Center, reflecting cracks throughout the plastic covering of the pillow and mattress large enough to expose the fill inside the mattress and pillow.
- Exhibit ZZ: Photograph of the same prisoner's mattress and pillow in the Adjustment Center, reflecting cracks throughout the plastic covering of the pillow and mattress large enough to expose the fill inside the mattress and pillow.
- Exhibit AAA: Photograph of cleaner that is distributed, reflecting a white plastic bucket with a label on it. Next to the bucket is a small unlabeled plastic bag of the cleaner that is an example of what is distributed to the inmates by the officers.
- Exhibit BBB: Photograph of the same bucket of cleaner, reflecting that the label on the bucket states that skin, eyes, and mucus membranes must be protected from contact when using the solution; that gloves and goggles are recommended when using the solution; and that eyes and skin must be immediately flushed with water when they come into contact with the solution.
- Exhibit CCC: Photograph of clothing being washed in the toilet in a prisoner's cell in the Adjustment Center.
- Exhibit DDD: Photograph of clothing hanging from a clothesline and being washed in the toilet in a prisoner's cell in the Adjustment Center.
- Exhibit EEE: Photograph of a prisoner's towel in the Adjustment Center, reflecting a large hole in the towel with a length that extends at least a quarter of the length of the towel and other smaller worn places on the towel.



Exhibit C



Exhibit D

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Exhibit E



Exhibit F

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Exhibit G



Exhibit H

RME411507

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**Exhibit I**



**Exhibit J**

RME411508

2716





Exhibit K



Exhibit L

RME411509

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Exhibit M



Exhibit N

RME411510

2718





Exhibit O



Exhibit P

RME411511

2719



Exhibit Q



Exhibit R

RME411512

2720



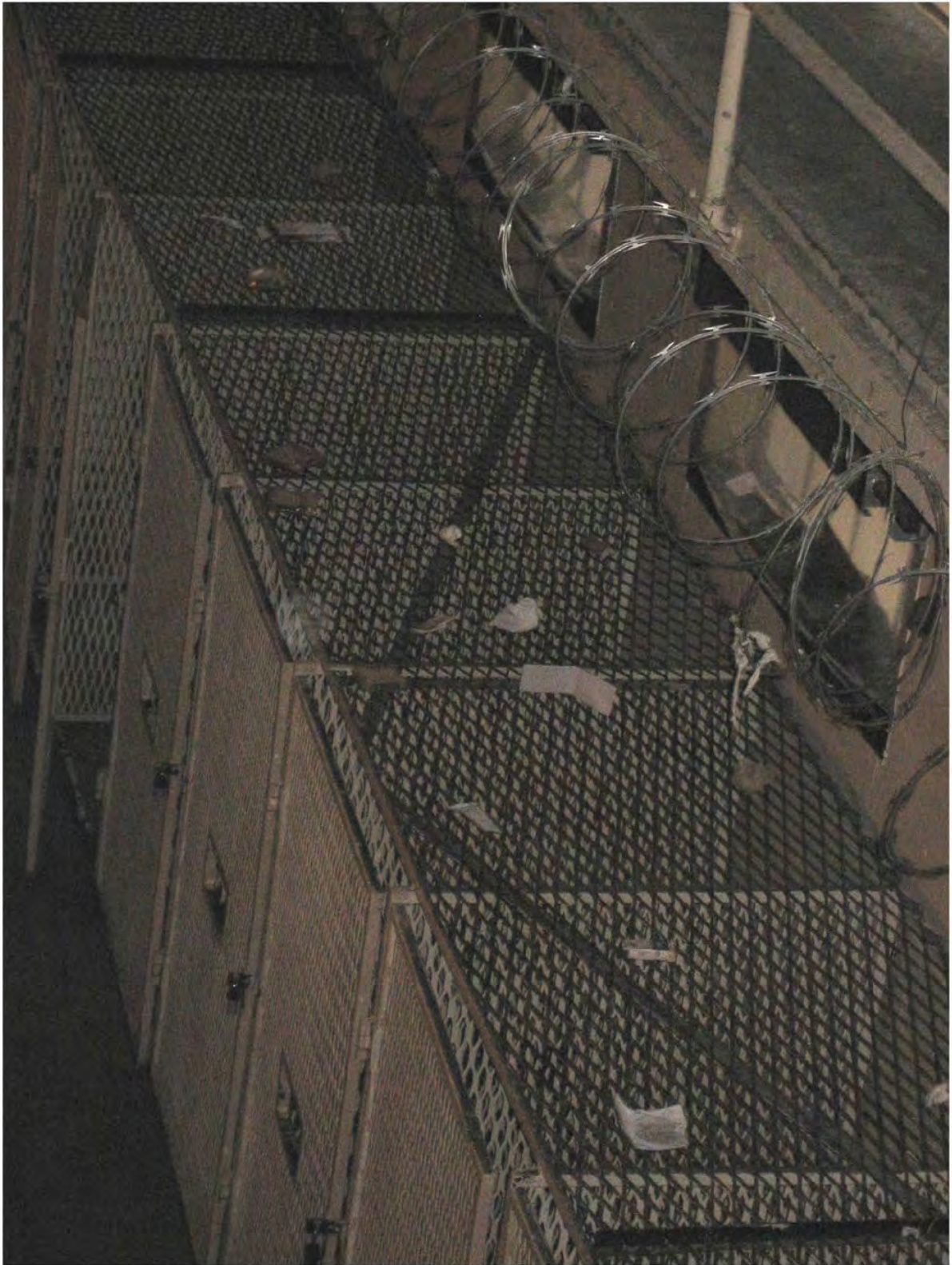


Exhibit S

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Exhibit 3  
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Exhibit T



Exhibit U

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2722





Exhibit V



Exhibit W

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2723



Exhibit X



Exhibit Y

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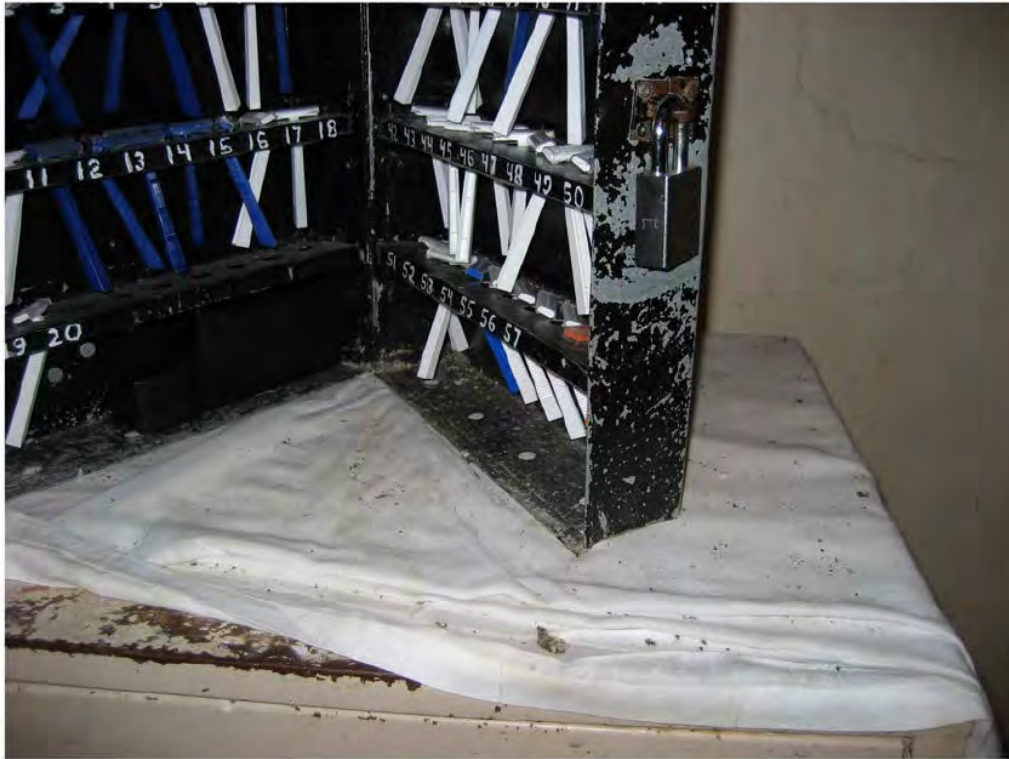


Exhibit Z



Exhibit AA

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Exhibit BB



Exhibit CC

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2726





Exhibit DD

RME411519

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Exhibit 3  
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Exhibit EE

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Exhibit 3  
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Exhibit FF



Exhibit GG

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Exhibit HH

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Exhibit 3  
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**Exhibit II**

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**2731**





Exhibit JJ

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2732

Exhibit 3  
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Exhibit KK



Exhibit LL

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Exhibit MM



Exhibit NN

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Exhibit OO



Exhibit PP

RME411527

2735



Exhibit QQ

RME411528

2736





Exhibit RR



Exhibit SS

RME411529

2737



Exhibit TT



Exhibit UU

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2738





Exhibit VV

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Exhibit 3  
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Exhibit WW

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Exhibit 3  
Page 276





Exhibit XX



Exhibit YY

RME411533

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Exhibit ZZ



Exhibit AAA

RME411534

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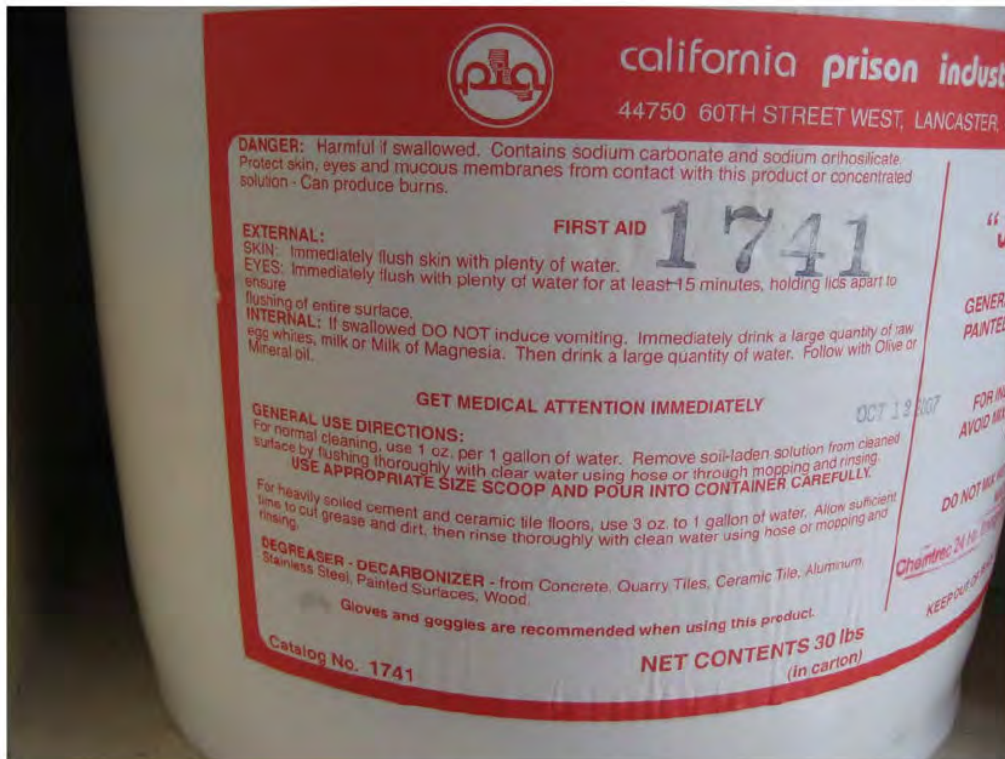


Exhibit BBB

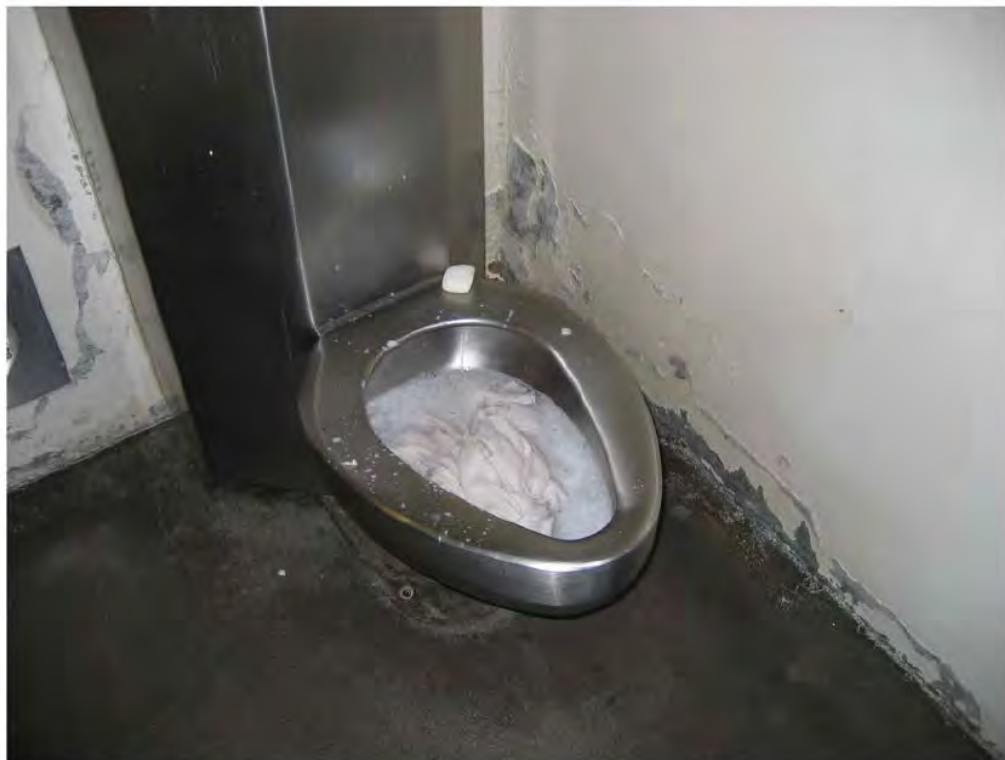


Exhibit CCC

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Exhibit DDD

RME411536

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Exhibit 3  
Page 280





Exhibit EEE

RME411537

2745

## Exhibit 4

*Discrimination, Torture, and Execution*  
*A Human Rights Analysis of the Death*  
*Penalty in California and Louisiana,*  
Center for Constitutional Rights and  
International Federation for Human  
Rights, June 14, 2013



# Discrimination, Torture, and Execution: A Human Rights Analysis of the Death Penalty in California and Louisiana

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,



October 2013 / N°618a

RME411368

Cover photo: Treatment cages for group therapy in the Adjustment Center at San Quentin's death row. Source: Expert Decl. of Jeanne Woodford in Supp. of Pls.' Opp'n to Defs.' Mot. to Terminate, Photo Ex. C, Coleman v. Brown, No. 90-0520 (E.D. Ca. Mar. 14, 2013).

RME411369



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# I. Executive Summary

*The use of the death penalty in California and Louisiana violates U.S. obligations under international human rights obligations to prevent and prohibit discrimination and torture, cruel, inhuman or degrading treatment.*

In May 2013, the Center for Constitutional Rights (“CCR”) and the International Federation for Human Rights (“FIDH”) undertook a fact-finding mission in California and Louisiana to evaluate the death penalty as practiced and experienced in these jurisdictions.

Applying a human rights framework, the mission examined whether the death penalty was being applied in a discriminatory manner, and if the conditions under which prisoners on death row were confined accorded with the obligation to prevent and prohibit torture and cruel, inhuman or degrading treatment.

The mission interviewed death-row prisoners, exonerees and their family members, advocates, legal counsel, and non-governmental organizations in both states. The mission analyzed the information gathered against the backdrop of international human rights law (including conventions, case-law and expert opinions), paying particular attention to the obligations undertaken by the United States as a State Party to various international treaties.

Based on the interviews conducted and documentary review, the mission concludes that the use of the death penalty in California and Louisiana fails to protect a number of basic rights, rendering the United States in breach of certain fundamental international obligations. Specifically, the mission finds California and Louisiana violate the principle of non-discrimination in the charging, conviction and sentencing of persons to death; a criminal justice system in which discrimination is evident both enables and compounds the violation. Through their detention policies and the conditions for detention, both states treat prisoners condemned to death in a manner that is, at minimum, cruel, inhuman or degrading, and in some cases, constitutes torture.

*On discrimination:* Stark racial disparities in charging, sentencing, and imposing death sentences persist; race continues to play a significant role in both states’ application of the death penalty. African Americans are overrepresented on death row in both states. While they make up only 32 percent of the general population in Louisiana, they represent 65 percent of the state’s death row. In California, African Americans make up 6.7 percent of the general population, but 36 percent of those on death row. Juries in death penalty cases are overwhelmingly white in both states. A small number of counties within both states are responsible for the majority of death sentences in each state, demonstrating that discretion on the part of prosecutors remains a large indication who is sentenced to death.

*On cruel, inhuman or degrading treatment and torture:* The conditions of confinement for persons on death row in California and Louisiana, including extreme temperatures, lack of access to adequate medical and mental health care,



overcrowding and extended periods of isolation, do not respect and promote human dignity. In both states, condemned prisoners can be held in solitary confinement for prolonged or indefinite periods of time, leading to severe mental pain and suffering. Such deplorable circumstances have been condemned by the U.N. Special Rapporteur on Torture as constituting cruel, inhuman, and degrading treatment, or, in certain circumstances, torture.

The use of the death penalty constitutes an inherent violation of the most fundamental of all rights, the right to life. No legal or correctional reforms can bring legitimacy to the necessarily inhumane and premeditated taking of a life by the state through its imperfect system. As such, the mission unambiguously and fundamentally opposes any use of the death penalty in the United States, including in California and Louisiana

Although CCR and FIDH advance general recommendations to alleviate the degree to which the death penalty is carried out in a discriminatory manner and to minimize human suffering on death row, adherence to the United States' human rights obligations, including the non-derogable obligation to protect the right to life, requires complete abolition of the death penalty.

In the interim, a moratorium on executions must be imposed to protect condemned prisoners' right to life. Simultaneously, as states progress towards abolition, they must take positive steps towards eliminating discriminatory charging and sentencing, and ensuring that those already under a sentence of death are not suffering torture or other cruel, inhuman or degrading treatment.

# II. Introduction

In May 2013, the International Federation for Human Rights (“FIDH”)<sup>1</sup> and its U.S. affiliate, the Center for Constitutional Rights (“CCR”),<sup>2</sup> conducted a fact-finding mission in the United States to assess whether the use of the death penalty in two States, California and Louisiana, complied with international human rights law. CCR and FIDH met with stakeholders in both States to evaluate the death penalty as practiced and experienced in the jurisdictions through a framework grounded in human rights law and practice. The mission conducted this human rights assessment through interviews with death row prisoners, exonerees, their family members, advocates, legal counsel, a federal judge, prison staff, and non-governmental organizations, as well as document review. The mission focused its analysis on discrimination and torture, cruel inhuman and degrading treatment and found numerous human rights violations, including the most basic right – the right to life – in the use of the death penalty in these two states.

The mission was conducted by two teams: Florence Bellivier, president of the World Coalition Against the Death Penalty and FIDH Representative on the Death Penalty, and Susan Hu, CCR Bertha Fellow, headed the California team; Vincent Warren, Executive Director of CCR, and Jessica Lee, CCR Bertha Fellow, headed the Louisiana team.

The mission chose to examine California based on the fact that it has the largest number of people on death row in the country and recently (November 2012) considered a state referendum to replace the death penalty with life without parole.<sup>3</sup> The mission focused on Louisiana because of its long, documented history of harsh treatment of death row and other prisoners, its relatively high rate of exonerations, and the presence of strong local organizing for abolition in the face of this brutality. The mission’s findings, however, are not limited to these two states, but rather, reflect general trends regarding the use of the death penalty across the United States.<sup>4</sup>

The mission interviewed 20 stakeholders in California and 21 in Louisiana. It visited inmates on death row in California; such visits were not possible in Louisiana. The mission is very grateful to the individuals who contributed their valuable time to the mission. A partial list of interviewees is available in Appendix A, as several individuals spoke only on condition of anonymity, due to fear of reprisals from state officials.

The mission reached two overarching conclusions: (1) although there is use of a human rights framework by some advocates in both states, public officials in California and Louisiana do not, as a matter of course, apply an international human rights framework to their analysis and discussion of the death penalty; and (2) analyzing the application of the death penalty as applied in California and Louisiana through a human rights framework reveals that both states are in breach of internationally recognized standards.

Although the U.S. played a pivotal role in drafting some of the key human



rights documents, including the Universal Declaration of Human Rights, and continues to hold itself out as a global leader on human rights, the U.S.'s global viewpoint belies the reality of "American Exceptionalism," whereby the U.S. chooses which internationally accepted standards or obligations it will follow and which it will not. The U.S. ambivalence to international human rights is particularly stark and disturbing in the context of the death penalty.

Internationally, there is wide recognition that the death penalty implicates not only criminal law, but also human rights law.<sup>5</sup> Although the death penalty is not affirmatively recognized in international conventions as a *per se* violation of international human rights law, its use must strictly comply with all of the protections otherwise afforded by human rights law, including the right to a fair trial, with full due process protections. Moreover, the conditions under which death row inmates are held must comply with international standards, including the Standard Minimum Rules for the Treatment of Prisoners ("Standard Minimum Rules").<sup>6</sup>

Coincident with the United Nations Human Rights Committee's review of the United States' obligations under the International Convention on Civil and Political Rights ("ICCPR"),<sup>7</sup> CCR and FIDH seek not simply to criticize and condemn the U.S. system, but rather to highlight a path for application of international human right law at the state level. Because the human rights protected by the ICCPR, which the U.S. has signed and ratified, must be guaranteed not only by the State party in general but by all divisions – federal, state and local, executive, administrative and judicial,<sup>8</sup> we call on these governments to take immediate action to meet their obligations under international law.

# III. Overview of the Death Penalty in the United States and Internationally

## A. History of the use of the death penalty in the United States

The death penalty in the United States has undergone dramatic changes in its four centuries of existence. The mid-20<sup>th</sup> Century brought challenges to the fundamental legality of capital punishment, and in 1972 the Supreme Court struck down the death penalty in *Furman v. Georgia*,<sup>9</sup> declaring that its application was so arbitrary as to be unconstitutional. Although many believed that *Furman* spelled the end of capital punishment in the United States, states responded by rewriting their death penalty laws in an effort to limit the arbitrariness of the punishment. In 1976 the Supreme Court considered and upheld a number of these revised statutes in *Gregg v. Georgia*,<sup>10</sup> effectively ending a four-year reprieve from executions. Since *Gregg*, the Supreme Court has endeavored to delineate the scope of the “modern,” constitutional death penalty, outlawing capital punishment for certain offenses, such as rape,<sup>11</sup> as well as for certain categories of persons, including the intellectually disabled,<sup>12</sup> juveniles<sup>13</sup> and, to a limited extent, those declared insane.<sup>14</sup>

The U.S. death penalty operates in a federalist context. It is imposed and managed primarily at the state level, with limited federal review. However, there is a federal death penalty, which is imposed by the United States government and encompasses a variety of crimes beyond that of first degree murder, including terrorism and large-scale drug trafficking.<sup>15</sup> The federal death penalty can be applied even in states that do not use the death penalty, and although executions for federal offenses remain rare, fifty-nine people are currently on the federal condemned inmates list.<sup>16</sup> United States military law also authorizes the death penalty for several crimes.<sup>17</sup>

## B. Overview of the capital process

Death penalty trials are bifurcated into two phases: the guilt/innocence phase and the penalty phase. The guilt/innocence phase operates like an ordinary criminal trial. If the defendant is found guilty, the trial proceeds to the penalty phase, during which the prosecution and the defense have the opportunity to present evidence. For the prosecution, this tends to relate to previous convictions, the nature of the offense, and, in most states, victim impact evidence. The defense, seeking to persuade the jury to spare the defendant’s life, presents evidence of “mitigating circumstances,”



including information relating to the defendant's character, mental health, and personal and family history. The jury weighs the evidence pursuant to the judge's instructions,<sup>18</sup> and decides whether to sentence the defendant to death.<sup>19</sup>

Since the "constitutionalization" of the death penalty in 1976, the Supreme Court has required three types of appellate review for defendants sentenced under state death penalty law: direct appeal, state post-conviction review, and federal habeas corpus review. Direct appeal is an automatic appeal to the highest state court,<sup>20</sup> and is limited to issues arising from the trial. At state post-conviction review, defendants may typically raise issues that are outside the trial record, such as ineffective assistance of trial counsel or new claims of factual innocence. At federal habeas corpus review, a civil action is brought in federal court on the grounds that the prisoner's incarceration violates the United States Constitution or federal law. Defendants can petition for discretionary Supreme Court review at the conclusion of each stage of appeals. The appellate process differs for defendants sentenced under the federal death penalty, a discussion of which is beyond the scope of this report. Executive clemency may be sought in both state and federal capital cases once all judicial options are exhausted, although it is rarely granted.<sup>21</sup> Clemency for state convictions is typically granted by the governor; however each state maintains its own process for review.

### **C. General trends in the domestic use of the death penalty**

The death penalty is currently authorized by 32 states, the federal government, and the military.<sup>22</sup> Death-eligible offenses vary between states, but are limited to homicide and crimes against the state.<sup>23</sup> As of 1 April 2013, there were 3,108 individuals on death row in the United States.<sup>24</sup> California has the largest death row population, with 742 prisoners as of 1 October 2013, followed by Florida (412) and Texas (298). Since capital punishment was reinstated in 1976, Texas has performed the most executions (504) – over four times that of the next state, Virginia (110).

Use of the death penalty has been declining dramatically in recent years. Six states have repealed the death penalty in the past six years: New York and New Jersey in 2007, followed by New Mexico in 2009, Illinois in 2011, Connecticut in 2012, and Maryland in 2013. In practice, executions are rare in much of the nation: 33 jurisdictions have not executed anyone in the past five years, and 26 jurisdictions had no executions in at least a decade.<sup>25</sup> Nine states performed executions in 2012 – the fewest number of executing states in 20 years.<sup>26</sup> The number of annual death sentences nationwide has dropped dramatically, from 315 in 1996 to 78 in 2012<sup>27</sup> – the second lowest since the death penalty was reinstated in 1976 (the lowest being in 2011).<sup>28</sup> A number of states where the death penalty remains an option, such as North Carolina, Virginia, South Carolina and Indiana, had no new death sentences in 2012.<sup>29</sup> The number of executions carried out has also been in decline: there were 43 executions a year in 2011 and 2012, compared with 85 in 2000.<sup>30</sup> Notably, death sentences are being overturned at a rate that outpaces admissions to death row. This trend has continued since 2001, when for the first time since 1976 the number of death sentences overturned was higher than the number handed down.<sup>31</sup> However, executions do continue in certain pockets of the country, with Texas executing 13 men in the first nine months of this year alone.<sup>32</sup>

## **D. General international consensus against the use of the death penalty**

International trends show an inexorable progress towards abolition. Over two-thirds of the world's nations are now abolitionist in law or practice, with an average of three countries per year abolishing capital punishment since 1990.<sup>33</sup> The use of the death penalty has also been increasingly curtailed through international law. After World War II, international human rights instruments either made no mention of capital punishment or allowed it as a carefully worded exception to the right to life. International law limited the punishment, excluding certain protected categories of individuals from execution – including juveniles, pregnant women and the elderly – and confining its use to only the most serious crimes. Notably, the death penalty is not a permissible form of punishment at international criminal courts and tribunals, even for the most serious crimes including genocide, crimes against humanity and war crimes. As the consensus against the death penalty has grown, international law has become increasingly abolitionist. For example, the American Convention on Human Rights (“American Convention”),<sup>34</sup> adopted in 1969, prevents the reinstatement of the death penalty once abolished by a state party. Since 1980, four international human rights treaties have been adopted that proclaim the abolition of capital punishment.<sup>35</sup> In 2007, the UN General Assembly approved Resolution 62/149, which calls for all retentionist states to establish a moratorium on executions with a view to abolishing the death penalty; two further resolutions reaffirming the call for a global moratorium were adopted in 2008<sup>36</sup> and 2010,<sup>37</sup> and in November 2012, the UN General Assembly's Third Committee adopted a fourth resolution calling for a moratorium, which received the support of a record 110 countries; the U.S. was one of just forty states to vote against the resolution.<sup>38</sup>



# IV. Legal Context

The death penalty necessarily implicates the most “supreme” of human rights, the right to life.<sup>39</sup> In spite of the growing international consensus that the death penalty is a *per se* violation of that right, States that continue to use the death penalty claim that the taking of a life is not arbitrary and is permitted under law. As such, rather than focusing solely on the right to life, we examined two of the most pervasive and oft-violated rights implicated in the use of the death penalty: the right to equality and non-discrimination, and the right to be free from torture or other cruel inhuman or degrading treatment. We analyze whether California and Louisiana meet the legal requirements for upholding these two rights, paying particular attention to those relevant international instruments which the U.S. has signed or ratified, and the jurisprudence of related treaty bodies or tribunals. These instruments include the ICCPR, the American Declaration on the Rights and Duties of Man (“American Declaration”),<sup>40</sup> the American Convention,<sup>41</sup> International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),<sup>42</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>43</sup> This section will define discrimination, torture, and other cruel, inhuman or degrading treatment; offer a general framework of international law; and briefly discuss significant departures from international law by the United States.

The rights to non-discrimination and to be free from torture and cruel, inhuman or degrading treatment place obligations and prohibitions not just against the federal government. In signing international agreements, the U.S. has committed to “ensure that all public authorities and public institutions, national and local, shall act in conformity with [the treaty] obligation.”<sup>44</sup> To that end, the U.S. is obligated to review governmental policies and “amend, rescind or nullify any laws and regulations”<sup>45</sup> which create or perpetuate racial discrimination, or allow torture or cruel, inhuman or degrading treatment of prisoners on death row.

CCR and FIDH hope that the mission’s analysis and findings can be of use by advocates and policymakers at the state, national and international level who are working towards full abolition in the United States.

## A. Discrimination

### 1. Discrimination under International Law

The principle of equality and non-discrimination is a foundational norm of international law,<sup>46</sup> and an “essential element” of due process.<sup>47</sup> The CERD defines discrimination as “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing,

of human rights and fundamental freedoms . . . .”<sup>48</sup> Non-discrimination provisions are also included in all other core human rights treaties to which the U.S. is a party, notably the ICCPR, which binds states to respect and ensure rights of the Covenant “without distinction of any kind,”<sup>49</sup> and the American Declaration, which affirms the “right to equality before the law.”<sup>50</sup> The bodies responsible for interpreting the ICCPR and the American Declaration—the Human Rights Committee (“HRC”) and Inter-American Court (“IACtHR”) and Commission on Human Rights (“IACHR”) respectively—have further interpreted the text of the treaties by adopting definitions of discrimination that are in accordance with the CERD definition and interpretation, including the prohibition against direct and indirect discrimination.<sup>51</sup>

Treaty bodies have emphasized that any unjustifiable disparate impact resulting from state conduct is contrary to human rights and violates a *jus cogens* norm.<sup>52</sup> The CERD Committee has recognized the difficulty of establishing indirect discrimination in the context of the administration and functioning of the criminal justice system. In its General Recommendation 31, it provided guidance on how “better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system,” instructing States to “pay the greatest attention to the following possible indicators of racial discrimination: [...]

(e) The number and percentage of persons belonging to those groups who are held in prison or preventive detention, including internment centres, penal establishments, psychiatric establishments or holding areas in airports;

(f) The handing down by the courts of harsher or inappropriate sentences against persons belonging to those groups; [...]<sup>53</sup>

The IACHR has addressed indirect discrimination as well.<sup>54</sup> In addressing a legal regime which adversely impacted migrants, the IACHR recalled that, “[i]nternational human rights law prohibits not only deliberately discriminatory policies and practices, but also policies and practices with a discriminatory impact on certain categories of persons, even though a discriminatory intention cannot be proved.”<sup>55</sup> Notably, the IACHR found the U.S.’s refusal to grant a new sentencing hearing to a defendant sentenced to death under a procedure later found to be unconstitutional, when others *were* granted a new hearing, was an unjustified and discriminatory denial of his human rights.<sup>56</sup>

Relevant to this report, non-discrimination principles are important in examining the fairness of a trial and the validity of a particular conviction, and apply to criminal trials, convictions and sentences.<sup>57</sup> Where discrimination on any basis has played a role in trying, convicting or sentencing defendants, an execution by the state is an arbitrary deprivation of life, and an affront to the most central principles and purposes of human rights.<sup>58</sup> For example, the IACHR has found that “the kinds of deficiencies that have been identified . . . as rendering an execution arbitrary and contrary to Article I of the American Declaration include . . . the failure to provide strict due process guarantees, and the existence of demonstrably diverse practices that result in the inconsistent application of the penalty for the same crimes.”<sup>59</sup> As such, in addition to the general provisions governing equality, international instruments address the right to be free from discrimination in the context of the judicial process at length.<sup>60</sup>



The HRC further observed that, “[e]xpressions of racist attitudes by a jury that are tolerated by the tribunal, or a racially biased jury selection are . . . instances which adversely affect the fairness of the procedure.”<sup>61</sup> Thus, the HRC has found discrimination where jurors have made statements that include racial epithets or stereotypes and the court took no remedial action.<sup>62</sup> Similarly, the IACHR found discrimination on the part of the U.S. where a juror presented the bailiff with a drawing of a hangman accompanied by a statement “hang the [racial epithet]” and the judge took insufficient remedial action.<sup>63</sup> In another case, prejudicial statements referring to a defendant’s status as a foreign national, offered by a prosecutor in front of a jury and permitted by the judge, were also found to violate the defendant’s rights under the American Declaration to a fair trial and equal protection without discrimination.<sup>64</sup> Violations of the treaties’ prohibitions on discrimination and requirements for a fair trial may also be found in wider contexts. In the past decade, regional courts have found substantiated statistics can play a role in establishing discriminatory effects.<sup>65</sup>

## 2. Discrimination in U.S. Context

The U.S. utilizes a different definition of discrimination in the context of criminal prosecutions, which brings it into conflict with its international obligations. International instruments recognize any distinction, exclusion, restriction or preference that has discriminatory *effects*, irrespective of intent, as discrimination.<sup>66</sup> In contrast, U.S. criminal courts only recognize claims of *intentional* discrimination.

*McCleskey v. Kemp*<sup>67</sup> exemplifies the significance of the U.S. reliance on a narrow, intent-only discrimination standard in the context of criminal prosecutions. In *McCleskey*, the U.S. Supreme Court rejected the discrimination claims of a man sentenced to death, despite a study using statistical evidence showing that use of the death penalty in the state of Georgia was linked to the race of the victim. Even after controlling for other factors, the study found that African Americans who killed Caucasians were over 4 times as likely to be given a death sentence. The court found that such disparities are “an inevitable part of our criminal justice system.”<sup>68</sup> In other words, the Supreme Court acknowledged the discriminatory *effect* of the operation of the death penalty in the U.S. Despite this recognition, the Court held that any alleged victim of racial discrimination in the justice system, “must prove that the decision makers in *his* case acted with discriminatory purpose . . .”<sup>69</sup> According to the former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the *McCleskey* ruling has “has had the effect of allowing the courts to tolerate racial bias because of the great difficulties defendants face in proving individual acts of discrimination in their cases.”<sup>70</sup>

The CERD Committee’s 2008 concluding observations on the U.S. note that the “definition of racial discrimination used in the federal and state legislation and in court practice is not always in line” with the Convention.<sup>71</sup> The Committee also noted that the disproportionately high ratio of minorities incarcerated “may be regarded as factual indicators of racial discrimination.”<sup>72</sup> The Committee recommended that the U.S. review the definition it uses “to ensure . . . that it prohibits racial discrimination in all its forms, including practices and legislation that may

not be discriminatory in purpose, but in effect.”<sup>73</sup> In relation to the death penalty, the Committee has expressed its concern regarding racial disparities in both of its Concluding Observations,<sup>74</sup> and recommended that the U.S. “adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.”<sup>75</sup> Indeed, the HRC put forward questions related to racial disparities in the use of the death penalty, among other issues of concern related to the death penalty, for the U.S. to address when it comes before the Committee in October 2013.<sup>76</sup>

## **B. Torture and Cruel, Inhuman or Degrading Treatment**

### **1. Torture and Cruel, Inhuman or Degrading Treatment under International Law**

Failure to provide treatment that respects the inherent dignity of those condemned to death violates international standards prohibiting torture or other forms of cruel, inhuman or degrading treatment or punishment (“CIDT”). The prohibition of torture and CIDT is a peremptory norm.<sup>77</sup> It is set forth, without reservation or exception, in the foundational human rights instrument, the Universal Declaration of Human Rights,<sup>78</sup> as well as the CAT,<sup>79</sup> two provisions of the ICCPR,<sup>80</sup> and various regional human rights instruments.<sup>81</sup>

Article 1, paragraph 1, of the Convention Against Torture provides a definition of torture that reflects the components of torture under customary international law:

[T]he term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>82</sup>

Of particular relevance in the death penalty context is that torture is not limited to physical acts; severe mental pain or suffering can constitute torture. The former Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, found that “[p]sychological ill-treatment is by no means less severe than physical abuse.”<sup>83</sup> An analysis of the treatment (physical or mental) is based on the specific circumstances including the “nature, purpose and consistency of the acts committed” and personal circumstances relating to the vulnerability of the victim.<sup>84</sup> Moreover, although a variety of acts have contributed to a finding of torture, it is not necessary to assess each act individually to find that, in isolation, it constitutes an act of torture; acts can be considered in combination.<sup>85</sup> The Inter-American Convention to Prevent and Punish Torture provides that “[t]orture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental



capacities . . . .”<sup>86</sup> The International Criminal Tribunal for the former Yugoslavia (“ICTY”) similarly confirms the profound effects of various forms of torture on the individual and has found torture to be “a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person.”<sup>87</sup>

Under CAT, torture does not include the infliction of pain or suffering that is “arising only from, inherent in or incidental to lawful sanctions.”<sup>88</sup> However, the death penalty is not exempt from consideration as torture merely by virtue of its imposition through a legal framework, as lawful sanctions “do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”<sup>89</sup> According to the Special Rapporteur on Torture, “[t]he proper understanding [of the lawful sanctions provision] is that the exclusion refers to sanctions that are lawful under both national and international law.”<sup>90</sup> As such, should a sentence of death be imposed in violation of international standards, such as standards requiring due process or non-discrimination, it would not qualify as a “lawful sanction,”<sup>91</sup> and the pain or suffering arising from the imposition of death penalty could qualify as torture. Further, the notion of lawful sanctions can evolve and practices which might initially be considered lawful might become outlawed and viewed as the most serious violations of human rights.<sup>92</sup>

The U.N. General Assembly has noted that CIDT, “should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental. . . .”<sup>93</sup> The ICTY has defined inhuman treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”<sup>94</sup> The European Commission on Human Rights has found that, at minimum, the prohibition on inhuman treatment, “covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.”<sup>95</sup> Degrading treatment has been defined as including treatment, “such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”<sup>96</sup> Inhuman treatment has often arisen in the context of the treatment of prisoners of war, and, as in our case, those in detention.<sup>97</sup> Failing to provide for the essential needs of prisoners, and treating prisoners in a manner that constitutes a serious attack on human dignity or causes serious suffering or injury, constitutes cruel, inhuman or degrading treatment.<sup>98</sup>

## **2. International Standards for Treatment in the Detention Context**

The prohibitions against torture and CIDT are particularly relevant in the detention context. For example, provisions of the ICCPR relate specifically to detention and apply an affirmative standard that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” and mandate that “the essential aim” of a penitentiary system shall be the “reformation and social rehabilitation” of its prisoners.<sup>99</sup> Although this aim is inherently discordant with the use of the death penalty, the methods of achieving such goals must be complied with despite the sentence; signatories to the ICCPR are not only prohibited from the use of torturous or other inhumane

treatment, but are also obligated to take affirmative measures to ensure that the dignity of prisoners is maintained.

To define what standard of care would provide humane treatment, the UN General Assembly has adopted two resolutions regarding conditions of incarceration: the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and the *Basic Principles for the Treatment of Prisoners*. Both articulate the fundamental principle that “[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights” as well as any other covenant to which the State is a party.<sup>100</sup>

The HRC, in assessing violations by member states of these standards, relies on the Standard Minimum Rules to determine whether a State party has violated its obligations for humane treatment.<sup>101</sup> The Standard Minimum Rules set forth practical and specific requirements for the physical environment, policies around use of force, provision of medical care, availability of cultural and educational opportunities, and access to the outside world that the UN recognizes as *minimally* necessary for treatment in accord with the dignity of those subject to incarceration. The UN Economic and Social Council has urged member states in which the death penalty may be carried out “to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.”<sup>102</sup> To this end, it adopted the *Safeguards Guaranteeing Protection of the Rights of Those Facing Death Penalty* in 1984.<sup>103</sup> Article 7 of the *Safeguards* affirms that the Standard Minimum Rules apply to those awaiting a sentence of death.

These broad mandates have been given greater specificity through the development of jurisprudence by the Inter-American Commission and Court of Human Rights.<sup>104</sup> In 2008, the Commission approved the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* which, in addition to the Standard Minimum Rules, provides guidelines for ensuring that the physical conditions, availability of programming, access to family, and legal processes associated with detention respect the dignity of those subject to confinement.<sup>105</sup> As the Inter-American Commission found:

[T]he conditions of imprisonment of persons sentenced to death must meet the same international norms and standards that apply in general to persons deprived of liberty. In particular, they must have access on an equal footing to the healthcare services of the jail; to education, job and training programs; to work shops and reading materials; and to cultural, sports and religious activities; and to contact with the outside world and their family members. . . . Therefore, there is no valid justification to subject this category of inmates to more restrictive or harsher conditions than those of the rest of the inmates.<sup>106</sup>

Although prisoners are not to be subjected to harsher conditions as a result of their sentence, condemned prisoners necessarily undergo psychological trauma as a result of the death sentence. Decisions by the Human Rights Committee make clear that conditions on death row can constitute a human rights violation and may be

exacerbated by the nature of this psychological trauma.<sup>107</sup> A largely psychological phenomenon of severe trauma resulting from the prolonged confinement of death row prisoners has been found to constitute CIDT, and has recently been found by expert opinions to constitute torture. “Death row phenomenon” is a term used to describe the collection of harms inherent in many death row contexts as a result of the time spent awaiting execution in the challenging conditions of confinement of death row, and the mental consequences of living under a sentence of death.<sup>108</sup> Death row phenomenon is frequently a compounding of several harms which have been found to constitute torture, such as a believable threat of execution,<sup>109</sup> sensory deprivation and/or isolation, prolonged denial of rest and sleep, prolonged denial of medical care, being kept in uncertainty, subjection to excessive light or noise, and simulated executions.<sup>110</sup> Although analyzed on the specific facts and with a focus on the vulnerability of the victim in question, regional human rights courts have found that prolonged confinement in the difficult conditions of death row constitutes cruel inhuman or degrading treatment.<sup>111</sup> In fact, the Privy Council of the British House of Lords has found that “in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.”<sup>112</sup>

Recently, the Special Rapporteur on Torture evaluated the use of the death penalty and the conditions under which it is implemented. He found that regardless of the legality of the death penalty itself and the evolving norm against its use, **“most conditions under which capital punishment is actually applied renders the punishment tantamount to torture,”** and in “less severe conditions,” CIDT.<sup>113</sup> Citing death row phenomenon, the Special Rapporteur finds that as a result of the anxiety suffered from a threat of death, which results in “great psychological pressure and trauma,” a “prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself.”<sup>114</sup> As a result, adherence to the prohibition on torture and other CIDT serve as “absolute limits on the use and enforcement of the death penalty.”<sup>115</sup>

### **3. Torture and Cruel, Inhuman or Degrading Treatment in the US context**

The U.S. government’s understanding of what constitutes torture and cruel, inhuman or degrading treatment, and the means by which to address it, are not in conformity with international law and practice. Within the United States, the treatment of prisoners is governed by the Eighth Amendment to the U.S. Constitution, which prohibits the infliction of “cruel and unusual punishments.”<sup>116</sup> The Supreme Court has held that, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>117</sup> The use of the Eighth Amendment to secure the realization of human rights has yielded some positive results, such as the abolition of the death penalty for minors,<sup>118</sup> and the intellectually disabled.<sup>119</sup> However, conditions of confinement challenges under this legal regime have resulted in haphazard, non-comprehensive standards for prisons. Necessarily, as a result of the “unusual” requirement, efforts to abolish the death penalty under this standard have thus far been limited.

Upon ratifying CAT, the U.S. issued an “understanding” clarifying its definition of torture with respect to mental harm, redefining “mental pain and suffering” as



“prolonged” mental harm which is related to the intentional infliction or threatened infliction of certain physical acts.<sup>120</sup> This limited definition of torture is also used in the federal statute prohibiting torture.<sup>121</sup> Although the suffering caused by conditions prevalent on death rows and the death row phenomenon described herein likely fits within this understanding, it is important to note that this definition is contrary to the Convention. The Committee Against Torture has urged in its Concluding Observations that the U.S. “should ensure that acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ . . . but constitute a wider category of acts . . . .”<sup>122</sup>

Additionally, the U.S. fails to provide an adequate remedy to detained individuals who have suffered in detention. The limited definition of torture serves as a barrier to inmates seeking compensation for their injuries. The Prison Litigation Reform Act (“PRLA”) was instituted to limit the ability of prisoners to bring suit based on their conditions by establishing, *inter alia*, the requirement that prisoners exhaust all administrative remedies before filing suit, the imposition of fees, and even permitting judges to revoke inmate’s good time credits for filing “malicious or harassing claims.”<sup>123</sup> In the context of the death penalty, the PRLA bars federal civil lawsuits by prisoners “for mental or emotional injury suffered while in custody without a prior showing of physical injury” or sexual act.<sup>124</sup> Although case law has established that detained individuals may sue to get a court order to cease the treatment, and some courts have allowed damages for infringement of constitutional rights, there is no mechanism for seeking compensatory damages for mental harm resulting from ill treatment.<sup>125</sup> The Committee Against Torture has expressed its concern with the PRLA in its 2006 Concluding Observations<sup>126</sup> and again in its 2010 list of issues.<sup>127</sup>

# V. California

With 741 individuals currently on death row<sup>128</sup> and an average of approximately 20 new judgments of death per year, California's death row is by far the most populous in the country and contains nearly twice as many condemned men and women as the nation's second largest death row in Florida. Seven hundred and twenty two out of the 741 prisoners on death row are men, and they are held at San Quentin State Prison, the oldest prison in California. San Quentin is located along the water in Marin County, about a thirty minute drive north from San Francisco. The remaining 20 – the women of death row – are imprisoned at Central California Women's Facility in Madera County, about a two hour drive from San Francisco and San Jose and a forty minute drive from Fresno.

California adopted its current death penalty law by popular initiative in 1978, two years after the Supreme Court reaffirmed the country's acceptance of the death penalty in *Gregg v. Georgia*.<sup>129</sup> Since then, the state's death row population has increased steadily. But unlike other states with large death row populations, California has carried out relatively few executions. Thirteen individuals have been executed since 1978, and none have been executed since a court-ordered stay was entered in 2006. More inmates on death row have died from suicides than from execution; more than four times as many have died from natural causes than from execution.

Although the lack of executions would appear to indicate that the state has little appetite for the death penalty, recent election results suggest that its citizens remain reluctant to give up the symbolism – and the fiction – of meting out the ultimate punishment to the “worst of the worst.” In the fall of 2012, abolitionist organizations around the state mounted a \$7 million campaign in support of Proposition 34, a state-wide ballot measure to abolish the death penalty in California and convert the sentences of over 700 death row inmates to life without parole.<sup>130</sup> The measure failed by a slim majority. As a result, California's death row population continues to grow, even as the state struggles to meet minimum international standards for conditions of confinement for the current condemned population.

It is clear that retaining the death penalty, even without frequent executions, comes at an unacceptable price for those on death row, their families, and even the state of California itself. In May 2013, the mission interviewed inmates on California's death row, family members of death row prisoners, attorneys who represent individuals in capital cases and post-conviction appeals, legal scholars, and advocates who have worked for decades to abolish the death penalty in California. Interviewees emphasized fundamental problems with how the death penalty is implemented in the state and described shockingly poor conditions on death row. These systemic problems, which will likely not be fixed in the foreseeable future given, *inter alia*, the state's long-term financial crisis, strongly suggest that continued administration of capital punishment will simply never – and can never – be compatible with the United States' obligations under international human rights law.

## **A. Overview of the Trial and Appeals Process**

The death penalty may be imposed in California for any first degree murder that also involves a “special circumstance” enumerated by the California Penal Code.<sup>131</sup> The state’s first-degree murder statute is broad; it includes “all murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing”; murder “committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking,” torture, sodomy, lewd acts against a child, unlawful oral copulation, and unlawful sexual penetration; and murder “perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death.”<sup>132</sup>

At trial, the factfinder (usually a jury) must make three separate findings before a sentence of death is imposed. During the “guilt phase,” the factfinder must first find the defendant guilty of first-degree murder, and then find that one or more “special circumstances” was present in the case. During the “penalty” phase, the factfinder weighs the aggravating factors and the mitigating circumstances in the case to determine whether the defendant should be sentenced to death or life imprisonment. A punishment of death is imposed if the jury returns a unanimous verdict that “the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.”<sup>133</sup>

Although all criminal defendants are permitted to file an appeal, a state habeas petition, and a federal habeas petition, there is one crucial difference between defendants sentenced to death and all other criminal defendants. In addition to being entitled to an attorney during the trial and appeal proceedings, death row defendants are entitled to an attorney during all stages of post-conviction review if they cannot afford a lawyer. By contrast, defendants sentenced to any term of imprisonment other than death, including defendants sentenced to life without parole, are guaranteed to a court-appointed attorney only at the trial and appellate stage. Although they are still permitted to file state and federal habeas petitions raising, for example, new claims of factual innocence, in practice they are unable to do so without the assistance and resources of a lawyer. Thus, in practice, death row inmates are the only population who are able to seek relief beyond the direct appeal stage.

## **B. Current State of Affairs**

In the fall of 2012, California voters were given an opportunity to abolish the death penalty by popular referendum. Proposition 34, which would have ended the death penalty and converted the sentences of the 741 men and women currently on death row to life without parole, was defeated by a vote of 52.8% to 47.2%, a difference of 500,000 votes.<sup>134</sup> The narrow margin was a partial victory for many



death penalty abolitionists, because it indicated that the state was on the cusp of change. Prop 34 was supported by a broad coalition of organizations and death penalty abolitionists around the state, which together spearheaded a \$7 million campaign called SAFE California to persuade citizens to vote for the measure. One of the campaign's central arguments was the high economic cost of maintaining the death penalty in a state that in recent years had faced multi-billion dollar shortfalls and major spending cuts<sup>135</sup>—an influential study by the bipartisan California Commission on the Fair Administration of Justice had previously pegged the cost of the California death penalty system at a staggering \$137 million, and the savings at about \$125 million should the death penalty be abolished in favor of life without parole.<sup>136</sup>

Prop 34 had broad support among abolitionists and the death penalty defense bar, but it also raised complex questions for some about the fairness of replacing the death penalty with life without parole.<sup>137</sup> For many death row prisoners, the passage of Prop 34 and the conversion of their sentences to life without parole meant that they would no longer be entitled to a court-appointed attorney beyond the appeals stage, and they stood to lose an important opportunity to investigate and raise new facts that could prove their innocence.<sup>138</sup> For others, like Christine Thomas, wife of condemned prisoner Correll Thomas, life imprisonment was no better than a sentence of death, because “either way, you die in prison.<sup>139</sup> And for some prisoners who had been on death row for years or decades, the prospect of being moved out of death row into another, potentially worse facility, was nearly unbearable.<sup>140</sup>

Although Prop 34 did not ultimately pass and the death penalty remains on the books in California, the next execution will likely not happen anytime in the near future. Executions have been on hold since 2006, when a federal district court ordered the state to stop executing people because the three-drug protocol used by the state created an “undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment[’s prohibition on cruel and unusual punishment].”<sup>141</sup> Among other things, the court found that there were “substantial questions” as to whether six of eleven men who had previously been executed by the state had been conscious at the time of execution and had suffered an unconstitutional level of pain; and that there were “critical deficiencies” in the way the state had been implementing its execution protocol, including a lack of adequate training and supervision of the execution team.<sup>142</sup>

In response, the state built a new execution chamber and revised its lethal injection protocol, but continued the use of the three-drug method, prompting a new legal challenge. In May 2013, a California appeals court upheld a ruling that the state's revised protocol failed to comply with the state's administrative procedure law, and that the state had failed to consider the single-drug protocol recommended by its own experts.<sup>143</sup> The state is now exploring a single-drug option. Executions could begin again once a new lethal injection protocol is approved and passes judicial review, which will likely take more than a year to complete.<sup>144</sup>

***“Back here [on death row], as long as there’s hope [that you might one day be free], there’s life. Life without parole takes that away from you. With LWOP [life without parole], you have no hope.”***

– Kevin Cooper, prisoner on death row

The death row population at San Quentin continues to grow in the meantime. Approximately 20 new judgments of death are handed down each year,



adding new inmates to a facility badly in need of repair and with inadequate resources to care for an aging and increasingly diverse population.<sup>145</sup> For example, according to the California Appellate Project, which provides legal assistance and training to private attorneys representing condemned inmates on appeal, 61 foreign nationals are currently on death row, and many are not provided with trained, certified interpreters when medical issues arise.<sup>146</sup> The prison also lacks resources and services to provide adequate facilities for a

US San Quentin: A police officer looks over a fence at the entrance to San Quentin Prison during a protest against the execution of death row inmate Stanley «Tookie» Williams, on December 12 2005. Protesters claimed he had been wrongfully accused of the crime for which he had spent half his life in detention, © HECTOR MATA / AFP

transgender prisoner,<sup>147</sup> and for the 16 men who are now over 70 years old.<sup>148</sup>

Overcrowding is also a pressing concern. In 2011, the U.S. Supreme Court ruled that overcrowding in California’s prisons created conditions that violated the Eighth Amendment’s prohibition on cruel and unusual punishment, and that a reduction in the prison population was necessary to solve systemic problems, including the lack of adequate medical and mental health care.<sup>149</sup> California was directed to reduce its prison population to 137.5% its design capacity.<sup>150</sup> San Quentin, which houses general population prisoners as well as prisoners on death row, contains roughly 4,200 men and currently operates at 137% capacity.<sup>151</sup>

Jeanne Woodford, former Warden at San Quentin, stated in May of 2013 that there was “insufficient capacity [at San Quentin] to appropriately house the growing condemned population” and that “in approximately four months, the condemned population will exceed the cell space set aside for it.”<sup>152</sup> A planned project to build a new \$356 million prison to house condemned inmates was cancelled by Governor Jerry Brown in April 2011, and no long-term plans are currently in place to address the space shortage.<sup>153</sup> If California continues to sentence individuals to death row at the current rate, overcrowding will become an increasingly significant problem in the coming years, exacerbating the already-poor conditions at the prison and placing even more serious burdens on prisoners’ freedom of movement.

### C. Discrimination and Arbitrariness in the Legal System

Perhaps one of the most significant problems with how sentences of death are handed down in California lies with the breadth of its death penalty statute. With 22 enumerated “special circumstances,” California’s sentencing statute is thought to be the broadest in the country.<sup>154</sup> The state is one of the few in the country that permits the imposition of the death penalty even though the defendant had no intent to kill; under § 190.2(a)(17) of the California Penal Code, the death penalty may

be sought for any murder that occurs while a defendant is engaged in committing one of twelve listed felonies, regardless of the defendant's mental state.<sup>155</sup> An individual may therefore be charged with death for accidental, "unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident," as long as the homicide occurred during the course of a felony.<sup>156</sup> The state is also one of the few in the country that permits the death penalty to be sought for any murder committed by a defendant while "lying in wait," a definition so broad that it encompasses the vast majority of premeditated murders.<sup>157</sup> As a result of the breadth of special circumstances categories, 87 to 90 percent of California's first degree murders are death eligible under California's sentencing statute.<sup>158</sup> A more recent study of over 27,000 homicides found that the death eligibility rate of first degree murders was 95 percent using the law in place in 2008.<sup>159</sup>

***"The notion that society is capable of selecting the worst of the worst to have their lives extinguished is fundamentally flawed. . . . The system is absolutely incapable of [deciding] which offender is deserving of the ultimate penalty."***

– Joseph Schlesinger, Capital Habeas Unit, Office of the Federal Defender for the Eastern District of California

The district attorney's office in the county in which the crime occurs makes the initial charging decisions, including whether to charge a "special circumstance" in a first-degree murder case, making it death eligible. Two studies found that out of the total pool of death eligible defendants, only 9.6 percent are sentenced to death in California; the number drops to 5 percent when only the most common "felony-murder" special circumstance cases – burglary-murder and robbery-murder – are considered.<sup>160</sup> These statistics show that in deciding which defendants to select for death, prosecutors have what one attorney called "virtually unfettered discretion."<sup>161</sup> Such discretion allows political factors to play a larger role in the decision-making process and increases the risk of racial discrimination in both charging and sentencing decisions.<sup>162</sup> In the words of one Federal Attorney who represents prisoners on death row, "Who gets the death sentence is at best arbitrary and at worst discriminatory."<sup>163</sup>

Indeed, numerous studies have confirmed that illegitimate factors such as race play a part in whether a defendant is charged and sentenced with the death penalty, and that the death penalty is applied in an arbitrary manner. Defendants in Hispanic and African-American victim cases, for example, have been shown to be less likely to face death-eligible charges than defendants in cases where the victim was Caucasian<sup>164</sup> Additionally, a study of statewide homicides committed between 1990 and 1999 concluded that defendants found guilty of killing whites were 3.7 times more likely to be sentenced to death than those found guilty of killing African Americans, and 4.7 times more likely to be sentenced to death than those found guilty of killing Hispanics.<sup>165</sup> Even after controlling for other factors, race and ethnicity of the victims remained a "significant predictor" of the imposition of the death sentence.<sup>166</sup> Charging and sentencing rates also vary wildly with geography. In one study that examined death-charging in a single county in California, researchers found that the same District Attorney's office sought death 2.5 times more often for murders occurring in one area of the county – where whites were three times more likely to be homicide victims – than in another – where African-Americans were four and a half times more likely to be homicide victims.<sup>167</sup> Another study has



shown that since 2000, 10 counties in California (out of a total of 58) with vastly different homicide rates have been responsible for 83% of all death sentences in the state,<sup>168</sup> while in the decade preceding, nearly half of California counties returned no death sentences for homicides.<sup>169</sup> Additionally, death sentencing rates in California have been found to be highest in counties that are more sparsely populated and overwhelmingly white.<sup>170</sup>

This pattern of discriminatory charging and sentencing may be a contributing factor as to why African-Americans are significantly overrepresented on death row. While they make up only 6.7% of the overall population in California, African-Americans represent 36% of prisoners on death row. While whites make up 73.7% of the overall population, they represent only 35% of prisoners on death row.<sup>171</sup>

#### **D. Delays in the Adjudication of Post-Conviction Claims for Relief**

Indigent death row prisoners in California – virtually everyone on death row – are denied prompt disposition of their claims because of inordinate delays in appointment of counsel and the slowness of California’s courts in deciding appeals and habeas petitions. While death row prisoners nationwide wait an average of approximately ten years for their post-conviction claims to be adjudicated, the thirteen inmates in California who were executed waited an average of 17.5 years before their execution.<sup>172</sup> New death row inmates sent to San Quentin will spend at least 20 years on death row awaiting execution.<sup>173</sup> Over 240 individuals currently on death row have been there for over 15 years; over 100 have been there for over 20 years; and eight have been on death row for over 30 years.<sup>174</sup> CCR and FIDH met with three inmates at San Quentin during its mission to California. All have been on death row for at least a decade or more.

The delay is due in part to a shortage of attorneys in the state qualified and willing to take on capital cases. Attorneys for death penalty cases are not compensated adequately by the state and, according to a report published by the California Commission on the Fair Administration of Justice, inadequate compensation is a “significant factor” in the decline of available attorneys handling death penalty appeals.<sup>175</sup> Death row prisoners now wait an average of 3-5 years before counsel is appointed to handle their direct appeal, and an additional 8-10 years following the conclusion of their appeal for an attorney to be assigned to their state habeas petition.<sup>176</sup> Approximately 85 defendants on death row are still awaiting counsel to handle their direct appeal, and approximately 335 defendants are awaiting counsel to handle their state habeas appeal.<sup>177</sup> In total, 57% of the death row population is without representation for post-conviction proceedings. The courts also add years to the delay. The Commission on the Fair Administration of Justice found that the California Supreme Court takes an average of 2.25 years to decide a death penalty appeal and approximately 2 years to decide a state habeas petition; resolution of federal habeas petitions by the federal district and appeals courts takes an additional 8 years.<sup>178</sup> By all accounts, the delay has worsened significantly since the Commission issued its report in 2008, as it now takes the California Supreme Court 3.7 years to resolve a habeas petition.<sup>179</sup>

These delays create significant practical problems for defense attorneys who are assigned to investigate habeas cases long after a crime has occurred, a situation which one attorney at the California Appellate Project called a “human rights crisis.”<sup>180</sup> One Federal Defender described how the decades-long delay made it much more difficult to challenge a conviction in a federal habeas case: “It is not uncommon for witnesses to have died, records to have been destroyed, and evidence to have been lost.”<sup>181</sup> This is particularly problematic in a state where cases are routinely reversed – at a rate of 80 percent – only at the federal level.<sup>182</sup> The majority of prisoners whose sentences are later vacated will have spent over 15 years on death row.

***“The legal system creates a lot of pain and makes people want to end their life quickly. People don’t have attorneys. They tend to turn in.”***

– Jarvis Masters, prisoner on death row

Delays also exact a very real human cost. Sixty condemned inmates have died from natural causes while waiting for the conclusion of their post-conviction claims, three times the number of those who have been executed by the state.<sup>183</sup> In one case, a death row prisoner died of cancer while waiting for the California Supreme Court to decide his state habeas petition – a wait that had had gone on for 13 years.<sup>184</sup>

## **E. Conditions of Confinement**

San Quentin’s death row is known for its poor living conditions. From 1980 to 2009, the prison was under judicial oversight to improve the housing and living conditions of condemned prisoners.<sup>185</sup> Although enough improvements were made to satisfy the court and the oversight was terminated in 2009,<sup>186</sup> some have argued that the termination was premature,<sup>187</sup> and many problems still persist.

Prisoners on San Quentin’s death row are housed in one of three facilities: North Segregation (“North Seg”), East Block, and the Adjustment Center, which also houses a few inmates from the general population. North Seg contains about 68 prisoners, all of whom are classified in the less restrictive “Grade A” class. East Block contains approximately 500 inmates, 450 of whom are classified as Grade A. The rest are classified as “Grade B” and are treated in a manner similar to inmates sentenced to a security housing unit, and subject to a host of restrictive measures.<sup>188</sup> The Adjustment Center houses about 100 prisoners, the vast majority of whom are death row inmates with a Grade B classification. All prisoners are housed in single cells, regardless of their classification.

***“It was not until we visited the tiers that we realized how horrible, how inhumane [death row] was. They treat prisoners like animals.”***

– Joseph Baxter, appellate attorney

There are significant differences in general living conditions between the three housing units. While North Block is relatively quiet, East Block, according to death row prisoner Jarvis Masters, is “very noisy . . . [there is] constant yelling

and screaming down the halls [and noises from] radios and TVs; it's enough to drive you nuts.”<sup>189</sup> With over 250 cells along each wall stacked five stories high and separated only by tiered walkways, noise from the walkways and from each of the cells can be heard by all. While the minority of inmates who reside in North Seg may leave their cells and access a small communal indoor space for a portion of each day, those in East Block and the Adjustment Center – or about 90 percent of the death row population – have no communal space besides the recreation yard. The Adjustment Center is the solitary confinement unit within death row and provides the most restrictive housing conditions; prisoners in the Adjustment Center are locked in their cells for all but nine hours a week.



Walkalone yard in East Block at San Quentin's death row. Source: Expert Decl. of Jeanne Woodford in Supp. of Pls' Opp'n to Defs' Mot. to Terminate, Photo Ex. A, Coleman v. Brown, No. 90-0520 (E.D. Ca. Mar. 14, 2013).

## 1. Lack of recreation time and adequate outdoor space

Although San Quentin's operating procedures for death row, known as the Condemned Manual, states that prisoners in East Block and the Adjustment Center are allowed access to outdoor yard space four hours per day, three days a week, the regulations do not reflect reality. Yard time is often shortened to two hours per day because of various delays, and it is frequently not offered to some inmates for weeks at a time.<sup>190</sup> In one case documented by Woodford, recreation time appeared not to have been offered to one inmate for four months.<sup>191</sup>



In addition, the amount of recreational space at San Quentin is inadequate for the current death row population. In East Block, up to 80 prisoners are released at a time to share a single yard that is roughly 60 feet by 80 feet, about the size of a basketball court. Little to no exercise equipment is available, and the space is so uncomfortable and crowded that prisoners frequently decline recreation time.<sup>192</sup> Most of the yard space in the Adjustment Center is made up of walk-alone space, which consists of outdoor cells known as “dog kennels” and meant for a single prisoner. The view is obstructed by a high wall on all four sides.<sup>193</sup> Prisoners housed in the Adjustment Center are also strip searched in a holding cell before and after going out to the yard, a policy which discourages many from going outside.<sup>194</sup> Aside from time spent in the yard, there is no opportunity for inmates to socialize in a communal space.<sup>195</sup>

## 2. Restrictions on contact and communication with family members

Approximately 150 of the over 700 prisoners at San Quentin are currently classified as Grade B and are subject to highly restrictive conditions. The most significant of these limitations apply to their communication with the outside world. Grade B prisoners are not able to make or receive phone calls, including phone calls to their attorneys; they are therefore forced to communicate with their lawyers by mail or during the few times a year their attorney can find the time to visit.<sup>196</sup> Inmates may sometimes be allowed to use the phone in exceptional circumstances such as family emergencies, but such instances are rare and the provision of a phone call is left to the complete discretion of prison staff. Although Grade A prisoners are allowed a minimum of two 15-minute time slots a week for collect phone calls,<sup>197</sup> the lines are monitored by prison staff and phone calls cost \$2.50 per minute – a prohibitively expensive rate for the indigent death row prisoners and their loved ones.<sup>198</sup>

In addition, visitation for Grade B prisoners is limited to one hour per visit, and contact visits are strictly prohibited, which means that prisoners are separated from their visitors at all times by a plexi-glass booth and must speak through a telephone.<sup>199</sup> Grade B prisoners may only receive packages once per year.<sup>200</sup>

These restrictions, combined with the fact that Grade B designations may be given for indeterminate periods of time, mean that some prisoners have not had phone calls or felt the touch of a family member for a decade or longer.

***“Before they kill you physically, they want to kill you emotionally.”*** – Kevin Cooper, prisoner on death row

*Although physical abuse by prison staff has decreased over the decades that San Quentin was under judicial supervision, a number of interviewees noted that prisoners at San Quentin are still often subject to harassment by correctional officers, and that certain intentional*

*behavior by prison staff cause prisoners psychological and emotional harm.<sup>201</sup> According to some interviewed by the mission, prisoners are “dehumanized and antagonized,”<sup>202</sup> and treated by guards “like chained animals.”<sup>203</sup> Correll Thomas, for example, described being subject to small injustices, such as having personal possessions overturned, broken, and destroyed during cell searches, on a regular basis, calling it “systematic torture.”<sup>204</sup> Another prisoner, Jarvis Masters, recalled how a guard would taunt him by reading Masters’ judgment of death out loud.<sup>205</sup> Kevin Cooper noted that he rarely ever saw correctional officers disciplined for mistreating an inmate and commented that “in this prison, the guards are always right, and you are always wrong.”<sup>206</sup> These small humiliations, according to Cooper, are “all part of the process to break you.”<sup>207</sup>*

### 3. Solitary confinement

Prolonged solitary confinement is routinely imposed at San Quentin. When inmates first arrive on death row they are placed in “administrative segregation” – solitary confinement for all practical purposes – in what San Quentin officials call the “Adjustment Center” and what death row inmates call “the Hole.” This initial placement into solitary confinement may range from a few weeks to six months, and applies to all prisoners, regardless of any special status or medical needs. Solitary confinement in the Adjustment Center is also imposed on prisoners if they are sentenced to Grade B status. Woodford has described the Adjustment Center as “very restrictive,” where inmates are “not allowed much freedom at all.”<sup>208</sup> Contact with other inmates is minimal. Communal meals are not allowed, and virtually the only time inmates are able to interact is during yard time. The Condemned Manual states that prisoners in the Adjustment Center are allowed up to 12 hours a week for outdoor exercise<sup>209</sup> – practically the only time in which they are allowed out of their cell – but in reality, yard time is frequently not offered.<sup>210</sup> Because the cells have solid doors, inmates are unable to see one another when they are in their own cells, and their only means of communication is by yelling back and forth through their cell doors.

Current guidelines allow prisoners to be classified as Grade B and placed in solitary confinement for determinate periods of up to 48 months,<sup>211</sup> but they may also be assigned Grade B status and sent to the Adjustment Center indefinitely. The loose standards specified in the operating procedures are frequently applied with wide amounts of discretion, via a classification process that death penalty advocates have criticized as arbitrary and lacking in due process.<sup>212</sup> For example, correctional officers may place a prisoner in the Adjustment Center for a “serious rule violation,” but offenses range widely from conduct that may be charged as a violent crime to relatively minor infractions such as possessing more than \$5 without authorization, possessing – or “constructive[ly] posse[ssing]” – a cell phone; or participating in a strike.<sup>213</sup>

Death row prisoners may also be given *indeterminate* Grade B status based on their “gang affiliation,” a term that is not defined anywhere in the regulations.<sup>214</sup>

Prisoners may also be given an indeterminate Grade B term for incurring one serious rule violation and two administrative rule violations within a six-month period.<sup>215</sup> Indeterminate Grade B status may additionally be assigned to any inmate who prison staff determine is being “disruptive to the normal operating procedures of the institution.”<sup>216</sup> There is no limitation to how long an individual with indeterminate Grade B status may remain in solitary confinement with all the accompanying restrictions on communication.

For individuals found to be affiliated with a gang, the prospect of release is especially bleak. Release from the Grade B “program” can only come through debriefing, which requires confessing to a gang-related crime and naming other members in the gang; or a finding by prison staff that the inmate is no longer an active gang member.<sup>217</sup> Neither option is satisfactory. Inactive reviews are conducted only once every six years,<sup>218</sup> and the periodic 90-day reviews provided for in the procedures<sup>219</sup> have little impact on a prisoner deemed to be affiliated with a gang.<sup>220</sup> On the other hand, debriefing comes with serious risks: it is legally unwise for many inmates who do not wish to reveal information that might damage their pending appeal; potentially dangerous for those who believe that they will be retaliated against if they reveal any names; and impossible for some who were incorrectly validated as a gang member and who have no actual information to provide.<sup>221</sup>

It is not surprising, then, that some death row prisoners have been in the Adjustment Center for decades.<sup>222</sup> The mission met with one inmate, Jarvis Masters, who spent 22 years in isolation in the Adjustment Center. Masters described the Adjustment Center as a place “where [prison guards] can torture you, taser you . . . [and] take retaliatory violence [against you]” with little repercussion. During the first six months he was in the Adjustment Center, Masters was placed in an even more restrictive environment, which he described as the “hole within the Hole,” and allowed few items beyond a blanket and a mattress. During the first year, his recreation time was limited to being in the “walkalone yard,” where he was not allowed to interact with any other prisoners. Because of the prohibition on contact visits and phone calls, Masters was “cut

## **Hunger Strike to Protest Conditions in the Adjustment Center**

*On 8 July 2013, the same day that 30,000 prisoners held in prisons across California began a hunger strike to protest the state’s practice of sending inmates into solitary confinement for decades with effectively no way out,<sup>224</sup> nearly 100 prisoners held in the Adjustment Center initiated a peaceful hunger strike to protest the solitary confinement policies in place on death row. Among other things, the prisoners in the Adjustment Center sought changes that would lift some of the most onerous restrictions placed on Grade B inmates, such as the ban on non-contact visits, and sought to end some of the unfair practices currently in use for sending prisoners to solitary confinement.<sup>225</sup> The prison administration’s response to the strike and to the prisoners’ demands was mixed, and at times, hostile. Two weeks after the strike began, correctional officers issued rules violation reports to all striking inmates, and the hunger strikers were punished by being confined to their quarters for 10 days, which severely limited their ability to communicate with one another.<sup>226</sup>*

*The hunger strike ended on 14 August 2013; it lasted a total of 38 days. More than a dozen prisoners lost consciousness or experienced medical difficulties as the strike unfolded.<sup>227</sup> By the end, administration officials acknowledged that there was a lack of meaningful process for those assigned to indeterminate Grade B status and understood that change was necessary, but made no promises except to end the humiliating practice of strip searching Adjustment Center prisoners outside in a holding cell before allowing them access to the recreation yard.<sup>228</sup> The prisoners are still waiting for the administration to make concrete changes to the operating procedures. Revised operating procedures are expected to come out sometime in spring 2014.<sup>229</sup>*



off from all human contact except [during] yard from 1985 to 2007” – the entire period during which he was in solitary.<sup>223</sup>



Treatment cages for group therapy in the Adjustment Center at San Quentin's death row. Source: Expert Decl. of Jeanne Woodford in Supp. of Pls.' Opp'n to Defs.' Mot. to Terminate, Photo Ex. C, Coleman v. Brown, No. 90-0520 (E.D. Ca. Mar. 14, 2013).

#### **4. Medical and mental health care**

Not surprisingly, a significant portion of prisoners on death row struggle with mental health problems. One prisoner commented that “the majority of people here don’t need prison, they need a mental hospital.”<sup>230</sup> Another interviewee, a Federal Defender representing death row inmates, explained that many prisoners arrive on death row with existing mental health issues, and that death row only exacerbates those problems because of the “lack of socialization” and the “stress of not knowing when they’ll be executed.”<sup>231</sup> Those who arrive without any problems develop them over time as they struggle to live under a death sentence with an unknown execution date, and slowly deteriorate.<sup>232</sup>

Despite the significant mental health needs of condemned prisoners, mental health treatment on San Quentin’s death row is often inadequate. For example, group therapy is always conducted with prisoners seated inside cramped, individual “treatment cages” that are lined up in a “dirty and crowded” room.<sup>233</sup> And current policies discourage prisoners from medical and psychiatric visits. The

Condemned Manual requires that inmates be strip searched before and after each medical visit.<sup>234</sup> Woodford has similarly noted that prisoners in the Adjustment Center are strip searched after returning from mental health appointments.<sup>235</sup> When prisoners do go for medical visits, their ankles are handcuffed to a bed, requiring them to sit or lie in the same position – often for hours – while waiting to be seen.<sup>236</sup> Additionally, San Quentin’s death row lacks resources and staff to treat the roughly 10-20 inmates who are severely mentally ill.<sup>237</sup> Unlike the general prison population, condemned prisoners are not eligible for transfer to a state hospital facility for specialized mental health care. Although the prison recently reported that a specialized program had been set up at San Quentin to treat those with acute mental illness, it has provided few details about the program. No policies and procedures have been made public, staffing for the program is uncertain, and the level of care is unknown.<sup>238</sup>

Two prisoners interviewed by the mission expressed feelings of mistrust between prisoners and medical staff, stating that a large part of mental health treatment at San Quentin consists of placing inmates on medication.<sup>239</sup> The lack of trust is due in part to knowing that mental health staff may not keep conversations confidential: one prisoner noted that doctors will sometimes reveal sensitive information told by prisoners, such as past sexual abuse, and that such information will eventually find its way to correctional officers.<sup>240</sup> Guards or escorts are present at all times during medical visits,<sup>241</sup> and one prisoner, Correll Thomas, explained that their presence deters prisoners from speaking openly to medical staff (and at times from even going to a medical visit) because prisoners know from past experience that guards will tell other officers about an inmate’s medical issues, and the information will later be used to taunt and humiliate the inmate.<sup>242</sup> Thomas also noted that prisoners do not trust that correctional officers will respond in their best interest during a medical emergency. He described a recent incident where an inmate died in his prison cell and guards refused to go into the cell for hours because the inmate was not handcuffed.<sup>243</sup> He recalled another incident where, for the same reason, guards refused to enter a prison cell to help an un-handcuffed prisoner even though the prisoner had just been stabbed.<sup>244</sup>

Psychiatric care is given to a prisoner set to be executed, but according to Kevin Cooper, a death row prisoner who came within hours of execution before receiving a stay, the purpose of those additional psychiatric visits was to monitor his actions and ensure that he did not commit suicide before the execution date.<sup>245</sup> Cooper noted that in the days before he was set to be executed, guards would also come by his cell every hour to see if he was all right and to make sure “that you don’t cheat them of their death.”<sup>246</sup> Cooper stated that even though he was traumatized in the weeks following the event, he received no counseling or therapy; he was only asked whether he wanted any medication. In general, counseling or therapy is offered to inmates only following a prisoner suicide; no therapy is offered when another prisoner is executed.<sup>247</sup>

## F. Death row phenomenon

*“Everything here is about death. That’s what makes [death row] different from other prisons. . . . [T]he thought of being executed, you don’t ever get used to that.”*

– Kevin Cooper, prisoner on death row

The post-conviction appeals process is an essential safeguard against mistakes, especially when a defendant’s life is at stake, and is a necessity in light of the high reversal rate for death penalty cases in California. But, as the European Court of Human Rights cautioned, “the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”<sup>248</sup> The California Supreme Court also recognized this in 1972 when it ruled the death penalty

unconstitutional, noting that “the cruelty of capital punishment lies not only in the execution itself . . . but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.”<sup>249</sup> That statement is even more true today, when the average length of time spent on death row is now an estimated 20 years, 12 more than the number of years that prompted the European Court of Human Rights and the California Supreme Court to make their observations.<sup>250</sup> The torment of a death sentence, which the California Supreme Court recognized as “psychological torture,”<sup>251</sup> and the punitive conditions of confinement are magnified for death row prisoners at San Quentin, who are forced to live under such conditions for decades while they wait for attorneys to be assigned and post-conviction remedies to be exhausted.”

One attorney noted that the length of time prisoners stay on death row constitutes “a special kind of torture.”<sup>252</sup> Jarvis Masters commented that it was the “people who have been on death row for a very long time” whom he saw developmental

health problems and “act out in harmful ways” because they could no longer stand the wait. Cooper, who has been on death row since 1985, described watching other inmates “turn into vegetables, give up, commit suicide, and become dependent on medication” over the course of their time on death row because of the long-term psychological effect of a death sentence.<sup>253</sup> And one Federal Defender representing

San Quentin Death Chamber, [http://en.wikipedia.org/wiki/File:SQ\\_Lethal\\_Injection\\_Room.jpg](http://en.wikipedia.org/wiki/File:SQ_Lethal_Injection_Room.jpg)





death row inmates noted that the stress of not knowing when they will be executed exacts an immeasurable toll on his clients' mental health, commenting, "I don't think I've had a client who isn't a potential volunteer, or who at one point was a volunteer. . . . [They say to me], I just want to be executed; I just want to get this over with. [Being on death row] is not an existence for them."<sup>254</sup>

Since 1978, 23 prisoners on California's death row have committed suicide (with the latest occurring four days before this report's publication), nearly twice the number executed by the state. The stress and anxiety of living under a sentence of death for a prolonged period of time is undoubtedly a factor, but conditions within San Quentin may also be contributing to feelings of loneliness, hopelessness, and isolation that impact a prisoner's will to live. The extended use of solitary confinement, which Woodford has argued is "unnecessary and avoidable,"<sup>255</sup> is well known for causing irreversible psychological damage.<sup>256</sup> The use of indefinite solitary confinement – the sentencing of prisoners to indeterminate Grade B status in the Adjustment Center – in particular exacerbates the pain and suffering of solitary because of the uncertainty of the length of punishment.<sup>257</sup> The "dehumanizing" treatment by correctional officers at San Quentin, which was emphasized by all three prisoners interviewed by the mission, also takes a serious toll. The constant degradation, noted the wife of one death row prisoner, is particularly hard on the prisoners who are mentally ill, who "can't bear up against [such] bullying."<sup>258</sup>

***"I went through a ritual of death that was so unreal . . ."***  
– Kevin Cooper, prisoner on death row

On 10 February 2004, **Kevin Cooper** was set to be executed by the State of California. Before the U.S. Supreme Court issued a decision affirming a last-minute stay less than four hours before the appointed time of execution, prison officials at San Quentin prepared Cooper for his death. Cooper recalled the month-long execution "ritual" and the psychological toll it continues to have on him:

*"The first thing they did was move my property to another cage so [that] they could watch me constantly. The cage was filthy and looked like it had never been cleaned [and] I spent days scrubbing it. Prison staff came by every hour to see if [I] was all right and to make sure [I] didn't cheat them of their death. They sent psychiatrists, nurses, and administrative staff [to see me] all over a two week period. They wanted to know my clothing size . . . they took me out in the middle of the night to take photos of me. They [then] took me to the hospital to have the execution squad size me up. The doctors [talked] about my execution and where my veins were right in front of me, without acknowledging [my] being there. This went on for weeks. . . ."*

*"As [the] execution got closer and closer, everything became more intense. I was moved to [a cell] above the execution chamber, and someone [took] notes on what I was doing every hour. [I was put in] a waist chain with my hands handcuffed to my sides during visits, and guards surround[ed] and watched[] me 24/7, even during visits. All the guards watching me were white. . . . The day before [my execution,*

*after my last visits were over], 14 guards marched me to a cage [right next to] the execution chamber. When they took my handcuffs off and strip searched me, they asked, ‘When we take this cuff off, is there going to be any trouble?’”*

*“I felt like a slave on an auction block. They poked and prodded me and made me do everything: [put my] head up, lift up my testicles, bend over . . . it went on and on. It was so dehumanizing . . . I watched them carry [all the execution materials past me] to the death chamber. . . . At 8:17 [four hours before I was set to die], the phone rang. The Supreme Court had decided not to lift the stay [in my case]. . . . I felt life reenter my body. . . . I [ ] suffered from PTSD after the incident, but I have not received [ ] counseling from anyone . . . They didn’t offer any help – no nurse, no doctor. . . . Every time an execution happens, I’ll watch the clock and relive what they put me through. . . . I see my life now as being on the clock, especially after they tried to kill me. It’s not a matter of minutes, but months.”<sup>259</sup>*

# VI. Louisiana

The mission's observations about the process by which defendants are sentenced to death in Louisiana and the cruelty of the conditions experienced on death row prior to execution raise serious questions about the state's adherence to international human rights law and the Constitution of the United States.

Located in the southern U.S., Louisiana is a largely rural state with a population of 4.6 million.<sup>260</sup> There are currently 88 people on Louisiana's death row, including two women. Since reinstatement of the death penalty in 1976, the state has executed 28 persons. In keeping with national trends, Louisiana's use of the death penalty has decreased since 2000. From 1990-1999, 68 people were sentenced to death in Louisiana, as compared with 43 people from 2000 to 2012.<sup>261</sup> Only one of these executions has occurred since 2003: a man who volunteered to die without undertaking appeals. Significantly, nine people have been exonerated while on Louisiana's death row.

Prosecutors seeking the death penalty for a homicide in Louisiana must charge a defendant with first degree murder, which includes one of 11 aggravating factors.<sup>262</sup> Until 2008, "aggravated rape of a child" (La. Rev. Stat. Ann. §14:42) was also a crime which could warrant the death penalty.<sup>263</sup> Louisiana has a newly implemented system of standards and operational guidelines for capital defenders,<sup>264</sup> which seek to reform years of poorly funded and decentralized capital defense. Although significant improvements have been made to this system, the mission learned that a lack of funding and slow implementation of defense counsel standards continue to serve as a major source of concern for Louisiana criminal justice reformers and attorneys.

In April and May 2013, mission representatives conducted interviews in southern Louisiana with former inmates who have been exonerated, a family member of the formerly incarcerated, advocates, attorneys for those on Louisiana's death row, and trial defense counsel. The mission was unable to gain access to visit the death row. The Warden of Louisiana State Penitentiary also declined to meet with the mission. Interviewees expressed their hopefulness that Louisiana will continue to decrease its use of the death penalty but also expressed a deep skepticism that the state could ever remedy both the widespread failings of its judicial process and the inhumane conditions in which it houses the incarcerated. Those interviewed by the mission underscored how the lack of integrity of the judicial process requires that the inmate be provided more time to challenge the state's position, while the severity of the treatment of inmates demands that inmates spend less time under the brutal conditions of detention.

The evidence of entrenched racial discrimination and arbitrariness throughout the legal process and the ruthlessness with which those on death row are treated leads the mission to conclude that the application of the death penalty in Louisiana is fundamentally inconsistent with the United States' obligations under international human rights law.



## A. Discrimination and Arbitrariness

Of the persons currently on death row in Louisiana, 58 are African American, 26 are Caucasian, three are Latino and one is Asian.<sup>265</sup> African Americans are overly represented on death row: they make up 65% of those sentenced to death, while they represent roughly 32% of the state’s population.<sup>266</sup> From 1990 to 1999, of those sentenced to death roughly 72% were African American, and from 2000-2012, roughly 63% of those sentenced were African American.<sup>267</sup> Although the trend towards disproportionate convictions of African Americans has seen a slight decrease in later years, this over representation of African Americans is still profound in light of the overall population and crime data, and is particularly concerning in light of Louisiana’s tumultuous racial history.

<b>Jurisdiction</b>	<b>% of persons on death row<sup>268</sup> (persons)</b>	<b>% Minority</b>	<b>Percent of State Population</b>
East Baton Rouge	20% (18)	89% (16)	10 % (444,526) <sup>269</sup>
Caddo	19% (17)	76% (13)	6 % (257,093) <sup>270</sup>
Jefferson	11% (10)	80% (8)	9% (433,676) <sup>271</sup>
<b>Total Top 3</b>	<b>51% (45 people)</b>	<b>82% (37 people)</b>	<b>25% (1,135,295)</b>
Total Statewide	88 people	70% (62 people)	4,601,893 <sup>272</sup>

Interviewees identified unchecked prosecutorial discretion as one of the primary reasons for the discriminatory application of the death penalty in Louisiana. The effect of this discretion is readily apparent in both disproportionate conviction statistics and the variant rates of death penalty sentencing among the local jurisdictions in Louisiana. For example, throughout the past two decades, the Parishes (localities) of Caddo, East Baton Rouge, and Jefferson have imposed the most death sentences in the state, comprising 51% of inmates on death row.<sup>273</sup> It is important to note, however, that despite these past sentences, East Baton Rouge and Jefferson Parish have recently decreased their use of the death penalty.

Aside from the singular statutory requirement describing the 11 factors which can constitute first degree murder, prosecutors have total charging discretion. They are influenced by pragmatic questions of resources and likelihood of conviction, along with external political considerations. First, prosecutors must consider their capacity to try a capital case, which is resource intensive. Multiple interviewees indicated that one of the reasons suburban areas seek the death

penalty at higher rates is that unlike small towns, they can afford the financial and human resources necessary for a death case. Prosecutors' decision-making is also factored by the size of their offices and the ability of existing staff to handle capital trials.

The political and cultural makeup of the judicial district was another factor repeatedly cited by many of the death penalty advocates and attorneys interviewed as a primary contributor to the wide variations between localities in sentencing people to death. When the culture of the area is rife with racially charged attitudes or history, serving as both an elected official and agent of justice can be challenging even for prosecutors with noble intentions. Notably, the areas which impose the most death sentences are characterized as having racial tension between communities, and a nearly even racial makeup between African Americans and Caucasians. At its worst, the Mission heard that there was a perception that prosecutors were enabling existing racial tensions within their locales as a measure of control and intimidation.

Prosecutors in Louisiana are elected, and are acutely aware of the risks related to re-election. Still, even when confronted with strong community pressure towards prosecuting certain crimes or defendants harshly, prosecutors have the opportunity to seek a lesser sentence. Abolition advocates and attorneys expressed relief that prosecutors in several districts have significantly decreased their death charges despite this pressure. Of course, the same biases present in the community may be reflected in the actions of the prosecutor, even if there is no purposeful or conscious malintent. Many prosecutors may intend and believe themselves to be fair and unbiased. Commenting on the prosecutors in a capital friendly district, one attorney stated, "I don't believe most of it is due to conscious race based discrimination. It's all under other guises."<sup>274</sup>

However, even when unintentional, the ramifications of racial bias on prosecutions, and ultimately sentencing, are serious. For example, disproportionate charging based on the race of the victim and defendant is the largest independent disparity in the capital process throughout the country, and readily apparent in Louisiana.<sup>275</sup> As a Louisiana death penalty researcher observed, "[o]ne possibility is that prosecutors' offices, jurors, judges, investigating police officers, and others involved in constructing a death penalty case are (consciously or unconsciously) not as outraged or energized, on average, when an African American is murdered as when a white is murdered."<sup>276</sup>

# Louisiana Parish Map with County Seat Cities



<http://geology.com/county-map/louisiana.shtml>



For example, a statistical analysis comparing all homicides with death prosecutions from 1990-2008 in East Baton Rouge Parish found that cases with Caucasian victims are prosecuted as first-degree (death eligible) at about four times the African-American victim rate.<sup>277</sup> The rate when an African American has allegedly killed a Caucasian (18% prosecuted) is six times higher than when an African American is alleged to have killed another African American (3%).<sup>278</sup> These prosecutions result in death sentences at a 2.6 times higher rate for those who were charged with killing Caucasians, and is significantly higher (2.3 times) regardless of any aggravators.<sup>279</sup> In another locale which has sentenced a significant number of the state's death row inmates, Caddo Parish, where 78% of potential cases were black-on-black, roughly 12% were for white-on-white crimes, and 13.4 % were black-on-white.<sup>280</sup> By the time cases were brought to trial, *13 times* as many black-on-white crimes were tried as death eligible as compared to black-on-black crimes.<sup>281</sup> Looking solely at the race of the victim, crimes against whites were prosecuted as death eligible nine times as often as murders against African Americans.<sup>282</sup> In Louisiana's history, only one Caucasian has ever been executed for a crime against an African-American person— in 1752.<sup>283</sup>

There may also be malicious intent present in the community or the prosecutor's office itself. When asked about one high level prosecutor, a veteran capital defense attorney remarked, "[redacted] is nothing but the Klan." Interviewees spoke of the "common knowledge" of bigots' involvement in Louisiana government, and indeed, a former KKK grand wizard, David Duke, was elected to the Legislature from Jefferson Parish.<sup>284</sup> In one disturbing incident in 2003, prosecutors in Jefferson Parish (then the parish with the most death sentences in Louisiana), wore neckties featuring a dangling noose and the Grim Reaper.<sup>285</sup> The prosecutors were chastised by the district attorney yet faced no other disciplinary action.<sup>286</sup> Although the image of the noose itself may be race-neutral in other contexts, it is important to recall that in Louisiana and throughout the American south, lynching was one of the most prominent features of the lawless era following the Civil War and into the turn of the century during which African Americans were grotesquely murdered.<sup>287</sup>

### ***Caddo Parish***

*Caddo Parish, the home of the last capital of the Confederacy and host to a torrid history of lynch mobs and brutality against African Americans, is now one of the top locales for death sentences in Louisiana. Encompassing both the city of Shreveport, and a number of smaller towns, Caddo is a large and racially mixed jurisdiction.<sup>288</sup> Despite racial parity in terms of population, reports indicate the Ku Klux Klan remains active in the area, and local African-American politicians have been terrorized.<sup>289</sup> Until late 2011, a Confederate flag flew in front of the Caddo courthouse.<sup>290</sup> This flag was erected in 1951, just twenty years after the Parish had been the lynching "capital" of the state and one of the leading lynchers in the entire South.<sup>291</sup> Erection of the flag outside of the courthouse during the rise of the U.S. civil rights movement is seen as white intimidation with*

*lasting implications: 76% of the men who were sentenced to death row while it stood are African American.*<sup>292</sup>

*Today, convictions in Caddo Parish are responsible for nearly 1 out of 5 of Louisiana's death row sentences.*<sup>293</sup> *Caddo prosecutors tried 13 times as many black-on-white crimes as death eligible as compared to black-on-black crimes.*<sup>294</sup>

*In the jury selection for LaMondre Tucker, an 18 year old African American who was one of the last people to face a capital trial under the Confederate flag, African Americans were struck from the jury at disproportionate rates. During the trial, jurors heard characterizations of Mr. Tucker from the prosecution which "leveraged racial stereotypes," such as noting his alleged preference for white women, and portraying him as lazy. During jury selection some white jurors were heard to comment that they wanted to "hang the Defendant from the Confederate memorial outside of the courthouse"*<sup>295</sup> *The jury ordered Mr. Tucker's death after less than 30 minutes of deliberation.*<sup>296</sup>

## 1. Jury selection

The racial selection of jurors is another critical factor for assessing discrimination in the capital process in Louisiana. Although prohibited under federal and state law, interviewees reported ongoing bias in jury selection, with a considerable number of juries containing disproportionately few, if any, minorities. The absence of African Americans on juries violates their right to participate fully in their government, and affects the fairness of a jury's decision, even absent discriminatory intent. As noted in a 2006 study, "racially diverse groups may be more thorough and competent than homogeneous ones."<sup>297</sup> Jury "bleaching" or the removal of non-white potential jurors, has a dramatic effect in some counties. For example, 80% of criminal trials in Jefferson Parish have been found to have no effective African-American representation.<sup>298</sup>

Louisiana's jury selection process contributes to the disproportionate removal of African-American potential jurors. First, African-American jurors are weeded out in the creation of the jury pool itself. Indeed, the federal government

***"The attorney told us 'he will get an all white jury, and they will convict him to death,' like it wasn't even a question"***

– Monique Matthews Ruiz, sister exoneree Ryan Matthews

has sued Louisiana for failure to meet voter registration requirements in low income communities.<sup>299</sup> After production of a jury pool, defense and prosecution attorneys conduct *voir dire*—questioning of the potential jurors. Following the questioning, the attorneys and judge may remove jury pool (known as the "venire") members for "cause," as defined by Louisiana statute.<sup>300</sup>

Jury “bleaching” often occurs under the guise of “death qualifying,” the jury. For example, the prosecution can “challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant’s guilt,” or who would never impose the penalty.<sup>301</sup> Interviewees noted that African Americans in Louisiana are more likely to express concern with the criminal justice system or the death penalty as a result of their negative interactions with the system and Louisiana’s violent racial history. As a result, they are more frequently struck for cause.<sup>302</sup> Although the U.S. Supreme Court has found that a defendant’s rights were violated as a result of the prosecutor striking all jurors who expressed mere *concern* about the imposition of a death penalty, in practice, prosecutors often use such strikes in order to remove as many sympathetic jurors as possible.<sup>303</sup>

A study of Louisiana’s Caddo Parish sheds light on the attitudes of jurors dismissed during “death qualification”. When interviewed about the impact of racial bias on their participation in the jury, potential jurors who had been removed from the jury pool during “death qualification” noted the presence of the Confederate flag outside of the courthouse.<sup>304</sup> Others underlined how personal experiences shaped their view on the death penalty and how they could not extricate perceptions of injustice from questions around sentencing overall:

Like many African-Americans I know and have spoken to, I feel that African-American people have never known justice. Slavery and segregation are a testament to this. For this reason we cannot consider the death penalty as a real option in a capital case. Our sense that the death penalty is wrong also stems from the fact that it is unbalanced in its application against other African-Americans.<sup>305</sup>

Another person shared how they were personally marked by injustice and its impact on their perception of the death sentence:

Once you have been misperceived you are aware of misperception and its consequences for people’s lives. In my experience, this reality lends itself to a negative view of the death penalty.<sup>306</sup>

Following the removal of jurors for cause, attorneys may use “peremptory challenges” to strike remaining potential jurors. Attorneys do not need to provide any reason for their peremptory challenges, and in a capital trial, each side may strike 12 potential jurors without cause. Examples of reasons given by Louisiana prosecutors for removing African Americans found acceptable by the trial court include: the juror was “too stupid to live much less be on a jury;”<sup>307</sup> a venireman “looked like a drug dealer;”<sup>308</sup> or the juror was a “single black male with no children.”<sup>309</sup> Although the U.S. Constitution forbids racially discriminatory use of peremptory challenges, in practice, prosecutors wary of the perceived impact of African American jurors can and do use preemptory challenges to strike them. As noted in a concurrence by Thurgood Marshall, one of only two African Americans to ever serve on the U.S. Supreme Court, in *Batson v. Kentucky*, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.”<sup>310</sup>



When jury members are stricken, a defense attorney has the option to raise a “*Batson* challenge” presenting evidence that leads to at least an inference of discriminatory purpose in the strike.<sup>311</sup> In response, a prosecutor must provide a race-neutral reason for their action to strike the juror, which does not need to be “persuasive, or even plausible.”<sup>312</sup> In assessing those assertions, trial courts are instructed to evaluate “all relevant circumstances” to determine whether the strikes were discriminatory.<sup>313</sup> Despite the high level of deference to prosecutors’ assertions, as described below, in *Snyder v. Louisiana*, the Supreme Court recently found that a Louisiana prosecutor discriminated when striking an African-American college student from the jury.<sup>314</sup> The prosecutor, who had struck all five of the African-American jurors who survived challenges for cause,<sup>315</sup> claimed that the student “looked very nervous.”<sup>316</sup>

## 2. Oversight and Accountability

The mission also found that prosecutorial discretion was not sufficiently regulated through post-trial oversight of Louisiana death penalty cases. Moreover, the Louisiana Supreme court rarely overturns cases due to racial disparities. The Supreme Court’s mandatory “proportionality review,” implemented after *Gregg v. Georgia*,<sup>317</sup> seeks to determine first, whether there was an undue influence of “passion, prejudice, or any other arbitrary factors,” second, whether the finding of aggravating factors was supported by evidence, and third, whether the sentence was proportionate to the sentence in other similar cases.<sup>318</sup>

This process is woefully inadequate.<sup>319</sup> Most notable of the shortcomings is that the review is only in comparison to other *death* sentences arising in the same locale.<sup>320</sup> Second, by limiting the review to cases within the same court, trends in prosecutorial discretion (or even misconduct) go unchecked, as long as they are in keeping with recent practice. This narrow review effectively blinds the supreme court from seeing discriminatory patterns of charging, and fails to provide a means for the court to determine whether the sentences imposed are for the “worst of the worst” or simply the result of a flawed legal system. Indeed, the Louisiana Supreme Court has only reversed one death penalty case in the last quarter century.<sup>321</sup> Moreover, it was not until 2005 that the court, which oversees disciplinary actions against prosecutors, imposed its first professional sanction. Only three prosecutors have ever been disciplined, a surprising number in a state with a high number of exonerations including nine from death row.<sup>322</sup>

In *Snyder v. Louisiana* in, the U.S. Supreme Court ruled on a case from Louisiana’s Jefferson Parish regarding a prosecutor’s use of a preemptory strike against an African-American college student.<sup>323</sup> Notably, the case reached the Supreme Court twice; first the Court vacated the judgment without comment in light of its decision in *Miller-El v. Dretke*,<sup>324</sup> then, after the Louisiana Supreme Court upheld the conviction again, the case returned to the U.S. Supreme Court where it was overturned because the prosecutor’s removal of the sole remaining African American juror was found to be racially biased.<sup>325</sup> Although the defendant eventually got relief from the U.S. Supreme Court, the Louisiana Supreme Court’s proportionality review of the case is nevertheless notable. In its first review of *Snyder*, the court’s analysis on “passion, prejudice, and other arbitrary factors” was

only two sentences long.<sup>326</sup> On its second attempt, the court found that statements made to the jury analogizing the case with the recently decided O.J. Simpson case were “...no more compelling than other race neutral inferences to be drawn...” and that “[n]either remark referred to Simpson’s or [the defendant] Synder’s race.”<sup>327</sup> This blindness to the racial context in which death penalty cases are tried, particularly in regard to Jefferson Parish, which had widely reported racial bias and disparity in earlier death cases, is shocking.

## B. Conditions of Confinement on Louisiana’s Death Row

All those sentenced to death live in Louisiana State Penitentiary, with the exception of two women on death row housed in an all-female facility. This former plantation turned hard-labor prison is most commonly referred to as “Angola,” after the home country of the enslaved Africans that worked on the original plantation. Angola is infamous for its history of brutality and racism. Although it is widely reported that conditions in the prison and its death row have become more tolerable under new leadership and with the building of new facilities, conditions remain bad.

“DEATH ROW TIER  
AT ANGOLA”

For at least twenty-three hours each day, prisoners at Angola’s death row are locked in their cells alone, meeting the international standards for what is commonly considered as “solitary confinement.”<sup>328</sup> Each cell houses a single prisoner, and is equipped with a bed, desk, toilet, and space for personal effects. Cells are clustered in tiers, with windows on one wall of the tier and cells on the other. Prisoners have limited communication with prisoners in the adjacent cells through the metal bars at the front of the cell. There are no windows within the cells, and the prisoners’ views out of the windows in the hallway are obstructed. Prisoners are able to watch shared televisions located outside of their cells.

Interviewees reported that prison officials tend to keep the most severely mentally ill prisoners clustered together. Being moved to this tier is dreaded, as the prisoners



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have been known to loudly express their anguish, throw feces, or disturb fellow prisoners. At times, prisoners who are not mentally disturbed are moved to that tier as a form of punishment. Interviewees shared how it was difficult to concentrate or sleep in such conditions.

Prisoners are allowed one hour each day to exit their cells, and this time rotates, even occurring at times in the pre-dawn hours. During the out-of-cell time allotted, the prisoner may walk within the death row building, or may spend time outside. This outdoor area has been referred to as a “dog kennel,” “cages,” or “like Guantánamo” because it consists of small area which is completely fenced in. Once outside, the prisoner has no access to recreational activities or equipment. Some prisoners may sleep through their time for the day, or choose as a result of their mental state, not to exit. Interviewees noted some prisoners had not been outside in significant periods of time due to their mental state, and at least one had not been outside in years.

Responding to outcry against the use of solitary confinement for the “Angola 3” political prisoners in conditions similar to prisoners on Angola’s death row, the Louisiana Attorney General argued that the conditions did not constitute solitary confinement, stating that the prisoners were kept in cells for 23 hours a day as a protective restriction, and noting that they have televisions, radios, reading and writing materials, can shop at the prison store twice a week, and can leave their cells for an hour a day to shower, place phone calls, and at times go outside.<sup>329</sup> He further noted that the prisoners are allowed to meet with spiritual advisors, medical personnel and social workers as well as visitors.<sup>330</sup> The mission considers that the factors the Attorney General cited are minimal provisions needed to meet international standards for detention. Access to modes of communication and in-cell recreation (such as reading) does not negate the traumatic impact of living 23 hours of every day in a cell, particularly when this continues for months, years, or even decades.<sup>331</sup> According to the Istanbul Statement on the Use and Effects of Solitary Confinement, solitary confinement includes being held in cells for 22-24 hours per day. In this environment, contact with other people may occur, but “[m]eaningful contact...is typically reduced to a minimum.”<sup>332</sup> Further, in solitary confinement “[t]he reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.”<sup>333</sup> Conditions at Angola’s death row meet this description.

### **Tours of Angola Prison**

*The prison conducts regular tours of the death row tiers, putting prisoners on display for visitors nearly every day. School or university groups are frequent visitors to death row. Although the number of visitors itself is not public, it is reported that at least a thousand visitors come to Angola prison each month.<sup>334</sup> Prisoners have described the experience of being put on display as humiliating. Although the tour guide has discretion over their narration, prisoners have often heard degrading descriptions given to the tour group, and can hear the participants’ degrading comments. Tours include visits to the room*



where executions take place. As the sister of a death row exoneree explained, “A lot of kids looked forward to going to Angola; that was our 6th grade field trip. We were all convinced this was a good thing. Now I see that the tour terrorizes those on the row, and it teaches kids the wrong lessons.”<sup>335</sup>

The mission concludes that tours of Louisiana’s death row violate prisoners’ rights to privacy and dignity. This “much sought after tour destination,” according to the Louisiana Department of Corrections, serves to humiliate the prisoners on death row.<sup>336</sup> The Louisiana Department of Corrections permitting the regular entry of members of the public, including youth, exposes inmates to disparaging remarks and insults. Putting prisoners on display has been considered a human rights violation, violating ICCPR Articles 7 and 10.<sup>337</sup> Article 45(I) of the Standard Minimum Rules, although not contemplating the public would be allowed into a prison, notes that when prisoners are outside of the prison, “they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.” Angola not only fails to shield the prisoners from public view, but seeks to put prisoners on display in what should be a safe environment, their home. Such action is degrading and must be ceased.

## 1. Temperature

Housed in a brick building with limited air circulation and without air conditioning, death row prisoners suffer from the effects of sweltering Louisiana summers. As reported in recent litigation challenging these conditions under the Eighth Amendment to the U.S. Constitution and the *Americans with Disabilities Act*, the heat index<sup>338</sup> regularly reached over 111 degrees Fahrenheit/44 degrees Celsius, into the “Danger” and “Extreme Danger” classifications for each day in August.<sup>339</sup> At these temperatures, prisoners “suffer from cramps, rashes, nausea, headaches, dizziness, chest pain, profuse sweating, and sleeplessness as a result of this extreme heat.”<sup>340</sup> Underlying health problems are exacerbated and the risk for heat stroke or other complications are high.<sup>341</sup>

Despite these conditions, little is done by the prison to alleviate the suffering caused by the heat. Although official policies require the provision of “fluids and ice, the allowance of additional showers and/or cold, wet towels, and increased ventilation to the area,”<sup>342</sup> these are not regularly supplied. Showers are scalding hot. Prisoners can only access ice during their daily out-of-cell hour, and it is often “unsanitary and infested with insects.”<sup>343</sup>

The impact of these extreme temperatures is unhygienic and dehumanizing conditions that persist for weeks or months at a time. As one exoneree notes, “guys will throw water from the toilet onto the floor to cool off. They’ll sleep on the floor to stay cool.”<sup>344</sup> Many stay on the floor even though it exposes them to fire ant

bites, which are prevalent within the cells. As a form of punishment for perceived misbehavior, prisoners can also be moved to the hotter tiers, where conditions are even more grueling.<sup>345</sup> Notably, the guard station is air conditioned.<sup>346</sup>

## 2. Recreation

Death row inmates at Angola are not allowed to participate in the recreational or rehabilitative programming offered to most prisoners such as work programs, training or educational programming. Not only does this policy deny death row prisoners the rehabilitative benefits of the programs themselves, but the denial of programming ensures the prisoners' confinement to only death row and the cages surrounding it.

Recently, in response to a prisoner's artwork being sold online, Angola instituted a policy which denies prisoners the ability to make art even within their cells. Under this new rule, prisoners are not only denied formal art supplies, but are even forbidden from informal and personal expressions. The policy has sparked paranoia and concern on death row, as, "if they so much as draw a stick figure, they'll get written up."<sup>347</sup> Several attorneys for death row prisoners noted that this is having a profound impact on clients' mental wellbeing with one attorney noting that his client "is deprived of the one thing that gives him hope."<sup>348</sup>

### Art in Angola Prison

*Not only does the prohibition of creating art in Angola's death row demoralize inmates and deprive them of its rehabilitative effects, it also violates their right to freedom of expression. In addition to the protections under the First Amendment of the U.S. Constitution, the ICCPR protects the freedom of expression, which includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." <sup>349</sup>*

## 3. Contact with family and attorneys

According to attorneys and prisoner advocates interviewed by the mission, family members are able to speak on the telephone with their loved ones on death row during the one hour per day that the prisoner is allowed out of their cell. However, the mission was informed that because the out-of-cell time rotates, on some days prisoners can only make calls placed in the middle of the night.<sup>350</sup> Moreover, interviewees indicated that calls are expensive, and many struggle to afford them.

Angola prison is located in an isolated region of Louisiana, several hours away from the areas which are home to most of the men on death row. It is challenging for many families to afford to make the trip, including taking time off

of work for the travel. As such, attorneys and prisoner advocates note that visits can pose a financial burden and can be difficult for families to arrange. Furthermore, the prison's disciplinary actions, which can result in visitation being taken away, may occur with short notice. The cancellation of visits due to perceived misbehavior is a major source of stress that adds to the difficulty that families face.<sup>351</sup> When meetings do occur, prisoners are allowed a limited number of "contact," family visitations, meaning the inmate is in the same room with his family, with hands un-cuffed and legs shackled. The ability to meet with family and maintain family ties is cited as one of the key factors in keeping prisoners sane in an otherwise isolating environment.

*"The first time I saw him in those conditions I screamed and hollered like a crazy woman. I just couldn't take it."*

–Monique Matthews Ruiz, sister of exoneree Ryan Matthews

Prisoners are only allowed non-contact visitation with attorneys. As one attorney for prisoners on death row explained, when discussing his clients' isolated conditions: "It's worse than typical prison because of the mental anguish and torture conditions. You're waiting for someone to kill you, while you're stripped of even the most basic humanity of simply shaking someone's hand."<sup>352</sup> The visits are conducted through a glass pane using a phone to talk. One attorney noted that the glass, although clear enough for typical conversations, impedes the ability to observe the small mannerisms which can indicate mental distress.<sup>353</sup> Phone calls are recorded, including attorney calls. The mission was informed that it is possible to request non-recorded calls for attorneys once a week, however, attorneys interviewed expressed their mistrust regarding the security of these calls and noted that arranging them in advance can be onerous.

#### 4. Medical Care

Prisoners at Angola's death row have regular access to doctors for basic needs, but the quality of care for more serious or chronic health needs is lacking. Reports from mid-2012 indicate that many doctors working in Louisiana's state prisons have been disciplined by the licensing board for serious infractions or even criminal convictions. A local newspaper explained that the prisons, including Angola, "appear to be dumping grounds for doctors who are unable to find employment elsewhere because of their checkered pasts, raising troubling moral questions as well as the specter of an accident waiting to happen."<sup>354</sup> In fact, Louisiana licensing standards include specific provisions that restrict medical practice to institutions or prisons, thereby implying a lesser standard of care for those at risk. The Assistant Medical Director of Angola has such a restriction on his license, reportedly as a result of a conviction on drug charges.<sup>355</sup>

The hospital at Angola is also notoriously unhygienic. The mission was informed that ventilation ducts are covered in mold and as a result air circulation is limited. Visitors to the hospital have noted that at least a portion of the facility has an ongoing problem with flies, with fly traps hanging from the ceiling directly over bedridden patients. Interviewees report that medication is not always available.<sup>356</sup>

Prisoners sentenced to death have been kept isolated even while seeking



care in the hospital. Doctors cannot order a prisoner/patient removed from solitary, regardless of how it is affecting their physical or mental health. In 1992, the Louisiana Supreme Court found that Michael Perry, a mentally ill prisoner who had been institutionalized prior to his conviction in 1983, could not be forcibly medicated in order to ensure his mental competency to be executed.<sup>357</sup> Despite the court's finding that "his underlying insanity can never be permanently cured or quelled"<sup>358</sup> Perry has been deteriorating in solitary confinement for decades rather than receiving specialized care.

There is no mental health hospital for those found to be incompetent for execution, nor for those whom solitary confinement is further damaging to their mental state. Inmates speak with counselors through the bars of their cells, where there is little possibility to build intimacy and there is no privacy from guards or nearby inmates. Intensive, one-on-one treatment with a psychotherapist is not provided. For many prisoners, the only relief is through medication.

The need for intensive mental health services is desperate, considering the impact of prolonged solitary confinement on the sanity of the prisoners. The majority of current death row prisoners have spent at least a decade on death row. The longest period a current prisoner has been on death row is 28 years.<sup>359</sup> Among attorneys and advocates interviewed, there was a widely held belief that all those on death row have serious mental health issues. Even those who suffered from few, if any, problems at the beginning of their sentence are now struggling to maintain their sanity.

***"[T]he sanest people go nuts in this environment."***

– Veteran capital defense attorney, Louisiana

Mental anguish faced by prisoners is further exacerbated by the appeals process itself. Prisoners are often given execution dates at each stage in the post-trial process. To go from a trial to final appeal has been described as a roller coaster, with hope and despair, which for many inmates and their families includes the terrifying anguish of anticipating the inmate's execution.

*John Thompson had been convicted of murder in 1985.<sup>360</sup> In the fourteen years he spent on death row, Thompson was given six dates for his execution, all procedurally stayed so that he could continue appeals. With each new writ of execution, the pressure on Mr. Thompson became "more crushing" and forced him to think about his life as "a constant countdown to lethal injection."<sup>361</sup> After his defense team exhausted all formal avenues of appeal, he was given his seventh date, which he knew would be his last. Mr. Thompson prepared to die. He sought to tell his youngest son about his scheduled death, which would occur the day before the boy's high school graduation, but his son's teacher unknowingly informed him first, announcing the upcoming execution to his class.<sup>362</sup> Just weeks before his scheduled execution, a private investigator on John's case discovered scientific evidence of his innocence which had been hidden by the prosecutor's office. His life was spared and Thompson returned home. In addition to evidencing the struggles of those on death row, Thompson's case is a prime example of the lack of redress for victims of due process violations and torture and cruel, inhuman, and degrading treatment. Upon release from prison, Thompson was given \$10 and a bus ticket. Although a jury later awarded Thompson \$14 million in damages, the Supreme Court reversed this award due to immunity protections the U.S. provides prosecutors.<sup>363</sup> Mr. Thompson is now organizing other exonerees in his community and across the nation to seek better prosecutorial oversight and options for redress.<sup>364</sup>*

According to a former inmate and other interviewees, many prisoners enter death row in a stable mental state, but their mental health may deteriorate over time.

The mental breakdown follows a pattern, with the first sign being they get paranoid, even of their allies and friends. They want to whisper, to keep quiet. They start to hear things. All friendliness is gone. They often remove their lawyers from the visitors list, even though they're the ones doing the most help to keep them alive and keep them sane.<sup>365</sup>

Attorneys working with inmates on death row indicated that a large portion of their work consists of supporting their client's mental stability, and that several clients have considered volunteering for early execution due to the unbearable nature of their conditions.

## 5. Current Challenge to Means of Execution

Two inmates currently on Louisiana's death row challenged Louisiana's refusal to disclose its execution protocol in federal court. The protocol, released in 2013 as a result of the lawsuit, involved a change from a controversial three drug cocktail to the sole use of pentobarbital.<sup>366</sup> This switch occurred as a result of international pressure cutting of sources of sodium thiopental, which was formerly used by Louisiana.<sup>367</sup>

An attorney representing prisoners in this federal challenge said, "we still do not know whether any medical authorities were consulted regarding the incorporation of (pentobarbital); the original source or expiration date of the new drug; how the drug is to be administered; or the training of personnel who will implement the new procedure for the first time,"<sup>368</sup> The imminent execution of one of the inmates, Christopher Sepulvado, had been stayed pending resolution of the case seeking the release of the protocol and in particular information on the drug's use, storage, and expiration.<sup>369</sup>



Cemetery at Angola  
Prison [http://  
en.wikipedia.org/wiki/  
File:PointLookoutIII.LSP.  
jpg](http://en.wikipedia.org/wiki/File:PointLookoutIII.LSP.jpg)

# VII. Mission Findings

## A. Discrimination

The mission finds that California and Louisiana’s practices in charging and trying defendants with capital offences, and sentencing defendants to death is discriminatory. The HRC determined that “[i]n capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception.”<sup>370</sup> The standard of review for the trial process in death penalty cases is strict and a “heightened level of scrutiny” is required in reviewing death penalty convictions, given the grave consequences of an imperfect conviction.<sup>371</sup> The capital trial process in California and Louisiana cannot withstand such scrutiny; discriminatory actions and effects in both states are obvious and unacceptable. Discrimination in jury selection compounds the initial harm arising from charging decisions and a failure to remedy these harms through judicial review further compounds the violation. The failure to ensure equal application of laws and policies, and provide racial and ethnic groups with proceedings that respect their right to a fair trial contravenes the international prohibition against discrimination.

Two indicators of racial discrimination are the number and proportion of minorities in prison, and the handing down of harsher sentences to those groups.<sup>372</sup> Both indicators are present in California and Louisiana. The justice systems in the mission states, tainted by racial bias from the charging onward, have produced death rows on which minorities are disproportionately represented; this is particularly true with regards to African Americans. In California, the ratio of African Americans on death row is nearly six times their percentage in the population at large, and in Louisiana, the percentage of African Americans is double their representation in the population. It is widely reported that the proportion of persons sentenced to death who are minorities does not correlate with the rates of all death eligible murders. As set forth above, the disparities are even more stark in cases where the victim is white. Indeed, as the CERD Committee found, “there is a disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty.”<sup>373</sup> The disproportionate use of the death penalty against African Americans is evidence of a legal regime which has the effect of “nullifying or impairing the...enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms”<sup>374</sup> including the basic right to life.

Statistics are regularly found to be reliable evidence in cases addressing discrimination, and are particularly helpful in understanding widespread and systemic discrimination.<sup>375</sup> Treaty bodies and regional human rights courts have found discriminatory effects constitute a violation of the principle of equality and non-discrimination based on statistical evidence, including when discriminatory intent has not been established.<sup>376</sup> Regional human rights courts have held that once a victim establishes the state has created or perpetuated a difference in treatment



tending to show discrimination, the government bears the burden of proving the difference is “the result of objective factors unrelated to any discrimination...”<sup>377</sup> The mission does not find any objective explanation for the disproportionate number of minorities charged and tried with capital offenses and sentence to death in California and Louisiana.

## 1. Charging Patterns and Practices

Reports indicate that the discretion granted to elected prosecutors in California and Louisiana and California contributes to inconsistent and biased use of the death penalty. Some of the clearest indicators of racial disparity – and discrimination – in the death penalty context arise in the prosecutor’s choice to charge those who kill whites, and minorities who kill whites in particular, with crimes punishable by death at significantly higher rates. In the mission states, this trend in racially biased charging exposes Hispanics and African Americans charged with killing white victims to the risk of death at rates up to 13 times greater than the rate of those with African-American and Hispanic victims. This charging process strongly suggests prosecutors are biased, consciously or unconsciously, against minorities.

*Capital eligible offenses: California and Louisiana have regularly increased the number of death eligible factors in their death penalty statutes. Continually adding more death eligible offenses further broadens the ability of a prosecutor to seek death for homicide suspects and violates international standards against the practice. The American Convention on Human Rights, Article 4(2) notes that the death penalty “shall not be extended to crimes to which it does not presently apply.” Upon its last review of the U.S., the Human Rights Committee expressed its concern with the continued expansion of the death penalty to additional offenses.*

## 2. Jury Selection

Denial of the ability to participate in juries strips African Americans of the right provided for in the ICCPR to “take part in the conduct of public affairs” and “to have access, on general terms of equality, to public service in his country.”<sup>378</sup> The statistics clearly demonstrate that the process of jury selection in the mission states produces a discriminatory effect. It ensures that the voices of African Americans are absent, or minimized, in one of the most important functions of government, in such a way as to impact verdicts.

A comparative example from the European Court of Human Rights is instructive. The court considered the issue of discriminatory jury selection in the context of the Maltese judicial system, in which statistical evidence established a disproportionately low number of women on juries. As in the mission states, there were no explicitly discriminatory laws related to jury selection. However discrimination was a part of “a well-established practice, characterized by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for exemption from jury service.”<sup>379</sup> The court considered these claims, recalling that discrimination is not only evidenced by laws themselves, but can also arise from a “de facto situation.”<sup>380</sup> The Court rejected the government’s justification, which included claims that dismissals from jury service were often based on work and family obligations, and that “for cultural reasons” there was a

tendency for the defense to challenge female jurors.<sup>381</sup> Similarly, in the mission states, there is no reliable explanation that could justify the consistent overuse of strikes against African-American potential jurors.

Finally, the removal of African Americans from the jury furthers the belief by a significant part of the public that the courts are not impartial. Such an undermining of public confidence in the judiciary can “adversely affect the fairness of the procedure.”<sup>382</sup> The Inter-American Commission has found that the standard on this issue of impartiality is an objective one based on “reasonableness, and the appearance of impartiality”<sup>383</sup> and that a court must consider whether there “is a real danger of bias affecting the mind” of the jurors.<sup>384</sup> Aside from any conscious bias, diverse groups have been found to exhibit better decision making; deliberating longer, discussing a wider range of facts and perspectives, and making fewer errors and more corrections.<sup>385</sup> The mission heard repeatedly that removal of African Americans does create the appearance of a partial tribunal – a view also shared by academics and advocates alike.<sup>386</sup> This is particularly true in Louisiana where there is the perception that prosecutors seek an all-white jury for the specific purpose of sentencing a defendant to death. Although the presence of an all-white jury has not been considered proof in itself of discrimination, courts reviewing the issue in the capital context have considered the racial makeup of juries in their findings.<sup>387</sup>

### 3. Checks on the process

*Both trial level judges and prosecutors are elected in California and Louisiana, leading to further concerns over impartiality. The HRC has repeatedly concluded that political influence on judges is an unacceptable affront to the independence of the tribunal. The Human Rights Committee’s General Comment No. 32 provides that “States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.”<sup>389</sup>*

Article 14, paragraph 5 of the ICCPR establishes the right to have one’s conviction and sentence reviewed by a higher court. Review of lower court rulings must be undertaken in as timely a manner as practicable; and the delays experienced in California and Louisiana are unacceptable. Critically, such a review must be substantive and must address both fact and law.<sup>388</sup> The high number of exonerations and commutations from death row at the federal level in both California and Louisiana suggest that serious systemic problems at the trial level are contributing to unjust convictions which may not be remedied for decades. These include lack of adequately trained and qualified defense attorneys, lack of resources for thorough investigations, and racial bias.. Local courts, for example, fail to remedy the non-invidious evidence of discrimination,

such as the intimidation presented by flying a Confederate flag at the courthouse or the numerous instances of racially biased public statements by prosecutors.

## B. Torture and Cruel, Inhuman or Degrading Treatment

“A prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself,”<sup>390</sup> according to the Special Rapporteur on Torture. Prolonged isolation with the limited social and intellectual stimulation described herein, combined with the constant confrontation with “the lengthy and anxiety-ridden wait for uncertain outcomes,” result in “mental trauma and physical deterioration” frequently referred to as “death row phenomenon.”<sup>391</sup> Over two decades ago, the European Court of Human Rights identified “death row phenomenon.”<sup>392</sup> It found that the conditions on death row a young prisoner would face if extradited to the U.S. state of Virginia would violate the European Charter’s prohibition against cruel, inhuman or degrading treatment, and therefore refused the extradition request.<sup>393</sup> Shortly after, the Privy Council of the British House of Lords found that a delay of more than five years on death row in itself would provide strong ground for a claim of inhuman or degrading punishment.<sup>394</sup> Just less than a decade later, the Inter-American Commission found that a prisoner’s suffering from death row phenomenon was cruel, inhuman or degrading treatment.<sup>395</sup> Thus, there is consensus at the international level that death row phenomenon constitutes, at minimum, cruel, inhumane, or degrading treatment, and could also constitute torture.<sup>396</sup>

Death row phenomenon for prisoners in California and Louisiana results as a combination of indefinite solitary confinement and isolation, inhumane prison conditions, and a lengthy and uncertain wait for execution. In California, the anxiety and horror of waiting for an execution date is exacerbated by the length of time prisoners spend on death row – in some cases for 20 or 30 years – in a constant state of uncertainty. Louisiana death row prisoners have expressed the terror at seeing their fellow inmates leave for execution, especially when uncertain of whether their own death may be a year or a decade away. In both states, lengthy waits in isolated and difficult conditions, while receiving multiple execution dates, contribute to severe suffering characteristic of the death row phenomenon.

The use of solitary confinement and the violations of international prison conditions standards described herein, particularly when assessed in light of the vulnerability of death row prisoners and the decades spent in these conditions, readily give rise to a finding of cruel, inhumane and degrading treatment. The mission finds that, particularly in cases involving prolonged or indefinite periods of solitary confinement, the conditions for many prisoners on death row further gives rise to credible claims of torture.

The mission further finds that the conditions of confinement for death row prisoners are widely considered a part of the inmate’s punishment, imposed on prisoners as a result of

First-hand account of John Thompson, exoneree who spent over a decade on Louisiana’s death row:

*“One summer they executed eight men. They executed one on August 29, while I was in jail, because I hadn’t been transferred even a year after conviction...I saw it on the news. Then, on September 1<sup>st</sup> I was called up. I was being moved to death row, but no lawyer had ever explained what the process was. I had no idea, thought I was being called up to die. All I could think is “I’m dying today.” Instead, I was brought to Angola. I walked on the grounds the first time and it looked and felt like a concentration camp.”*



their status as condemned. In fact, the attorney defending Louisiana's extreme heat conditions has stated, "[t]hey've been subject to their treatment because of their statuses as death row inmates...it's the price offenders pay for their crimes against humanity."<sup>397</sup> Particularly when viewed in combination, the totality of the death row prisoner's mental and physical pain and suffering described below is undoubtedly severe.

## 1. Solitary Confinement

Solitary confinement constitutes the most striking threat to human dignity of death row prisoners in the mission states and contributes significantly to the degradation of their mental and physical well-being.<sup>398</sup> As concluded by the Special Rapporteur on Torture,

Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment.<sup>399</sup>

The Special Rapporteur has concluded that "solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture."<sup>400</sup> The vulnerability and lack of oversight inherent in the use of solitary in the mission states' death rows runs contrary to international standards calling for the regulation and oversight in the use of solitary. As the Principles and Best Practices provide most succinctly, solitary confinement should be allowed only:

as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel. In all cases, the disposition of solitary confinement shall be authorized by the competent authority a shall be subject to judicial control, since its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment.<sup>401</sup>

The solitary confinement regime practiced in the mission states relegates inmate's sanity to the control of prison administrators, until they grant release—or the inmate is executed. This is contrary to the Inter-American Commission's requirement that "[u]nder no circumstances may the solitary confinement of an individual be left exclusively in the hands of the authorities in charge of the centers of deprivation of liberty without proper judicial oversight."<sup>402</sup> This classification-based solitary and its lack of oversight are particularly detrimental to those facing serious mental health challenges. The Special Rapporteur has stated that "[w]here the damaging effects of solitary confinement on a particular individual are known, the regime cannot continue."<sup>403</sup> In keeping with this principle, regional bodies have required or suggested prisons conduct regular assessments of those committed to solitary for their ability to withstand such treatment.<sup>404</sup> However, the mission

states continue to confine a large number of prisoners whose mental deterioration is closely linked to their isolated status, and, in one case in Louisiana, continues to isolate at least one prisoner who has been found so mentally incompetent that he cannot be executed.

The use of solitary confinement in California and Louisiana, like solitary in prisons across the United States, is also damaging as a result of its *prolonged* nature. As the Special Rapporteur on Torture observed, “the longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.”<sup>405</sup> The Special Rapporteur has called for “an absolute prohibition” on confinement lasting over 15 days; any longer is considered prolonged and may be “torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances.”<sup>406</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommends that states use solitary confinement as a punishment for no more than 14 days, and “preferably lower.”<sup>407</sup> Prior to the Special Rapporteur’s recommendation, the European Court determined that a detention in solitary confinement for three years was a violation of the prohibition against torture and cruel, inhuman or degrading treatment.<sup>408</sup> The decades spent in solitary confinement in the mission states well exceeds these time periods.

In addition to the physical isolation of inmates in their cells, the mission states implement further practices which serve to isolate prisoners from social contact, contrary to the requirements of international law.<sup>409</sup> Louisiana’s ad hoc control of visitation rights by prison officials, and its practice of allowing phone calls only during one pre-assigned hour a day, and California’s policy of denying all communication by phone and all contact visits for Grade B inmates place unacceptable burdens on the ability for inmates to communicate with their loved ones. These practices may be contrary to the HRC’s finding that under provision of Article 10(1) of the ICCPR “prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits.”<sup>410</sup> Additionally, the failure of Louisiana to provide for ample and unmonitored communication with attorneys is a detriment to their legal representation.<sup>411</sup>

The Inter-American Court has found the prohibition against cruel, inhuman or degrading treatment violated where prisoners were held in unacceptable conditions and prisoners were characterized as “suffering lack of communication or restrictions to visits”<sup>412</sup> and recommended the transfer of prisoners to penitentiary centers close to their families.<sup>413</sup> In addition to the suffering separation caused the prisoners, the Inter-American Court found that the inmates’ *families* endured “great pain and suffering and have been constantly worried as a consequence of the degrading and inhuman detention conditions suffered by the alleged victim, the isolation to which he was subject, the distance and inaccessibility of the different penitentiaries to which he was transferred. All of the above constituted a violation of the mental and moral integrity of the alleged victim’s next of kin.”<sup>414</sup> The testimony provided to the mission from prisoners’ family members, who described their continuous and prolonged anguish regarding the conditions of confinement and sentence of their love ones, describes facts similar to those the court found impermissible.

The mission finds that indefinite and prolonged solitary confinement and social isolation in the mission states results in severe mental suffering. Prisoners, former prisoners, and their attorneys have attested to the gradual decline in mental health that the prison regimes create. Although difficult and unnecessary to distinguish the harms caused by each aspect of prison conditions, solitary confinement has repeatedly been referred to as a major source of the inmates' suffering.

## **2. General conditions of confinement**

For death row prisoners in the mission states, who are imprisoned in their cells for extended periods of time, the unsatisfactory conditions of confinement significantly add to the suffering. Conditions of confinement in Louisiana and California do not meet international standards. The mission is concerned with the widespread perspective that inmates on death row are owed a lesser standard of treatment as a result of their sentence.

General cell conditions in Louisiana fail to meet international standards. For example, the death row at Angola prison has insufficient windows; there are no windows within the cells, and the windows in the building are shuttered, providing only minimal ventilation and light. This contravenes the Standard Minimum Rules requiring windows "large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation."<sup>415</sup> Further, the presence of biting fire ants violates the Standard Minimum Rules on proper maintenance.<sup>416</sup> Finally, the general cell conditions are often unsanitary.

Access and facilities for recreation, particularly critical for those inmates in solitary confinement, is noticeably lacking in both mission states. Not only do the Standard Minimum Rules require access to the outdoors *daily*, but also provides that "[y]oung prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations, and equipment should be provided."<sup>417</sup> In contrast, prisoners in mission states are not given equipment necessary to ensure their recreational time is useful for the maintenance of their physical wellbeing; prisoners in California do not receive daily outdoor recreation time and may sometimes be denied recreation time for weeks; and prisoners in Louisiana are not allowed to participate in group recreation.

Finally, the mission observes that the amount of discretion given to guards for imposing disciplinary measures leads to abuse and punishment that is overly harsh and arbitrary. For example, prison staff at San Quentin are allowed to send prisoners to solitary confinement inside the Adjustment Center for months at a time for infractions as minor as possessing more than \$5, and may impose solitary indefinitely on any prisoner found to be "disruptive to the normal operating procedures of the institution."<sup>418</sup> Additionally, the mission expresses concern about the use of informal disciplinary measures in Louisiana, such as forcing inmates to move cells for perceived misbehavior and recalls that due process applies to all disciplinary action.<sup>419</sup> Such a practice can be disturbing or even destabilizing for prisoners already under extreme mental stress.



## Heat in Angola prison

*One of the most disturbing prison conditions reported to the mission was the use of extreme heat in Angola prison. This heat, which regularly exceeds a heat index of 110 degrees F (44 C), creates unsafe and painful conditions for those on death row, who are locked in their sweltering cells for at least 23 hours each day with no respite. The Principles and Best Practices on the Protection of Persons Deprive of Liberty in the Americas specify, in addition to the general norm of humane treatment, that prisons shall have “appropriate ventilation and heating, according to the climatic conditions...”<sup>420</sup> Both the Principles and Best Practices and the Standard Minimum Rules specifically note the requirement that bathing needs be met in a fashion appropriate for the climate.<sup>421</sup> The European Court has found treatment was inhuman where inmates are exposed to extreme temperatures,<sup>422</sup> and other courts have noted conditions of extreme temperature in their findings of torture or other cruel, inhuman or degrading treatment.<sup>423</sup>*

### 3. Provision of medical care

The provision of medical care, including mental health care, constitutes part of the State’s obligation to provide humane treatment,<sup>424</sup> and should be of the best available quality regardless of the inmates’ status as prisoners.<sup>425</sup> Although the mission is not in a position to address the specific health needs of individual prisoners, reports raised concerns that the quality of medical and mental health care for chronic and complex problems is insufficient. In California, the policy of not transferring prisoners who are severely mentally ill to appropriate care facilities do not conform with international standards, which require the transfer of prisoners who require specialist treatment “to specialized institutions or civil hospitals.”<sup>426</sup> The mission is particularly disturbed by reports from Louisiana that indicate medical licensing boards knowingly relegate certain practitioners to Angola prison as a result of their violation of the professional code, or even criminal law. Although this is not *per se* a violation of the prisoners’ human rights, it tends to evidence a lesser standard of care for those in detention. Notably, this practice is contrary to Principle XX of the Principles and Best Practices which states “the personnel shall be carefully selected, taking into account their ethical and moral integrity....”<sup>427</sup>

Further, the availability of mental health care for disturbed prisoners is of particular concern. International provisions call for the insane to be detained in separate accommodations.<sup>428</sup> The European Court for Human Rights has found that subjecting a mentally ill person to isolation “is not compatible with the standard of treatment required in respect of a mentally ill person.”<sup>429</sup> Special provisions must be made to accommodate those suffering from severe mental distress. Regardless of where these prisoners are housed, mental health treatment should be provided by well qualified practitioners, and undertaken confidentially.

The mission further finds that California may be unacceptably contributing to suicide risk within its death row. Suicide is an “ever-present reality” resulting

from the simple act of “confining someone in a closed environment from which they are unable to leave at their own will” and states must take appropriate actions to alleviate the risk of prisoners harming themselves.<sup>430</sup> The Inter-American Commission has specifically noted several stressors influencing the decision to commit suicide which are particularly present in California, including physical or sexual assault, “reiterated and unjustified procedural delays,” and “particularly trying or degrading conditions of detention, such as intolerable overcrowding or solitary confinement with significantly long periods of confinement.”<sup>431</sup> The

### Medical and Mental Health Visits at San Quentin

*On California’s death row, correctional officers remain in the room during medical visits and frequently do not keep communications between patients and doctors confidential. In addition, San Quentin’s practice of requiring strip-searches before a medical or mental health visit for prisoners held in the Adjustment Center may deter prisoners from accessing medical services due to the humiliation involved. The Inter-American Commission has urged that “[p]risoners must be able to consult medical professionals confidentially...”<sup>434</sup>*

Inter-American Commission has found that the maintenance of inhuman conditions, coupled with inadequate medical care and not reacting properly to suicide threats constituted a “series of omissions that caused [the victim’s] health to deteriorate and ultimately caused his death.”<sup>432</sup> Although the mission has not evaluated the 22 specific incidences of suicide in California’s death row, the testimony it received leads it to conclude that the poor conditions, lack of health care, and lack of monitoring are similar to those which have been found to contribute to an inmate’s suicide risk. Although, the Inter-American Commission has found that in addition to the multitude of stressors already inherent in detention “the incarceration of an individual in isolation conditions that do not meet the applicable international standards constitutes a risk factor for suicide.”<sup>433</sup>



US Washington – June 29 2009, Abolitionist Action Committee protests in front of the US Supreme Court, @ CHIP SOMODEVILLA / GETTY IMAGES NORTH AMERICA / AFP

# VIII. Conclusion

The death penalty, as implemented in California and Louisiana, violates not only the right to life but also other fundamental human rights, including those of non-discrimination, due process, and freedom from torture or cruel, inhuman, or degrading treatment. The violations of these core human rights obligations overlap and intersect, and are present at every stage in the capital process, from the charging of a death eligible crime, to the actual commission of the execution.

In assessing potential remedies to the problematic use of the death penalty in these states, the mission is faced with a paradox. To ensure capital trials are impartial and absent discrimination, not only must radical changes be implemented at the outset of the trial process, but the post-conviction appeals process must be, impartial, undertaken by fully-funded and well qualified counsel, and thorough. To reach these goals, states would need to substantially increase the time and resources available to the already lengthy, costly post-trial process — while continuing to imprison the condemned on death row for significant periods of time. Therefore, in order to address the problem of racial discrimination, states would have to maintain the inherently cruel system of a lengthy and uncertain wait for death.<sup>435</sup>

The mission considers that it is impossible to honor both the right to a fair trial and the right to be free from torture or cruel, inhuman or degrading treatment; abandoning either, however, would be contrary to human rights obligations. The duty to ensure due process in a death case is absolute, while the duty of states to not torture is one of the core tenets of a modern society. Both obligations are protected by law. The mission can conceive of no permissible balance that can be struck between these foundational tenets of human rights, which the United States has promised both its citizens and the international community to uphold.

This paradox underscores once again that the only ethically and legally tenable response to the death penalty is its complete abolition.

The use of the death penalty constitutes an inherent violation of the most fundamental of

all rights, the right to life. No legal or correctional reforms could bring legitimacy to the necessarily inhumane and premeditated taking of a life by the state through its imperfect system. As such, the mission unambiguously and fundamentally opposes any use of the death penalty in the United States, including in California and Louisiana. To continue to use the death penalty, particularly in light of the fair trial and treatment violations, shocks the conscience and violates international law. The mission calls for its immediate abolition.

Nevertheless, we recognize that complete abolition of the death penalty will not occur immediately, despite the multitude of efforts throughout the United States, and internationally, to end it. In the interim, a moratorium on executions must be imposed to protect condemned



prisoners' right to life. In addition, states must alter trial procedures to ensure that more defendants are not sentenced to death in trials rife with discrimination. Further, reforms to prison conditions must be implemented to ensure that those already under a sentence of death are not suffering torture or other cruel, inhuman, or degrading treatment.

# IX. Recommendations

Until the complete abolition of the death penalty in the United States is realized, we recommend the following interim steps must be taken to bring California and Louisiana into compliance with the U.S.'s international treaty obligations, including:

1. **Impose an immediate moratorium on executions and new death sentences**
2. **Expand the domestic prohibition to include discriminatory impact without a particularized showing of intent—in line with international norms**
3. **End the use of solitary confinement and isolation for death row.** Prisoners must have meaningful access to phone calls and regular contact visitation with their families and attorneys. Visitation, phone calls and mail must not be denied arbitrarily
4. **Ensure meaningful, expeditious judicial review of death penalty convictions**
5. **Regulate prosecutorial discretion that makes minorities vulnerable.** Prosecutorial discretion should not be unsupervised and unguided. Steps should be taken to reduce the total discretion exercised by prosecutor by:
  - Reducing rather than expanding the list of death-eligible aggravating factors and narrowing the definition of existing factors
  - Establishing advisory boards to assist prosecutors in capital charging decisions
  - Implementing or strengthening sanctions against prosecutors with high reversal rates, repeated due process violations, or racist statements;
6. **Provide properly funded and well trained counsel.** States must properly fund trial and post-conviction counsel in timely fashion, and ensure full funding for experts and investigators. States must also follow ABA guidelines on the qualification of capital defense counsel
7. **Ensure there are impartial juries that represent the full range of public opinion**
  - Allow for those with even strong doubt about the use of the death penalty to serve on juries
  - Implement reforms to more carefully monitor the use of peremptory challenges against jurors

## **8. Ensure humane conditions on death row**

- Ensure death row meets international conditions standards outlined by the Standard Minimum Rules
- Reform the PRLA to provide access to justice and restitution for those who have undergone torture or CIDT at the hands of the state
- Require procedural safeguards and due process for any punishment of a prisoner
- Ensure the confidentiality of attorney/client communications
- Maintain a comfortable temperature, ensure access to clean cold water and ice, provide air ventilation
- Ensure prisoners have privacy and dignity by ending tours of death row in Louisiana

## **9. Ensure high quality medical and mental health care**

- Ensure medical care is given by properly qualified staff
- Ensure that medical and mental health communications remain confidential between inmates and doctors
- Provide sanitary hospital conditions
- Permit ready access to necessary medications
- Establish special medical regimes, housing and protections for those condemned prisoners who suffer from mental illness and severe mental illness, including access to therapy in a one-on-one setting
- End practices, such as strip searches and the use of handcuffs during medical exams, that deter or prevent prisoners from utilizing medical and mental health services

## **10. Allow access to social and educational outlets**

- Allow death row inmates to participate in rehabilitation, educational and work programming available to the general population
- Allow death row inmates to create art
- Provide access to communal spaces
- Provide daily access to outdoor recreational space with appropriate recreational equipment
- End practices, such as strip searches, that deter or prevent prisoners from utilizing recreational space



# X. Appendix: Partial List of Interviewees

## 1. California

- Pat Aties, member, Campaign to End the Death Penalty
- Joseph Baxter, Attorney for Jarvis Masters, Law Offices of Joseph Baxter
- Sarah Chester, Staff Attorney, California Appellate Project
- Kevin Cooper, death row prisoner since 1985
- Steve Fama, Attorney, Prison Law Office
- The Honorable William Fletcher, Judge, 9th Circuit Court of Appeals
- Norm Hile, attorney for Kevin Cooper, Senior Counsel, Orrick, Herrington, & Sutcliffe LLP
- Terry Kupers, M.D., Psychiatrist
- Michael Laurence, Executive Director, Habeas Corpus Resource Center
- Jarvis Masters, Death row prisoner since 1990
- Michael Millman, Executive Director, California Appellate Project
- Natasha Minsker, Associate Director, ACLU of Northern California
- Fred Renfroe, Staff Attorney, Habeas Corpus Resource Center
- Joseph Schlesinger, Chief Attorney, Capital Habeas Unit, Office of the Federal Defender, Eastern District of California
- Elizabeth Semel, Clinical Professor of Law, University of California Berkeley School of Law
- Kathrin Smith, Wife of death row prisoner Jarvis Masters
- Don Spector, Attorney, Prison Law Office
- Christine Thomas, wife of Correll Thomas and paralegal, Office of the Federal Defender for the Eastern District of California
- Correll Thomas, Death row prisoner since 1999
- Jeanne Woodford, Former Warden of San Quentin State Prison
- Elizabeth Zitrin, Attorney, Vice President of Coalition Against the Death Penalty

## 2. Louisiana

- Richard Bourke, Director, Louisiana Capital Assistance Center
- Gary Clements, Director, Capital Post Conviction Project of Louisiana
- Ben Cohen, Of-Counsel, The Capital Appeals Project
- Elizabeth Compa, Staff Attorney, The Capital Appeals Project
- Rosana Cruz, Associate Director of Voice of the Ex-Offender
- Sophie Cull, Louisiana Coalition for Alternatives to the Death Penalty
- Calvin Duncan, 2013 Soros Justice Fellow and Paralegal, Louisiana Capital Assistance Center
- Norris Henderson, Founder and Executive Director of Voice of the Ex-Offender
- Denny LeBoeuf, ACLU Capital Punishment Project
- Mercedes Montagnes, Deputy Director, The Capital Appeals Project
- Monique Matthews Ruiz, Advocate and sister of exonerees Ryan Matthews
- William Sothern, Law Office of William M. Sothern
- John Thompson, Co-founder and Director, Resurrection After Exoneration
- Nick Tenticosta, Director, Center for Equal Justice
- Cecelia Tenticosta, Staff Attorney, The Capital Appeals Project

# Endnotes

1. The International Federation for Human Rights (“FIDH”) is a federation comprised of 178 human rights organizations in more than 100 countries. Founded in 1922, FIDH aims at obtaining effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy and litigation, FIDH has developed strict and impartial procedures which are often relied upon by independent human rights experts. FIDH is a member of the Steering Committee of the World Coalition against the Death Penalty (“WCADP”). For more information, visit [www.fidh.org](http://www.fidh.org).
2. The Center for Constitutional Rights (“CCR”) is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change. CCR is a member of the WCADP. For more information, visit [www.ccrjustice.org](http://www.ccrjustice.org).
3. That is also the reason why the International Commission against the Death Penalty (“ICDP”) conducted a mission to California in April 2012, before the referendum. See *Country Mission to California*, ICDP, [HTTP://WWW.ICOMDP.ORG/2012/05/COUNTRY-MISSION-TO-CALIFORNIA-23-27-APRIL-2012](http://www.icomdp.org/2012/05/COUNTRY-MISSION-TO-CALIFORNIA-23-27-APRIL-2012). The Commission observed that, “Repeal of the death penalty in California will provide important leadership not only to other U.S. states but also internationally to countries moving towards abolition.”
4. The mission chose not to select target states based on number of executions; if so, it might have selected Texas, where FIDH conducted a mission ten years ago. See FIDH INVESTIGATIVE MISSION REPORT: UNITED STATES OF AMERICA, THE DEATH PENALTY IN THE UNITED STATES (2002), <http://www.fidh.org/IMG/pdf/us316a-2.pdf>.
5. This is evident from the myriad decisions on the death penalty that have been the focus of the Inter-American Court on Human Rights and the European Court of Human Rights, as well as by the fact that the Third Committee of the U.N. General Assembly has considered, and adopted, a resolution entitled “Moratorium on the use of the death penalty,” which garnered 110 votes in support in November 2012. Currently, 150 countries have either abolished or do not practice the death penalty. See Press Release, U.N. Secretary-General, Secretary-General Welcomes Third Committee’s Death Penalty Moratorium Resolution, U.N. Press Release SG/SM/14661 (21 Nov. 2012).
6. *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1955), approved by the U.N. Econ. & Soc. Council, E.S.C. Res. 663(C) (XXIV) (31 July 1957) and E.S.C. Res. 2076 (LXII) (13 May 1977).
7. International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 17. See also THE ADVOCATES FOR HUMAN RIGHTS AND REPRIEVE: SHADOW REPORT ON THE DEATH PENALTY IN THE UNITED STATES FOR CONSIDERATION DURING THE 109<sup>TH</sup> SESSION OF THE U.N. HUMAN RIGHTS COMMITTEE (2013), [http://www.theadvocatesforhumanrights.org/united\\_states\\_-\\_human\\_rights\\_committee\\_-\\_death\\_penalty\\_-\\_october\\_2013.html](http://www.theadvocatesforhumanrights.org/united_states_-_human_rights_committee_-_death_penalty_-_october_2013.html).
8. See U.N. Hum. Rts. Com., CCPR Gen. Comm. No. 31, *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13.
9. 408 U.S. 238 (1972).
10. 428 U.S. 153 (1976).
11. *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008). There remain certain non-homicide crimes against the state, such as treason and espionage, for which capital punishment has not been ruled unconstitutional. The Supreme Court has yet to address the proportionality of capital punishment for these crimes because no death sentence has been imposed for them in the post-*Furman* era.
12. *Atkins v. Virginia*, 536 U.S. 304 (2002).
13. *Roper v. Simmons*, 543 U.S. 551 (2005).
14. *Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007).
15. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STAT’S [hereinafter U.S. DEP’T OF JUSTICE, B.J.S.], *Table 3, Federal Capital Offenses, By Statute, 2009*, <http://www.bjs.gov/content/pub/pdf/cp11st.pdf>. Note that each state has its own criminal code, and there also is a federal criminal code.
16. Three individuals have been executed for federal offenses since the reinstatement of the federal death penalty in 1988. See *Federal Death Row Prisoners List*, Death Penalty Information Center [hereinafter DPIC] <http://www.deathpenaltyinfo.org/federal-death-row-prisoners#list>.



17. *The U.S. Military Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/us-military-death-penalty>.
18. The formula for weighing aggravating and mitigating circumstances varies by state.
19. Every death penalty state utilizes jury sentencing except Alabama, Florida and Delaware. In those states, the jury recommends a sentence but the judge makes the ultimate decision. This system means that judges can override jury verdicts of life to impose the death penalty.
20. In two states, Alabama and Tennessee, the direct appeal beings in the intermediate court of criminal appeals.
21. BARRY LATZER & DAVID MCCORD, *DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT* 33 (3d ed. 2011).
22. *States With and Without the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.
23. U.S. DEP'T OF JUSTICE, B.J.S., *Table 1, Capital Offenses, By State, 2010*, <http://www.bjs.gov/content/pub/pdf/cp10st.pdf>.
24. *Death Row Inmates by State and Size of Death Row by Year*, DPIC, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#state>.
25. This includes both death penalty and non-death penalty states; *see Jurisdictions With No Recent Executions*, DPIC, <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions>.
26. *2012 Year End Report*, DPIC, 2, <http://deathpenaltyinfo.org/documents/2012YearEnd.pdf>.
27. *Facts About the Death Penalty (May 2013)*, DPIC, 3, <http://www.deathpenaltyinfo.org/FactSheet.pdf>.
28. *2012 Year End Report*, DPIC, *supra* note 26, at 1.
29. *Id.*
30. *Executions By Year*, DPIC, <http://www.deathpenaltyinfo.org/executions-year>.
31. *Capital Punishment, 2011 – Statistical Tables*, U.S. DEP'T OF JUSTICE, B.J.S., <http://www.bjs.gov/content/pub/pdf/cp11st.pdf>.
32. *Number of Executions by State and Region Since 1976*, DPIC, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.
33. *Abolitionist and Retentionist Countries*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.
34. American Convention on Human Rights, 21 Nov. 1969, 1144 U.N.T.S. 143.
35. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 Apr. 1983, E.T.S. 114; Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (15 Dec. 1989); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 8 June 1990, O.A.S.T.S. 73, 29 I.L.M. 1447; Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, 3 May 2002, E.T.S. 187.
36. G.A. Res. 63/168, U.N. Doc. A/RES/63/168 (8 Dec. 2008); 106 countries voted in favor of the resolution.
37. G.A. Res. 65/206, U.N. Doc. A/RES/65/206 (21 Dec. 2010); 109 countries voted in favor of the resolution.
38. G.A. Third Com. Res., U.N. Doc. A/C.3/67/L.44/Rev.1 (15 Nov. 2012); 110 countries voted in favor of the resolution.
39. U.N. Hum. Rts. Com. CCPR Gen. Comm. No. 6: *The right to life (art. 6)*, 30 Apr. 1982, U.N. Doc. HRI/GEN/1/Rev.1. *See also Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/67/279 (9 Aug. 2012) (by Juan Méndez) [*hereinafter* Méndez 2012 Interim Report], ¶ 26 (“Capital punishment is the ultimate exception to the inherent right to life.”).

40. American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (2 May 1948).
41. American Convention, *supra* note 34..
42. International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, 660 U.N.T.S. 195.
43. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85.
44. CERD, *supra* note 42, at art. 2(a).
45. *Id.* at art. 2(c)(c).
46. “[T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable.” *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) No. 18, ¶ 101 (2003).
47. *Id.* at ¶ 47.
48. CERD, *supra* note 42, at art. 1, para. 1.
49. ICCPR, *supra* note 43, at art. 2, para 1; *see also id.* at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).
50. American Declaration, *supra* note 40, at art. 2. The American Convention, which the U.S. has signed but not ratified, includes the duty to ensure the free exercise of rights and equal protection under the law without discrimination; American Convention, *supra* note 34, at arts. 1, 24.
51. *See, inter alia*, U.N. Hum. Rts. Com., CCPR Gen. Comm. No. 18, *Non-discrimination* (10 Nov., 1989), U.N. Doc. HRI/GEN/1/Rev.1, ¶ 7; *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 46, at ¶ 101.
52. *See* U.N. Hum. Rts. Com., CCPR Gen. Comm. No. 18, *supra* note 51; *Simunek et al. v. Czech Republic*, U.N. Hum. Rts. Com. Communic’n No. 516/1992 (19 July, 1995), U.N. Doc. CCPR/C/54/D/516/1992, ¶ 11.7 (“[A]n act which is not politically motivated may still contravene article 26 if its effects are discriminatory”); *Cecilia Derksen v. Netherlands*, U.N. Hum. Rts. Com. Communic’n No. 976/2001 (1 Apr., 2004), U.N. Doc. CCPR/C/80/D/976/2001, ¶ 9.3 (finding that “article 26 prohibits both direct and indirect discrimination” in the case of a law that was neutral on its face, yet failed to provide equal legal standing for children born out of wedlock). The CERD Committee has found indirect discrimination to be a violation of the Convention where a proposed housing measure was approved, but later cancelled due to racially charged public opposition. Finding that even the denial of a *proposed* benefit was a discriminatory action, the Committee noted that, “[i]n assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.” *L.R. et al. v. Slovakia*, U.N. CERD Com., Communic’n No. 31/2003 (7 Mar. 2005), U.N. Doc. CERD/C/66/D/31/2003, ¶ 12. While international law permits race-based differentiations in certain very limited circumstances, treaty bodies have emphasized that any unjustifiable disparate impact resulting from state conduct is contrary to human rights and violates a *jus cogens* norm. *See* U.N. CERD Com., Gen. Rec. No. 14, *Definition of discrimination (Art. 1, par.1)* (22 Mar. 1993), U.N. Doc. A/48/18, ¶ 2 (“a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate”). In analyzing a race-based differentiation, the Committee focuses on the effect, and will determine if the action “has an effect contrary to the Convention” through evaluating any “unjustifiable disparate impact.” *See also Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 ¶ 57 (19 Jan. 1984) (finding there is no discrimination if “the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not . . . be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind”).
53. U.N. CERD Com., Gen. Rec. No. 31, *On the prevention of racial discrimination in the administration and functioning of the criminal justice system*, (3 Oct. 2005), U.N. Doc. A/60/18, in Rep. of the CERD Com., 66<sup>th</sup> Sess., 21 Feb.–11 Mar. 2005, U.N. Doc. A/60/18, GAOR, 60<sup>th</sup> Sess., Supp. No. 18, at 99, 98-108, ¶ 1. *See also, id.*, *Preamble*, “. . . Convinced that, even though the system of justice may be regarded as impartial and not

affected by racism, racial discrimination or xenophobia, when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect . . . .”

54. See *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 46, at ¶¶ 83-96; *The Yean and Bosico Children v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (8 Sept. 2005); *The Situation of People of African Descent in the Americas*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., Doc. 62, 5 Dec., 2011; *Mossville Environmental Action Now v. United States*, Case 12.755, Inter-Am. Comm’n H.R., Report No. 43/10, OEA/Ser.L/V/II.138, doc. 47, ¶ 42 (17 Mar. 2010) (“[T]he right to equal protection under international human rights law has been interpreted as prohibiting not only intentional discrimination, but also any distinction, exclusion, restriction or preference which has a discriminatory effect . . .”).

55. *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 46, at ¶ 47.

56. *Jeffrey Timothy Landrigan v. United States*, Case 12.776, Inter-Am. Comm’n H.R., Report No. 81/11, ¶¶ 46-54 (21 Jul. 2011).

57. See, *inter alia*, U.N. Hum. Rts. Com., CCPR Gen. Comm. No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial* (23 Aug. 2007), U.N. Doc. CCPR/C/GC/32.

58. See *id.*, ¶ 59 (“The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant [requiring equality before courts and tribunals] have not been respected, constitutes a violation of the right to life. . . .”); ICCPR, *supra* note 7, at art. 6(2) (“This penalty can only be carried out pursuant to a final judgment rendered by a *competent court*” (emphasis added)); *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. Doc. 68, ¶ 11 (31 Dec. 2011) [*hereinafter The Death Penalty in the Inter-American Human Rights System*] (“[T]he kinds of deficiencies that have been identified by the Commission as rendering an execution arbitrary and contrary to Article I of the American Declaration include . . . the failure to provide strict due process guarantees, and the existence of demonstrably diverse practices that result in the inconsistent application of the penalty for the same crimes.”).

59. *The Death Penalty in the Inter-American Human Rights System*, *supra* note 58, at ¶ 11.

60. See, ICCPR, *supra* note 7, at art. 6(2) (the death penalty can only be carried out pursuant to a final judgment rendered by a competent court), art. 26 (right to equality before the law); see also American Declaration, *supra* note 40, art. 2 (right to equality before the law), art. 18 (right to a fair trial), art. 26 (right to due process of law).

61. U.N. Hum. Rts. Com., Gen. Com. No. 32, *supra* note 57, at ¶ 25.

62. *Narrainen v. Norway*, U.N. CERD Com., Communic’n No 3/191 (15 Mar. 1994), U.N. Doc. CERD/C/44/D/3/1991, ¶ 2.4-2.5.

63. *William Andrews v. United States*, Case 11.139, Inter-Am. Comm’n H.R., Report No. 57/96, OEA/Ser.L/V/II.95, doc. 7 (1996) (finding violations of arts. 1, 2 and 26 where, in a jurisdiction whose citizenry held prejudicial beliefs, a juror presented the bailiff with a drawing of a hangman accompanied by the statement, “Hang the [racial epithet],” and the judge took no remedial action).

64. *Roberto Moreno Ramos v. United States*, Case P4446/02, Inter-Am. Comm’n H.R., Report No. 61/03, OEA/Ser.L/V/II.118, doc. 70 (2003).

65. *Case of Zarb Adami v. Malta*, 2006 Eur. Ct. H.R. 637, ¶¶ 75, 77-78 (finding discrimination based on statistics); *Orlando Cordia Hall v. United States*, Case 12.719, Inter-Am. Comm’n H.R., Report No. 77/09, OEA (2009). But see *Hugh Jordan v. the United Kingdom*, 2001 Eur. Ct. H.R. 327, ¶ 154 (finding statistics alone insufficient proof of discrimination); *Celestine v. United States*, Case 10.031, Inter-Am. Comm’n H.R., Res. No. 23/89, OEA/Ser.L/V/II.77, doc. 7 (1989) (finding statistics from another jurisdiction alone were insufficient evidence of discriminatory purpose).

66. See U.N. CERD Com., Gen. Rec. No. 14, *supra* note 52.

67. 481 U.S. 279 (1987).



68. *Id.* at 312.

69. *Id.* at 292.

70. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories, Addendum, Mission to the United States*, U.N. Doc. E/CN.4/1998/68/Add.3, ¶ 65 (22 Jan. 1998) (by Bacre Waly Ndiaye).

71. U.N. CERD Com., *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the CERD Committee: United States of America*, U.N. Doc. CERD/C/USA/CO/6 ¶ 10 (8 May 2008) [*hereinafter CERD U.S. Concluding Observations 2008*].

72. *Id.* at ¶ 20.

73. *Id.* at ¶ 10.

74. U.N. CERD Com., *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/59/Misc.17/Rev.3, ¶ 17(13 Aug. 2001) [*hereinafter CERD U.S. Concluding Observations 2001*], (“[T]here is a disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi and Texas.”); *see also CERD U.S. Concluding Observations 2008, supra* note 71, at ¶ 23.

75. *CERD U.S. Concluding Observations 2008, supra* note 72, at ¶ 23.

76. U.N. Hum. Rts. Com., *List of issues in relation to the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr. 1), adopted by the Committee at its 107<sup>th</sup> Session (11-28 March 2013)*, U.N. Doc. CCPR/C/USA/Q/4, ¶¶ 8(a), 8(e) (29 Apr. 2013).

77. For example, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has observed that the “essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is [...] the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.” *The Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 183 (10 Dec. 1998).

78. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, UN Doc A/RES/217 (III), art. 5 (10 Dec., 1948) [*hereinafter UDHR*].

79. CAT, *supra* note 43, at arts. 2, 16.

80. ICCPR, *supra* note 7, at arts. 7, 10.

81. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 Nov. 1950, E.T.S. 5, art. 3 [*hereinafter* European Convention on Human Rights]; American Declaration, *supra* note 40, art. 25, 26; American Convention, *supra* note 34, art. 5; African Charter on Human and Peoples’ Rights, 27 June 1981, 21 I.L.M. 58, art. 5.

82. CAT, *supra* note 43, at art.1. Notably, the Inter-American Convention to Prevent and Punish Torture applies a broader definition, which includes “physical or mental pain or suffering inflicted...for any other purpose.” Inter-American Convention to Prevent and Punish Torture, 9 Dec. 1985, O.A.S.T.S. 67, art. 2. The United States is not a party to this convention.

83. *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/HRC/13/39, ¶ 46 (30 Dec. 2009) (by Manfred Nowak) (“Definitions of torture that leave out its psychological dimension encourage the use of mental ill-treatment and provide a loophole resulting in impunity.”).

84. U.N. Hum. Rts. Com., Gen. Comm. No. 20: *Replaces general comment concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, ¶ 4 (10 Mar. 1992) (“[T]he distinctions depend on the nature, purpose and severity of the treatment applied.”); *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶¶

484-85 (1 Sept. 2004). *See also Soering v. United Kingdom*, 161 Eur. Ct. H.R. ¶ 104 (ser. A) (1989); *Case of Iorgov v. Bulgaria* 2004 Eur. Ct. H.R. 113, ¶ 119 (“[W]hen assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant.”) (citing *Dougoz v. Greece*, 2001 Eur. Ct. H.R. 213, ¶ 46, and *Kalashnikov v. Russia*, 2002 Eur. Ct. H.R. 416, ¶ 95).

85. *See, e.g.*, R. 186 (Eur. Comm’n on H.R.) (“*the Greek Case*”).

86. Inter-American Convention to Prevent and Punish Torture, *supra* note 83, at art. 2. *See also* U.N. Hum. Rts. Com., CCPR Gen. Comm. No 32, *supra* note 57 .

87. *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, ¶ 485.

88. CAT, *supra* note 43, at art. 1; *see also* Inter-American Convention to Prevent and Punish Torture, *supra* note 83, art. 2 (“[I]nherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.”). The ICCPR does not contain a similar provision.

89. Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(a)(3).

90. Méndez 2012 Interim Report, *supra* n. 39, at ¶ 28. Taking corporal punishment as an example of interpretations of “lawful sanctions” that change over time, the former Special Rapporteur on torture traced the arc of corporal punishment from an act that was “widely accepted in European societies” to one that was widely recognized as a form of cruel, inhuman or degrading treatment. *See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/10/44, ¶ 35 (14 Jan. 2009) (by Manfred Nowak). The current Special Rapporteur, in further developing this analysis, explains that because corporal punishment has been found to at least constitute CIDT, “it is not immune from being categorized as torture. Likewise, if the death penalty can be characterized as unlawful in some manner, including as a form of CIDT, it is not immune from also being found to be a form of torture.” Méndez 2012 Interim Report, *supra* note 39, at ¶ 28.

91. *Reid v. Jamaica*, U.N. Hum. Rts. Com. Communic’n No. 250/1987 (20 July 1990), U.N. Doc. CCPR/C/39/D/250/1987, ¶ 11.5 (“the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that “the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”” Absent these guarantees it is an arbitrary deprivation of life.)

92. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment*, U.N. Doc. E/CN.4/1988/17, ¶¶ 42, 44 (22 Jan. 1988) (by Pieter Kooijmans).

93. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (9 Dec. 1988), Note to Principle 6.

94. *Prosecutor v. Delalić (Zejnil)*, Case No. IT-96-21-T, Judgment, ¶ 543 (16 Nov. 1998); for an extensive review of the development of the understanding of inhuman treatment, *see also* ¶ 551, explaining that cruel treatment is equivalent to inhumane treatment.

95. *Denmark, Norway, Sweden and The Netherlands v. Greece*, App. No. 3321-3/67, 1969 12 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R.) (“*the Greek Case*”).

96. *Ireland v. United Kingdom*, 35 Eur. Ct. H.R. (ser. A) ¶ 167 (1976).

97. *Prosecutor v. Delalić (Zejnil)*, Case No IT-96-21-T, ¶¶ 516-543.

98. *See, inter alia, Case of Neira Alegria et al. v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 60 (19 Jan. 1995) (“[E]very person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity . . . Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.”); *Case of The “Street Children” (Villagrán-Morales et al.) v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 165 (19 Nov. 1999); *Prosecutor v. Delalić (Zejnil)*, Case No. IT-96-21-T, ¶ 543; *Case of Labita v. Italy*, 2000 Eur. Ct. H.R. 161, ¶ 120.).

99. ICCPR, *supra* note 7, at art. 10, paras 1, 3. *See also* American Declaration, *supra* note 40, art. 25 (“Every

individual who has been deprived of his liberty . . . has the right to humane treatment during the time he is in custody”) and at art. 26 (“Every person accused of an offense has the right . . . not to receive cruel, infamous or unusual punishment”); American Convention on Human Rights, *supra* note 34, at art. 5 (“No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”).

100. *Basic Principles for the Treatment of Prisoners*, G.A. Res. 45/111, U.N. Doc. A/RES/45/111, ¶ 5 (14 Dec. 1990); *see also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 93.

101. *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6. *See, e.g., Womah Mukong v. Cameroon*, U.N. Hum. Rts. Com. Communic’n No. 458/1991 (10 Aug. 1994), U.N. Doc. CCPR/C/51/D/458/1991, ¶ 9.3. The Special Rapporteur on Torture has recently issued a detailed report examining the Standard Minimum Rules from the perspective of torture and CIDT, and recommends areas where the Rules should be updated in light of developments in international law, while urging States to “renew their commitment to adequately addressing the needs of persons deprived of liberty, with full respect for their inherent dignity and their fundamental rights and guarantees, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/68/295, *Summary* (9 Aug. 2013) (by Juan Méndez).

102. U.N. Econ. & Soc. Council, E.S.C. Res. 1996/15, ¶ 7 (23 Jul. 1996).

103. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, U.N. Econ. & Soc. Council, E.S.C. Res. 1984/50, U.N. Doc. E/RES/1984/84 (25 May 1984).

104. The Inter-Am. Comm’n H.R. and Inter-Am. Ct. H.R. have applied the Standard Minimum Rules for the Treatment of Prisoners to determine whether the treatment of prisoners complies with international standards and obligations; *see, inter alia, Case of Raxcacó-Reyes v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 99 (15 Sept. 2005); *Dexter Lendore v. Trinidad and Tobago*, Case 12.269, Merits, Inter-Am. Comm’n H.R., Report No. 28/09, OEA/Ser.L/V/II.124, doc. 7, ¶¶ 30-31 (2009); *Chad Roger Goodman v. Bahamas*, Case 12.265, Merits, Inter-Am. Comm’n H.R., Report No. 78/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1, ¶¶ 86-87 (2007).

105. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. Comm’n H.R., Res. 01/08, 131st Sess., 3-14 Mar. 2008 (13 Mar. 2008).

106. *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II Doc. 64 (31 Dec. 2011) [*hereinafter Report on the Human Rights of Persons Deprived of Liberty in the Americas*], ¶¶ 513-515.

107. *See, e.g. Rolando v. The Philippines*, U.N. Hum. Rts. Com. Communic’n No. 1110/2002 (3 Nov. 2004), U.N. Doc. CCPR/C/82/D/1110/2002, ¶ 5.4 (“[R]eiterat[ing] [our] prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the State party should attempt to minimize this anguish as far as possible”); *Wilson v. The Philippines*, U.N. Hum. Rts. Com. Communic’n No. 868/1999 (30 Oct. 2003), U.N. Doc. CCPR/C/79/D/868/1999, ¶ 7.4 (“In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death, (13) the Committee concludes that the author’s suffering under a sentence of death amounted to an additional violation of article 7”); *Francis v. Jamaica*, U.N. Hum. Rts. Com. Communic’n No. 606/1994 (3 Aug. 1995), U.N. Doc. CCPR/C/54/D/606/1994, ¶ 9.2 (“Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author’s confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row”).

108. For more information, *see* CCR, THE UNITED STATES TORTURES BEFORE IT KILLS: AN EXAMINATION OF THE DEATH ROW EXPERIENCE FROM A HUMAN RIGHTS PERSPECTIVE(2011), [http://ccrjustice.org/files/deathrow\\_torture\\_postition\\_paper.pdf](http://ccrjustice.org/files/deathrow_torture_postition_paper.pdf).

109. *See Prosecutor v. Natelić and Martinović*, Judgment, Case No. IT-98-34-T, ¶ 367-68 (31 Mar. 2003).

110. U.N. Special Rapporteur on Torture, Report pursuant to Hum. Rts. Comm’n Res. 1985/33, U.N. Doc. E/CN.4/1986/15, ¶ 119 (19 Feb. 1986) (by Pieter Kooijmans)(articulating a non-exhaustive list of actions found



to constitute torture). *See also* Report of the Comm. Against Torture, 25th & 26th Sess., 13-24 Nov. 2000, 30-18 May 2001, U.N. Doc. A/56/44, GAOR, 56th Sess., Supp. No. 44, ¶ 186 (2001) (concerning the inquiry on Peru, finding severe isolation to cause “persistent and unjustified suffering which amounts to torture”).

111. *See, e.g. Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (finding cruel, inhuman or degrading treatment where a young prisoner would experience the death row phenomenon in a Virginia prison); *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 168-169 (21 June 2002) (finding cruel, inhuman or degrading treatment or punishment where the victims were subjected to inhuman treatment for “extensive periods of time,” including a suffering caused by delays in the appeals process and the agony of anticipating execution); *Denton Aitken v. Jamaica*, Case 12.275, Inter-Am. Comm’n H.R., Report No. 58/02, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 133 (2002) (finding a violation of the American Convention on Human Rights, art. 5, “when considered in light of the lengthy period of nearly four years for which he has been detained on death row”); *Paul Lallion v. Grenada*, Case 11.765, Inter-Am. Comm’n H.R., Report No. 55/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶¶ 86-90 (2002) (finding a violation of the American Convention on Human Rights, art. 5, where the conditions to which the victim was “subjected fail to respect his physical, mental and moral integrity”).

112. *Pratt & Morgan v. Jamaica*, 1993] 4 All E.R. 769 (P.C.). *See also Pratt & Morgan v. Jamaica*, U.N. Hum. Rts. Com. Commun. No. 210/1986 and 225/1987 (6 Apr. 1988), U.N. Doc. Supp. No. 40 A/44/40 at 222 ¶¶ 13.6-13.7 (rejecting Article 7 claim for prolonged judicial proceedings, but finding an Article 7 violation as a result of the State not informing prisoners of a stay of execution).

113. Méndez 2012 Interim Report, *supra* note 39, ¶ 75.

114. *Id.* at 75.

115. *Id.* at 76.

116. U.S. CONST. amend. VIII. The Federal Constitution also applies to the states under U.S. CONST. amend. XIV.

117. *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

118. *Roper v. Simmons*, 543 U.S. 551(2005).

119. *Atkins v. Virginia*, 536 U.S. 304 (2002).

120. The understanding provides: “mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” U.S. reservations, declarations, and understandings, CAT, Cong. Rec. S17486-01 (daily ed., 27 Oct. 1990).

121. 18 U.S.C. § 2340.

122. U.N. CAT Comm., *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture: United States of America*, U.N. Doc. CAT/C/USA/CO/2, ¶ 13 (25 Jul. 2006) [*hereinafter* U.N. CAT Com., *U.S. Concluding Observations 2006*].

123. *See* Jennifer Winslow, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?* 49 UCLA L. REV. 1655, 1660 (2002), citing 42 U.S.C. § 1997e(a); 28 U.S.C. § 1915(b)(1); Prison Litigation Reform Act of 1995 - Section Summary, 141 CONG. REC. S14,417 (1995).

124. PLRA 42 U.S.C. § 1997e(e).

125. U.S. STATE DEP’T, *Periodic Report of the United States of America to the Committee Against Torture*, ¶ 151, (12 Aug. 2013), <http://www.state.gov/documents/organization/213267.pdf>.

126. U.N. CAT Com., *U.S. Concluding Observations 2006*, *supra* note 122, at ¶ 29.

127. U.N. CAT Com., *List of issues prior to the submission of the fifth periodic report of United States of*

America, U.N. Doc. CAT/C/USA/Q/5, ¶ 28 (10 Jan. 2010).

128. DIV. OF ADULT OPS., CAL. DEP'T OF CORR. AND REHAB., *Condemned Inmate Summary List*, (1 Oct. 2013), [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf).

129. *Gregg v. Georgia*, 428 U.S. 153 (1976).

130. California's state constitution allows California voters to pass state laws by popular initiative. When a petition for the proposed measure receives a sufficient number of signatures, the proposed law is placed on the ballot and submitted for a direct vote by the people. Initiatives pass by simple majority.

131. CAL. PENAL CODE § 187-90.2.

132. CAL. PENAL CODE § 189.

133. JUDICIAL COUNCIL OF CAL., CRIM. JURY INSTRUCTIONS, No. 766 (2013).

134. David Love, *Prop 34 Fails But Signals the Imminent Demise of California's Death Penalty*, THE GUARDIAN, 9 Nov., 2010, <http://www.theguardian.com/commentisfree/2012/nov/09/proposition34-fails-california-death-penalty>.

135. Interview with Natasha Minsker, Associate Director, ACLU of Northern California, in San Francisco, Cal. (8 May 2013) (notes on file with author).

136. CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 10 (Chris Boscia & Gerald Uelman 2008), <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> [*hereinafter* CCFAJ REPORT].

137. *See, e.g.*, Interview with Pat Aties, member, Campaign to End the Death Penalty, in San Francisco, Cal. (5 May 2013).

138. Interview with Kevin Cooper, death row prisoner, in San Quentin, Cal. (6 May 2013) (notes on file with author); Interview with Christine Thomas, wife of death row prisoner, in San Quentin, Cal. (5 May 2013) (notes on file with author); Interview with Correll Thomas, death row prisoner, in San Quentin, Cal. (5 May 2013) (notes on file with author). *See also* Bob Egelko, *Death Row Inmates Oppose Prop. 34*, SAN FRANCISCO CHRONICLE, 24 Sept. 2013, <http://www.sfgate.com/news/article/Death-Row-inmates-oppose-Prop-34-3891122.php>.

139. Interview with Christine Thomas (5 May 2013).

140. Interview with Kevin Cooper (6 May 2013) (commenting that "a lot of prisoners believed that passing the bill would send them to Pelican Bay," the prison facility known for notoriously harsh solitary confinement conditions).

141. *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).

142. *Id.* at 979-980.

143. Order Affirm. J., *Sims v. Dep't of Corrections*, 216 Cal. App. 4th 1059 (30 May 2013); Maura Dolan, *Ruling, Red Tape are a Setback for California Executions*, L.A.; TIMES, 31 May, 2013 <http://articles.latimes.com/2013/may/31/local/la-me-lethal-injection-20130601>.

144. Howard Mintz, *California Abandons Defense of Three-Drug Executions*, SAN JOSE MERCURY NEWS, 11 July, 2013, [http://www.mercurynews.com/ci\\_23635792/california-death-penalty-state-abandons-defense-three-drug](http://www.mercurynews.com/ci_23635792/california-death-penalty-state-abandons-defense-three-drug).

145. CCFAJ Report, *supra* note 136, at 18.

146. Interview with Sarah Chester Staff Attorney, California Appellate Project, in San Francisco, Cal. (9 May 2013). According to Chester, correctional officers rather than certified interpreters are usually asked to translate for the prisoners. When interpreters must be used because guards are not available, they frequently interpret for the prisoner over the phone and rarely come to the prison to translate in person. Interpreters are rarely ever used when the prisoner goes before a committee hearing.

147. *Id.*

148. Div. of Adult Ops., Cal. Dep't of Corr. and Rehab., *Condemned Inmate Summary List*, (1 Oct. 2013),

[http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf). See also Interview with Sarah Chester (9 May 2013); Interview with Jeanne Woodford, former Warden of San Quentin State Prison, in San Francisco, Cal. (9 May 2013) (notes on file with author).

149. *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

150. See, e.g., Three-Judge Ct. Order Requiring List of Proposed Population Reduction Measures, *Coleman v. Brown*, No. 90-00520, dkt no. 5452 (E.D. Ca. 11 April 2013).

151. Cal. Dep't of Corr. and Rehab., 18 Sept. 2013 Population Report, [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad130918.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad130918.pdf).

152. Expert Decl. of Jeanne Woodford in Supp. Of Pl.'s Opp. To Def'ts' Mot. to Terminate, ¶ 37, *Coleman v. Brown*, No. Civ S 90-0520, dkt no. 4380 (E.D. Ca. 14 Mar. 2013) [hereinafter Woodford Declaration].

153. Wyatt Buchanan, "Gov. Brown Cancels Plans to Build New Death Row," *SAN FRANCISCO CHRONICLE*, 20 April 2011.

154. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (1997); see also Steven F. Shatz, Summary of Expert Testimony Before the Cal. Comm'n on the Fair Admin. of Justice, <http://www.ccfaj.org/documents/reports/dp/expert/Shatz%20Testimony.pdf>.

155. The twelve felonies are: robbery; kidnapping; rape; sodomy; the performance of a lewd or lascivious act on a child under the age of 14; oral copulation; first or second degree burglary; arson; train wrecking; mayhem; rape by instrument; and carjacking. Cal. Pen. Code § 190.2(a)(17).

156. Shatz & Rivkind, *supra* note 154, at 1321. The authors gave the following example of what qualifies as a death-eligible crime: "In one case, the defendant yanked the victim's purse off her arm in a store parking lot and fled. When the victim gave chase, she suffered a heart attack and died shortly thereafter. The defendant was charged with murder. Because the defendant had used force on the victim by yanking the purse, the purse-snatch was a robbery. Because the death occurred during flight from the robbery, the defendant was guilty of felony murder and was death-eligible." *Id.* at 1321-22.

157. CAL. PENAL CODE § 190.2(a)(15); Shatz & Rivkind, *supra* note 154, at 1322-23; see also Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F.L. REV. 1249, 1279 (1996).

158. Shatz & Rivkind, *supra* note \_\_, at 1331; Shatz Testimony Before the Cal. Comm'n on the Fair Admin. of Justice, *supra* note 154, at 1; see also CCFAJ REPORT, *supra* note 136, at 16-18. ACLU OF NORTH. CAL., DEATH BY GEOGRAPHY: A COUNTY TO COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CAL. 3-5 (2008).

159. See Amended Decl. of David C. Baldus, *Ashmus v. Wong*, No. 93-594, dkt no. 473 (N.D. Cal. 19 Sept. 2010).

160. Shatz & Rivkind, *supra* note 154, at 1322; Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Study*, 59 U. FL. L. REV. 719, 745 (2007).

161. Interview with Michael Laurence, Executive Director, Habeas Corpus Resource Center, in San Francisco, Cal. (10 May 2013) (notes on file with author); see also Phone interview with Joseph Schlesinger, Chief Attorney, Capital Habeas Unit, Office of the Federal Defender for the Eastern District of California (17 Apr. 2013) (notes on file with author); Phone Interview with Elisabeth Semel, Clinical Professor of Law, University of California Berkeley School of Law (19 Apr. 2013) (notes on file with author); Steven Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1258 (2013); Shatz & Rivkind, *supra* note 154, at 1332 ("[f]ewer than one out of eight death-eligible convicted first degree murderers is selected for death at the complete discretion of prosecutors and juries.").

162. Shatz, *supra* note 160, at 769.

163. Interview with Joseph Schlesinger in San Francisco, Cal. (10 May 2013) (notes on file with author).

164. See, e.g., Catherine Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California*, 35 J. OF CRIM. JUST. 17, 21 (2007).

165. Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 18 (2005).



166. *Id.* at 36.
167. Shatz & Dalton, *supra* note 161, at 1262, 1266.
168. ACLU of Northern California, *Death by Geography: A County to County Analysis of the Road to Execution in California* 3-5 (2008). The ten counties are Los Angeles, Riverside, San Bernardino, Alameda, Orange, Contra Costa, San Diego, Sacramento, Tulare, and Ventura.
169. Pierce & Radelet, *supra* note 165, at 25.
170. *Id.* at 32.
171. Compare United States Census Bureau, State and County QuickFacts: California, <http://quickfacts.census.gov/qfd/states/06000.html> with Cal. Dep't of Corr. & Rehab., *Condemned Inmate Summary List* (4 Sept. 2013), available at [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf).
172. Cal. Dep't of Corr. & Rehab., *Inmates Executed, 1978-Present*, [http://www.cdcr.ca.gov/Capital\\_Punishment/Inmates\\_Executed.html](http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html).
173. Judge Arthur Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 726 (2007).
174. CCFJA REPORT, *supra* note 136, at 26-27.
175. *Id.* at 47.
176. *Id.* at 23-24.
177. Interview with Sarah Chester (9 May 2013).
178. *Id.* at 24; see also Alarcon, *supra* note 173, at 722-23.
179. Statistics provided by Michael Laurence indicate that for first petitions filed after July 17, 2002, the California Supreme Court's disposition has taken an average of 3.7 years, and with many of those petitions still pending.
180. Interview with Sarah Chester (9 May 2013).
181. Phone Interview with Joseph Schlesinger (17 April 2013).
182. James S. Liebman & Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, App. A-25, 1973-1995* (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>.
183. Sara Colon, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CAL. L. REV. 1377, 1401 (2009).
184. Interview with Joseph Schlesinger (10 May 2013). Schlesinger also stated that he knew of at least two innocence cases where the client died before his case could be heard. *Id.*
185. See generally *Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987)
186. See *Lancaster v. Cate*, 2009 WL 837643 (N.D. Cal. 26 Mar. 2009).
187. Testimony by Jeanne Woodford for the House Jud. Subcomm. on Crime, Terrorism, and Homeland Security, Hearing on H.R. 4109, the "Prison Abuse Remedies Act of 2007," April 22, 2008.
188. San Quentin's operating procedures for death row, also known as the "Condemned Manual," defines Grade A as prisoners "without a high violence or escape potential who have demonstrated a good disciplinary-free adjustment and are able to get along safely and peacefully with other inmates and staff." Grade B prisoners are defined as inmates "with a high escape or violence potential or who are serious disciplinary or management cases." San Quentin Operational Procedure, *Condemned Manual*, No. 608 ("OP 608"), § 301 (revised March 2013).
189. Interview with Jarvis Masters, death row prisoner, in San Quentin, Cal. (8 May 2013) (notes on file with author).
190. Interview with Correll Thomas (5 May 2013); Woodford Declaration, *supra* note 152, ¶ 29.

191. Woodford Declaration, *supra* note \_\_\_\_, ¶ 30.
192. Interview with Sarah Chester (May 9, 2013); Interview with Jeanne Woodford (May 9, 2013); Woodford Declaration, *supra* note 152, ¶¶ 31, 41.
193. *See* Woodford Declaration, *supra* note 152, ¶ 32.
194. Interview with Sarah Chester (9 May 2013); *see also* OP 608, § 471(g).
195. Interview with Correll Thomas (5 May 2013).
196. Interview with Jarvis Masters (8 May 2013). The Condemned Manual does not specify telephone privileges for “Grade B” prisoners at all, and states explicitly that “Grade B inmates are not routinely afforded access to the telephone.” OP 608, § 475-78.
197. *Id.* § 477.
198. Interview with Correll Thomas (5 May 2013).
199. OP 608, § 480(b).
200. *Id.* § 446.
201. *See* Interview with Joseph Baxter, Attorney, in San Quentin, Cal. (8 May 2013) (notes on file with author); Interview with Steve Fama and Don Spector, Attorneys, Prison Law Office, in Berkeley, Cal. (7 May 2013) (notes on file with author).
202. Interview with Correll Thomas (5 May 2013).
203. *Id.*; Interview with Kevin Cooper (6 May 2013).
204. Interview with Correll Thomas (5 May 2013).
205. Interview with Jarvis Masters (8 May 2013).
206. Interview with Kevin Cooper (6 May 2013).
207. *Id.*
208. Interview with Jeanne Woodford (9 May 2013).
209. OP 608, § 467(e).
210. Interview with Jarvis Masters (8 May 2013); *see also* Woodford Declaration, *supra* note 152, ¶ 41.
211. OP 608, § 829. The guidelines specify, for example, that a term of up to 18 months may be assessed for “leading a . . . strike” or conspiring to lead a strike; up to 12 months for fighting; and up to 9 months for refusing to accept a housing assignment.
212. Interview with Steve Fama and Don Spector (7 May 2013).
213. OP 608, § 805(D); 15 Calif. Code Reg. § 3315(a)(3); *see also* Interview with Correll Thomas (5 May 2013).
214. OP 608, § 301. Under the Condemned Manual, a gang may be any formal or informal association of three or more people whose members have an identifying symbol and who have engaged or threatened or planned to engage in an “act of misconduct” on behalf of the group. *Id.* § 802. Although “gang association” is defined in regulations governing all California prisons, *see* 15 Calif. Code Reg. § 3375.3, “gang affiliation” is not.
215. OP 608, § 826(B).
216. Inmates may receive a Grade B classification as long as prison officials find that the inmate “endangers the lives of staff, other inmates and/or [is] disruptive to the normal operating procedures of the institution.” OP 608, § 826(B)(3).
217. *Id.* § 828(2); 15 Calif. Code Reg. § 3378.1.

218. 15 Calif. Code Reg. § 3378(e).
219. OP 608, § 826(A).
220. *See* Phone Interview with Joseph Schlesinger (17 April 2013); Phone Interview with Kathrin Smith, wife of death row prisoner (18 April 2013) (notes on file with author); Interview with Sarah Chester (9 May 2013).
221. In an active federal lawsuit, CCR is currently challenging the procedures by which prisoners in California’s Pelican Bay State Prison are placed into solitary confinement as a result of their validation as gang affiliates, as well as conditions of confinement in these isolation units. *See* Second Am. Compl., *Ashker et al. v. Governor of Cal., et. al.*, No. 09-5796, dkt no. 136 (N.D. Cal. 10 Sept. 2012).
222. Interview with Sarah Chester (9 May 2013).
223. Interview with Joe Baxter (8 May 2013).
224. *See* Paige St. John, *Inmates End California Prison Hunger Strike*, L.A. TIMES, 5 Sept. 2013.
225. *See* Prisoner Hunger Strike Solidarity, San Quentin Demands, <http://prisonerhungerstrikesolidarity.wordpress.com/san-quentin-demands/>.
226. Email from Sarah Chester, 3 Oct. 2013 (notes on file with author).
227. *Id.*
228. *Id.*
229. Phone Interview with Christine Thomas (3 Oct. 2013).
230. Interview with Kevin Cooper (6 May 2013).
231. Interview with Joseph Schlesinger (10 May 2013).
232. Interview with Jarvis Masters (8 May 2013) (“People who have been on death row for a very long time are those with problems; they start to act out in a harmful way.”); Interview with Kevin Cooper (6 May 2013).
233. Interview with Christine Thomas (5 May 2013); Woodford Declaration, *supra* note 152, ¶ 53.
234. OP 608, § 420(d).
235. Woodford Declaration, *supra* note 152, ¶ 56.
236. Phone interview with Christine Thomas (3 Oct. 2013) (notes on file with author).
237. Interview with Steve Fama and Don Specter (7 May 2013); Interview with Sarah Chester (9 May 2013).
238. Interview with Steve Fama and Don Specter (7 May 2013); Woodford Declaration, *supra* note 152, ¶ 45.
239. Interview with Jarvis Masters (8 May 2013); Interview with Correll Thomas (5 May 2013).
240. Interview with Terry Kupers, M.D. (6 May 2013) (notes on file with author).
241. Interview with Correll Thomas (5 May 2013).
242. *Id.*
243. *Id.*
244. *Id.*
245. Interview with Kevin Cooper (6 May 2013).
246. *Id.*
247. *Id.*; Interview with Correll Thomas (5 May 2013).



248. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), ¶ 106.
249. *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972).
250. *Id.* at 894 n. 7; *Soering*, 161 Eur. Ct. H.R. (ser. A), ¶ 106.
251. *People v. Anderson*, 493 P.2d at 894.
252. Interview with Steve Fama and Don Specter (7 May 2013).
253. Interview with Kevin Cooper (6 May 2013) (“This place is unnatural; it makes people do things and become things they would not become. A lot of people here give up on life. They don’t live, they exist.”).
254. Interview with Joseph Schlesinger (10 May 2013).
255. ACLU, *A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 6* (July 2013).
256. *See generally* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL’Y 325 (2006).
257. *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/66/268 (5 Aug. 2011) (by Juan Méndez) [*hereinafter* Méndez 2011 Interim Report], ¶¶ 58-59.
258. Phone Interview with Christine Thomas (5 Oct. 2013) (notes on file with author).
259. Interview with Kevin Cooper (6 May 2013).
260. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *State & County QuickFacts, Louisiana*, <http://quickfacts.census.gov/qfd/states/22000.html> (last revised 27 June 2013) [*hereinafter QuickFacts Louisiana*].
261. This information is updated through January 23, 2012, as this is the most recent date to which comprehensive sentencing data is available. Data Tables, Interview with Nick Trenticosta, Director, Center for Equal Justice, in New Orleans, L.A. (10 Apr. 2013)(data on file with the author)[*hereinafter*, Trenticosta Data Tables].
262. First degree murder is defined as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm, “(1)and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second degree cruelty to juveniles; (2) ...upon a fireman, peace officer, or civilian employee of the Louisiana State Police Crime Laboratory or any other forensic laboratory engaged in the performance of his lawful duties, or when the specific intent to kill or to inflict great bodily harm is directly related to the victim’s status as a fireman, peace officer, or civilian employee; (3)... upon more than one person; (4) ... and has offered, has been offered, has given, or has received anything of value for the killing; (5) ...upon a victim who is under the age of twelve or sixty-five years of age or older; (6) ...while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law; (7) ...and is engaged in the activities prohibited by R.S. 14:107.1(C)(1); (8) ... and there has been issued by a judge or magistrate any lawful order prohibiting contact between the offender and the victim in response to threats of physical violence or harm which was served on the offender and is in effect at the time of the homicide; (9) ...upon a victim who was a witness to a crime or was a member of the immediate family of a witness to a crime committed on a prior occasion and: (a) The killing was committed for the purpose of preventing or influencing the victim’s testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced; or (b) The killing was committed for the purpose of exacting retribution for the victim’s prior testimony; (10) ... upon a taxicab driver who is in the course and scope of his employment...; (11) ... and the offender has previously acted with a specific intent to kill or inflict great bodily harm that resulted in the killing of one or more persons.” LA. REV. STAT. ANN. § 14:30 (A).
263. The U.S. Supreme Court rejected the Supreme Court of Louisiana’s position that rape of a child could warrant the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
264. *See* CAPITAL DEFENSE GUIDELINES, LA. ADMIN. CODE tit. 22, pt.XV
265. DEBORAH FINS, CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. SPRING 2013 <http://www.deathpenaltyinfo.org/documents/DRUSASpring2013.pdf>.

266. *QuickFacts, Louisiana*, *supra* note 260.
267. Trenticosta Data Tables, *supra* note 261.
268. *Death Row Inmates by County*, DPIC, <http://www.deathpenaltyinfo.org/documents/DeathRowCounties.xlsx> [hereinafter *Death Row Inmates by County*].
269. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *State and County Quick Facts: East Baton Rouge Parish, Louisiana*, <http://quickfacts.census.gov/qfd/states/22/22033.html> (last revised 27 June 2013).
270. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *State and County Quick Facts: Caddo Parish Louisiana* <http://quickfacts.census.gov/qfd/states/22/22017.html> (last revised 27 June 2013) [hereinafter *QuickFacts Caddo Parish Louisiana*].
271. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *State and County Quick Facts: Jefferson Parish Louisiana* <http://quickfacts.census.gov/qfd/states/22/22051.html> (last revised 27 June 2013).
272. *Quick Facts: Louisiana*, *supra* note 260.
273. *Death Row Inmates by County*, *supra* note 268.
274. Interview “H,” New Orleans, Louisiana (19 Apr. 2013)
275. *See, e.g.*, TUSHAR KANSAL, THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE, (Marc Mauer ed., 2005) [http://www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf)
276. Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 671 (2011).
277. Tim Lyman, *East Baton Rouge (LA) Parish Study on Race, Homicides, and Death-Eligible Prosecutions, 1990-2008*, (5 Aug. 2013) at 4, (unpublished report), <http://ssrn.com/abstract=2096254> [hereinafter *Caddo (LA) Parish Study*]; *See also* Pierce & Radelet, *supra* note 276
278. Pierce & Radelet, *supra* note 276.
279. *Id.* at 660.
280. *Caddo (LA) Parish Study*, *supra* note 277 at 2.
281. *Id.* at 5.
282. *Id.*
283. Pierce & Radelet, *supra* note 276, at 649, note 16, citing, Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOC. Q. 529, 537 (1989).
284. *See* Henry Weinstein, *Jury to Come Under Justices’ Scrutiny*. L.A. TIMES, (3 Dec. 2007), <http://articles.latimes.com/2007/dec/03/nation/na-jury3>.
285. Jeffrey Gettleman, *Prosecutors’ Morbid Neckties Stir Criticism*, N.Y. TIMES, (5 Jan. 2003), <http://www.nytimes.com/2003/01/05/us/prosecutors-morbid-neckties-stir-criticism.html>.
286. *Id.*
287. For more context on this period or the noose, *see* Jeannine Bell, *The Hangman’s Noose and the Lynch Mob: Hate Speech and the Jena Six* 44 HARV. C.R. –C.L. L. REV. 329 (2009); James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 B.J. POL. S. 269 (Apr. 1998).
288. As of 2012 the Caddo population was 257, 093, 49% white and 47.7% black. *See: QuickFacts Caddo Parish Louisiana*, *supra* note 270.
289. *See* Cecelia Trenticosta and William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. RACIAL & ETHNIC JUST. 125 (2011).

290. Carolyn Roy and Jeff Ferrell, *Confederate flag comes down Friday*, KSLA, (17 Nov. 2011) <http://www.ksla.com/Global/story.asp?S=15955226&autostart=true>.
291. Trenticosta and Collins, *supra* note 289, at 131, citing: MICHAEL JAMES PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947*, 142 (2004) and STEWART EMORY TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, 138 (1995).
292. *Death Row Inmates by County*, *supra* note 268.
293. *Id.*
294. *Caddo (LA) Parish Study*, *supra* note 277, at 4.
295. *Id.* at 91.
296. *Id.* at 94.
297. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PER. SOC. PSYCHOL. 597 (2006).
298. “Effective representation” is used because for non-death penalty felony trials, verdicts need not be unanimous, and the presence of one or even two African Americans can be negated by all whites voting to convict. RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, LOUISIANA CRISIS ASSISTANCE CENTER, *BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY’S OFFICE*, (1 Sept. 2003) [http://www.blackstrikes.com/resources/report/black\\_strikes\\_report\\_september\\_2003.pdf](http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.pdf).
299. *Justice Department Files Lawsuit Against Louisiana Alleging Violations of the National Voter Registration Act*, Department of Justice, Office of Public Affairs, (12 July 2011) <http://www.justice.gov/opa/pr/2011/July/11-crt-908.html>
300. *See* LA. CODE. CRIM. PROC. ANN. § 797. *See also* LA. CODE. CRIM. PROC. ANN. § 798 (1990) for additional information on cause.
301. *Witherspoon v. Illinois*, 391 U.S. 510, 513 (1968).
302. Note: this may also mean that African Americans are more likely to be dismissed from the jury pool under a peremptory challenge. Attorneys selecting the venire know that they could justify their striking of a particular juror in an appeal by expressing concern about the potential juror’s sentiments on the judicial system.
303. *Witherspoon*, 391 U.S. 510.
304. Mtn. for a New Trial, *State of Louisiana v. Lamondre Tucker*, Case 273-436 (La. App. 2 Cir. Section 4), at Ex. 16.
305. *Id.* at Ex. 14.
306. *Id.* at Ex. 15.
307. *State v. Crawford*, 873 So. 2d 768, 784 (La.App. 5 Cir. 27 Apr. 2004) (upholding the trial court’s finding that the strike was not discriminatory).
308. *Id.* at 783.
309. *State v. Harris*, 820 So. 2d 471, 477 (La. 21 Jun. 2002) (finding a *Batson* violation for the strike).
310. 476 U.S. 79, 106 (1986).
311. *Johnson v. California*, 545 U.S. 162 (2005)(clarifying *Batson* standard); *Batson*, 476 U.S. at 93-94 (stating that the defendant makes a *prima facie* case of purposeful discrimination against a strike “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”).
312. *Purkett v. Elem* 514 U.S. 765, 768 (1995).
313. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).



314. 552 U.S. 472 (2008).

315. *Id.* at 475-76.

316. *Id.* at 478.

317. 428 U.S. 153 (1976).

318. LA. S. CT. R. 28 § 1.

319. For a thoughtful and comprehensive examination of the proportionality review, see Bidish J. Sharma, Smith Robert J. Smith & Ben G. Cohen, *Struck by Lightning: Walker v. Georgia and Louisiana's Proportionality Review of Death Sentences* 37 S.U. L. Rev. 65 (2009).

320. "If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises." *State v. Legrand*, 864 So. 2d 89, 104 (La. 2003).

321. Sharma, Smith & Cohen, *supra* note 319 at 2.

322. Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And the System That Protects Them*, THE HUFF. POST (1 Aug. 2013) [http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana\\_n\\_3529891.html](http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html).

323. 552 U.S. 472.

324. *Snyder v. Louisiana*, 545 U.S. 1137 (2005).

325. *Snyder*, 552 U.S. 472.

326. *State v. Snyder*, 750 So. 2d 832, 861 (La. 1999).

327. *State v. Snyder*, 942 So. 2d 484, 499 (La. 2006).

328. Louisiana code *prohibits* the use of solitary confinement. See La. Rev.Stat. Ann. § 15:865 (2004).

329. See James Ridgeway and Jean Casella, *Louisiana Attorney General Says Angola 3 "Have Never Been Held in Solitary Confinement,"* SOLITARY WATCH, 21 Mar. 2013, <http://solitarywatch.com/2013/03/21/louisiana-attorney-general-says-angola-3-have-never-been-held-in-solitary-confinement/>.

330. *Id.*

331. Notably, one of the Angola 3, Herman Wallace, was released on 1 October 2013, after having spent 41 years in conditions commonly understood to constitute solitary confinement. He died 3 days later. See Associated Press, Herman Wallace: 'Angola Three' inmate dies days after release from solitary, THE GUARDIAN, (4 Oct. 2013), <http://www.theguardian.com/world/2013/oct/04/herman-wallace-angola-three-dies-solitary-confinement>.

332. *The Istanbul Statement on the Use and Effects of Solitary Confinement*, adopted 9 Dec. 2007, Int'l. Psych. Trauma Symp. [http://solitaryconfinement.org/uploads/Istanbul\\_expert\\_statement\\_on\\_sc.pdf](http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf).

333. *Id.*

334. James Ridgeway, *God's Own Warden*, MOTHER JONES, (Jul./Aug. 2011) <http://www.motherjones.com/politics/2011/07/burl-cain-angola-prison>.

335. Telephone interview with Monique Matthews Ruiz, 18 May 2013.

336. LA. DEP'T OF PUBLIC SAFETY & CORR., *Louisiana State Penitentiary*, ("Tours at LSP"), <http://www.doc.la.gov/pages/correctional-facilities/louisiana-state-penitentiary/>.

337. *Polay Campos v. Peru*, U.N. Hum. Rts. Com. Communic'n No. 577/1994 (6 Nov. 1997), U.N. Doc. CCPR/C/61/D/577/1994, ¶ 8.5; *Valasinas v. Lithuania*, 2001 Eur. Ct. H.R. 483, ¶ 117 (the Eur. Ct. H.R. found degrading treatment where the treatment in question, a strip search in the presence of a woman, "must have left [the applicant] with feelings of anguish and inferiority capable of humiliating and debasing him.").

338. A calculation taking into account both heat and humidity, as calculated by *The Meteorological Conversions and Calculations: Heat Index Calculator*, Nat'l Oceanic and Atmosph. Admin., U.S. Dept. of Commerce <http://www.hpc.ncep.noaa.gov/html/heatindex.shtml> (last modified 3 June 2013).
339. Mem. in Support of the Motion for a Preliminary Injunction, *Ball, et. al. v. LeBlanc, et. al.*, Civil Action No. 13-368, US District Court, West Feliciana (18 Jun. 2013) [*hereinafter* Ball Preliminary Injunction Mem.] at 1.
340. *Id.* at 2.
341. *Id.*
342. *Id.* at 17.
343. *Id.* at 5.
344. Interview "E" New Orleans Louisiana (21 May 2013).
345. *Id.*
346. Ball Preliminary Injunction Mem., *supra* note 339, at 5.
347. Interview "C," New Orleans Louisiana (21 May 2013).
348. Interview "H," New Orleans, Louisiana (9 Apr. 2013).
349. ICCPR, *supra* note 7, at art. 19(2).
350. Interview "B" New Orleans, Louisiana (8 Apr, 2013).
351. Interview "B" New Orleans, Louisiana (6 May 2013); Telephone interview with Monique Matthews Ruiz, sister of exoneree (18 May 2013).
352. Interview "H" New Orleans, Louisiana (19 Apr. 2013).
353. Interview "I" New Orleans, Louisiana (8 Apr, 2013).
354. Cindy Chang, *Many doctors treating state's prisoners have disciplinary records themselves*, THE TIMES-PICAYUNE, (29 Jul. 2012) [http://www.nola.com/crime/index.ssf/2012/07/many\\_doctors\\_treating\\_states\\_p.html](http://www.nola.com/crime/index.ssf/2012/07/many_doctors_treating_states_p.html).
355. *Id.*
356. For example, the sister of Ryan Matthews who was exonerated from death row, noted "*We had to fight to get him his anti-seizure medicine. I wrote letters, I even offered to pay for the medicine myself...People started to realize he was innocent and started treating him with more dignity and respect. Still, it took about a year for him to start getting medicine regularly, and we worry that his time without the medicine did serious damage.*" Telephone interview with Monique Matthews Ruiz, sister of exoneree (18 May 2013).
357. *State v. Perry*, 610 So. 2d 746 (La. 1992).
358. *Id.* at 748.
359. Trenticosta Data Tables, *supra* note 261.
360. Interview with John Thompson, death row exoneree, New Orleans, Louisiana (22 May 2013).
361. JOHN HOLLOWAY AND RONALD M. GAUTHIER, *KILLING TIME: AN 18-YEAR ODYSSEY FROM DEATH ROW TO FREEDOM*, (2010).
362. John Thompson, *The Prosecution Rests, but I Can't*, N.Y. TIMES, (9 Apr. 2011), [www.nytimes.com/2011/04/10/opinion/10thompson.html](http://www.nytimes.com/2011/04/10/opinion/10thompson.html).
363. *Connick v. Thompson*, 131 U.S. 1350 (2011).
364. Interview with John Thompson, former death row inmate and Founder and Director of Resurrection After Exoneration, New Orleans, Louisiana (22 May 2013).

365. Interview “E” New Orleans Louisiana (21 May 2013).
366. Information about Execution Protocol and the use of Pentobarbital is available online. See State of Louisiana, Department of Public Safety and Corrections, Corrections Services, Department Regulation No. C-03-001, (1 Aug. 2012), available at <http://www.scribd.com/doc/150605809/Louisiana-Execution-Protocol>.
367. Lauren McGaughy, *Louisiana releases execution protocol; inmate’s lawyer calls it ‘inadequate’*, THE TIMES PICAYUNE, (28 June 2013) [http://www.nola.com/crime/index.ssf/2013/06/death\\_row\\_execution\\_protocol\\_1.html](http://www.nola.com/crime/index.ssf/2013/06/death_row_execution_protocol_1.html). See also, Erik Eckholm and Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES, (21 Jan. 2011) [http://www.nytimes.com/2011/01/22/us/22lethal.html?\\_r=0](http://www.nytimes.com/2011/01/22/us/22lethal.html?_r=0).
368. McGaughy, *Louisiana releases execution protocol; inmate’s lawyer calls it ‘inadequate*, supra note 367.’
369. *Id.*
370. *Lenford Hamilton v. Jamaica*, U.N. Hum. Rts. Com. Communic’n No. 333/1988 (7 Nov. 1988), U.N. Doc. CCPR/C/50/D/333/1988 ¶ 10.
371. *Medellín, RamírezCardenas and LealGarcía v. United States*, Case 12.644, Inter-Am. Comm’n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37, ¶¶122-23 (2009); *Rudolph Baptiste v. Grenada*, Case 11.743, Inter-Am. Comm’n H.R., Report No. 38/00, OEA/Ser.L/V/II.106, doc. 3, ¶¶ 64-66 (2000); *Desmond McKenzie et al., v Jamaica*, Cases. 12.023, 12.044, 12.107, 12.126 & 12.146, Inter-Am. Comm’n H.R., Report No. 41/100, OEA/Ser.L/V/II.106, doc. 3 ¶¶ 169-71 (2000).
372. See U.N. CERD Com., Gen. Rec. No. 31 supra note 53, at ¶¶ 1 (e) and (f).
373. CERD U.S. Concluding Observations 2001, supra note 74, at ¶ 17; see also CERD U.S. Concluding Observations 2008, supra note 71, at ¶ 23 (noting the “persistent and significant racial disparities” evidenced by studies, and recommending remedial action including a moratorium); U.N. CAT Com., *U.S. Concluding Observations 2006*, supra note 122, at ¶ 29 (“the Committee remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities.”).
374. CERD, supra note 42, at art. 1, ¶ 1.
375. See *D.H. and Others v the Czech Republic*, 2007 Eur. Ct. H.R. 922 ¶ 180 (“the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory. However, in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or de facto situation, the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.” (internal citations omitted)); see also *Hoogendijk v. The Netherlands*, 2005 Eur. Ct. H.R. 930; *Opuz v. Turkey*, 2009 Eur. Ct. H.R. 870 ¶183.
376. See, e.g. *Horvath and Kiss v Hungary*, 2012 Eur. Ct. H.R. 1206 ¶¶ 110, 129; *D.H. and Others*, 2007 Eur. Ct. H.R. ¶¶ 190-193 (finding discrimination for a practice of sending Roma children to special schools).
377. *Hoogendijk*, 2005 Eur. Ct. H.R. See, e.g. *Mudric v. the Republic of Moldova*, 2013 Eur. Ct. H.R. 685, ¶¶ 60, 62-64. One petitioner to the European Court of Human Rights argued that the domestic violence she suffered was in part due to state discrimination and failure to protect women from violence, as required by international law. The court found, based in part on statistics noting the disproportionate effect of domestic violence on women, that the state violated the prohibition on non-discrimination and equal protection in the European Convention by failing to implement an adequate legal framework to protect against acts of violence, in effect condoning the acts.
378. ICCPR, see supra note 7, at art. 25 (a)(c).
379. *Zarb Adami v. Malta*, 2006 Eur. Ct. H.R. 637, ¶ 75.
380. *Id.* at ¶ 76.
381. *Id.* at ¶¶ 56, 81-82.
382. See, e.g. U.N. Hum. Rts. Com., CCPR Gen. Comm. No. 32, supra note 57, at ¶ 25, citing *Gridin v. Russian Federation*, U.N. Hum. Rts. Com. Communic’n No. 770/1997 (18 July 2000), U.N. Doc. CCPR/C/69/D/770/1997 ¶ 8.2. See also, *Gregory v. The United Kingdom*, 1997 Eur. Ct. H.R. 9, ¶ 43 (finding that “it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused”).



383. *William Andrews*, Case 11.139, Inter-Am. Comm'n H.R ¶ 159.

384. *Id.* at ¶ 130.

385. Sommers, *supra* note 297, at 608.

386. *See, inter alia*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (Aug. 2010) <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf> ; SPEEDY RICE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE DEATH PENALTY IN THE UNITED STATES, RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 6 (Feb. 2008) <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN21.doc> (citing racially based jury selection as a “source of the racial disparity.”)

387. In addressing the issue of a United States capital prosecution, where the primary consideration was the trial court's failure to appropriately address a juror's presentation of a note stating, “hang the [epithet]” alongside a drawing of a hanging stick figure, the Inter-American Commission also looked to the makeup of the jury. Mr. Andrews was an African-American male, and was tried by an all-white jury some of whom were members of the Mormon Church and adhered to its teachings that African-American people were inferior beings. The Commission noted that “[t]he record ... reflects ample evidence of “racial basis.” *William Andrews*, Case 11.139, Inter-Am. Comm'n H.R ¶ 165.

388. *Bandajevsky v. Belarus*, U.N. Hum. Rts. Com. Communic'n No. 1100/2002, (19 Apr. 2002) U.N. Doc. CCPR/C/86/D/1100/2002.

389. U.N. Hum. Rts. Com., CCPR General Comment No. 32, *supra* note 57, at ¶ 19 citing U.N. Hum. Rts. Com., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Slovakia*, U.N. Doc. CCPR/C/79/Add.79. ¶ 18. ), ¶ 18.

390. Méndez 2012 Interim Report, *supra* note 39, at ¶ 78.

391. *Id.* at ¶ 42.

392. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

393. *Id.*

394. *Pratt & Morgan v. Jamaica*, [1993] 4 All E.R. 769 (P.C.).

395. *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 167-169 (21 June 2002).

396. Méndez 2012 Interim Report, *supra* note 39, at ¶ 72.

397. Lauren McGaughy, *Angola prison warden apologizes for violating court order during death row heat lawsuit*, THE TIMES PIC., 6 Aug. 2013, [http://www.nola.com/crime/baton-rouge/index.ssf/2013/08/angola\\_warden\\_apologizes\\_for\\_v.html](http://www.nola.com/crime/baton-rouge/index.ssf/2013/08/angola_warden_apologizes_for_v.html).

398. For a definition of solitary confinement, *see The Istanbul Statement on the Use and Effects of Solitary Confinement*, adopted 9 Dec. 2007, Int'l. Psych. Trauma Symp. Istanbul, [http://solitaryconfinement.org/uploads/Istanbul\\_expert\\_statement\\_on\\_sc.pdf](http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf) (“Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.”).

399. Méndez 2012 Interim Report, *supra* note 39, at ¶ 81.

400. *Id.* at ¶ 48.

401. Principles and Best Practices on the Protection of Persons Deprived of Their Liberty in the Americas, Inter-Am. Comm'n H.R., *supra* note 105, Principle XXII.

402. *Report on the Human Rights of Persons Deprived of Liberty in the Americas* *supra* note 106, at ¶ 412.”

403. Méndez 2011 Interim Report, *supra* note 257, at ¶ 56 citing *G.B. v. Bulgaria*, 2004 Eur. Ct. H. R. 112, ¶ 85.

404. *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150. ¶ 94 (5 July 2006).

405. Méndez 2011 Interim Report, *supra* note 257, at ¶ 58.

406. *Id.* at ¶ 76.

407. Eur. Comm. for the Prevention of Torture and I.D.T.P., *21<sup>st</sup> General Report of the CPT*, Doc. No. CPT/Inf (2011) 28(2011), <http://www.cpt.coe.int/en/annual/rep-21.pdf>.

408. *A.B. v. Russia*, 2010 Eur. Ct. H. R. 1511, ¶¶ 99-113.

409. *See, e.g. Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6, at arts. 37, 44(2); Principles and Best Practices on the Protection of Persons Deprive of Liberty in the Americas, *supra* note 105, at Principle XVIII.

410. *Estrella v. Uruguay*, U.N. Hum. Rts. Com. Communic'n No. 84/1981, (29 Mar. 1983) U.N. Doc. CCPR/C/OP/2, ¶ 9.2.

411. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 93, at Principle 18. 3 (“The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.”).

412. *Garcia-Asto v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 137 ¶¶ 221, 229, 233 (25 Nov. 2005).

413. *Id.* at ¶ 225.

414. *Id.* at ¶ 230 (internal citations omitted); *see also id.* at ¶¶ 234-35.

415. *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6, art. 11(a).

416. *Id.* at arts. 10, 14.

417. *Id.* at art. 21 (2).

418. *See supra* note 213.

419. *See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 93, at Principle 30(2) (“A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.”).

420. Principles and Best Practices on the Protection of Persons Deprived of Their Liberty in the Americas, Inter-Am. Comm'n H.R., *supra* note 105, at Principle XII(1).

421. *Id.*; *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6, at art. 13 (“[E]very prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region . . .”).

422. *Zakharkin v. Russia*, 2010 Eur. Ct. H.R. 885, ¶ 125; *Mathew v. The Netherlands*, 2005 Eur. Ct. H.R. 652, ¶ 214 (“The court finds it unacceptable that anyone should be detained in conditions involving a lack of adequate protection against precipitation and extreme temperatures.”).

423. *See, e.g., Slyusar v. Ukraine*, U.N. CAT Com., Communic'n No. 353/2008 (16 Jan. 2011), U.N. Doc. CAT/C/47/D/353/2008 (plaintiff held in temporary detention where the cell was near freezing, was beaten, threatened with harm to family, and deprived of food and sleep found to constitute torture); *Gulyayeva v. Russia*, 2010 Eur. Ct. H.R. 437 (finding that windowless and smoke-filled cells, infested with insects and subject to extreme temperatures constituted inhuman and degrading treatment); *Juvenile Reeducation Institute v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 69(e) (2 Sep. 2004) (noting prisoners suffered in summer temperatures of not less than 40 degrees and the cells had only one ceiling fan); *Garcia-Asto v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 137 (25 Nov. 2005) (noting the lack of covers in a freezing cell, alongside *inter alia* solitary confinement, limited contact with family, beating and poor medical care).

424. *See, e.g., Garcia-Asto v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R.

(ser. C) No. 137, ¶ 226 (25 Nov. 2005) (“[L]ack of adequate medical assistance does not meet the minimum material requirements for humane treatment . . .”).

425. See, *inter alia*, *Application of the Inter-Am. Comm’n H.R. to the Inter-Am. Ct. H.R. in the case of Pedro Miguel Vera Vera (Case 11.535) v. Ecuador*, ¶ 42 (2010) (“[T]he obligation of states to respect their physical integrity, not to use cruel or inhuman treatment, and to respect the inherent dignity of the human person, includes guaranteeing access to proper medical care.”); *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, G.A. Res. 46/119, U.N. Doc. A/RES/46/119, Principle 1.1 (17 Dec. 1991) (“All persons have the right to the best available mental health care, which shall be part of the health and social care system.”); *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6, at arts. 22-26; *Cabal and Pasini v. Australia*, U.N. Hum. Rts. Com. Communic’n No. 1020/2001 (7 Aug. 2003), U.N. Doc. CCPR/C/78/D/1020/2002, ¶ 7.7 (right to health governed by ICCPR arts. 6, 10); Principles and Best Practices on the Protection of Persons Deprived of Their Liberty in the Americas, Inter-Am. Comm’n H.R., *supra* note 105, Principle X (“Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk groups . . .”).

426. *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6, at art. 22(2).

427. Principles and Best Practices on the Protection of Persons Deprived of Their Liberty in the Americas, Inter-Am. Comm’n H.R., *supra* note 105.

428. *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 6, at art. 82.

429. *Keenan v. The United Kingdom* 2001 Eur. Ct. H.R. 242.

430. *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, *supra* note 106, at ¶¶ 313, 319; *César Alberto Mendoza et al. v. Argentina*, Case 12.651, Inter-Am. Comm’n H.R., Report No. 172/10, OEA/Ser.L/V/II.130, doc. 22 rev. I ¶ 276 (2010). See also, WORLD HEALTH ORGANIZATION, PREVENTING SUICIDE IN JAILS AND PRISONS 9-21 (2007) (providing guidelines on the prevention of suicide in detention).

431. *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, *supra* note 106, at ¶ 314.

432. *César Alberto Mendoza et al.*, Case 12.651, Inter-Am. Comm’n H.R., ¶ 271; see also, *Barbato et al. v. Uruguay*, U.N. Hum. Rts. Com. Communic’n No. 84/1981, (21 Oct. 1982) U.N. Doc. CCPR/C/OP/2 ¶ 9.2 (“While the Committee cannot arrive at a definite conclusion as to whether [the victim] committed suicide, was driven to suicide or was killed by others while in custody; yet, the inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life”).

433. *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, *supra* note 106, at ¶ 319.

434. *Id.* at ¶ 575(9).

435. The HRC has refused to consider the time spent of death row as a determining factor in a CIDT analysis, specifically because of this paradox. See *LaVende v. Trinidad and Tobago*, U.N. Hum. Rts. Com. Communic’n No. 554/1993, (17 Nov. 1997) U.N. Doc. CCPR/C/61/D/554/1993, ¶ 5.5 (“The second implication of making the time factor per se the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed.... It should be stressed that by adopting the approach that prolonged detention on death row cannot, per se, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.”).



### Establishing the facts

#### Investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

### Supporting civil society

#### Training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

### Mobilising the international community

#### Permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

### Informing and reporting

#### Mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.



### Center for Constitutional Rights (CCR)

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, to train the next generation of constitutional and human rights attorneys, and to strengthen the broader movement for constitutional and human rights. Our work began on behalf of civil rights activists, and over the last four decades CCR has lent its expertise and support to virtually every popular movement for social justice.

Since our founding, CCR has provided legal skills in a unique and effective manner and always with a progressive perspective. We use daring and innovative legal strategies which have produced many important precedents. CCR is often "ahead of the curve" in both identifying a problem and in suggesting novel or radical legal responses which, over time, become accepted and respected precedents and theories.

For more information about CCR:

[www.ccrjustice.org](http://www.ccrjustice.org)

Facebook: [CenterforConstitutionalRights](https://www.facebook.com/CenterforConstitutionalRights)

Twitter: [theccr](https://twitter.com/theccr)

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Design: CBT

FIDH  
represents 178  
human rights organisations  
on 5 continents



inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

## ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

### A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

### A universal movement

FIDH was established in 1922, and today unites 178 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

### An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

**fidh**

Find information concerning FIDH's 178 member organisations on [www.fidh.org](http://www.fidh.org)

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Exhibit 4

Page 370

## Exhibit 5

Notice of Appeal, *Mitchell Sims v.  
California Department of Corrections  
and Rehabilitation, et al.*, Marin County  
Superior Court Case No. CIV1004019,  
April 26, 2012



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7 *California Department of Corrections and*  
*Rehabilitation and Matthew Cate*

(Exempt from filing fees—  
Gov. Code, § 6103.)

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF MARIN

13 **MITCHELL SIMS,**

14 Plaintiff,

15 v.

17 **CALIFORNIA DEPARTMENT OF**  
18 **CORRECTIONS AND**  
**REHABILITATION, et al.,**

19 Defendants.

Case No. CIV1004019

**NOTICE OF APPEAL**

20  
21 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

22 NOTICE IS HEREBY GIVEN that defendants the California Department of Corrections  
23 and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First  
24 District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims.

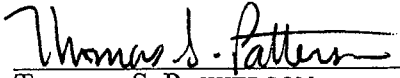
25 The state has expended significant time and resources developing a three-drug lethal-  
26 injection protocol for carrying out the death penalty, and this protocol conforms with a procedure  
27 that has been upheld by the United States Supreme Court. This notice of appeal is filed because  
28 the state's three-drug protocol is the law of California and should not be abandoned without

1 appellate review, and because the superior court made fundamental errors in issuing its decision.  
2 At the same time, appellants recognize that the availability of the three drugs comprising the  
3 current protocol is uncertain. If it becomes certain in the future that the drugs needed to  
4 implement the protocol have, in fact, become unavailable, appellants will reevaluate whether this  
5 appeal, or any portions of it, should continue to be prosecuted. In the meantime, under the  
6 Governor's direction, the California Department of Corrections and Rehabilitation will also begin  
7 the process of considering alternative regulatory protocols, including a one-drug protocol, for  
8 carrying out the death penalty.

9  
10 Dated: April 26, 2012

Respectfully Submitted,

11 KAMALA D. HARRIS  
12 Attorney General of California

13  
14   
15 THOMAS S. PATTERSON  
16 Supervising Deputy Attorney General  
17 *Attorneys for Defendants*  
*California Department of Corrections and*  
*Rehabilitation and Matthew Cate*

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **M. Sims v. CDCR, et al.**  
No.: **CIV1004019**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 26, 2012, I served the attached

**NOTICE OF APPEAL**

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Sara J. Eisenberg, Esq.**  
**Howard Rice Nemerovski Canady**  
**Falk & Rabkin**  
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**Jan B. Norman**  
**Attorney at Law**  
**1000 Wilshire Boulevard, Suite 600**  
**Los Angeles, CA 90017**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2012, at San Francisco, California.

\_\_\_\_\_  
T. Oakes  
Declarant

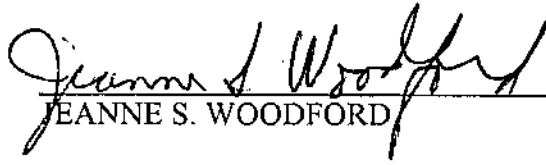
\_\_\_\_\_  
  
Signature



Exhibit 6  
Declaration of Jeannie S. Woodford,  
August 27, 2010



1 United States and the State of California on August 27, 2010.

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4 JEANNE S. WOODFORD  
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## Exhibit 7

Ed Payne and Marino Castillo, *Tennessee to Use Electric Chair When Lethal Drugs Unavailable*, CNN.com, May 23, 2014

## Tennessee to use electric chair when lethal drugs unavailable

By Ed Payne and Mariano Castillo , CNN  
updated 11:14 AM EDT, Fri May 23, 2014

CNN.com

**(CNN)** -- As controversies over lethal injection drugs surge, Tennessee has found a way around the issue: It is bringing back the electric chair.

Eight states authorize electrocution as a method of execution but only at the inmate's discretion.

Now Tennessee is the first state to make use of the electric chair mandatory when lethal injection drugs are unavailable.

Tennessee Gov. Bill Haslam signed the measure into law Thursday.

"This is unusual and might be both cruel and unusual punishment," said Richard Dieter, president of the Death Penalty Information Center.

"No state says what Tennessee says. This is forcing the inmate to use electrocution," according to Dieter, who believes "the inmate would have an automatic Eighth Amendment challenge."

The amendment protects against cruel and unusual punishment.

"The electric chair is clearly a brutal alternative," Dieter said.

Controversy over lethal injections has been brewing in recent years after European manufacturers, including the Denmark-based manufacturer of pentobarbital, banned U.S. prisons from using their drugs in executions.

In April, a botched lethal injection in Oklahoma catapulted the issue back into the international spotlight. It was the state's first time using a new, three-drug cocktail for an execution. Execution witnesses said convicted murderer and rapist Clayton Lockett convulsed and writhed on the execution gurney and struggled to speak, before officials blocked the witnesses' view. Lockett died 43 minutes after being administered the first drug, CNN affiliate KFOR-TV in Oklahoma City reported.

Earlier this year, a convicted murderer and rapist in Ohio, Dennis McGuire, [appeared to gasp and convulse](#) for at least 10 minutes before dying from the drug cocktail used in his execution.

In 2009, the U.S.-based manufacturer of sodium thiopental, a drug also commonly used in executions, stopped making the painkiller.

Many states have scrambled to find products from overseas or have used American-based compounding pharmacies to create substitutes.

This month, a group of criminal justice experts recommended that federal and state governments move to a single lethal drug for executions instead of complex cocktails that can be botched.

The controversy over legal injection drugs raises the question of when a case will arise to test the new

<http://www.cnn.com/2014/05/22/us/tennessee-executions/>

law.

The last death penalty by electrocution in Tennessee was that of Daryl Holton in 2007.

Holton -- a convicted murderer who killed his three young sons and his ex-wife's daughter -- elected to be killed by the electric chair.

Before Holton's execution, Tennessee had not used the electric chair in 47 years.

CNN's Dave Alsup contributed to this report.

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## Exhibit 8

Jon Herskovitz, *Botched Oklahoma Execution Comes As Alternatives Emerge*, Reuters, April, 30, 2014

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## Botched Oklahoma execution comes as alternatives emerge from shadows

Wed, Apr 30 2014

By Jon Herskovitz

AUSTIN, Texas (Reuters) - Firing squads, electric chairs and other methods of execution seen as cruel or antiquated could be getting a fresh look after Oklahoma botched a lethal injection, leaving the condemned inmate withering in apparent pain on its death chamber gurney.

Lawmakers in several states this year have put forward legislation to revise alternative methods of capital punishment in the face of a shortage of drugs once used for executions as well as legal challenges to new lethal "cocktails."

Oklahoma was among those states, and it had faced lawsuits to stop the execution of convicted rapist and murderer Clayton Lockett, who died on Tuesday night of an apparent heart attack minutes after a medical official on the scene called a halt to the botched process, saying something had gone wrong with the lethal injection.

"As long as there are problems with lethal injection, and there have been and there will be, there will always be legislators determined to kill people with some other method," said Rick Halperin, director of the Embrey Human Rights Program at Southern Methodist University in Dallas.

So far this year, lawmakers in Tennessee have passed a measure to allow the state to electrocute death row inmates if it could not obtain drugs for lethal injections.

A Missouri lawmaker introduced a bill to set up firing squads and a gas chamber should there be problems with lethal injections. In Wyoming, lawmakers were also considering firing squads.

The Virginia House in January passed a measure to make electrocution the default death penalty method if lethal injection drugs cannot be procured, but the bill was halted in the state Senate.

The electric chair was used for years after the U.S. Supreme Court reinstated capital punishment in 1976, but it has also produced some horrific results.

There were reports in both Virginia and Alabama of an inmate being set on fire in the early 1980s, with the smell of charred flesh wafting through the death chambers.

In response, several states led by Texas began using lethal injections in the early 1980s, with the method of execution seen as more humane.

It is now the primary method of execution in all of the 32 U.S. states that use the death penalty as well as for federal death row convicts.

Since 1976, just over 1,200 inmates have been executed by lethal injection while 158 were electrocuted, 11 put to death in a gas chamber, three hanged and three killed by firing squad, according to the Death Penalty Information Center, a capital punishment monitoring agency.

### CRUEL AND UNUSUAL

Eight states still have electrocution on their books as an alternative method of execution, but with caveats. For example, Oklahoma can use the electric chair if its lethal injection protocol is found to be unconstitutional. Virginia allows some inmates to die in the electric chair if they chose to do so. Its last electrocution using the chair was in 2013 when it put inmate Robert Gleason to death.

Larry Fitzgerald, a former spokesman for the Texas Department of Criminal Justice who has witnessed scores of executions, said the results of the state's lethal injections were always the same - with the inmate being rendered unconscious and then dying from drugs designed to stop breathing and stop the heart.

About five minutes after all the drugs of a three-drug cocktail were administered, a physician would be called in to pronounce death.

However, there were a few rare times when inmates blurted "I can feel it," or "I can taste it," after the injection, Fitzgerald said.

The U.S. Supreme Court has ruled that executions do not need to be painless. In a pair of cases out of Kentucky, the court in 2008 dismissed the idea that the potential for pain made the three-drug cocktail method of execution unlawful.

"Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual," Chief Justice John Roberts wrote then.

The Eighth Amendment to the U.S. Constitution bans cruel and unusual punishment.

Megan McCracken a lawyer at the University of California, Berkeley School of Law's Death Penalty Clinic said that although lethal injections appear serene, the inmate can be suffering greatly.

"The prisoner could be conscious and in extraordinary agony, but once that paralytic is administered, we would never see it," McCracken said.

The lethal injection process in the United States underwent a fundamental change in 2011, when drug company Hospira stopped making sodium thiopental, due to concerns about its widespread use in executions. It was the lone U.S. manufacturer of the drug.

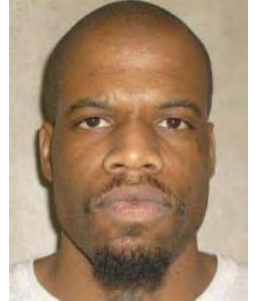
The drug was an anesthetic that would render a person unconscious before the other drugs that would cause death were administered.

Texas changed to a single drug while other states scrambled to develop new lethal injection protocols.

The botched execution in Oklahoma has raised questions on whether these new protocols could be ruled as cruel and unusual punishment by the courts.

"This is really going to make the courts demand a whole lot more and they are not going to be as quick to allow executions to go forward unless the state can prove it knows what it is doing," said Richard Dieter, executive director of the Death Penalty Information Center.

(Additional reporting Bredan O'Brien in Milwaukee, Wisconsin and David Ingram in New York; editing by G Crosse)



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