Statement of

STEPHEN B. BRIGHT

Southern Center for Human Rights
83 Poplar Street, N.W., Atlanta, GA 30303
(404) 688-1202 sbright@schr.org
www.schr.org

Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
203/ 432-7430 stephen.bright@yale.edu

regarding

The Death Penalty

before the

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

February 1, 2006

MR. CHAIRMAN and members of the subcommittee, thank you for this opportunity to discuss the use of capital punishment in our nation today.

This is a most appropriate time to assess the costs and benefits of the death penalty. Thirty years ago, in 1976, the Supreme Court allowed the resumption of capital punishment after declaring it unconstitutional four years earlier in *Furman v. Georgia*. Laws passed in response to *Furman* were supposed to correct the constitutional defects identified in 1972. However, 30 years of experience has demonstrated that those laws have failed to do so.

The death penalty is still arbitrary. It's still discriminatory. It is still imposed almost exclusively upon poor people represented by court-appointed lawyers. In many cases the capabilities of the lawyer have more to do with whether the death penalty is imposed than the crime. The system is still fallible in deciding both guilt and punishment. In addition, the death penalty is costly and is not accomplishing anything. And it is beneath a society that has a reverence for life and recognizes that no human being is beyond redemption.

Many supporters of capital punishment, after years of struggling to make the system work, have had sober second thoughts it. Justice Sandra Day O'Connor, who leaves the Supreme Court after 25 years of distinguished service, has observed that "serious questions are being raised about whether the death penalty is being fairly administered in this country" and that "the system may well be allowing some innocent defendants to be executed."[1] Justices Lewis Powell and Harry Blackmun also voted to uphold death sentences as members of the court, but eventually came to the conclusion, as Justice Blackmun put it, that "the death penalty experiment has failed."[2]

The Birmingham News announced in November that after years of supporting the death penalty it could no longer do so "[b]ecause we have come to believe Alabama's capital punishment system is broken. And because, first and foremost, this newspaper's editorial board is committed to a culture of life." The editorial is appended to this statement.

The death penalty is not imposed to avenge every murder and – as some contend – to bring "closure" to the family of every victim. There were over 20,000 murders in 14 of the last 30 years and 15,000 to 20,000 in the others. During that time, there have been just over 1000 executions – an average of about 33 a year. Sixteen states carried out 60 executions last year. Twelve states carried out 59 executions in 2004, and 12 states put 65 people to death in 2003.

---

1. "Justice O'Connor Expresses New Doubts About Fairness of Capital Punishment," *Baltimore Sun*, July 4, 2001, page 3A.

2. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). *See also* John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 451 (1994) (quoting Justice Powell after his retirement saying that the death penalty "reflect[s] discredit on the law").

Moreover, the death penalty is not evenly distributed around the country. Most executions take place in the South, just as they did before *Furman*. Between 1935 and 1972, the South carried out 1887 executions; no other region had as many as 500. Since 1976, the Southern states have carried out 822 of 1000 executions; states in the Midwest have carried out 116; states in the west 64 and the Northeastern states have carried out only four. The federal government, which has had the death penalty since 1988, has executed three people. Only one state, Texas, has executed over 100 people since 1976. It has executed over 350.

Further experimentation with a lethal punishment after centuries of failure has no place in a conservative society that is wary of too much government power and skeptical of government's ability to do things well. We are paying an enormous cost in money and the credibility of the system in order to execute people who committed less than one percent of the murders that occur each year. The death penalty is not imposed for all murders, for most murders, or even for the most heinous murders. It is imposed upon a random handful of people convicted of murder – often because of factors such the political interests and predilections of prosecutors, the quality of the lawyer appointed to defend the accused, and the race of the victim and the defendant. A fairer system would be to have a lottery of all people convicted of murder; draw 60 names and execute them.

Further experimentation might be justified if it served some purpose. But capital punishment is not needed to protect society or to punish offenders. We have not only maximum security prisons, but "super maximum" prisons where prisoners are completely isolated from guards and other inmates, as well as society.

I. THE DEATH PENALTY IS ARBITRARY AND UNFAIR

Justice Potter Stewart said in 1972 that the death penalty was so arbitrary and capricious that being sentenced to death was like being struck by lightning. It still is. As was the case in 1972, there is no way to distinguish the small number of offenders who get death each year from the thousands who do not. This is because prosecutorial practices vary widely with regard to the death penalty; the lawyers appointed to defend those accused are often not up to the task of providing an adequate defense; differences between regions and communities and the resulting differences in the composition of juries; and other factors.

A. Prosecutorial discretion and plea bargaining

Whether death is sought or imposed is based on the discretion and proclivities of the thousands of people who occupy the offices of prosecutor in judicial districts throughout the nation. (Texas, for example, has 155 elected prosecutors, Virginia 120, Missouri 115, Illinois 102, Georgia 49, and Alabama 40). Each prosecutor is independent of all the others in the state.

The vast majority of all criminal cases – including capital cases – are decided not by juries, but through plea bargains. The two most important decisions in any capital case are the prosecutor's – first, whether to seek the death penalty and, second, if death is sought, whether to agree to a lesser punishment, usually life imprisonment without any possibility of parole, instead of the death penalty as part of a plea bargain.

The practices of prosecutors vary widely. They are never required to seek the death penalty. Some never seek it; some seek it from time to time; and some seek it at every opportunity. Some who seek it initially will nevertheless agree to a plea bargain and a life sentence in almost all cases; others will refuse a plea disposition and go to trial. In some communities, particularly predominantly white suburban ones, the prosecutor may get a death sentence from a jury almost any time a case goes to trial. In other communities – usually those with more diverse racial populations – the prosecutors often find it much more difficult, if not impossible, to obtain a death sentence. Those prosecutors may eventually stop seeking the death penalty because they get it so seldom. And regardless of the community and the crime, juries may not agree to a death sentence. Timothy McVeigh's co-defendant, Terry Nichols, was not sentenced to death by either a federal or state jury for his role in the bombing of the federal building in Oklahoma City that caused 168 deaths.

Without being critical of any of person or community and without questioning the motives of any of them, it is clear that there is not going to be consistent application of the death penalty when prosecutors operate completely independent of one another.

Because of different practices by prosecutor, there are geographical disparities with regard to where death is imposed within states. Prosecutors in Houston and Philadelphia have sought the death penalty in virtually every case where it can be imposed. As a result of aggressive prosecutors and inept court-appointed lawyers, Houston and Philadelphia have each condemned over 100 people to death – more than most states. Harris County, which includes Houston, has had more executions in the last 30 years than any state except Texas and Virginia.

Whether death is sought may depend upon which side of the county line the crime was committed. A murder was committed in a parking lot on the boundary between Lexington County, South Carolina, which, at the time, had sentenced 12 people to death, and Richland County, which had sent only one person to death row. The murder was determined to have occurred a few feet on the Lexington County side of the line. The defendant was tried in Lexington County and sentenced to death. Had the crime occurred a few feet in the other direction, death penalty almost certainly would not have been imposed.

There may be different practices even within the same office. For example, an Illinois prosecutor announced that he had decided not to seek the death penalty for Girvies Davis after Davis' case was reversed by the state supreme court. However, while the case was

pending, a new prosecutor took office and decided to seek the death penalty for Davis. He was successful and Davis was executed in 1995.[3]

As a result of a plea bargain, Ted Kaczynski, the Unabomber, who killed three, injured many others, and terrified even more by mailing bombs to people, avoided the death penalty. Serial killers Gary Leon Ridgway, who pleaded guilty to killing 48 women and girls in the Seattle area, and Charles Cullen, a nurse who pleaded guilty to murdering 29 patients in hospitals in New Jersey and Pennsylvania, also avoided the death penalty through plea bargains, as did Eric Rudolph, who killed security guard in Birmingham and set off a bomb that killed one and injured many more at the 1996 Olympics. Rudolph was allowed to plead and avoid the death penalty in exchange for telling the authorities where he hid some dynamite in North Carolina. Others avoid the death penalty by agreeing to testify for the prosecution against the other(s) involved in the crime.

Although some serial killers are sentenced to death, most of the men and women on death rows are there for crimes that, while tragic and fully deserving of punishment, are less heinous than the examples mentioned above as well as many other cases in which death was not imposed.

B. Representation for the accused

Once a prosecutor decides to seek death, the quality of legal representation for the defendant can be the difference between life and death. A person facing the death penalty usually cannot afford to hire a attorney and is at the mercy of the system to provide a court-appointed lawyer. While many receive adequate representation (and often are not sentenced to death as a result), many others are assigned lawyers who lack the knowledge, skill, resources – and sometime even the inclination – to handle a serious criminal case. People who would not be sentenced to death if properly represented are sentenced to death because of the incompetent court-appointed lawyers.

For example, Dennis Williams was convicted twice of the 1978 murders of a couple from Chicago's south suburbs and sentenced to death. He was represented at his first trial by an attorney who was later disbarred and at his second trial by a different attorney who was later suspended. Williams was later exonerated by DNA evidence. Four other men sentenced to death in Illinois were represented by a convicted felon who was the only lawyer in Illinois history to be disbarred twice.

A dramatic example of how bad representation can be is provided by this description from the *Houston Chronicle* of a capital trial:

---

3. *See People v. Davis*, 579 N.E.2d 877 (Ill. 1991).

> Seated beside his client – a convicted capital murderer – defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.
>
> His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.
>
> Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.
>
> When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.
>
> "It's boring," the 72-year-old longtime Houston lawyer explained . . .
>
> Court observers said Benn seems to have slept his way through virtually the entire trial.[4]

This sleeping did not violate the right to a lawyer guaranteed by the United States Constitution, the trial judge explained, because, "[t]he Constitution doesn't say the lawyer has to be awake." On appeal, the Texas Court of Criminal Appeals rejected McFarland's claim that he was denied his right to counsel over the dissent of two judges who pointed out that "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense."[5] Last year, the Court reaffirmed its opinion.[6]

George McFarland was one of at least three people sentenced to death in Houston at trials where their lawyers slept. Two others were represented by Joe Frank Cannon. One of them, Carl Johnson, has been executed. Cannon was appointed by Houston judges for forty years to represent people accused of crimes in part because of his reputation for hurrying through trials like "greased lightening," and despite his tendency to doze off during trial.[7] Ten of Cannon's clients were sentenced to death, one of the largest numbers among Texas

---

4. John Makeig, "Asleep on the Job: Slaying Trial Boring, Lawyer Says," *Houston Chronicle*, Aug. 14, 1992, at A35.

5. *McFarland v. State*, 928 S.W.2d 482 (Tex. Cr. App. 1996).

6. *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Cr. App. 2005).

7. Paul M. Barrett, "Lawyer's Fast Work on Death Cases Raises Doubts About System," *Wall Street Journal*, Sept. 7, 1994, at A1.

attorneys. Another notorious lawyer appointed to defend capital cases in Houston had 14 clients sentenced to death.

The list of lawyers eligible to handle capital cases in Tennessee in 2001, circulated to trial judges by the state Supreme Court, included a lawyer convicted of bank fraud, a lawyer convicted of perjury, and a lawyer whose failure to order a blood test let an innocent man languish in jail for four years on a rape charge. Courts in other states have upheld death sentences in cases in which lawyers were not aware of the governing law, were not sober, and failed to present any evidence regarding either guilt-innocence or penalty. One federal judge, in reluctantly upholding a death sentence, observed that the Constitution, as interpreted by the U.S. Supreme Court, "does not require that the accused, even in capital cases, be represented by able or effective counsel."[8]

The Supreme Court has said that the death penalty should be imposed "with reasonable consistency, or not at all."[9] That is simply not happening.

II. THE COURTS ARE FALLIBLE

Innocent people have been wrongfully convicted because of poor legal representation, mistaken identifications, the unreliable testimony of people who swap their testimony for lenient treatment, police and prosecutorial misconduct and other reasons. Unfortunately, DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system – in which the defense lawyer scrutinizes the prosecution's case, consults with the client, conducts a thorough and independent investigation, consults with experts, and subjects the prosecution case to adversarial testing – to bring out all the facts and help the courts find the truth. But even with a properly working adversary system, there will still be convictions of the innocent. The best we can do is minimize the risk of wrongful convictions. And the most critical way to do that is to provide the accused with competent counsel and the resources needed to mount a defense.

The innocence of some of those condemned to die has been discovered by sheer happenstance and good luck. For example, Ray Krone, was convicted and sentenced to death in Arizona based on the testimony of an expert witness that his teeth matched bite marks on the victim. During the ten years that Krone spent on death row, scientists developed the

8. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

9. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

ability compare biological evidence recovered at crime scenes with the DNA of suspects. DNA testing established that Krone was innocent.[10]

The governor of Virginia commuted the death sentence of Earl Washington to life imprisonment without parole in 1994 because of questions regarding his guilt. Were it not for that, Washington would not have been alive six years later, when DNA evidence – not available at the time of Washington's trial or the commutation – established that Washington was innocent. He was released.[11]

Poor legal representation led to a death sentence for Gary Drinkard, who spent five years on Alabama's death row for a crime he did not commit. At his trial, he was represented by one lawyer who did collections and commercial work and another who represented creditors in foreclosures and bankruptcy cases. The case was reversed on appeal for reasons having nothing to do with the quality of his representation. Our office joined with an experienced criminal defense lawyer from Birmingham and represented him at his retrial. The jury acquitted Drinkard in less than two hours.

Evidence of innocence has surfaced at the last minute and only because of volunteers who found it. Anthony Porter, sentenced to death in Illinois, went through all of the appeals and review that are available for one sentenced to death. Every court upheld his conviction and sentence. As Illinois prepared to put him to death, a question arose as to whether Porter, who was brain damaged and mentally retarded, understood what was happening to him. Just two days before he was to be executed, a court stayed his execution for a mental examination. After the stay was granted, a journalism class at Northwestern University and a private investigator examined the case and proved that Porter was innocent. They obtained a confession from the person who committed the crime. Porter was released, becoming the third person released from Illinois's death row after being proven innocent by a journalism class at Northwestern.[12]

There has been some argument over how many innocent people have been sentenced to death and whether any have been executed. We do not know and we cannot know. If DNA evidence had not been available to prove Ray Krone's innocence, if Earl Washington had been executed instead of commuted to life, if Gary Drinkard had not received a new trial, and if Anthony Porter was not mentally impaired and the journalism class had not come to

---

10. Henry Weinstein, "Arizona convict freed on DNA tests is said to be the 100th known condemned U.S. prisoner to be exonerated since executions resumed," *Los Angeles Times* April 10, 2002.

11. Brooke A. Masters, "Missteps On Road To Injustice: In Va., Innocent Man Was Nearly Executed," *Washington Post*, Dec. 1, 2000, at A1.

12. Jon Jeter, "A New Ending to an Old Story," *Washington Post*, Feb. 17, 1999, at C1; Don Terry, "DNA Tests and a Confession Set Three on a Path to Freedom in 1978 Murders," *N.Y. Times*, June 15, 1996, at A6.

his rescue, all would have been executed and we would never know to this day of their innocence. Those who proclaim that no innocent person has ever been executed would continue to do so, secure in their ignorance.

With regard to the quibbling over how many people released from death rows have actually been innocent, even one innocent person being convicted of a crime and sentenced to death or a prison term is one too many. "Close enough for government work" is simply not acceptable when life and liberty are at stake. Regardless of how one counts and what one counts, we know that an unacceptable number of innocent people have been convicted in both capital and non-capital cases.

There is nothing wrong with looking at the system as it really is and with a little humility about what it is capable of. There are cases – many of them – in which the criminal courts have correctly determined that a person is guilty. There are others where it is clear the system was wrong because the innocence of those convicted has been conclusively established though DNA evidence or other compelling proof. There are also cases in which it is virtually impossible to tell for sure whether a person is guilty or innocent. There is no DNA evidence or other conclusive proof. The case depends upon which witness the jury believes. Or new facts come to light after the trial. It is impossible to know what the jury's verdict would have been if it had considered those facts.

We want to believe that our judges and juries are capable of doing the impossible – determining the truth in every instance. In most instances, they can determine the truth. But cases that depend upon eyewitness identification, forensic evidence from a crime laboratory with shoddy practices like those that have come to light in Houston and Oklahoma City, the testimony of a co-defendant, who claims the defendant was the primary person, or the cellmate who claims the defendant admitted committing the crime to him, or there is inadequate defense for the accused, there is a serious possibility of an error. Just last week, a judge who presided over a capital case in California in which death was imposed wrote to the governor urging clemency for the defendant because the judge believes the sentence was based on false testimony from a jailhouse informant.[13]

Often overlooked is the jury's verdict with regard to sentence – whether to condemn the person to die or sentence him to a long prison sentence – which is as important as its verdict on guilt. The decision of the legal system to bring about the deliberate, institutionalized taking of a person's life is surely a determination that the person is so beyond redemption that he or she should be eliminated from the human community. But that determination is quite often erroneous.

---

13. Henry Weinstein, "Judge Requests Clemency for Killer He Condemned," *Los Angeles Times*, Jan. 18, 2006, p. 1.

I have seen many people who were once condemned to die but are now useful and productive members of society. One of them, Shareef Cousin, works in our office. He was sentenced to death when he was 16 years old. However, it turned out that he was not guilty of the murder for which he was sentenced to death. We are tremendously impressed with him. He is a hard worker; someone we have found we can count on. He is applying to colleges. He is very serious about getting in to college and will be a very serious student.

But it is not just the innocent. William Neal Moore spent 16 ½ years on Georgia's death row for a murder he committed in the course of a robbery. He had eight execution dates and came within seven hours of execution on one occasion. His death sentence was commuted to life imprisonment in 1990 and a year later he was paroled. He comes to the law schools and speaks to my classes every year. He was very religious while in prison, and he has remained every bit as religious in the 15 years he has been out. He met and married someone with two daughters and has been a good father. Both girls are in college. He has judgment and maturity now that he did not have when he committed the crime.

I can give you many more examples like these of people who were condemned to die but who have clearly demonstrated that they were more than the worst thing they ever did.

III. PEOPLE WHO KILL ARE NOT DETERRED

The scholars will address whether a punishment that is imposed in less than one percent of murder cases serves as a deterrent to murder. I offer no statistics, only a few observations from over 30 years of dealing with the people who are supposedly being deterred.

In my experience, these are not people who assess risks, plan ahead and make good judgments. They would not have committed their crimes if they thought they were going to be caught, regardless of the punishment. But they don't expect to get caught so they don't even get to the question of what punishment will be inflicted. Why would anyone commit a crime – for example, murder and robbery to get money to buy drugs – if he thought that instead of enjoying the drugs in the free world he would be spending the rest of his life in prison or even years in prison?

Even if they get to the issue of punishment – I cannot imagine how they process the information. A large portion of the people who end up on death rows are people with very poor reading skills. They don't read the newspaper or watch the news or listen to public radio. When they are assessing the risk of getting executed, are they supposed to consider that nationally they have a one percent chance of getting the death penalty if they are caught and convicted? Or are they to consider whether they are in one of the 12 to 16 states that have carried out death sentences in the last three years? How much of a deterrent can it be in the states that have two or three people on their death rows and have carried out one or two

executions over 30 years? Are they deterred if they are in New Hampshire, which has a death penalty law but has never imposed it? How do they learn that New Hampshire has a death penalty law? Do states that have not carried out any executions or have carried out just a few need to carry out more in order to deter, or can they benefit from executions in other states?

The more routine executions become, the less media coverage they get. How are people supposed to find out about executions and be deterred if executions are not getting any media coverage?

Beyond that, is the potential murderer going to take into account the likelihood of being assigned a bad court-appointed lawyer, of being tried before an all-white jury instead of a racially diverse jury, and other factors which will increase his chances of getting the death penalty?

The people I have encountered who committed murder do not have the information and many are not capable of analyzing it if they had it. Many people who commit murder suffer from schizophrenia, bi-polar disorder, major brain damage or other severe mental impairments. They may have a very distorted sense of reality or may not even be in touch with reality.

Finally, if death were a deterrent, it would surely deter gang members and drug dealers. They see death up close. Killings over turf and in retaliation for other killings make death very real. It is summary and there are no appeals. They see brothers and friends killed; go to funerals. They have much greater likelihood of getting death on the streets than in the courts. But, it does not change their behavior.

IV. THE COST IS NOT JUSTIFIED

There is a growing recognition that it is just not worth it. A Florida prosecutor allowed a defendant to plead guilty to killing five people because a sentence of life imprisonment without parole would bring finality. The *Palm Beach Post* observed "The State saves not only the cost of a trial; the victims' relatives – who supported the deal – do not have to relive the horror. The state will save more by avoiding years of appeals; . . . Most important, [the defendant] never again will threaten the public."[14]

New York spent more than $170 million on its death penalty over a ten year period, from 1995 to 2005, before its Court of Appeals declared its death penalty law unconstitutional. During that time, the state did not carry out a single execution. Only seven

14. *Palm Beach Post*, December 16, 2004 (editorial).

persons were been sentenced to death – an average of less than one a year – and the first four of those sentences were struck down by the New York Court of Appeals on various grounds. The speaker of the state's assembly remarked, "I have some doubt whether we need a death penalty. . . . We are spending tens of millions of dollars [that] may be better spent on educating children." He also pointed out that the state now has a statute providing for life imprisonment without parole that ensures those convicted of murder cannot go free.

Similarly, Kansas did not carry out any executions between 1994, when it reinstated the death penalty, and 2004 when the state supreme court ruled it unconstitutional. Kansas had eight people under sentence of death, six from one county.

New Jersey, which just declared a moratorium on executions, has spent $253 million on its death penalty since 1983. It has yet to carry out an execution and has only ten people on its death row. In other words, the state has spent a quarter of a billion dollars over 23 years and has not carried out a single execution. Michael Murphy, a former prosecutor for Morris County, remarked, "If you were to ask me how $11 million a year could best protect the people of New Jersey, I would tell you by giving the law enforcement community more resources. I'm not interested in hypotheticals or abstractions, I want the tools for law enforcement to do their job, and $11 million can buy a lot of tools."

These are states which made every effort to do it right. It is also possible to have death on the cheap. A number of states have done this. Capital cases may last as little as a day and a half. Georgia recently executed a man who was assigned a lawyer – a busy public defender – just 37 days before his trial and denied any funds for investigation or expert witnesses. But this completely undermines confidence in the courts and devalues life.

V. CONCLUSION

Supreme Court Justice Arthur Goldberg said that the deliberate institutionalized taking of human life by the state is the greatest degradation of the human personality imaginable. It is not just degrading to the individual who is tied down and put down. It is degrading to the society that carries it out. It coarsens the society, takes risks with the lives of the poor, diminishes respect for life and belief that any person is capable of redemption. It is a relic of another era. It is not serving any purpose in our society and is not worth the cost. It should be abandoned.

A death penalty conversion

Birmingham News
November 6, 2005 (editorial)

> "The dignity of human life must never be taken away, even in the case of someone who has done great evil." – Pope John Paul II

In his last moments of life, John Peoples smiled, lifted a thumb toward his brother Gerry and said a few final words: "I hope I've handled everything ... with dignity."

Peoples lay his head back on the gurney. A chaplain knelt beside him and held his hand. Peoples' lips moved along with the chaplain's prayer.

Then, the state of Alabama killed him.

As the first drugs entered his veins, Peoples gasped twice and went still. For the next 15 minutes, as more poisons flowed into his body, the color of life slowly drained from his face.

Peoples was put to death for murdering Paul and Judy Franklin and their 10-year-old son, Paul Jr. Prosecutors said he killed the Franklins in 1983 to get their red Corvette. Authorities couldn't determine how Paul Franklin died. Judy Franklin and Paul Jr. were beaten to death with a rifle.

The family's loved ones and friends waited 22 years to see Peoples die for his crime. Their long wait for justice ended Sept. 22 at 6:27 p.m. Peoples was the 737th person the state of Alabama has executed – the 10th by lethal injection.

"I think we do it as dignified and humane as you can execute a person," said Grantt Culliver, the warden of Holman Correctional Facility and, as such, the state's executioner. "There's no glory in it. It's a matter of law."

It's a matter of law that deeply troubles *The News'* editorial board. After decades of supporting the death penalty, the editorial board no longer can do so. Today and over the next five days, we will explain our change of mind and heart.

We know that many of our readers, including families and friends of murder victims, will disagree. We acknowledge we cannot grasp the profound grief experienced by those who lose loved ones in senseless, savage killings. We well understand some crimes are so great that those who commit them don't deserve to live in the free world ever again, and that some don't deserve to live at all. Yet we can no longer in good conscience continue to advocate the death penalty in Alabama.

A broken system:

Why? Because we have come to believe Alabama's capital punishment system is broken. And because, first and foremost, this newspaper's editorial board is committed to a culture of life.

Put simply, supporting the death penalty is inconsistent with our convictions about the value of life, convictions that are evident in our editorial positions opposing abortion, embryonic stem-cell research and euthanasia. We believe all life is sacred. And in embracing a culture of life, we cannot make distinctions between those we deem "innocents" and those flawed humans who populate Death Row.

Faith tells us we all are imperfect, but we're not beyond redemption. We believe it's up to God to say when a life has no more purpose on this Earth.

We are not turning soft on crime. Remember, the alternative to the death penalty is not leaving predators free to kill again. The alternative to execution is life in prison without any chance, ever, for parole. That is enough to protect the public.

"We don't have to execute people to prove we are outraged about a crime," said Bryan Stevenson, executive director of the Equal Justice Initiative of Alabama, a Montgomery nonprofit group that defends Death Row inmates.

Even people who embraced the death penalty in the past are having second thoughts. One is George Ryan, the Republican former governor of Illinois who commuted all the death sentences in his state after a string of exonerations. Another is U.S. Sen. Rick Santorum, a conservative Republican from Pennsylvania who has expressed growing reservations about the nation's use of the death penalty. "I still see it as potentially valuable," he said, "but I would be one to urge more caution than I would have in the past."

Some of the most poignant reflections on the issue came from the late Pope John Paul II, who shifted Catholic Church teaching on the death penalty and spoke pointedly against capital punishment.

"The new evangelization calls for followers of Christ who are unconditionally pro-life, who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil," the pope said in 1999.

No doubt, some sincerely believe executing killers shows reverence for the lives of victims. But how much regard does a society hold for life if it uses the death penalty in a haphazard fashion? This is a crucial question - and one that must matter to Alabamians.

Many misgivings:

While a strong majority of Alabamians support capital punishment in theory, a number of them have misgivings about the death penalty in practice. More than seven in 10 Alabamians strongly support capital punishment, according to a July survey of 863 people by the Alabama Education Association's Capital Survey Research Center.

Yet almost six in 10 among those polled say they want the death penalty halted while the state studies questions of fairness and reliability. Only 47 percent believe the death penalty is applied fairly in Alabama, according to the poll. But the most troubling number is this: Eighty percent of those polled think the state could execute someone who is not guilty.

There is plenty of reason to fear that possibility. In the past dozen years, five men have walked free from Alabama's Death Row - not because they escaped, but because juries acquitted them in new trials or prosecutors dropped charges. Across the nation, more than 120 people have been released from Death Row, some of them having come harrowingly close to being executed.

A startling number of death penalty cases are also overturned because of errors in the prosecution and trial. A massive study in 2000 by Columbia University Law School professors put the national error rate for capital cases at 68 percent and at 77 percent in this state. Incompetent defense lawyers, prosecutors suppressing evidence, misinstruction of juries, and biased judges and jurors led to most reversals, the study found.

Two professors at John Jay College attacked the Columbia figures because the study made no distinction between errors on conviction and sentencing. Even as they estimated a national error rate of 27 percent for conviction, they noted Alabama's conviction reversals during the study period were higher than 60 percent.

Then-Attorney General Bill Pryor criticized the Columbia study because it covered the years 1973 to 1995, but did not take into account cases from 1995 through 2000. During those years, Pryor wrote, "so-called" error rates for each phase of the capital process ranged from 3 percent to 14 percent. But he reported error rates only from each phase of the process, and not the overall error rate, which would be much higher.

When possibly innocent lives are at stake, even Pryor's figures are too high.

Some say overturned cases are a sign the system works, or that it shows how much scrutiny death penalty cases receive. That's true, to a point. But it should be no comfort to death penalty supporters that in the process leading to execution, mistakes are so common.

As a result of these kinds of questions, some states have halted executions and/or embarked on serious studies about the death penalty. More than a dozen states either have done or are doing death penalty studies, said Richard Dieter, executive director of the Death Penalty Information Center in Washington, D.C. California is among those just launching a broad review of the death penalty, he said.

Commuting sentences:

The most noted example is Illinois. In 2000, a series of exonerations led then-Gov. Ryan, a supporter of capital punishment, to declare a moratorium on executions, create a study commission and ultimately commute the sentences of all 167 people facing the death penalty in his state.

The moratorium remains in place, and Illinois lawmakers have since passed a number of the reforms recommended by Ryan's commission on capital punishment. Among other things, the state limited the number of crimes that result in a death sentence, improved police procedures, created pretrial hearings to determine the credibility of jailhouse informants, and established a method for courts to toss out death sentences in the interest of "fundamental justice."

At the heart of what has happened in Illinois and elsewhere - including Alabama - are disturbing questions about the fallibility of our justice system.

Cases where inmates have been convicted and later cleared challenge long-held notions about the reliability of eyewitness identification, the use of jailhouse snitches and, in some cases, the integrity of police and prosecutors. These cases highlight other problems as well, such as incompetent and/or inadequate legal defense, and the role race plays.

While these questions apply to all criminal cases, they are particularly troubling in death penalty cases where mistakes can go, literally, to the grave. At the very least, we should be assured the ultimate punishment is inflicted fairly and accurately. That's not the case.

Alabama has one of the nation's broadest capital punishment laws, allowing the death penalty for 18 varieties of murder. Despite the sizable number of murders that qualify, only a fraction end up with a death sentence.

The factors that determine which cases end with death are arbitrary. The prestige and wealth of defendants, the quality of their defense, even the race of their victims can play into the outcome of a case. While blacks are far more likely to be murder victims, the overwhelming number of murders that lead to a death sentence involve victims who are white.

Many other problems exist.

Before the U.S. Supreme Court ruled it unconstitutional in 2002, Alabama had condemned and executed killers who were mentally retarded. Before the high court struck down the execution of juvenile offenders this year, the state had sent people to Death Row for crimes they committed when they were as young as 16. In addition, some inmates who have been executed and others still on Death Row have had histories of serious mental illnesses.

Hit-or-miss lawyers:

Even when capital defendants are mentally sound, they are usually poor. This means they can't afford to hire their own lawyers or mount a vigorous defense. They rely largely on court-appointed attorneys who make less than the going rate and whose skills can be hit-or-miss.

"It's better to be rich and guilty than innocent and poor," said Richard Jaffe, a criminal defense lawyer in Birmingham who has represented a number of capital defendants.

As important as a strong defense is to anyone accused of a crime, it's decidedly more important for those charged with capital crimes. It's not just that the stakes are so high, but emotions are, too. The most heinous crimes often create a public

outcry that may tempt police and prosecutors to take shortcuts. These are the cases where people may be most at risk for a wrongful conviction.

And yet, 70 percent of those on Alabama's Death Row were convicted when defense lawyers were capped at $1,000 in pay for out-of-court work - a critical stage of any defense that should involve hundreds of hours of investigation, legwork and legal preparation.

But at least the state has some system for providing for the legal defense, however spotty, of death penalty defendants at trial. There is no such system of assuring lawyers for defendants for the crucial second and third round of appeals where miscarriages of justice are most often uncovered. These cases are spread out largely among a small collection of nonprofit defense firms and volunteer lawyers. Some defendants luck out with great appeals lawyers; others have missed filing deadlines for appeals because they had no lawyer at all. Who gets a thorough and top-notch review on appeals is mostly a matter of chance.

Despite these problems, Alabama Attorney General Troy King said, "We have a system that works as well as any in the world."

At the end of the day, we grant King this: Most of those on Death Row indeed are guilty. They committed vicious crimes, terrorizing old people, even children. They cut precious lives short and forever altered the lives of grieving survivors.

"Those victims have had the most horrible things happen to them, and we speak for them," said Talladega County District Attorney Steve Giddens.

Profound sorrow:

We hear the profound sorrow in the voices of those left behind, people like Judy Franklin's brother Bill Choron and his wife, Gail, who in September went to Holman to watch John Peoples die.

The Chorons believe Peoples died an easy death compared to his victims. "It's not easy to watch a man die," Gail Choron said after witnessing Peoples' last breath. "But it's not easy to think about what he did to deserve this death."

The Equal Justice Initiative's Stevenson argues the question is not whether these killers merit the state's ultimate punishment.

"The question has to be not whether they deserve to die," he said. "The question is, do we deserve to kill?"

The News' editorial board strongly believes the answer to that question is no.