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## USA: Second thoughts – Former jurors rethink death decision as execution approaches

Oklahoma parole board votes for clemency, prisoner's fate in governor's hands

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*The jury of twelve people and two alternates were selected as a good and lawful jury of Canadian County, Oklahoma, to try said defendant...[T]he jury did return a verdict of 'guilty' to murder, first degree, a felony, and the jury, after due deliberation returned by separate verdict that said defendant shall suffer 'death'*

*State of Oklahoma v. Richard Tandy Smith, Judgment and Sentence on Conviction, 21 April 1987*

Nearly a quarter of a century after he was dispatched to death row by an Oklahoma jury, Richard Smith is scheduled to be executed on 8 April 2010. In the 23 years since his sentencing, there has been something of a shift in the death penalty landscape – in Oklahoma, the USA, and across the world – as well as a change of heart among the jurors who voted in 1987 that he should be killed by the state.<sup>1</sup>

On 25 March 2010, the Oklahoma Pardon and Parole Board decided by three votes to two to recommend that Governor Brad Henry commute Richard Smith's death sentence. The recommendation is non-binding.

Governor Henry should reflect on how things have changed since 1987, and reject execution.

According to the evidence at Richard Smith's trial, on the night of 21 July 1986, he and two women, Pamela Rutledge and Rita Cagle, drove to two houses in Oklahoma City to acquire methamphetamine ("crank"). Some time after midnight, the three left the second house with John Cederlund, a known drug dealer, and drove into rural Canadian County. Based primarily on the testimony of Pamela Rutledge and Rita Cagle, who were never charged, the prosecution's case was that Richard Smith decided to rob John Cederlund of drugs and money, but after Cederlund said he had no money, Smith had shot him.

Richard Smith was tried at a time when the "modern" era of judicial killing in the USA was less than a decade old, when much evidence of systematic error in the capital justice system was yet to be revealed, and when local prosecutors in the USA were obtaining three times as many death sentences as they are today. Richard Smith was one of 287 people sent to death row nationwide in 1987. Since 2004, fewer than 150 people have been condemned to death in the USA each year, and in 2008 only 111 death sentences were passed, with the projected total for 2009 even lower. Smith was one of 15 people sentenced to death in Oklahoma in 1987, five times as many as in 2007. In the decade from 1989 to 1998, 114 death sentences were passed in the state, twice as many as the 57 handed down the following decade. Annual death sentences in Oklahoma have been in single figures since 1998.

This raises the question of whether a contemporary Oklahoma jury would make the same sentencing decision that the 12 jurors took 23 years ago. It takes only one juror in an Oklahoma case to vote against the death penalty for life imprisonment to be the outcome. In this case, it seems likely that at least six of the original jurors would vote against Richard Smith's execution if they were making the decision today.

In fact, if the trial had taken place only a year later – let alone two decades – it appears likely that Richard Smith would not now be facing execution. For, two months after the jury voted for his death

sentence, Oklahoma's legislature passed a law adopting life imprisonment without parole (LWOP) as a sentencing option in the state (the law went into effect six months after that). Three jurors from Richard Smith's trial have signed affidavits stating that if LWOP had been an option, they would have voted for it, not for death. A fourth has stated that he believes LWOP is the "appropriate sentence" in this case. Two others have said that they would not oppose commutation of his death sentence to LWOP.

Capital jurors in the USA are by definition death penalty supporters – they have to be "death-qualified". Those citizens who would be "irrevocably committed" to vote against execution can be excluded 'for cause' by the prosecution.<sup>2</sup> Two years before Richard Smith's trial, the US Supreme Court relaxed this standard, expanding the class of potential jurors who could be dismissed for cause.<sup>3</sup> Under this standard, a juror can be dismissed if his or her feelings about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath".

At jury selection for Richard Smith's trial, several prospective jurors were indeed dismissed after saying that they could not impose the death penalty under any circumstances. Questions were raised on appeal about one of the jurors who was not dismissed, despite signs that he was overly committed to the death penalty. During jury selection this juror had said that "if it was just brutal first degree murder..., I wouldn't even consider a life sentence". However, he was allowed on to the jury after subsequently indicating that he would be able to consider both life and death sentences. This juror is not one of those who, since the trial, have signed statements in favour of a life sentence for Richard Smith.

As early as 1986, a year before Richard Smith's trial, the US Supreme Court acknowledged evidence that the "death qualification" of capital jurors "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries".<sup>4</sup> Any acknowledgment from such jurors that the system is less than perfect should surely make officials who would otherwise rely on their death verdicts sit up and listen.

Some of the jurors from Richard Smith's trial point to reasons for clemency other than Oklahoma's adoption of life imprisonment without parole shortly after the trial.

In their affidavits, two of these jurors recalled that they had been "unimpressed" by the defence lawyer's performance at the trial, with one of them referring to the "meaningless case in mitigation" he had presented at the sentencing phase, when the lawyer was supposed to be zealously defending his client from the death penalty. In 2005, the federal District Court judge who reviewed the case described the mitigation case as "shocking in its brevity, its failure to humanize [Smith] or to explain his actions".

The mitigation evidence presented by the lawyer amounted to less than three pages of the trial transcript, consisting of confirmation from the defendant's mother that her son had been treated by "psychiatrist physicians" in California about 10 years earlier, but any details of which she could not recall. The only other witness presented by the defence was Richard Smith's sister whose brief appearance consisted of her asking the jury to give her brother "a chance". The clemency authorities, who are being provided with the compelling mitigation evidence not presented to the jury, should now give Richard Smith the chance that the jury refused him.

The defence presented no expert witnesses at the sentencing. In 1992, a psychologist and a neuropharmacologist hired for Richard Smith's appeals provided details about him which the jury never heard, of a childhood and adolescence marked by years of neglect and violence, as well as serious mental impairments and substance abuse. In an affidavit signed in November 2009, one of the jurors from the trial said that evidence concerning "mental illness, family dysfunction, severe substance abuse, and an abusive childhood" was information "that I would have wanted to know when setting his punishment".

Richard Smith was the third capital defendant to be represented by the defence lawyer in question. The earlier two cases also resulted in death sentences. His first client was Steven Hatch, who was sentenced to death for two murders committed by his severely mentally ill co-defendant Glen Ake in 1979. Hatch had already left the house when Ake, who was eventually sentenced to life imprisonment, committed the murders. Steven Hatch was executed in 1996.

The lawyer's second client was Bigler Stouffer. In 2000, a three-judge panel of the 10<sup>th</sup> Circuit overturned Stouffer's conviction, describing the "ineptness" of his legal representation at trial. The Court noted that the lawyer's inadequate performance had infected both stages of the trial, and had "clearly prejudiced" the defendant "by denying any reasonable prospect for avoiding the death penalty". Something similar happened at Richard Smith's trial, according to one of his jurors, who recalled in a November 2009 affidavit that "the trial attorney was not on the ball and appeared to be uninterested in presenting a defense on behalf of Mr Smith".

In 2008, another three-judge panel of the 10<sup>th</sup> Circuit noted that the defence lawyer's investigation for the sentencing phase in Richard Smith's case had begun "a mere seven to ten days before trial", and "with 20-20 hindsight, there is much more that might have been presented, including [Smith's] abuse as a child, addiction problems, and psychological problems, brain injury and borderline intelligence". However, as the District Court had done in 2005, the 10<sup>th</sup> Circuit panel upheld Smith's death sentence.

Executive clemency is not constrained by legal precedent and procedure in the way that the courts are. Even for a death penalty supporter, killing a prisoner condemned by a jury left in the dark about the defendant is surely intolerable.

As part of the expert assessment for his appeals, Richard Smith was diagnosed with chronic schizophrenia, and ascertained to have suffered multiple head injuries. According to the psychologist, Smith did not receive adequate treatment during his youth, and his mental illness was exacerbated by his drug and alcohol use, and probable brain damage. She concluded that at the time of the crime, his ability to conform his conduct to the law was likely very impaired. Since being on death row, Smith has been prescribed anti-psychotic medication.

In the US District Court ruling on the case in 2005, the judge ruled that, "by today's standards", the failure by Richard Smith's trial lawyer "to request funds for or the appointment of a psychiatrist to assist him at the penalty phase of the trial was not objectively reasonable". However, the judge upheld the death sentence, saying that under the state of the law in 1987 he could not rule that the lawyer's failure was "professionally unreasonable" at that time.

Now, execution should be held to be unreasonable; and incompatible with basic notions of justice, fairness and human dignity.

One of the jurors explains in his affidavit that he has thought about the trial over the years, and has "never felt fully comfortable with the case, or the outcome. It was the kind of case where it was difficult to know the truth – what actually happened". He recalls his feeling that the credibility of the state's two key witnesses – the two women present at the shooting who were never charged – was suspect because "they were participants to some extent in the crime", and that "it was not an open and shut case, where Richard Smith's guilt was clear". Indeed, one of these two witnesses, Rita Cagle, since the trial, has stated that the gun went off during a struggle between John Cederlund and Richard Smith, and that she could not be sure if Smith had intended to shoot the victim.

In the time that Richard Smith has been on death row, evidence of errors committed in the US capital justice system has grown by the year. Most starkly, this has come in the form of people released from death rows on grounds of innocence. More than 100 such exonerations have occurred since March 1987, eight of them in Oklahoma.

Such cases may be one reason why the US public appears to be turning against the death penalty, with growing awareness about such errors also denting the confidence of those death penalty supporters qualified to serve on capital juries. In a 2007 survey, for example, 60 per cent of respondents said that their knowledge about the cases of death row prisoners later exonerated had lessened their support for the death penalty or strengthened their existing opposition to the punishment. Forty per cent of those who believed they would be eligible to serve on a capital jury responded that they would be less likely to vote for a death sentence in light of what they had heard about death row exonerations.<sup>5</sup>

In an affidavit signed in 2009, one of the jurors from Richard Smith's trial noted "all the news lately about wrongful convictions" and that she now had "serious concerns about the State executing Mr Smith". She added that it is now her belief that this case "is just not a death penalty case", and that Richard Smith was not among "the worst of the worst" offenders or responsible for the "worst of the worst" crimes for which the US death penalty is supposed to be reserved.

That juror also noted that Richard Smith was 23 years old at the time of the crime, and stated that her experience of raising six sons had shown her that "young men at that age do not always think clearly and often act impulsively". While "Mr Smith's lack of maturity does not relieve him of total responsibility for his crime", she added, he "should not be executed for this offense".

The former jurors supporting clemency are joined by Donald Cederlund, who also opposes the execution of the man convicted of killing his older brother. After reviewing the trial transcript, Donald Cederlund believes that Richard Smith's "sentence should be changed to life". He continues: "This was a crime fuelled by drugs, and Mr Smith had no intent to take my brother's life".

Although Richard Smith turned down the prosecution's pre-trial offer of a life prison sentence in return for a guilty plea, the fact that the offer was made suggests that the state considered a life sentence an acceptable outcome. Having gone to trial, however, the death penalty became the prosecution's goal. Arguing for a dehumanizing punishment, the prosecutor turned to dehumanizing language, encouraging the jury to think of the defendant as an animal:

"The course of his conduct has been cast. He has killed. There's nothing left for him but to kill again. I know that many of you have probably seen some these animal shows on TV; National Geographic, Wild Kingdom, these kind of shows. They are exciting and informative because we get a rare glimpse of pure wild animals. The cheetah or the tiger that kills for its food.

Often, as you might recall from these shows, they are stalking and pursuing weaker animals, the young, the old, the lame. Certainly, you can see the vicious savageness about killing. If you then go to the zoo the next day to see one of these animals up close, they look different, don't they? They are in a cage; they are confined. They are fed so they don't have to kill for their food. Well, this defendant is a lot like a caged animal. He has viciously and savagely killed before."

The "cage" to which Richard Smith has been confined is H-Unit of Oklahoma State Penitentiary, where the state's male death row population has been housed since November 1991. H-Unit is constructed entirely of concrete with the living accommodation sited effectively underground. It is an electronically controlled facility designed to minimize contact between inmates and prison staff. Prisoners are confined for 23 or 24 hours a day in cells measuring 7' 7" (2.31m) wide by 15' 5" (4.70m) long by 8' 4" (2.54m) high. The walls, floors and ceilings are of unpainted concrete. Each cell has two concrete beds on either side of an uncovered toilet and sink. There is no other furniture in the cells apart from two concrete shelves on the back wall which serve as a "table" and two similar shelves above these. The cell doors are solid metal, except for the upper part which has a plexiglass window with thick bars on the outside. There are no windows to the outside world. There is no natural fresh air ventilation to the cells, which are air-conditioned through a pipe system in which air is passed in and out of two vents in the back of each cell.

After visiting H-Unit in 1994, Amnesty International concluded that the conditions under which death row inmates were being held there constituted cruel, inhuman and degrading treatment in violation of international law and standards.<sup>6</sup> In February 2010, Amnesty International wrote to the Oklahoma authorities to express concern that not only are these conditions continuing, but in some respects they appear to have worsened recently.<sup>7</sup>

Despite being held in dehumanizing conditions for two decades, Richard Smith is today "a very different person that he was in July 1986", according to his clemency petition. He has sought to use his experience to help others turn away from drug abuse, including a number of his own relatives, and the nephew of one of his former lawyers. He has contributed to the development of a community endeavour

called TASK (Teaching and Saving Kids), which seeks to turn young people away from drugs, gangs and crime. Richard Smith has helped to have an aspect of the program which seeks to reduce violence in prison through conflict resolution, implemented at the Oklahoma State Penitentiary.

Richard Smith has effectively already served a life sentence. For more than half of his life, he has also endured the cruelty of living daily with the prospect of being put to death by the state. As a US Supreme Court Justice wrote in 1972, “we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”<sup>8</sup>

Richard Smith, like others on death row, has also endured the execution of his fellow inmates. When Richard Smith was condemned to death, Oklahoma had not executed anyone for 21 years. However, since he arrived on death row 23 years ago, the state has carried out 92 executions, and is now the US state with the highest number of executions per capita of its population.

As Amnesty International noted in its report on Oklahoma’s death penalty at the beginning of the 21<sup>st</sup> century, old habits die hard.<sup>9</sup> Nine years later, those trying to turn the Oklahoma authorities away from this state killing continue to face an uphill task.

Amnesty International welcomes the parole board’s vote for clemency for Richard Smith, and urges Governor Brad Henry to accept it.<sup>10</sup> Since taking office on 13 January 2003, Governor Henry has received six recommendations for clemency for death row inmates from the Pardon and Parole Board. He has rejected all but two of them. There have been 37 executions in Oklahoma during his term in office.

Richard Smith’s execution would highlight once again how the USA is on the wrong side of history on this human rights issue. For another shift that has taken place since Richard Smith has been on death row is the progress towards global abolition of the death penalty. Since 1987, an average of more than two countries a year have abolished the death penalty, bringing the total number of countries that are today abolitionist in law or practice to 139, a clear majority.

At least some of the jurors who 23 years ago voted for Richard Smith’s execution have had second thoughts. Like much of the rest of the world, the Oklahoma authorities should have second thoughts about the death penalty. A good place to start would be for Governor Henry to accept the Pardon and Parole Board’s recommendation for clemency for Richard Smith.

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<sup>1</sup> The jury voted on 16 March 1987 that Richard Smith be sentenced to death. That sentence was formally imposed by the trial judge on 17 April 1987.

<sup>2</sup> *Witherspoon v. Illinois*, US Supreme Court, 1968.

<sup>3</sup> *Wainwright v. Witt* (1985).

<sup>4</sup> *Lockhart v. McCree* (1986).

<sup>5</sup> A crisis of confidence: Americans’ doubts about the death penalty. Death Penalty Information Center, June 2007, <http://www.deathpenaltyinfo.org/CoC.pdf>.

<sup>6</sup> USA: Conditions for death row prisoners in H-Unit, Oklahoma State Penitentiary, April 1994, <http://www.amnesty.org/en/library/info/AMR51/034/1994/en>.

<sup>7</sup> Amnesty International letter to Ron Workman, Warden, Oklahoma State Penitentiary, 02 February 2010.

<sup>8</sup> *Furman v. Georgia* (1972), Justice Brennan concurring.

<sup>9</sup> See USA: Old habits die hard: The death penalty in Oklahoma, April 2001, <http://www.amnesty.org/en/library/info/AMR51/055/2001/en>.

<sup>10</sup> See Amnesty International’s Urgent Action at <http://www.amnesty.org/en/library/info/AMR51/024/2010/en>.