

UA 73/07 Death penalty

USA (Texas) Vincent Gutierrez (m), Hispanic, aged 28

Vincent Gutierrez is scheduled to be executed in Texas on 28 March. He was sentenced to death in 1998 for the murder of Jose Cobo in 1997.

Forty-year-old US Air Force Captain Jose Cobo was shot during a carjacking in San Antonio on 11 March 1997. Three people were convicted in connection with the crime: Christopher Suaste pleaded guilty to a lesser charge of aggravated robbery in return for a sentence of 35 years in prison. He testified against his co-defendants, Vincent Gutierrez and Randy Arroyo. These two were tried jointly after the trial judge refused their request to be tried separately. Both were sentenced to death.

Vincent Gutierrez was 18 years old at the time of the murder. Randy Arroyo was aged 17. Randy Arroyo's death sentence was commuted to life imprisonment in June 2005 following the US Supreme Court's *Roper v. Simmons* ruling three months earlier, which brought the USA into line with international law prohibiting the use of the death penalty against people who were under 18 at the time of the crime. Amnesty International had long campaigned for this outcome, and welcomed the *Roper* ruling.

The prohibition on the death penalty for child offenders stems from recognition of the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility often associated with youth. But, as noted by the US Supreme Court in its *Roper* decision, "drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Sixteen years earlier, four Supreme Court Justices had noted that: "Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s." Scientific research shows that development of the brain and psychological and emotional maturation continues at least into a person's early 20s.

Historically other countries have recognized this. A study of the death penalty in the 1960s found that out of 101 countries which then set a minimum age for the death penalty, 17 set that minimum age at 18 years, and 77 set it at age 20. Paraguay, for example, set its minimum age at 22, Greece 21, Hungary and Bulgaria 20, and Greece 21. All have now abolished the death penalty. Cuba, on the other hand, retains capital punishment, but restricts it to offenders over 20 years old.

At the 1998 trial, the jurors found the two defendants equally culpable and handed down death sentences. Today, at least six of the jurors have signed affidavits supporting the argument presented in Vincent Gutierrez's clemency petition that it is unfair that he is facing execution while Randy Arroyo is not. Amnesty International emphasises that the power of executive clemency exists to compensate for the rigidity of the law. While Texas was following the law when it commuted the death sentence of Randy Arroyo, it would no less be serving the interest of justice and the perception of justice and fairness to commute the death sentence of Vincent Gutierrez, due to his age at the time of the same crime for which Arroyo was convicted.

At the trial, Vincent Gutierrez's lawyers presented evidence that he was a "follower" who was easily influenced by others, and that he had been a polite, quiet and non-violent child. However, their investigation appears to have been limited, and they did not discover, for example, available evidence of mental illness and sexual abuse within his family that they might have used to develop mitigating evidence on behalf of their client. For example, Vincent Gutierrez's older brother had been diagnosed with bipolar disorder, and there is evidence that his father and younger brother also suffered from this serious mental illness.

Vincent Gutierrez's current lawyer has raised a claim of possible prosecutorial misconduct evidence of which has only recently emerged, in relation to the state's use of witnesses at the 1998 trial. Christopher Suaste's testimony alone was legally insufficient under Texas law, which prohibits a conviction from being based upon the testimony of an accomplice in the absence of corroborating evidence. The prosecution also presented the testimony of Sean Lowe, a friend of Suaste and an acquaintance of Gutierrez and Arroyo. Lowe was apparently present during the planning of the car theft, and had assisted in transporting Gutierrez and Arroyo before and after the crime. Although the trial court ruled that Sean Lowe was not an accomplice as a matter of law, his credibility was nevertheless in question, including because at the time he was facing proceedings in relation to a burglary offence.

However, the prosecution presented another witness, Antonio Pina, who was not associated with the defendants, and

who had no apparent incentive to adjust his testimony in favour of the state. Antonio Pina was subsequently convicted of theft in another case and sentenced to imprisonment. In August 2005, he wrote to the lead prosecutor in the Gutierrez/Arroyo trial (now a state court judge) asking for his assistance in reducing his sentence. In his letter, Antonio Pina referred back to the meeting that he and the prosecutor had on that case, and stated: "You mention[ed] to me if I ever needed a favor you would help me". Vincent Gutierrez's lawyer is arguing that this statement suggests that the prosecutor had made some kind of offer to Pina in return for his testimony at the 1998 trial. Any such offer was not disclosed to the defence and the evidence of it was not revealed until October 2005: too late for Gutierrez's appeals in the federal courts.

Since the USA resumed judicial killing in 1977, there have been 1,067 executions, of which 388 (36 per cent) have been carried out in Texas. In 2006, Texas carried out 24 executions, five times as many as the next highest state total. Nine of the 10 executions in the USA so far in 2007 have been carried out in Texas.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language (please quote Vincent Gutierrez's prison number, #999262, in appeals):

- expressing sympathy for the family of Jose Cobo, and explaining that you are not seeking to condone the manner of his death or to downplay the suffering caused;
- welcoming the fact that Randy Arroyo's death sentence was commuted in 2005 in line with constitutional and international law, given that he was 17 at the time of the crime;
- noting that Vincent Gutierrez was only marginally older than Randy Arroyo and that the jury had found the two teenagers equally culpable under the law at that time, and further noting that at least six of the jurors have signed affidavits raising questions in relation to the fairness of Vincent Gutierrez now being the only defendant to face execution;
- noting evidence that has arisen only late in the appeals process of a possible offer made to a prosecution witness, and pointing out that was not revealed to the defence at the 1998 trial;
- noting that executive clemency exists precisely to compensate for the rigidity of the law;
- calling for clemency for Vincent Gutierrez in the interest of justice.

APPEALS TO:

Rissie Owens, Presiding Officer,
Board of Pardons and Paroles, Executive Clemency Section
8610 Shoal Creek Boulevard, Austin, TX 78757, USA

Fax: +1 512 463 8120

Salutation: Dear Ms Owens

Governor Rick Perry, Office of the Governor, P.O. Box 12428, Austin, Texas 78711-2428, USA

Fax: +1 512 463 1849

Salutation: Dear Governor

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

PLEASE SEND APPEALS IMMEDIATELY. Check with the International Secretariat, or your section office, if sending appeals after 28 March 2007.*****