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UNITED STATES OF AMERICA

THE DEATH PENALTY: WARREN McCLESKEY (GEORGIA)

July 1991

RACE:	Black	**DATE OF BIRTH:**	17 March 1946
DATE OF CRIME:	13 May 1978	**AGE AT CRIME:**	32
DATE OF SENTENCE:	12 October 1978	**MURDER VICTIM:**	White policeman

SUMMARY OF AMNESTY INTERNATIONAL'S CONCERNS:

Warren McCleskey, a prisoner under sentence of death in Georgia, has exhausted his legal appeals and Amnesty International fears that an execution date will soon be announced. McCleskey, who is black, was convicted of the murder of a white police officer. Amnesty International is concerned that the US Supreme Court, in 1987, narrowly dismissed an appeal in his case based on a claim that the death penalty in Georgia was applied in a racially discriminatory manner. The appeal presented evidence that those who killed white victims were more likely to receive the death penalty than other defendants. Amnesty International is also concerned by a further Supreme Court ruling in the case in 1991 for reasons described below. Amnesty International believes that the arguments presented in the case provide strong grounds for granting clemency.

Amnesty International opposes the death penalty in all cases as a violation of the right to life and the right not to be subjected to cruel, inhuman and degrading treatment or punishment, as proclaimed in the Universal Declaration of Human Rights.

CURRENT STATUS: Warren McCleskey has exhausted all available legal appeals and it is feared likely that an execution date will soon be announced. McCleskey's two appeals to the US Supreme Court, both raising substantial issues, were heard by the Court and denied in 1987 and 1991.

CRIME: Warren McCleskey, black, was convicted of the murder of a white police officer during an armed robbery of a furniture store in Atlanta, Georgia. The robbery was committed by four armed men, one of whom shot and killed the off-duty policeman who entered the store while the robbery was in progress. No witness from the store could identify which of the four robbers shot the police officer.

McCleskey initially confessed to police that he had participated in the robbery. He later renounced his confession. One of the other accomplices testified at McCleskey's trial that McCleskey had shot the officer. The prosecution also introduced the testimony of Offie Evans, a "jail informer" who had been placed in a cell next to McCleskey. Evans testified that, during conversations, McCleskey had admitted shooting the officer.

US Supreme Court Justice Thurgood Marshall commented in 1991, "Outside of the self-serving and easily impeachable testimony of the codefendant, the <u>only</u> evidence that directly supported the

State's identification of McCleskey as the triggerman was the testimony of Evans...Without it, the jury might very well have reached a different verdict."[1]

McCleskey was convicted and sentenced to death by a jury of 11 white and 1 black jurors.

LEGAL BACKGROUND:

McCLESKEY v KEMP: One of McCleskey's main issues on appeal was that Georgia's death penalty, in its application, discriminated on the basis of race. This became a major constitutional challenge to the death penalty in the USA and resulted in the landmark ruling McCleskey v Kemp, announced by the US Supreme Court on 22 April 1987.

McCleskey contended that Georgia's capital punishment system was unconstitutional because those who killed white victims were four times more likely to receive the death penalty than other defendants in cases at similar levels of aggravation. Black defendants charged with killing white victims were more likely to receive the death penalty than any other category of offender. McCleskey's argument was supported by evidence in the form of a detailed statistical study undertaken by Professor David Baldus of Iowa State University.

Baldus examined more than 2,000 homicide cases in Georgia during the period 1973 to 1979. The significant racial disparities in death sentencing persisted even after the study took into account more than 230 non-racial factors. It found, for example, that prosecutors had sought the death penalty in 70 percent of cases involving black defendants and white victims, as opposed to only 32 percent of cases involving white defendants and white victims, and 19 percent of white defendants with black victims.

By five votes to four, the US Supreme Court rejected McCleskey's appeal. It said the racial disparities revealed in the Baldus study were insufficient to show that Georgia's capital sentencing system was operating "irrationally" or "arbitrarily." The Court did concede that "apparent disparities in sentencing are an inevitable part of our criminal justice process," and that any system for determining guilt or punishment "has its weaknesses and potential for misuse," but said that McCleskey had failed to prove that the decision-makers in his particular case had acted with discriminatory intent.

In three strongly-worded separate written opinions the four dissenting judges criticized the majority decision. The dissenting justices were persuaded that the Baldus study revealed a risk of racial discrimination in the operation of Georgia's death penalty statute that clearly violated the US Constitution. Justice William Brennan said that the "risk that race influenced McCleskey's sentence is intolerable by any imaginable standard."

McCLESKEY v ZANT: Following the US Supreme Court's ruling in McCleskey v. Kemp, an execution date was set for mid-July 1987. A stay of execution was granted after McCleskey's lawyers unexpectedly uncovered important new evidence regarding the testimony given at trial by Offie Evans (see above). This evidence indicated that Evans had been a police informer and had been placed in the adjacent cell to McCleskey on purpose. Evans had used a false name, had purported to know a friend of McCleskey's and had coaxed him into giving details of the crime. In return for his testimony against McCleskey, the charges against Evans were dropped.

A second federal habeas corpus petition was filed and, in December, 1987 the Federal District Court in Atlanta ordered that McCleskey be granted a new trial. The judge found that McCleskey's constitutional right to counsel had been violated by the use of the informer to elicit incriminating statements from him. The District Court found that the State had covertly planted the informer Evans in an adjoining cell for the purpose of eliciting incriminating statements that could be used against McCleskey at trial. However, the Court of Appeals

[1] McCleskey v Zant, decided 16 April 1991, Justice Marshall, dissenting (with Blackmun and Stevens joining).

reinstated the conviction saying that McCleskey should have raised the informant issue during his first round of appeals in 1981.

McCleskey petitioned the US Supreme Court which again agreed to hear his case. Its ruling in April 1991 was another landmark decision which once again upheld McCleskey's conviction and death sentence. The Court held by six votes to three that second habeas corpus petitions must be dismissed except in unusual circumstances. Under the Court's new rule, a prisoner must show "cause" for not having raised a new argument earlier, and that he or she suffered "actual prejudice" from the constitutional error in question.

In McCleskey's case, Justice Kennedy (for the majority) said the fact that his lawyer had failed to raise the issue earlier did not constitute "cause," even though the state had withheld the informer's 21-page statement from the defense team. (The new evidence was obtained only after McCleskey's lawyers filed a request under a state "open records" statute that was not construed to apply to police files until 1987.) Writing for the dissent, Justice Marshall vehemently argued that McCleskey had suffered "prejudice" from the informer's testimony in that it formed a critical part of the prosecution's case against him. It was the only evidence that directly supported the State's identification of McCleskey as the triggerman.

AMNESTY INTERNATIONAL'S CONCERNS: In 1987, Amnesty International expressed its grave concern at the US Supreme Court's decision in McCleskey v Kemp. It found the evidence of racial discrimination in the application of Georgia's death penalty statute to be compelling. Amnesty International is deeply disturbed that the Court has seen fit to tolerate a system in which there is a clear and substantial risk that the race of the victim and the defendant may be the determining factors in who is sentenced to death for the crime of murder.

The ruling against Warren McCleskey was passed by only the narrowest majority, with four of the nine Justices entering vigorous dissents. The risk remains that racial considerations may have improperly influenced the outcome of Warren McCleskey's trial.

The US Supreme Court's 1991 ruling, McCleskey v Zant also gives grave cause for concern. The ruling denied McCleskey's petition, not on its merits, but on the procedural grounds that prisoners will not be permitted to file a second federal habeas corpus petition other than in exceptional circumstances. The merits of McCleskey's second appeal are compelling and the Court's refusal to address them extremely disturbing.

Amnesty International is extremely concerned that Warren McCleskey faces imminent execution despite the very substantial arguments which mitigate in favour of clemency.

As of 24 April 1991 there were 113 prisoners under sentence of death in Georgia, 54 of whom were black. The most recent execution in the state was that of Henry Willis on 18 May 1989. Ten of the 14 people executed in Georgia since the death penalty was reinstated in the 1970s have been black, nine of whom were convicted of murdering white victims. No white person has been executed under Georgia's current death penalty laws for the murder of a black victim.