

# USA

## CALL ON GOVERNOR TO STOP EXECUTION

### STATE OF ALABAMA FILES EMERGENCY MOTION TO BE ALLOWED TO EXECUTE MAN WITH MENTAL DISABILITY

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In an emergency motion filed on 2 October 2017, the State of Alabama has asked the US Supreme Court to lift a stay of execution granted to Jeffrey Borden by the federal Court of Appeals. If successful, the execution would be reset for the evening of 5 October. While the stay relates to a challenge to the state's lethal injection protocol, Jeffrey Borden is said by his lawyers to have a severe mental disability and to be "actively psychotic".

Cheryl Borden and her father Roland Harris were shot dead at a family gathering in Gardendale, Alabama, on 24 December 1993. Jeffrey Borden, the estranged husband of Cheryl Borden, was charged with capital murder. He pled "not guilty by reason of mental disease or defect". The defence highlighted a watershed event in Jeffrey Borden's life, namely a car accident in 1977 that had left him in a coma for four days and with a severe head injury. The jury was told of his subsequent history of mental disability, multiple hospitalizations, suicide attempts, electro-shock treatment and medication. A psychiatrist testified for the defence that, in his opinion, Jeffrey Borden had had schizo-affective disorder – a serious mental disability combining schizophrenia and depression – since at least 1981 and that he was likely experiencing the symptoms of this disorder at the time of the shootings. For the state, a psychiatry professor testified that while he would not "necessarily dispute that [Borden] may have at some time in the past been suffering from mental illness or psychosis", at the time of the crime Jeffrey Borden had not been "operating under irresistible impulse". The jury found Jeffrey Borden guilty of capital murder on 14 September 1995.

The sentencing phase began on the same day. The defence presented members of Jeffrey Borden's family who testified about his mental disability and his changed mental state after the 1977 accident, but did not present any testimony from the doctors who had treated Jeffrey Borden. By a vote of 10-2 on the morning of 15 September 1995, the jury voted to recommend the death penalty. On 13 November 1995, the judge accepted that recommendation, finding the presence of two mitigating factors – that the defendant had no prior criminal history and that the crimes were committed "while the defendant was under the influence of extreme mental or emotional disturbance".

In an opinion issued in 2011, a three-judge panel of the US Court of Appeals for the 11<sup>th</sup> Circuit stated that "we are not blind to the possibility that testimony from Borden's treating physicians at the penalty phase of his trial could have strengthened his ability to full present the mitigating circumstances... and we can imagine that hearing testimony from his doctors could have provided a more in-depth view of Borden's mental state over the years". But, by a two one vote, it upheld the death sentence, under the deferential standard imposed on it under US law. The dissenting judge argued that "testimony from Borden's physicians would have rebutted a powerful and pervasive attack levelled at Borden's mental-health strategy throughout the entire trial" by the prosecution which had argued that he was "faking" and making "excuses".

On 7 September 2016, lawyers for Jeffrey Borden filed a complaint challenging Alabama's lethal injection protocol. Three weeks later, this was consolidated with the cases of four other Alabama death row plaintiffs. The federal US District Court dismissed the complaints on 31 March 2017. The plaintiffs appealed, but the state moved to set an execution date for Jeffrey Borden, and 5 October 2017 was the date set.

After the 11<sup>th</sup> Circuit vacated the District Court's dismissal of the lethal injection lawsuit on 6 September 2017, Jeffrey Borden's lawyers filed a motion to vacate his execution date. Having received no decision from the Alabama Supreme Court on this motion a week later, they filed an emergency motion in the 11<sup>th</sup> Circuit. The Alabama Supreme Court denied the stay motion before it on 22 September, but the 11<sup>th</sup> Circuit Court of Appeals granted the motion before it on 29 September.

On 2 October 2017, the state of Alabama filed an emergency motion of its own in the US Supreme Court asking for “expedited consideration” by the Court and for it to intervene “to vacate an unlawful decision”: “the Eleventh Circuit erred in placing Borden’s interest in pursuing more meritless litigation above the State’s and victims’ strong interest in carrying out its judgment against Borden’s crime. This Court should vacate the lower court’s stay.”

In their response, lawyers for Jeffrey Borden noted: “The State begins its recitation of the procedural history of this case with the facts of the offense, which are completely irrelevant to the issue before this Court. Mr Borden would note that the facts, while irrelevant, are also incomplete. The State does not tell this Court about Mr Borden’s history of psychological, sexual and physical abuse as a child, and his severe mental illness, which includes numerous suicide attempts, hospitalizations, and nine attempts at electroconvulsive therapy that pre-date his capital crime. All of these attempted treatments failed, and Mr Borden is actively psychotic to this day.”

If the US Supreme Court does not rule by midnight on 5 October, the execution will not proceed. Amnesty International calls on Governor Kay Ivey to step in and stop this execution in the event that the state is successful in having the stay of execution lifted.

## **ADDITIONAL INFORMATION**

International law and standards on the use of the death penalty hold that it not be imposed or carried out on people with mental or intellectual disabilities. This applies whether the disability was relevant at the time of the crime or developed after the person was convicted.

There have been 1,460 executions in the USA since judicial killing resumed in 1977 under new capital statutes approved by the US Supreme Court in 1976. Alabama accounts for 60 of these executions. It was one of five states which executed in 2016, a year which saw the lowest national judicial death toll for 25 years. There have been 18 executions in the USA this year, two of them in Alabama. Amnesty International opposes the death penalty, unconditionally. Today some 141 countries are abolitionist in law or practice.

Alabama Governor Robert Bentley resigned on 10 April 2017 and pled guilty to certain misdemeanours. Lieutenant Governor Kay Ivey was sworn in as governor on 10 April, saying: “Today is both a dark day for Alabama yet also one of opportunity. I ask for your help and patience as we together steady the Ship of State and improve Alabama’s image. Those are my first priorities as your 54<sup>th</sup> Governor.” The two executions in Alabama this year have been carried out since then.