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UNITED STATES OF AMERICA

Letter to Governor Keating of Oklahoma on his rejection of clemency for David Brown

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On 25 June 2002, the Oklahoma Court of Criminal Appeals granted David Jay Brown a stay of execution about six hours before he was due to be put to death for the murder of his former father-in-law in 1988. Earlier, Governor Frank Keating had rejected a clemency recommendation by the Oklahoma Pardon and Parole Board. In a letter to the Board on 18 June, Governor Keating wrote: "After carefully studying the issues involved, I have decided to deny clemency. I appreciate the thoughtful consideration you have given this difficult decision and I respect your recommendation. However, I believe this is the appropriate decision in this case. Thank you for your service to the State of Oklahoma."

In a letter faxed on 25 June, reproduced below, Amnesty International urged Governor Keating to reconsider his decision. The stay of execution granted by the court allows him more time to change his mind and accept the Board's recommendation for clemency in the event that David Brown receives another execution date.

For further information, see *Old Habits Die Hard: The Death Penalty in Oklahoma*, April 2001, available at <http://web.amnesty.org/ai.nsf/Index/AMR510552001>.

BY FAX ONLY

Frank Keating
Governor of Oklahoma
State Capitol Bldg
Oklahoma City
OK 73105, USA

Ref.: TQ AMR 51/2002.74

25 June 2002

Dear Governor Keating

I am writing on behalf of the more than one million members of Amnesty International worldwide to express our deep regret at your rejection of the state Pardon and Parole Board's recommendation for clemency in the case of David Jay Brown. We urge you to reconsider your decision and to intervene to prevent David Brown's execution, scheduled for 6pm tonight.

A recommendation for clemency by the Oklahoma Pardon and Parole Board is indeed a rare event. There have been only three such recommendations in death penalty cases since 1966 – in the cases of Phillip Smith, Gerardo Valdez and now David Brown. All three have occurred in the past 15 months – perhaps a sign that the mounting evidence of the unfair, arbitrary, and error-prone nature of the country's capital justice system has begun to trouble the Pardon and Parole Board along with many other people across the United States.

Amnesty International deeply regrets that, as in the case of Gerardo Valdez, you have rejected the Board's vote to recommend clemency for David Brown. The Board's decision, by three votes to two, followed a clemency hearing on 11 June at which the Board heard expert forensic and other evidence supporting David Brown's consistently held claim that he shot his former father-in-law, Eldon McGuire, not in a premeditated killing as the prosecution contends, but in an act of self-defence. The Board members were presented with evidence of crime scene contamination not known by the trial jury, of the withholding of evidence from the defence counsel, and of the denial of funding for expert witnesses until too late in the appeals process. Board member Susan Bussey, who cast the deciding vote, was reported as saying that she had been "troubled" by the fact that the defence had not been provided all the necessary information by the prosecution at the time of the trial. When a defendant's life is at stake and there are such issues, surely all clemency officials should be so troubled.

The Board had also been presented with an affidavit from one of the jurors from the trial in which he stated that he had not wanted to find David Brown guilty of first degree murder or to sentence him to death. He claims to have done so only under the pressures which resulted from being the only African American on the jury in a racially charged environment. Amnesty International has documented other such cases of alleged juror coercion in US capital cases over the years. Indeed, in March 1999, Governor Huckabee of Arkansas commuted the death sentence of Bobby Ray Fretwell following an appeal from one of the trial jurors for the execution to be stopped. The juror wrote that he had been the only one of the 12 initially to vote for life, but had changed his vote to death because he felt intimidated and did not want to be shunned by his community. Further examples in other states have involved the apparent coercion of solitary black jurors, as has been alleged in the David Brown case.

Governor Huckabee's principled act of clemency led to one of the approximately 30 executive commutations of death sentences to have occurred nationwide since 1990, the year that Oklahoma resumed executions after 24 years. They have occurred in several states, including Alabama, Georgia, Idaho, Illinois, Maryland, Missouri, North Carolina, Ohio, Texas and Virginia. The reasons for clemency have been varied and have included: possible innocence, the defendant's mental impairment, inadequate legal representation, rehabilitation of the prisoner, juror coercion during sentencing, racial

concerns, the defendant's possible lesser role in the crime, and the personal convictions of the governor.

Amnesty International, which opposes all executions unconditionally, has long had concerns about Oklahoma's clemency process, and its perceived failure to give full consideration to this wide range of potential clemency issues. In our April 2001 report *Old Habits Die Hard: The death penalty in Oklahoma*, a copy of which we presented to your office shortly before publication, we wrote: "In the past 10 years the Oklahoma Pardon and Parole Board has not been persuaded by petitions for clemency based on remorse, rehabilitation, mental impairment, arbitrariness, international law, morality or inadequate legal representation. Given the Board's recent decision in the Phillip Smith case, itself perhaps a reflection of the current heightened concern in the USA about the potential for wrongful capital convictions, it seems that in Oklahoma clemency is only a possibility for someone who has a strong claim of innocence".

The Pardon and Parole Board's votes in the Valdez and Brown cases appear to suggest that since then the Board has become open to a broader range of clemency issues than previously. We cautiously welcome this development. However, we remain concerned that your position on clemency remains rigidly and narrowly defined. In *Old Habits Die Hard*, we noted your reasons for rejecting the Board's recommendation of clemency in 2000 in the case of Cathy Sue Lamb, a prisoner serving life without parole, who was seeking a reduction in sentence. In that case, your decision had turned on the narrow question of whether Cathy Sue Lamb was innocent, not the broader issues of whether the sentence was too harsh, as the trial prosecutor himself believed, or the prisoner's claim of rehabilitation. While we again take this opportunity to commend your subsequent decision to accept the Board's clemency recommendation in the case of Phillip Smith, we note that that decision, too, may be further evidence that you will only consider questions of actual innocence as legitimate issues for clemency. We hope that we are wrong, and remain hopeful that you will yet intervene in the next few hours in David Brown's case.

While Amnesty International believes that you erred in rejecting the Board's clemency recommendation for Mexican national Gerardo Valdez, not least because Oklahoma had violated the USA's international legal obligations under the Vienna Convention on Consular Relations in that case, we suggest that even in purely domestic terms, your decision in the Valdez case has subsequently been shown to have been mistaken. In explaining your rejection of clemency in a letter to the President of Mexico on 20 July 2001, you wrote that the denial of Gerardo Valdez' consular rights had been "harmless error", and that his legal representation at the trial had been sufficient. On this latter issue, you noted that "the court-appointed trial counsel was experienced in criminal defense".

On 1 May 2002, the Oklahoma Court of Criminal Appeals overturned Gerardo Valdez's death sentence. It found that his "court-appointed counsel was inexperienced in capital cases; in fact, Petitioner's case was his counsel's first capital case. Petitioner's trial counsel did not have the financial resources available to properly investigate Petitioner's childhood, social history or other aspects of his life. While arguments can be made that trial counsel could have requested funds to hire expert witnesses, it is evident that trial counsel's inexperience in capital litigation caused him to believe such funds were unavailable."

The Court emphasized the significance that timely consular assistance could have had in this case: “We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner’s defense, and provided resources to ensure that he received a fair trial and sentencing hearing”.

Amnesty International is not party to the reason why you have rejected the Pardon and Parole Board’s recommendation for clemency for David Brown, because your letter of 18 June to the Board does not give any detail. We would simply ask – is it not possible that you could be mistaken in this case, as it appears you were in the case of Gerardo Valdez? Should you not give greater weight than you have done to the opinion of the three members of the Pardon and Parole Board who were persuaded that David Brown should not be executed? We recall that three members of the Board had also voted for clemency for Gerardo Valdez, after voicing concern about his inadequate legal representation and the denial of his consular rights. Their vote has since been vindicated by ruling of the Oklahoma Court of Criminal Appeals.

Two years ago, Governor Parris Glendening of Maryland commuted the death sentence of Eugene Colvin-El for the same reasons that you accepted clemency for Phillip Smith. In his statement, Governor Glendening said that he could not be absolutely certain of Eugene Colvin-El’s guilt: “It is not appropriate to proceed with an execution when there is any level of uncertainty, as the death penalty is final and irreversible”. Amnesty International believes that such reasoning must not be limited to the question of actual innocence. That is, just as you would not allow the execution of Phillip Smith because of doubts about whether he committed the crime for which he was convicted, can you be absolutely certain that David Brown is guilty of an offence that carries the death penalty? Is there any possibility at all that he committed an offence of less than first degree murder, as he has always maintained, and for which there is evidence not heard by the trial court? If so, to allow his execution would be to contribute to the arbitrariness and unfairness of the death penalty.

We urge you to reconsider your rejection of the Board’s recommendation for clemency, and to commute David Brown’s death sentence in the name of justice, fairness, and the reputation of your state. In addition, we urge you to support efforts for a moratorium on executions in Oklahoma, with a view to abolition of this cruel, inhuman and degrading punishment.

Yours sincerely

Tracy Ulltveit-Moe
Acting Program Director - America

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM
