

PUBLIC

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EXTRA 32/03

Death penalty / Legal concern

5 June 2003

USA (Texas)

Kia Levoy Johnson (m), black, aged 39

Kia Johnson is scheduled to be executed in Texas on 11 June 2003. He was sentenced to death in February 1995 for the murder in 1993 of William Rains, a 32-year-old white man who was shot during a robbery of the shop in San Antonio where he worked as a night manager.

Kia Johnson's appeal lawyers have just filed an appeal in the Texas courts seeking a stay of execution based on evidence that Johnson may have mental retardation. An evaluation conducted in 1997 revealed that he had IQ scores within the mental retardation range, and two doctors have concluded that "there is a significant likelihood that Kia is functioning at a mentally retarded level". This conclusion has been lent additional weight by a review of his school records. In June 2002, in *Atkins v Virginia*, the US Supreme Court ruled that the execution of people with mental retardation was unconstitutional. It sent the issue back to the states to determine how they would comply with the decision. Neither the Texas legislature nor the courts have yet established procedures on this issue. Although some Texas inmates have had their executions stayed by the courts in order that their claims of mental retardation can be assessed, the current absence of a defined procedure leaves the system open to arbitrariness. Kia Johnson's lawyers are seeking an evidentiary hearing to fully develop and present all available evidence supporting his claim of mental retardation. The jury which sentenced Kia Johnson to death was not presented with evidence of potential mental retardation to consider in mitigation.

At the sentencing phase of the trial, at which the jury would have to decide whether Kia Johnson should live or die, the defence lawyer called the murder victim's father as a witness. William Rains's father told the jury that "I want the guilty person punished, whether it be Mr Johnson or whomever it may be because I don't think my son could rest until his murderer is taken care of". In 2002, the US Court of Appeals for the Fifth Circuit rejected the claim that the eliciting of this witness testimony by the defence lawyer constituted ineffective assistance of counsel.

To win an appeal on a claim of ineffective assistance of counsel in the USA can be very difficult. The US Supreme Court in *Strickland v Washington* (1984) held that "judicial scrutiny of counsel's performance must be highly deferential", and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Applying this principle in Kia Johnson's case, the Fifth Circuit Court of Appeals held that the defence lawyer's questioning of the murder victim's father "apparently was part of a strategy intended to elicit some statement indicating that the defendant should be spared the death penalty. This is indicated, for example, by the fact that Johnson's attorney asked [the father] whether he was a religious man, which implies that counsel may have been seeking to elicit a plea that Johnson be spared for religious reasons". The Fifth Circuit pointed to the fact that the father "only" asked that his son's murderer be "taken care of", which, the court held, "suggests that he might have been satisfied with the lesser punishment of life imprisonment". The Fifth Circuit said that the "possibility of eliciting a statement from the victim's father opposing imposition of the death penalty... might have justified the attendant risks of calling [the father] to the stand. In retrospect, this strategy seems to have failed; but in a [*Strickland v Washington*] analysis, every effort must be made to eliminate the distorting effects of hindsight".

BACKGROUND INFORMATION

Amnesty International opposes the death penalty in all cases, unconditionally. The death penalty is a symptom of a culture of violence, not a solution to it. It has not been shown to have any special deterrent effect. It carries the risk of irrevocable error. It denies the possibility of rehabilitation and reconciliation. It extends the suffering endured by the family of the murder victim to the family of another, that of the

condemned individual. Evidence continues to mount that death sentences in the USA are handed down by a capital justice system characterized by arbitrariness, discrimination and error. Authorities in the USA, including Texas, have violated international standards in their pursuit of the ultimate punishment, including by imposing it on defendants who were under 18 at the time of the crime, the mentally impaired, those who were inadequately represented, those whose guilt was in doubt, and foreign nationals denied their consular rights.

Texas is the leading US death penalty state. There have been 35 executions in the USA so far this year, 15 of them in Texas. Texas now accounts for 304 of the 855 executions carried out nationwide since the USA resumed judicial killing in 1977. See: *Texas: In a world of its own as 300th execution looms* (AMR 51/010/2003, 23 January 2003).

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words:

- expressing sympathy for the friends and family of William Rains, and explaining that you are not seeking to condone his murder, or to minimize the suffering it will have caused;
- expressing concern about the quality of Kia Johnson's legal representation at trial, stressing that executive clemency exists to compensate for the rigidity of the courts;
- noting evidence that Kia Johnson may have mental retardation, and expressing concern that Texas has not yet established procedures to comply with the June 2002 *Atkins v Virginia* decision;
- calling on the Governor to stop the execution of Kia Johnson in the interests of decency and the international image of the State of Texas.

APPEALS TO:

(In your appeals, please quote Kia Johnson's death row number: #999139)

The Honorable Rick Perry
Governor of Texas
State Capitol
PO Box 12428
Austin, TX 78711, USA

Telegram: Texas State Governor, Austin, Texas, USA

Fax: +1 512 463 1849 / 0039 / 1932

Salutation: Dear Governor

COPIES TO: Diplomatic representatives of the USA accredited to your country.

You may also write brief letters of concern (not more than 250 words) to:

Letters to the Editor
Austin-American Statesman
P.O. Box 670, Austin
Texas 78767, USA

Fax: +1 512 912 5927

Email via website: <http://www.statesman.com/search/content/feedback/letterssubmit.html>

PLEASE SEND APPEALS IMMEDIATELY.