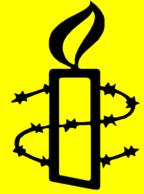
AMNESTY INTERNATIONAL



13 April 2017
AI Index: AMR 51/6065/2017

USA

DEATH IN ARKANSAS, AGAIN

Early in 1997, for the second time in three years, the State of Arkansas executed three men on the same day. The next morning Vatican Radio reported that "the death chambers in American prisons have resumed their sad work and the rhythm seems like that of a macabre assembly line".[1] Twenty years later, a period that has seen the number of countries that are abolitionist in law or practice rise to 141, and four months after the USA recorded its lowest annual execution total for 25 years, the Arkansas conveyor belt of death is about to restart with a vengeance.

In the space of 11 days, employees of the State of Arkansas are due to kill seven prisoners in what would be the first executions there since 2005. If the state sees this through, two condemned men will be taken out of their cells on 17 April, two on 20 April, two on 24 April, and one on 27 April, strapped down, and injected with a lethal combination of chemicals. Another man who was scheduled for execution on 27 April currently has a stay.[2]

The death penalty is a dehumanizing punishment to its core. Its "true significance", a US Supreme Court Justice wrote 45 years ago, is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded".[3] The lives of these eight Arkansas prisoners have been toyed with for two decades or more.

> From 1913 to 1964 there were 172 executions in Arkansas. The years in which there were seven or more executions were 1926 (10); 1930 (10); 1935 (9); 1938 (7); 1939 (7); and 1960 (8).
>
> Since 1976, when the US Supreme Court upheld new statutes, there have been 27 executions in Arkansas, all of them conducted between 1990 and 2005. The most executions in a year during this period was five in 1994.

MENTAL DISABILITIES

Bruce Ward has been on death row for the past quarter of a century and is due to be put to death on 17 April. He has repeatedly been diagnosed with paranoid schizophrenia, and the doctor who has diagnosed him has concluded that as a result of this serious mental disability, he does not have a rational understanding of his punishment. If so, his execution would violate the US constitution.

International law and standards on the use of the death penalty clearly state that it may not be imposed or carried out on people with mental or intellectual disabilities. This applies whether the disability was relevant at the time of their alleged commission of the crime or developed after the person was sentenced to death.

Jack Jones, scheduled for execution on 24 April after 20 years on death row, also has a history of serious mental disability. The jurors who sentenced him to death did not know he had been diagnosed with bipolar disorder shortly before the crime.

A theme running through US capital justice is how often juries have been denied a full picture of who it was they were being asked to send to death row. Perhaps if Don Davis, who is due to be put to death on 17 April, had had the necessary financial means, his lawyer could have hired the expert assistance he needed to develop his mitigation case at the 1992 trial. The judge had ordered an assessment by a psychiatrist, who concluded after a brief evaluation that Don Davis was not "insane" at the time of the crime, but that his attention deficit hyperactivity disorder "could have contributed to the commission of the alleged offense". The defence lawyer requested funds to hire an independent psychiatrist, arguing that, under the 1985 US Supreme Court ruling, *Ake v. Oklahoma*, Don Davis was entitled to such expertise to help him develop mitigating evidence. The judge refused to authorize the funds. In 2005, a three-judge panel of the US Court of Appeals upheld the death sentence, by two to one. The dissenting judge noted that the examination by the original psychiatrist did "not come close to satisfying the requirements of

[1] Vatican Radio, 9 January 1997.

[2] On 6 April 2017, a federal judge stayed the 27 April execution of Jason McGehee following a parole board vote (6-1) that the governor commute his death sentence. The order prevents officials from carrying out the execution until the statutory requirement that a clemency recommendation be kept open for 30 days before it goes to the governor is met. At the time of writing, seven executions could go forward; it was unclear if the state would appeal in the McGehee case.

[3] *Furman v. Georgia*, 1972, Justice Brennan concurring.

Ake", which demanded "a full and thorough examination" followed by the expert working "side by side with the defendant and defense counsel". Here, there was "no question" that the psychiatrist "only provided meager assistance", his examination was "cursory" and his conclusions "preliminary and undeveloped". He "did not conduct even the most rudimentary psychological testing, conducted no additional interviews, and was not provided an opportunity to review relevant medial, educational and psychological records from Davis's past".

SELECTING DEFENDANTS THAT 'DESERVE' EXECUTION

The judge who oversaw the 1998 trial of Jason McGehee now considers that his two co-defendant's life sentences, and McGehee's rehabilitation, mean that his death sentence is excessive punishment and has called for it to be commuted. Twenty years ago, the prosecution believed that there were three youths equally responsible for the murder of their friend (one of more than 200 murders that occurred in Arkansas in 1996) and tried to seek a death sentence for each of them. In his appeal for clemency, the now retired judge – who oversaw all three trials – described the crime as "the tragic result of a group-dynamic gone wrong" – a classic case of immature individuals doing something as a group they would likely not have done on their own. Jason McGehee was the only one of the three who got a death sentence, perhaps helped by the fact that certain mitigating evidence about his childhood was kept from the jury. A federal judge ordered a new sentencing on that issue, but that was overturned. On 6 April 2017, the parole board voted that the governor should commute Jason McGehee's death sentence, and on the same day a federal judge stayed the execution. How the governor responds to the parole board's recommendation and whether the state appeals the judge's order remains to be seen.

Jason McGehee and the seven other prisoners were each sentenced to death for capital murder. The crimes were undoubtedly serious, and had terrible consequences for the victim and her or his family and friends. Seeking to stop the state from carrying out more killings and extending the pain to more families is in no way intended to excuse the crimes of which these prisoners were convicted or to downplay the suffering caused.

The eight murders – of six women, one man and one 15-year-old boy – were committed between 1989 and 1999, representing about one third of one per cent of the more than 2,500 murders recorded in Arkansas during that time.[4] Most murders do not result in execution, either in Arkansas or the rest of the USA, begging the question about how reliably the system selects the "worst of the worst" crimes and offenders for the death penalty as required under constitutional law. At the halfway point of the 1989-1999 period, in 1994, a US Supreme Court Justice issued his now famous conclusion that the death penalty "experiment" endorsed by the Court in 1976 had failed: "The basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative", wrote Justice Harry Blackmun.[5] His conclusion still stands.

In 2015 Justice Stephen Breyer wrote: "Every murder is tragic, but unless we return to the mandatory death penalty struck down in [1976], the constitutionality of capital punishment rests on its limited application to the worst of the worst", and an "extensive body of evidence suggests that it is not so limited." He elaborated:

> "[S]tudies indicate that the factors that most clearly ought to affect application of the death penalty – namely, comparative egregiousness of the crime – often do not. Other studies show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do. Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty. Fewer, but still many, studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference. Geography also plays an important role in determining who is sentenced to death."[6]

Arbitrariness, discrimination and error remain hallmarks of the US death penalty.

RACE

Of these eight cases, four of the prisoners are black and four are white. Each was sentenced to death for the murder of a white person.

Study after study over the past four decades has found that race, particularly race of murder victim, has an impact on who receives the death penalty in the USA. Blacks and whites are the victims of murder in approximately equal numbers (meaning that black people, who make up only about 13% of the population, are disproportionately the victims of murder). In the country as a whole, 78% of executions since 1977 were of people convicted of crimes involving white victims. In Arkansas the figure is 89%. As in other states, the Arkansas Supreme Court has declined to find systematic discrimination, on the basis of the US Supreme Court's 1987 ruling that "a discriminatory purpose must be proved on the part of the decision-maker in the defendant's particular case".[7]

Stacey Johnson's lawyer sought a change of trial venue due to the extensive publicity. The judge granted the motion but chose Pike County rather than Little River County as requested. The defence objected, arguing that Pike County's

---

[4] Some of the eight were accused or convicted of other crimes, as noted in Amnesty International's Urgent Actions.

[5] *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting.

[6] *Glossip v. Gross*, 29 June 2015, Justice Breyer dissenting.

[7] *Nooner v. State*, Arkansas Supreme Court, 9 October 1995, citing *McCleskey v. Kemp*, US Supreme Court, 1987.

population had a much smaller percentage of black people (3% of registered voters compared to 19% in Little River), and this was a black defendant/white victim case. The retrial nevertheless proceeded in Pike County in 1997, before a jury with one African American member on it.

Before Ledell Lee's trial for a 1993 murder, his lawyer had moved to prohibit the use of voter registration records as the means by which to choose the pool from which his jury would be selected, arguing that it led to the systematic under representation of African Americans (again, this was a black defendant/white victim case). The motion was denied. Of the 85 people then summoned to jury service, only 10 were black, that is, 11%, compared to the over 25% in the county's population. It is unclear from the record what the racial mix of the jury eventually selected was, but the jury appears to have been chosen from the first 75 called, of whom only one was black.

INADEQUATE LEGAL REPRESENTATION

After Ledell Lee's trial, he was appointed a lawyer for his state appeal. He filed a petition claiming inadequacy of the defence lawyers' representation at trial. It was denied. The case moved to the federal courts where in 2003, a judge found that the transcript of the state post-conviction hearing indicated that Lee's lawyer had been "impaired to the point of unavailability" during the hearing. He ordered that the case be returned to the trial court. The state appealed, but in 2006, the Arkansas Supreme Court remanded the case for a new hearing on the grounds that the lawyer had been drunk during the hearing. It held that, contrary to what the state argued, "counsel who is impaired by alcohol abuse cannot be said to be qualified counsel". The lawyer had repeatedly been unable to understand questions from the judge, had not been familiar with his own witnesses, failed to tell witnesses to attend, and "rambl[ed] incoherently, repeatedly interjecting 'blah, blah, blah' into his statements". With Ledell Lee represented by newly appointed counsel, another post-conviction hearing was held in 2007. The lawyers had organized an expert mitigation investigation to pursue the claim that the trial representation was deficient, but presented none of the evidence at the hearing. The judge denied the petition. The appeal to the Arkansas Supreme Court was then delayed by five months because his lawyers twice filed briefs that did not conform to the court's rules.

"People who are well represented at trial do not get the death penalty," said US Supreme Court Ruth Bader Ginsburg in 2001. "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."[8] Federal assistance for states' efforts to get death row prisoners to the execution chamber and defeat claims of constitutional violations, including claims of inadequate legal representation, had come five years earlier in the form of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, passed by US Congress and championed by a former Governor of Arkansas, Bill Clinton. Three years after he became President, President Clinton said as he signed the AEDPA into law: "I have long sought to streamline federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served. From now on, criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences." A federal judge has characterized the AEDPA as "misconceived at its inception and born of misguided political ambition".[9] In 1998, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote that the AEDPA had "further jeopardized the implementation of the right to a fair trial" under international law.[10]

Marcel Williams is due to be killed in the Arkansas execution chamber on 24 April. But for the AEDPA, he might well now be serving a life sentence. The AEDPA placed unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts' ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited "successive" appeals except in very narrow circumstances. The US Supreme Court has said that under the AEDPA federal courts must operate a "highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt".[11] Even before the AEDPA was passed, when federal courts addressed claims of inadequate defence representation, "judicial scrutiny of counsel's performance [had to] be highly deferential".[12] With the AEDPA, federal review has to be "doubly deferential".[13]

At the 1997 capital murder trial of Marcel Williams the defence lawyers presented no mitigating evidence, despite knowing about his background of poverty, deprivation and abuse. In 2007, after the death sentence had been upheld in the state courts, a federal judge ruled that "by clear and convincing evidence" the performance of the trial lawyers had been constitutionally inadequate. After conducting a three-day evidentiary hearing, the US District Court judge summarized this evidence as follows:

---

[8] Associated Press, 10 April 2001.

[9] Hon. Stephen P. Reinhardt, The demise of habeas corpus and the rise of qualified immunity: the Court's ever increasing limitations on the development and enforcement of constitutional rights and some particularly unfortunate consequences. Michigan Law Review, Vol. 113: 1219 (May 2015).

[10] UN Doc.: E/CN.4/1998/68/Add.3, 22 January 1998. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum, Mission to the United States of America.

[11] *Woodford v. Visciotti*, 537 U.S. 19 (2002).

[12] *Strickland v. Washington*, 466 U.S. 668 (1984).

[13] See *Knowles v. Mirzayance*, US Supreme Court (2009).

"Marcel Wayne Williams was subject to every category of traumatic experience that is generally used to describe childhood trauma. He was sexually abused by multiple perpetrators. He was physically abused by his mother and stepfather, who were his primary care[givers]. He was psychologically abused by both of his primary care[givers]. He was subjected to gross neglect in all categories of neglect: medical, nutritional, educational. He was a witness to violence in the home and in his neighbourhood throughout his childhood. As an adolescent, he was violently gang-raped in prison. It should be fairly obvious that, for somebody who has been subjected to that kind of unrelenting trauma up to the point of his incarceration at the age of fifteen, who then gets raped in prison and then spends essentially ten years in prison, there's not going to be a good outcome to this. Where would he learn anything that he needs to know in order to function in society?"

The judge concluded that had the jurors heard such evidence it was likely they would have returned a life sentence. He ordered the state to give Marcel Williams a new sentencing hearing or change his sentence to life imprisonment without parole. The state appealed, however, and in 2009, a three-judge panel of the US Court of Appeals panel reversed emphasised that "we must apply the deferential standards for reviewing state court determinations mandated by AEDPA". Under the strictures of the AEDPA, the Court of Appeals ruled, the District Court had been wrong to grant an evidentiary hearing in the Marcel Williams case, and so "we must decline to consider the evidence presented at that hearing". The Court of Appeals said that the District Court had overturned the death sentence "on an evidentiary record never presented to the state courts", and that, based on the record in state court, the upholding of the death sentence by the state courts had not been unreasonable. In 2010, the US Supreme Court declined to take the case, over the dissent of two Justices, who argued that the Court of Appeals' opinion came "at an unacceptable cost to the interests of justice".

The death penalty is never compatible with human rights. As Justice Potter Stewart wrote in 1972, agreeing with the US Supreme Court's decision to overturn the country's capital laws, the death penalty "is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[14]

STOP THIS SENSELESS STATE KILLING

In 2008, the then most senior Justice announced that his 30 years on the Court had led him to conclude that death penalty represented "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes", and as such was an unconstitutionally cruel and excessive punishment.[15]

The condemned wait, held in the final weeks of their decades-long cycle of hope and despair, while their executioners prepare to inflict the "pointless and needless extinction of life". This cruel ritual can be stopped regardless of recent decisions taken by the Arkansas parole board, which on 6 April voted to recommend that Governor Asa Hutchinson commute the death sentence of Jason McGehee but deny clemency to Stacey Johnson, Ledell Lee, Marcel Williams and Kenneth Williams (on 10 April the board voted unanimously against clemency for Jack Jones). The Governor has independent clemency authority regardless of any recommendation from the board.

"*We grew up in the same gang-infested neighbourhood; we [] lived as outlaws, who ran the streets of Pine Bluff, Arkansas, living dangerously on the edge… I was ten years old the first time I was sentenced to the boy's school for reform. After my release, I committed recidivism over and over again. I fled just about every foster home my case worker placed me in. At sixteen years old I was sentenced to prison for first degree escape from 'The Arkansas Serious Offender Program' and for second degree battery… After serving two years and two months, I was released on April 2, 1998…. I'm on Death Row, the closest a person can come to being in a grave without actually being there… We've all dropped the ball in some way, and boy does it show unmistakably in our school houses, in our jails, and prisons, our rehabs, and yes… most regrettably, our graveyards too.*" Kenneth Williams, scheduled for execution on 27 April, for a murder committed during a prison escape when he was 20.

Amnesty International opposes the death penalty unconditionally, regardless of aggravation, mitigation, or the execution method chosen by the state. To end the death penalty is to abandon a destructive, diversionary and divisive public policy, which not only runs the risk of irrevocable error, but is also costly, to the public purse as well as in social and psychological terms. The death penalty has not been proved to have a special deterrent effect. It tends to be applied in a discriminatory way in the USA, on grounds of race and class. It denies the possibility of rehabilitation, prolongs the suffering of the murder victim's family, and extends the suffering to friends and relatives of the condemned. It diverts resources that could be better used to work against violent crime and assist those affected by it.

In 1993, an article entitled "Death in Arkansas" appeared in The New Yorker, telling the story of what remains to this day one of the most notorious executions of the modern era in the USA. Whether or not to proceed with the execution of a mentally disabled man "became a test in Arkansas of the lengths to which a society would pursue the old urge to expiate one killing by performing another – and a test of the state's highest temporal authority, the governor, who alone could stop it." [16] That execution was not stopped, to the enduring shame of those involved.

In the end, any execution is a policy choice, not a legal requirement. The Governor of Arkansas can stop these premeditated killings. He should do so by commuting all eight death sentences now.

---

[14] *Furman v. Georgia*, 1972, Justice Stewart concurring.

[15] *Baze v. Rees*, Justice Stevens, concurring.

[16] See Death in Arkansas, by Marshall Frady. The New Yorker, 22 February 1993.