

UA 311/06      Death penalty / Legal concern

USA (Virginia)      Percy Levar Walton (m), black, aged 28

Levar Walton is scheduled for execution in Virginia on 8 December 2006. He was sentenced to death in 1997 for the murders of an elderly white couple, Elizabeth and Jesse Hendrick, aged 81 and 80, and a 33-year-old black man, Archie Moore, in the town of Danville in November 1996.

On 8 June 2006, Governor Timothy Kaine issued a stay of execution for Levar Walton about an hour before he was due to be put to death (see UA 139/06, AMR 51/078/2006, 18 May 2006 and follow-up, AMR 51/089/2006, 9 June 2006). The six-month reprieve was for the purpose of obtaining an evaluation of Levar Walton's mental competency. That evaluation is due to take place shortly, and will be conducted by three mental health professionals, chosen by the defence, the prosecution and a federal judge respectively.

In 1999, three mental health experts concluded that Levar Walton suffers from severe schizophrenia and was probably suffering from this mental illness at the time of the crime. Walton, who was 18 years and one month old at the time of the murders, had displayed signs of emerging mental illness since the age of 16. He manifested bizarre beliefs and inappropriate behaviour after his arrest, in pre-trial custody, and during the trial. In a 1999 affidavit, his lawyer recalled how Levar Walton "did not meaningfully assist us in preparing a defence". The lawyer recalled that "we were unable to convince Mr Walton that he would not come back to life" if he was executed.

Initially, before the trial, Walton said that he wanted to plead guilty. Then in September 1997 he told his lawyer that he wanted to plead not guilty and have a jury trial because he was innocent. Days later, he reverted to admitting guilt. At end of that month, asked whether he would plead guilty or not guilty, he refused to speak, but responded by writing the word "chair" on a piece of paper. He told his lawyer that he wanted to be executed in order "to come back to life so he could be with his honeys". In court in October 1997, he pleaded guilty to the murders, the judge accepted the plea and, after a sentencing phase at which no mental health evidence was presented, sentenced him to death.

As Levar Walton's mental health has deteriorated on death row - prison records have described an inmate who is "floridly psychotic" with little apparent concern about his impending execution - the principal question that has been raised is whether he is legally insane and therefore "incompetent" for execution. The execution of an insane prisoner violates the US Constitution under the 1986 Supreme Court ruling, *Ford v. Wainwright*. However, *Ford* protections have proved minimal. Precisely what the *Ford* decision means continues to cause dissent in the lower courts, including in Levar Walton's case.

In May 2003, a District Court issued a stay of execution in order to assess whether Levar Walton was competent for execution under *Ford*. After holding hearings, at which he heard conflicting professional opinions on Walton's competence for execution, the judge ruled him competent under a narrow interpretation of the *Ford* ruling. Walton's lawyers appealed to a three-judge panel of the US Court of Appeals for the Fourth Circuit, arguing that the *Ford* decision requires not only that the condemned inmate understands that he is to be executed and why, but also that this understanding is such that the prisoner is able to prepare for his death. Two of the judges agreed. Noting that the *Ford* decision "presents challenges" because it had neither defined insanity nor mandated the procedures for making competency determinations, the panel's 2005 opinion stated that, as in Walton's case, "a person who can only acknowledge, amidst a barrage of incoherent responses, the bare facts that he will be executed and that his crime is the reason why does not meet the standard for competence" under *Ford*.

The state appealed for a rehearing in front of the full Fourth Circuit court of 13 judges. In March 2006 a majority of seven judges concluded that the District Court had applied the correct legal standard. The other six dissented, noting the "substantial evidence that Percy Levar Walton does not understand that his execution will mean his death, defined as the end of his physical life". They noted that "there is no dispute that since his sentencing, Walton

has fallen deeper and deeper into mental illness". The only dispute for the Court was how to establish whether he was competent for execution under the *Ford* decision. Clearly these federal judges were far from agreement on how to resolve this issue. As the Fourth Circuit panel opinion noted, "undoubtedly, determining whether a person is competent to be executed is not an exact science."

There is also evidence that Levar Walton has at least borderline mental retardation and the mental age of a young child. If the crimes for which he was sentenced to death had been committed five weeks earlier, Levar Walton would have been 17 years old and his execution would categorically violate US and international law. By all accounts, Levar Walton is less developed intellectually than most 18-year-olds.

In 2002, in *Atkins v. Virginia*, the Supreme Court prohibited the death penalty for people with mental retardation. The Court reasoned that the impairments of defendants with mental retardation diminish their personal culpability and their ability to understand consequences, rendering the death penalty unjustifiable on grounds of retribution or deterrence. There is a profound inconsistency in exempting people with mental retardation from the death penalty while those with serious mental illness remain exposed to it. The same rationale of diminished culpability, greater vulnerability and limited capacity can apply to defendants afflicted with severe mental illness (see *USA: The execution of mentally ill offenders* (AMR 51/003/2006, January 2006), [http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/\\$File/AMR5100306.pdf](http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf)).

Virginia accounts for 98 of the 1,056 executions in the USA since judicial killing resumed in 1977. In 1999, Virginia's then Governor, James Gilmore, commuted the death sentence of Calvin Swann on grounds of his schizophrenia from which he had suffered since his late teens. Swann was tried in front of the same judge, by the same prosecutor, and with the same defence lawyer, as Percy Levar Walton.

**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 relatives of Elizabeth and Jesse Hendrick and of Archie Moore, and explaining that you are not seeking to minimize the suffering their deaths will have caused;
- opposing the execution of Percy Levar Walton, noting evidence that he had begun suffering from serious mental illness more than a year before the crime, that his illness has deepened on death row, and also that he has borderline mental retardation and the mental age of a young child;
- pointing out that determining who is or is not "competent" for execution under US law remains an inexact science and a matter of substantial dispute within the federal judiciary, as illustrated in this case;
- pointing out that the power of executive clemency exists to provide a failsafe against injustices that the judiciary have been unable to remedy due to the rigidity of or lack of clarity in the law;
- welcoming Governor Kaine's decision to halt the execution of Percy Levar Walton in June;
- recalling Governor James Gilmore's 1999 decision to commute the death sentence of Calvin Swann on the grounds of the prisoner's schizophrenia, and calling for clemency for Percy Levar Walton.

**APPEALS TO:**

Governor Tim Kaine, Office of the Governor  
Patrick Henry Building, 3rd Floor, 1111 East Broad Street, Richmond, Virginia 23219, USA

**Fax:** +1 804 371 6351

**Email via website:**

<http://www.governor.virginia.gov/AboutTheGovernor/contactGovernor.cfm>

**Salutation:** Dear Governor

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

**PLEASE SEND APPEALS IMMEDIATELY.**

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