

PUBLICAI Index: AMR 51/145/00

1 September 2000

Further information on EXTRA 70/00 (AMR 51/134/00, 21 August 2000) - Death penalty

USA (Virginia) Derek Rocco Barnabei, white, aged 33

The Governor of Virginia has ordered a police investigation into the disappearance of evidence from Derek Barnabei's case file. However, Governor Gilmore has not said whether he will halt the execution or grant clemency. Barnabei is scheduled to die in less than two weeks.

Derek Barnabei was sentenced to death in 1995 for the rape and murder of 17-year-old Sarah Wisnosky in Norfolk, Virginia, in 1993 (see original EXTRA). He is scheduled for execution on 14 September. He has always maintained that he had consensual sex with Wisnosky shortly before her murder, but that he had neither raped nor killed her. He is seeking DNA testing on fingernail clippings from the victim and on other items from the crime scene, which he claims could point to another person as the murderer. He is also seeking modern DNA testing of vaginal swabs taken in 1993, which two experts have stated could possibly reveal evidence that another man had sex with Wisnosky before she died.

Evidence from Barnabei's case file, reportedly including the fingernail clippings, was reported missing on 30 August. In a statement issued the next day, Governor Gilmore noted the "overwhelming evidence" of Barnabei's guilt presented at the 1995 trial. With regard to the request for DNA testing, he said: "As is typical in a request of this nature, I have sought review of the evidence in the case in order to determine whether additional testing would prove innocence. Upon performing this check, I have been informed by the Clerk of the Circuit Court of Norfolk that some of the evidence from the Derek Rocco Barnabei case stored in that office may have been lost or compromised... While it is uncertain whether further examination of the missing evidence would be probative [provide proof], I am troubled by the apparent disappearance of this evidence. Accordingly, I have directed the Virginia State Police to thoroughly investigate the circumstances under which any evidence in this case may have been compromised and to determine if any criminal activity has occurred".

BACKGROUND INFORMATION

Since the Governor of Illinois stopped executions in his state, on 31 January 2000, because of its "shameful" record of wrongful convictions, the US death penalty has come under increasing scrutiny. The debate within the USA has focused mainly on the risk of executing the innocent, and on the potential for modern DNA testing techniques to exonerate or incriminate.

DNA testing is undoubtedly an important forensic tool, but it provides no guarantee that fatal errors will be eliminated in death penalty cases. Like any forensic evidence, DNA testing is vulnerable to human fallibility or misconduct. Samples may become contaminated by poor collecting techniques, or may be planted at a crime scene by unscrupulous investigators. The potential also exists for laboratories to make mistakes or falsify test results. Even if the

missing DNA evidence in the Barnabei case is eventually recovered, it may prove impossible to determine if it has been tampered with since its disappearance.

A recent case in the USA illustrates the limitations of DNA testing as an absolute indicator of guilt or innocence. Odell Barnes was executed in Texas on 1 March 2000, still proclaiming his innocence. Among the most incriminating evidence against him was small blood spots found on his clothing, later identified by DNA testing as coming from the victim. Post-conviction investigation by defense experts found that the bloodstains contained a preservative used in the storing of blood. An expert concluded from the level of preservative in the stain that the blood did not come directly from the victim, but was spilled on the clothing after the crime.

Furthermore, only a relatively small number of murder cases produce any DNA evidence. On 22 June 2000, Gary Graham was executed in Texas despite serious doubts over his guilt. He had been convicted on the basis of the testimony of a single eyewitness, without any physical evidence linking him to the crime. As in many other death penalty cases, there was no DNA evidence available that could possibly resolve the lingering question of Graham's guilt or innocence.

Amnesty International unconditionally opposes the death penalty as a violation of fundamental human rights, regardless of the alleged guilt or innocence of the individual facing execution. While the organization supports the re-examination of any potentially exonerating evidence, the fact remains that no conceivable safeguards can address the inevitable risk of fatal error. The death penalty in the USA remains a lethal lottery: who lives and who dies depends as much on factors such as race, geography and social status as it does on the severity of the crime itself.

No amount of tinkering with the machinery of death can eliminate these fatal flaws. Questions of actual innocence, along with arbitrariness, discrimination, legal incompetence and official misconduct will continue to characterize the death penalty in the USA and elsewhere in the world. The only appropriate response to this brutal and unreliable punishment is its total abolition.

FURTHER RECOMMENDED ACTION: Please send telegrams/faxes/express/airmail letters in English or your own language, in your own words, using the following guide:

- expressing sympathy for the family and friends of Sarah Wisnosky and acknowledging the seriousness of the crime;
- noting the doubts that surround Derek Barnabei's conviction, which was based on circumstantial evidence, and noting the increasing concern about the reliability and fairness of the US capital justice system as a whole;
- expressing concern about the disappearance of evidence, including some which Derek Barnabei was seeking to have DNA tested, and noting that even if it is eventually recovered, it may prove impossible to determine if it has been tampered with since its disappearance;
- arguing that the risk of fatal error can only be eradicated by abolishing the death penalty, which more than half the countries of the world have done;
- urging the Governor to grant clemency to Derek Barnabei, and to endorse efforts to establish a moratorium on executions in Virginia.

APPEALS TO:

The Honorable James Gilmore
Governor of Virginia
State Capitol, Richmond, VA 23219, USA
Telegrams: Governor Gilmore, Richmond, VA, USA
Fax: +1 804 371 6351
Tel: +1 804 786 2211
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, *Richmond Times-Dispatch*, PO Box 85333, Richmond, VA 23293, USA
Fax: +1 804 775 8090
E-mail: letters@timesdispatch.com

PLEASE SEND APPEALS IMMEDIATELY.