

2007
UA 45/07

Death penalty / Legal concern

USA (Texas) Joseph Bennard Nichols (m), black, aged 45

Joseph Nichols is scheduled to be executed in Texas on 7 March 2007. He was sentenced to death in 1982 for the murder of 70-year-old grocery store employee Claude Shaffer in 1980. Joseph Nichols was 19 years and one month old at the time of the crime. He has been on death row for 25 years.

On 13 October 1980, 24-year-old Willie Williams and Joseph Nichols, both black, robbed a grocery store in Houston. There were three employees in the store – Claude Shaffer, white; Cindy Johnson, white; and Teresa Ishman, black. During the robbery, Claude Shaffer was shot. He died from a single bullet wound. Both assailants had fired their weapons. Cindy Johnson was interviewed by police at the scene, but Teresa Ishman left. She returned and gave her name as Teresa McGee, but was not interviewed at the scene. Defence lawyers later tried to locate Teresa "McGee", but to no avail, and she played no part in the trials.

Willie Williams was brought to trial first. He pleaded guilty to killing Claude Shaffer. He said that Nichols had fired first but had not hit Shaffer. He said that Nichols was "already out the door and I had the gun still pointed back toward the old man. I thought [Shaffer] was coming up on me and I just fired". The state presented the medical examiner's evidence in support of its theory that Williams had shot Shaffer. The prosecutor said to the jury: "Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence ...there is only one bullet that could possibly have done it and that was Willie Williams' ... Nichols is out the door." The "law of parties" formed no part of the jury instruction. This is the Texas law under which the distinction between principal actor and accomplice in a crime is abolished and each defendant may be held equally culpable. Williams was sentenced to death in January 1981. He was executed on 20 January 1995.

Joseph Nichols was brought to trial in July 1981. The state argued that regardless of who fired the fatal shot, Nichols was guilty under the law of parties. The defence argued "abandonment", that is that the murder had occurred after Nichols had left the crime. The jury found him guilty of capital murder, but a mistrial was declared after the jury was unable to reach a sentencing verdict. Following the trial, the prosecution interviewed some of the jurors and learned that their doubts about whether Joseph Nichols had been the person who had fired the fatal shot had left them unable to agree on the death penalty.

Joseph Nichols was retried in February 1982 by the same prosecutor. The jury was instructed on the law of parties, but this time the prosecution primarily argued that Nichols had fired the fatal shot. It did not base this about-turn on any additional investigation. The prosecutor argued that "Willie could not have shot [Shaffer] ...[Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that". The prosecution relied heavily on the testimony of Cindy Johnson, arguing to the jury: "I'll tell you that it was [Nichols's] hand that did the killing. How do you know that? Cindy saw it. She told you". Additionally, the state presented evidence from the same medical examiner as in Williams' trial to support this new theory that the bullet came from Nichols's position in the store. In March 1982, the jury voted for a death sentence.

In 1992, a federal judge ruled that the prosecution had presented false evidence by changing its argument from Nichols's first trial to his retrial (Nichols II). Judge David Hittner said: "The State argued, the jury found, and the court accepted the determination in the Williams trial that Williams was the triggerman, not just a party to the offence. That fact was established as the truth. This court has concluded that the prosecutor in charge of Nichols II offered evidence and argued to the jury and court that Nichols was the triggerman. By prior judicial determination, the evidence submitted was necessarily false. Accordingly, this court finds that the prosecutor in charge of Nichols II knowingly used false evidence to obtain the conviction and sentence in Nichols II." Judge Hittner concluded that "the due process boundary upon prosecutorial misconduct and the appearance of basic fairness derived from that boundary command a determination that, in a criminal prosecution, the State is constitutionally [barred] from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial". He said that "Williams and Nichols cannot both be guilty of firing the same bullet because physics will not permit it". He ordered that Nichols be released or retried. However, the state appealed and the Fifth Circuit Court of Appeals overturned Judge Hittner's ruling.

In 1992, Judge Hittner had ordered the state to produce all its files in the case. These revealed that Teresa McGee was in fact Teresa Ishman; that the state had known her true identity before Nichols's trials; had known that she would not be at the Houston address provided to the defence; and had interviewed her in the county jail prior to extraditing her to Louisiana on a shoplifting charge (the reason Ishman had assumed a false name). Her statements during those interviews threw doubt on the reliability of Cindy Johnson's testimony. For example, she claimed that Johnson could

not have seen the fatal shots fired because she had been hiding in the bathroom at the time. Judge Hittner had not considered the non-disclosure of evidence because it had not been ruled on in state court. The issue was returned to the state courts which concluded that the prosecution had failed to inform Nichols's lawyers about the location and true identity of Teresa Ishman, and that her testimony would have in some respects been favourable to Nichols, but that the suppression of her name and identity had not affected the outcome of the trial. The federal courts have upheld the death sentence.

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 Joseph Nichols 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 1,063 executions, of which 384 (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. Five of the six executions in the USA so far in 2007 have been carried out in Texas. Race, particularly race of murder victim, has consistently been shown to be a factor in US death sentencing. Similar to the national picture, 75 per cent of those executed in Texas since 1977 were put to death for crimes involving white victims, and 21 per cent were of black defendants convicted of killing white victims.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language (please quote Joseph Nichols' prison number, #709, in appeals):

- expressing sympathy for the family of Claude Shaffer, and explaining that you are not seeking to condone the manner of his death or to downplay the suffering caused;
- expressing deep concern at the state's tactics in this case, including the prosecution's use of inconsistent arguments to obtain two death sentences in the same crime, and the state's failure to disclose the name and identity of an eyewitness whom it knew the defence lawyers were trying to locate;
- noting that Joseph Nichols has been on death row for 25 years, and that US Supreme Court Justices have raised concerns that such use of the death penalty may amount to excessive and cruel punishment;
- calling for clemency for Joseph Nichols in the interest of justice.

APPEALS TO:

Rissie Owens, Presiding Officer, Texas Board of Pardons and Paroles, Executive Clemency Section
8610 Shoal Creek Boulevard, Austin, Texas 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 7 March 2007.
