

05 April 2007

UA 80/07 Death penalty / Legal concern

USA (Texas) James Lee Clark (m), white, aged 38

James Clark is scheduled to be executed in Texas on 11 April 2007. He was sentenced to death in May 1994 for the rape and murder of 17-year-old Shari Catherine Crews in June 1993.

James Clark's clemency petition seeks commutation of his death sentence to life imprisonment on the grounds that he has mental retardation. In 2002, in *Atkins v Virginia*, the US Supreme Court outlawed the execution of people with retardation. The Court did not define retardation, although it pointed to the definition used by the American Association of Mental Retardation (AAMR). Under such a definition, mental retardation is a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning (generally indicated by an IQ of less than 70) accompanied by limitations in two or more adaptive skill areas such as communication, self-care, work, and functioning in the community. The Supreme Court noted that "not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." The Court left it up to individual states to develop "appropriate ways" to comply with the ruling. This opened the door to further inconsistency in the application of the death penalty in the USA.

In an assessment in April 2003, clinical psychologist Dr George Denkowski, hired by the state, concluded that James Clark had retardation – he assessed Clark's IQ at 65 and concluded that he had adaptive skill deficits in three areas (health and safety, social, and work). This was the fifth post-*Atkins* case that Dr Denkowski had worked on – in one other case he found that the defendant had mental retardation, in the other three he concluded that they did not have this level of impairment. Dr Denkowski found that Robert Smith had mental retardation, and an IQ of 63. The Harris County prosecutor accepted this, citing Denkowski's expertise, and Smith's death sentence was commuted. In 2006 and 2007 Dr Denowski found that death row inmates Darrell Carr, Demetrius Simms, and Exzavier Stevenson had mental retardation. In each case, the Harris County prosecutor accepted Dr Denkowski's finding and the death sentences were commuted. In two other Harris County cases, those of Coy Wesbrook in 2006 and Brian Davis in 2004, Dr Denkowski concluded that the inmate did not have retardation. They remain on death row.

In James Clark's case, the Denton County prosecution did not accept Dr Denkowski's finding of retardation. Instead it hired another psychologist, Dr Thomas Allen. He concluded that Clark was faking retardation to avoid execution. The defence had an assessment done by Dr Denis Keyes, an expert whose studies were among those cited in the *Atkins* ruling. Dr Keyes concluded that James Clark has retardation (and an IQ of 68). He noted that Dr Denkowski's findings in Clark's case were "credible and correct". In contrast to this, Dr Keyes noted that Dr Allen "did no standardized testing (which is *required* for diagnosis *and* for ruling out a diagnosis)." Neither Dr Keyes nor Dr Denkowski found that James Clark had faked his mental retardation during their assessments, something that these experts specifically tested for.

An evidentiary hearing was held in the trial court in 2003, during which James Clark was shackled, handcuffed and forced to wear an electro-shock stun belt. When his lawyer asked for the stun belt to be removed, the judge refused. The judge deferred to Dr Allen's conclusions, rejecting those of Drs Keyes and Denkowski. She held that an IQ score of 74 that Clark achieved in 1983 in youth custody was "the most reliable indicator" of his IQ because he then had no reason to fake retardation, whereas a finding now would determine whether he was executed or not. The judge ruled that the 1983 score did not meet the AAMR's first criterion (IQ 70 or under) of mental retardation, even though with the generally accepted margin of error, a score of 74 falls within the range of 69-79. In addition, Dr James Flynn, an expert on assessing IQ scores to take account of changes over time, has concluded that "the best estimate" of James Clark's 1983 score in terms of up-to-date norms would be about 68.57 (that is, very similar to Dr Keyes' finding), and "it is almost certain that [Clark's IQ] is not 70 or above". In another post-*Atkins* case in 2006, the importance of the so-called "Flynn effect" and the margin of error was recognized by the Texas Court of Criminal Appeals (TCCA), when it remanded a case of an inmate with an IQ assessed at 81 to the trial court level for further evidentiary development on the retardation question.

In March 2004 in James Clark's case, the TCCA upheld the trial judge's findings. Without holding any further evidentiary hearings, the federal courts have upheld the death sentence, with the Supreme Court refusing to take the case in February 2007.

BACKGROUND INFORMATION

Nearly five years on, the Texas legislature has not enacted a law to comply with the *Atkins* ruling. In the absence of legislation, the TCCA has taken it upon itself to issue guidelines for trial courts in making retardation determinations. In February 2004, the TCCA wrote: "The Texas legislature has not yet enacted legislation to carry out the *Atkins*

mandate ..[W]e must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims". It asked: "Is there, and should there be, a 'mental retardation' bright-line exemption from our state's maximum statutory punishment?... [W]e decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature". In February 2007, the TCCA emphasised that its 2004 guidelines "were intended only to be guidelines for trial courts to work with until the Legislature was to reconvene and establish conclusively both the substantive laws and the procedures that would bring our codes into compliance with the mandate issued by *Atkins*. Yet to this day, no such guidance has been provided by the Legislature."

Amnesty International opposes the death penalty in all cases, unconditionally. Today, 128 countries are abolitionist in law or practice. In contrast, there have been 1,069 executions in the USA since it resumed judicial killing in 1977, of which 390 (37 per cent) have been carried out in Texas. Eleven of the 12 executions in the USA so far in 2007 have been carried out in Texas. One hundred and fifty-one people have been put to death in Texas since Rick Perry became governor in 2001. The five-year governorship of his predecessor, George W. Bush, saw 152 executions. There are 385 men and women on death row in Texas.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words (please include James Clark's inmate number, #999095):

- expressing sympathy for the family of Shari Catherine Crews, and explaining that you are not seeking to condone the manner of her death or to deny the suffering caused;
- noting that two experts, including Dr George Denkowski hired by the state in a number of other cases in which his assessments for and against findings of retardation have been accepted, concluded that James Clark has mental retardation, and should be exempted from execution under the *Atkins v Virginia* decision;
- noting that these experts conducted thorough assessments, and ruled out malingering;
- expressing concern that Texas has still not enacted legislation to comply with the *Atkins* ruling, and decisions on mental retardation are being made on the basis of "temporary judicial guidelines" formulated by the Texas Court of Criminal Appeals, which has expressed concern at the lack of legislative guidance;
- noting that assessing mental retardation is not an exact science, and that in this regard, executive clemency is an important failsafe against error and inconsistency, especially in the absence of legislation;
- calling for the clemency for James Clark.

APPEALS TO:

Rissie Owens, Presiding Officer, Board of Pardons and Paroles, Executive Clemency Section
8610 Shoal Creek Boulevard, Austin, TX 78757, USA

Fax: +1 512 463 8120

Salutation: Dear Ms Owens

Governor Rick Perry, Office of the Governor, P.O. Box 12428, Austin, Texas 78711-2428, USA

Fax: +1 512 463 1849

Salutation: Dear Governor

COPIES TO: diplomatic representatives of USA accredited to your country.

PLEASE SEND APPEALS IMMEDIATELY.
