

UA 38/07

Death penalty / Legal concern

USA (Texas) Donald Anthony Miller (m), white, aged 44

Donald Miller is scheduled to be executed in Texas on 27 February 2007. He was sentenced to death in 1982 for the murder of Michael Mozingo earlier that year. Donald Miller was 19 years old at the time of the crime. He has been on death row for nearly 25 years.

Michael Mozingo and another man, Kenneth Whitt, were robbed and shot dead on 2 February 1982. Three men were charged with the crime: Eddie Segura, Danny Woods and Donald Miller. Before Donald Miller's trial, Eddie Segura pleaded guilty to aggravated robbery and became a key witness against Donald Miller. Segura was sentenced after Miller's trial, to 25 years in prison. Before Miller's trial, Danny Woods, who admitted to shooting Kenneth Whitt, pleaded guilty to murder and was sentenced to life imprisonment. Woods did not testify at Miller's trial. Donald Miller, according to his trial attorney (now deceased), faced a death penalty trial after he refused a plea bargain of a life sentence in return for a guilty plea.

Following an evidentiary hearing in 2002, a federal district court judge ruled in 2004 that the prosecution had withheld exculpatory evidence at Donald Miller's trial, in violation of the US Supreme Court's 1963 ruling, *Brady v. Maryland*. The federal judge found that the withheld evidence was material to the question of sentencing: that is, the sentence might have been different if the evidence had not been suppressed.

The evidence in question related to statements made by witnesses prior to the trial. The federal judge noted that pre-trial statements made by Ray McCall, who was the brother of Eddie Segura's then-girlfriend, were inconsistent with his trial testimony against Miller and could have been used by the defence to undermine McCall's credibility. At the 2002 evidentiary hearing, Miller's trial lawyer had described McCall's testimony as "the most devastating testimony in the whole trial" in that it depicted Donald Miller as a cold-blooded and remorseless killer. The federal judge also noted inconsistencies in the statements of another witness, Archie Morris, who was Ray McCall's grandfather. Prior to the trial, Morris had told investigators that he only owned a .22 calibre handgun and had not given it to Donald Miller. At the trial, however, he testified that on the day of the crime Miller had borrowed from him the .38 calibre gun used in the shooting.

In addition, the state suppressed affidavits from four people who did not testify at the trial. Robert White, for example, stated that Danny Woods had told him that after one of the victims had been killed with a shotgun, "either Danny or the guy with Danny then reached down into his boot and pulled a .38 pistol and shot the other guy when he started to run". Miller's appeal lawyers have argued that this was important because it was established at trial that Miller was not wearing boots at the time of the murders. White's affidavit also states that the day after the murders, Woods had denied that Miller was involved. The federal judge found that the affidavits indicated that Woods may have killed both victims and that Segura was armed at the time.

On appeal to the US Court of Appeals to the Fifth Circuit, the state argued that District Court's decision was wrong, and Miller's appeal lawyers countered that the suppressed evidence not only went to the question of the reliability of the sentence, but also to the question of Miller's guilt. The Fifth Circuit panel rejected Miller's arguments about guilt and overturned the District Court's ruling on sentencing. One of the three judges dissented, arguing that "the various pieces of evidence, taken together, could have raised a reasonable doubt in a juror" when deciding whether to vote for a death sentence. On McCall's testimony, the dissenting judge noted that although McCall was "generally impeached on cross-examination as a dishonest criminal who was not always truthful with the police during the investigation", there "is a significant difference between evidence that a witness is generally not truthful and specific evidence that he gave inconsistent statements with respect to the subject of his crucial testimony ... The defence was not able to cross-examine McCall about his [pre-trial] statements ...". The judge said that McCall provided "important corroboration of Segura's account of the crime, which portrayed Miller as a leader in the killings, so weakening his testimony could have cast doubt on whether Miller planned the killings and was an actual shooter". Similarly, Archie Morris' testimony had provided "critical corroboration ... linking Miller to one of the murder weapons" and yet the credibility of his testimony had gone unchallenged at the trial.

In Texas, a jury can only pass a death sentence if it unanimously agrees that the defendant would likely commit future criminal acts of violence if allowed to live, even in prison (the "future dangerousness" question). The dissenting Fifth Circuit judge noted that undermining the prosecution's portrayal of Donald Miller as ringleader and gunman in the crime could have affected the jury's finding that he posed a future danger.

A study published by the Texas Defender Service in 2004 concluded that predictions of "future dangerousness" in the Texas death penalty system were wrong in a majority of cases, and that "basing capital sentencing decisions on predictions of future dangerousness is unjustifiable – and not only because a system that so allots punishment in effect punishes defendants for offences they may or may not commit, thus violating the fundamental legal principle that the accused is innocent until proven guilty." During his nearly 25 years on death row, Donald Miller is reported never to have been disciplined for violent or aggressive behaviour towards other inmates, guards, or anyone else. He was reportedly once accused of assaulting a guard, but was cleared of

this by the prison system.

In 1995, a US Supreme Court Justice wrote that executing a prisoner who had been on death row for 17 years – eight years less than Donald Miller has suffered – arguably negated any deterrent or retributive justification for the punishment. In 2002, in the case of an inmate who had been on death row for about 27 years, another Justice wrote of this "extraordinarily long confinement under sentence of death, a confinement that extends from late youth to later middle age." If executed, the Justice stated, the prisoner would have been "punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel", in violation of the US Constitution.

Since the USA resumed judicial killing in 1977, there have been 1,062 executions, of which 383 (36 per cent) have been carried out in Texas. Texas has executed nearly four times as many people as the next leading death penalty state, Virginia. Although there are signs that the USA is slowly turning against capital punishment (see *USA : The experiment that failed: A reflection on 30 years of judicial killing*, 16 January 2007, <http://web.amnesty.org/library/Index/ENGAMR510112007>), the rate of judicial killing in Texas remains high. In 2006, Texas carried out 24 executions, five times as many as the next highest state total. Four of the five executions in the USA so far in 2007 have been carried out in Texas. Governor Perry's governorship of Texas has seen 144 executions in the state (since 2001). There were 152 executions in Texas during the five-year term of his predecessor, George W. Bush.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language:

- expressing sympathy for the family and friends of Michael Mozingo and Kenneth Whitt, stating that you are neither seeking to condone the manner of their deaths in 1982 nor to downplay the suffering caused;
- opposing the execution of Donald Miller for the murder of Michael Mozingo;
- expressing concern that the prosecution suppressed evidence at his trial, and noting that two federal judges have concluded that the evidence could have made a difference to the sentencing outcome;
- noting that despite doubts about whether Donald Miller was the ringleader in the crime, as the prosecution depicted, he would be the only defendant to be executed, raising questions of arbitrariness;
- noting that the jury's determination that Donald Miller would be a future danger to society, even in prison, has not been borne out by his past 25 years on death row;
- calling on the Governor to stop this execution and do all in his power to bring about clemency.

APPEALS TO:

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. *****