

13 May 2008

UA 124/08

Death penalty / Legal concern

USA (Mississippi)

Earl Wesley Berry (m), white, aged 49

Earl Berry is scheduled to be executed in Mississippi at 6pm local time on 21 May 2008. He was sentenced to death for the murder of Mary Bounds in 1987. His lawyers have provided the courts with evidence that he has mental retardation which, if the case, would render his execution unconstitutional. However because his former lawyers had failed to file the requisite expert evidence in timely fashion, he has not had an evidentiary hearing on this claim and has been held to be barred on procedural grounds from such judicial review.

Mary Bounds was reported missing on 29 November 1987. Her car was found on 1 December near the First Baptist Church she attended in Houston, Mississippi. Her body was found the next day in nearby woods. She had died of head injuries as a result of blows to the head. On 6 December, 28-year-old Earl Berry was arrested at his grandmother's house, and confessed to the crime. He rejected an offer from the prosecution of a life sentence in return for a guilty plea. After a jury trial, he was sentenced to death on 28 October 1988.

The death sentence was overturned by the state Supreme Court which found fault with the instructions given to the jury, and a resentencing was held in June 1992. At this hearing, the defence presented mitigating evidence, including testimony from a neuropsychologist about Earl Berry's low intellectual functioning and possible brain damage. A psychologist also testified that, in his opinion, Berry suffered from paranoid schizophrenia. For his part, the prosecutor resorted to potentially inflammatory comments in seeking a death sentence. For example, he made what amounted to little more than a call for vengeance in a speech based around the notion of "justice". He asked "where is the justice and mitigation and mercy of being a faithful member of the First Baptist Church, a member of the choir, taught Sunday school, there when the doors are open? ... This woman was there every time the doors were open, at night, Sunday night. She missed choir practice that night. No doubt about that. ... [T]here is only one verdict in my opinion. That is this man receive the death penalty, the same penalty Mary Bounds got without hearing by jury or a trial. That man acted as judge, jury, and executioner all in a matter of minutes. She didn't have any of the benefits of any justice or mitigation or mercy, and there is none due here in my humble opinion". The prosecutor also injected Biblical references into the proceedings when urging the jury to vote for the death penalty, arguing for example, that "it's authorized by Mississippi, and it's been authorized by scriptural law for a long time".

The jury voted for a death sentence. The sentence was again appealed to the state Supreme Court, which remanded the case to the trial court for a hearing on the prosecutor's dismissal of five African American potential jurors during jury selection (the eventual jury had one African American on it). The defence argued that the African Americans had been struck because the prosecution believed they would be less likely to vote for the death penalty. The prosecutor provided reasons for the dismissals. For example, he said that one African American had been dismissed because she had a patchy employment history, and another because he had relatives in jail and an unstable employment history. The trial court ruled that such reasons were "race-neutral", and that a prima facie case of discrimination had not been made.

Earl Berry's lawyers have challenged his death sentence with the claim that he has mental retardation. The US Supreme Court banned the execution of people with mental retardation in *Atkins v. Virginia* in 2002. In *Chase v. State* in 2004, the Mississippi Supreme Court announced the criteria for determining which inmates sentenced to death in Mississippi before the *Atkins* decision should receive an evidentiary hearing on a claim of mental retardation. Under this test, the condemned prisoner must provide on appeal an affidavit from a qualified expert to the effect that the inmate has an IQ of 75 or below, and in the opinion of the expert "there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded". For reasons that are unclear, but possibly due to lack of funding for, and the sheer workload on, the understaffed public defender office representing Earl Berry at that time – Berry's claim of retardation was not supplemented by the requisite expert affidavit after the *Chase* ruling. In August 2004, the state Supreme Court ruled that Berry had failed to comply with the *Chase* criteria and denied him an evidentiary hearing.

On 24 April 2008, a psychologist with expertise in mental retardation signed an affidavit stating that his review of the materials relating to Earl Berry had led him to the conclusion that Berry had an IQ of 75 or lower and/or "significantly sub-average intellectual functioning,

and “to a reasonable degree of psychological certainty that further testing will demonstrate that Mr Berry meets the criteria established by the American Psychiatric Association and the American Association on Mental Retardation to be classified as mentally retarded”. Among other things, he noted that during Berry’s school years his IQ was assessed as low as 72, and when the 25-year-old Berry was discharged from a Mississippi Department of Corrections prison hospital on 24 April 1985 following an apparent suicide attempt, the final diagnosis was “suicidal gestures / mentally retarded”. Other affidavits – from Earl Berry’s mother, other relatives, and people who knew Berry – describe Berry’s slow development as a child, childhood head injuries he sustained as a boy, and the fact that even as an adult he never lived independently. His mother said that he attempted suicide six or seven times.

On 5 May 2008, despite this new *Chase*-compliant expert affidavit, the Mississippi Supreme Court ruled that Earl Berry’s claim of retardation was procedurally barred. The Presiding Justice of the Court dissented: “As an indigent defendant sentenced to the ultimate and final punishment, Berry is entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief. He has now presented this Court with substantial evidence that but for his post-conviction attorney’s deficient performance, he would have been granted an opportunity to pursue his claim that he is mentally incompetent pursuant to *Atkins*. . . . Whatever the reasons for his prior counsel’s deficient performance, it is clear that Berry was not allowed a meaningful opportunity to present his mental retardation claim to this Court. . . . When appointed counsel fails to provide the Court with the relevant facts, the system designed to ensure due process as well as a timely end to the appellate process, ceases to function. In the end, justice fails for all of those involved”.

Since the USA resumed executions in 1977, 1,100 prisoners have been put to death, eight of them in Mississippi. Discrimination, arbitrariness and error have been hallmarks of US capital justice. Amnesty International opposes the death penalty in all cases, unconditionally. There is no such thing as a humane, fair, reliable or useful death penalty system (see ‘*The pointless and needless extinction of life’: USA should now look beyond lethal injection issue to wider death penalty questions*, <http://www.amnesty.org/en/library/info/AMR51/031/2008/en>).

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

- expressing sympathy for any family of Mary Bounds, and explaining that you are not seeking to excuse the manner of her death or to downplay the suffering it will have caused;
- opposing the execution of Earl Wesley Berry;
- noting evidence that Earl Berry has mental retardation, and expressing concern that he has not even had an evidentiary hearing on this issue as a result of his prior counsel’s failure to file the necessary affidavit;
- pointing out that the power of executive clemency is not restricted by the sort of technical procedural rules that may leave courts unwilling or unable to prevent injustices;
- urging the Governor to grant clemency to Earl Berry.

APPEALS TO:

Haley Barbour, Governor of Mississippi, P.O. Box 139, Jackson, Mississippi 39205, USA

Fax: +1 601 359 3741

Email: governor@governor.state.ms.us

Salutation: Dear Governor

COPIES TO: diplomatic representatives of USA accredited to your country.

PLEASE SEND APPEALS IMMEDIATELY. All appeals must arrive by 21 May 2008.