

States of the Union

AN APPEAL FROM DEATH ROW

BY RICHARD J. MARGOLIS

*"The flowers that bloom in the
spring, tra la,
have nothing to do with the case."*

—W. S. GILBERT,
The Mikado

MY FRIEND Joan Potter—journalist, raconteur and befriender of people with problems—tried recently to get flowers into Death Row at New York State's Green Haven prison. A local florist took the order, arranged a delicate bouquet and telephoned prison authorities for delivery instructions. The word came back, "You may not deliver flowers to a prisoner."

Five men occupy Death Row at Green Haven, and flowers are much on their minds. They had an Easter lily once but it withered away. Last spring they tried gardening on an adjoining roof surrounded by high brick walls where each prisoner is allowed to stroll, alone, for an hour each day. The roof is asphalt, but there is a bit of dirt to be found in the corners, and in cracks between the bricks. Gradually, the men succeeded in accumulating a

few piles of soil. They planted zinnia seeds—who knows where they found zinnia seeds!—and before long they had a modest roof garden. One morning, though, the sprouts shriveled and died; the guards had urinated on them.

Joan's bouquet had been intended for two inmates, Charles Culhane (#13720) and Gerald McGivern (#13721), who for nearly three years have been sitting in cells one floor beneath the electric chair, waiting to be executed, hoping to be freed. That particular chair has hardly brought on the energy crisis; it hasn't been used since 1963. Yet the state of New York clings to high-voltage dreams: Its lawyers tried to block an appeal by Culhane and McGivern for a new trial; and in a separate action New York State attorneys urged the U.S. Supreme Court to overturn a lower court ruling that had thrown out the state's death penalty statute.

Apparently the state places great value on the heads of McGivern and Culhane. It is not their deaths that seem to matter—their cells have been stripped of clothes hooks, wires

and other possible aids to suicide—it is their execution. On Death Row, the state seems to be saying, one ought not to die on whim but rather on demand, and in the prescribed manner.

For the present, however, the state's plans are in disarray. Last month the Supreme Court declined to review the lower court's decision, which means that executions in New York remain illegal. Still, the respite may only be temporary, since the Court nixed capital punishment on extremely narrow grounds, observing that no jury can both convict a defendant and sentence him to death. A new law calling for two juries to do the job might satisfy the Court, and such a law has already been introduced in Albany. The other day I asked Superintendent Leon Vincent, who presides over Green Haven, if he planned to junk his electric chair. After all, I reasoned, it's been gathering dust for more than 10 years. "No," he replied, "the chair will stay. There'll be a better law next year."

(I also asked Vincent if he favored capital punishment. "Well,"

he said, "it's not always easy to know whether you're doing the right thing. Take the case of a man who kills his wife after 40 years of marriage. Maybe she kept at him all that time, if you know what I mean. You have to wonder how much she contributed to it.")

In any event, last October 23 the State Court of Appeals ordered a new trial for Culhane and McGivern—hence the flowers—and as of this writing, although the two continue to reside on Death Row, they are innocent of murder in the eyes of the law. They have had a long ordeal, some of it of their own making, and it is by no means finished.

Both Culhane and McGivern are 29 years old; both were born and raised in the Bronx, in families that had respectability but little money; and both have talent: Culhane is a poet, McGivern an artist (the adjacent drawing is his work). In 1966, the two men attempted to knock over a gas station in Westchester. They were caught and convicted. McGivern got 15-20 years, Culhane a maximum of 10.

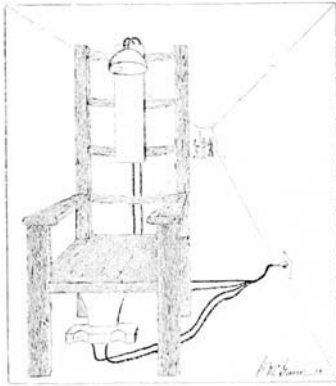
Two years later, hoping to lighten their sentences, Culhane and McGivern asked for and were granted a day in court. Two deputy sheriffs drove them, along with a third prisoner named Bowerman, from Auburn State Prison toward the courthouse in White Plains. They never got there. In mid-passage, the car stopped near an overpass to let Bowerman relieve himself, and instead of getting out, he grabbed a deputy's pistol and started shooting.

A brief gun battle followed. When it was over Bowerman and one of the deputies were dead; Culhane was unconscious with a bullet wound in the back of his head, and McGivern had wounds in both arms. Only Joseph Singer, the deputy who had been driving, was unhurt; and there was only Singer's testimony to send Culhane and McGivern to Death Row.

Singer claimed all three prisoners

had been in on the escape attempt; Culhane and McGivern insisted it had been strictly Bowerman's show from start to finish. The first trial ended in a hung jury; in the second, the two men were convicted and sentenced to die.

As THE State Court of Appeals noted in its unanimous decision for retrial, Singer's testimony was marred by inconsistencies, and "the prosecutor's evidence . . . presented substantial questions of credibility. . . ." Yet it was not these weaknesses that ultimately led to the judges' decision—it was the pretrial publicity, which had plainly tainted the opinions of



the prospective jurors and the handling of their selection.

Four members of the panel the jury was drawn from were correction officers, and two of these were actually chosen to serve. As Judge Sol Wachtler, writing on behalf of the eight-man Appeals Court, pointed out, "Surely the prospect of a jury composed, in whole or in part, of correction officers would present a nightmarish specter to these two convicts on trial for their lives. Conversely, if [these] officers . . . were being brought up on charges of having brutalized prisoners, they would not want members of the Fortune Society [an organization of ex-convicts] to be the fact-finders in the case."

Some of the dialogue between the defense lawyers and the panel members is instructive. Consider this exchange between Culhane's attorney and a correction officer who eventually got on the jury:

Q. If the main witness for the People's case is a police officer, a deputy sheriff, would you tend to believe him more than somebody else?

A. I would tend to believe him, yes.

Q. Do you think that it is possible he could lie under oath?

A. I don't think so. I don't think he would lie.

Earlier, McGivern's attorney had taken a different line with the same man:

Q. . . . You do recall that the newspaper said that the sheriff was shot during the course of an attempted escape by the three prisoners?

A. Right.

Q. And I am asking you now whether you have an opinion as to whether or not the prisoners were attempting to escape or not?

A. Well, I would have an opinion they were attempting to escape. That's my opinion.

So the two convicts have won a new trial, and the State of New York is still out for blood. In the meantime, McGivern is drawing sketches and Culhane is writing poetry—and for an hour each day they are enjoying the relative freedom of the roof. Culhane, like Oscar Wilde, but without Wilde's cadenced bitterness, has written affectingly about what a moment of fresh air can mean to a prisoner:

*The wind humming over the world
Over my face entering my body
Carrying a shiver to my bones
Shuddering through my shoulders
and thighs
Now in a natural dance of the
outer and the inner
Giving praise to the wind
To the sky the earth and the
heavens.*