

**PUBLIC**

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**Death penalty / Legal concern**

**04 August 2006**

**USA (Oklahoma)**

**James Patrick Malicoat (m), white, aged 31**

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James Malicoat is scheduled for execution in Oklahoma on 22 August 2006. He was sentenced to death in 1998 for the murder of his 13-month-old daughter Tessa Leadford in 1997.

On 21 February 1997, James Malicoat and his girlfriend brought their 13-month-old daughter to the county hospital emergency room. It was determined that the child had been dead for several hours, and that her death had been caused by a head injury and internal bleeding from abdominal injuries. James Malicoat subsequently admitted to police that he had caused the injuries. He said that he had not realized that his actions would seriously hurt or kill his child. He was charged with first-degree murder and brought to trial in 1998. In Oklahoma, first-degree murder by child abuse is a "general intent" crime. As such, the prosecution was not required to prove that James Malicoat intended to kill or injure his child, but only that he intended to commit the abusive act. The Oklahoma Court of Criminal Appeals (OCCA) has upheld the constitutionality of this law and ruled that a defendant convicted under it may be sentenced to death.

The jury convicted James Malicoat and sentenced him to death. In 2000, the OCCA upheld the sentence despite finding numerous instances of prosecutorial misconduct at the sentencing phase. Evidence that James Malicoat had failed to pay child support was admitted at the trial. The OCCA said this was irrelevant and "could only serve to prejudice Malicoat further in the eyes of the jurors". The prosecutor read out in court a first-hand account of the baby's final hours, that is, as if from the child's perspective. The OCCA described this as "theatrical", and conduct that "very nearly constitutes an improper solicitation of sympathy for the victim". The prosecutor repeatedly described Malicoat as a "monster" and "evil". The OCCA noted that it had "repeatedly looked with disfavor on this sort of name-calling". It described as "improper and reprehensible" several of the prosecutor's arguments for execution. Nevertheless, it ruled that this misconduct, even cumulatively, had been harmless to the defendant.

Over the objection of the defence, the state had introduced a photograph of Tessa Leadford taken two months before her death. The OCCA said that photographs of live victims are "generally inadmissible, as they are irrelevant to any issues at trial." It held that this photo was "irrelevant and should not have been admitted, and that the State's use of it in closing argument compounded the error". Arguing for a death sentence, the prosecutor had held up this photo of the live child and compared it with four post-mortem pictures. Nevertheless, the appeal court concluded that the use of the photo "did not contribute to Malicoat's death sentence". In contrast, in a decision in Texas, also in 2000, the state's Court of Criminal Appeals overturned the death sentence of condemned inmate Raymond Reese because the jury at his trial had been shown a photograph of the victim lying in a coffin next to her unborn fetus. The Court ruled that this may have inflamed jurors into voting for death, saying that it is "society's natural inclination... to protect the innocent and the vulnerable". The fact that Reese's death sentence was overturned, while Malicoat's was not, would appear to be an example of arbitrariness in the application of the death penalty in the USA.

James Malicoat was himself subjected to severe physical and psychological abuse as a child. According to his clemency petition, by the age of five, James Malicoat was being beaten by his mother's husband, and was subjected to abuse for years. His stepfather would hit him with wrenches, pitchfork handles and an electric cattle prod. He would lock the boy in a chicken coop with fighting roosters to teach him not to be afraid of them. The roosters would attack the boy, and his mother has recalled that she could hear him screaming from 100 feet (30 metres) away. James's mother, who had herself suffered an upbringing marked by sexual, physical and mental abuse, was threatened with death by her husband (including at gunpoint on one occasion) if she were to take the children away. She has said that she used to contact the police at least

twice a month about the abuse being inflicted on her son, but eventually stopped because “it never did me any good”. Eventually, when James Malicoat was about 14 years old, the stepfather was prosecuted for child abuse and pleaded guilty to “feloniously, wilfully, maliciously and intentionally” injuring his adoptive son “by beating him repeatedly with a wooden board”. Not long after this, James Malicoat’s mother left her husband and took the children with her. James Malicoat’s mother has recalled how the abuse changed her son, and caused him to become a subdued child but with a short temper – “he’d get very angry and he would never know exactly why he was getting angry”. She has recalled that James began having fainting spells and blackouts (which the jury was not told). He was hospitalized at around the age of 17 as he was having suicidal thoughts.

James Malicoat’s trial took place in Grady County District Court. Behind the judge was a large carving of two statues depicting a man and a woman holding a sword between them. Along the blade is the inscription “AN EYE FOR AN EYE AND A TOOTH FOR A TOOTH”. In the Bible, this phrase appears in Exodus, Deuteronomy, and Leviticus, and includes in those books the notion of “life for life”; “life shall go for life”, and “he that killeth a man, he shall be put to death”. The largest religious denomination in Oklahoma is Southern Baptism (accounting for about a third of the state’s population), the leadership of which has contended that the Bible supports capital punishment. The courts have rejected the claim that the inscription on the sword deprived James Malicoat of a fair trial. An OCCA judge dissented, arguing that the sign is “inappropriate for any criminal trial... [I]n the context of a capital trial I believe that the sign is outrageous and unconstitutional”.

The Oklahoma Pardon and Parole Board has voted to deny clemency to James Malicoat, despite appeals for clemency from his family and the mother of Tessa Leadford. The Governor has the power to grant a reprieve. Amnesty International urges that he do so and that he ask the Board to reconsider the case with a view to recommending clemency and breaking the cycle of violence in this case.

Oklahoma has the highest rate of execution per capita of all the US death penalty states. It ranks 27<sup>th</sup> of the 50 US states in terms of population and third in the number of executions carried out since the USA resumed judicial killing in 1977 (behind Texas and Virginia). It accounts for 81 of the nationwide total of 1,037 executions since that year. Oklahoma has violated international law and standards in its pursuit of judicial killing and its prosecutors have earned a reputation for misconduct in capital cases (see *USA: Old habits die hard: The death penalty in Oklahoma*, April 2001, <http://web.amnesty.org/library/index/engamr510552001>). In June 2006, the governor of Oklahoma signed into state law a bill expanding the death penalty to the cases of repeat offenders who sexually abuse children without killing them (see *USA: More about politics than child protection – The death penalty for sex crimes against children*, 21 June 2006, <http://web.amnesty.org/library/Index/ENGAMR510942006>).

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

- explaining that you are not seeking to downplay the seriousness of the crime in this case or the suffering caused;
- opposing the execution of James Malicoat, urging the governor to recognize the cycle of violence evident in this case, and explaining your opposition to the death penalty in general;
- expressing concern at the repeated instances of prosecutorial misconduct in this case;
- urging the Governor to grant James Malicoat a reprieve and to ask the Oklahoma Pardon and Parole Board to reconsider the case with a view to recommending clemency.

**APPEALS TO:**

Governor Brad Henry  
State Capitol Building, 2300 N. Lincoln Blvd., Room 212, Oklahoma City, OK 73105, USA  
Fax: + 1 405 521 3353  
Email, via: <http://www.gov.ok.gov/message.php>.  
Salutation: Dear Governor

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

**PLEASE SEND APPEALS IMMEDIATELY.**