

PUBLIC

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UA 290/06 Death penalty / Legal concern

USA (Virginia) John Yancey Schmitt (m), white, aged 33

John Schmitt is scheduled to be executed in Virginia on 9 November 2006. He was sentenced to death for the murder of a security guard during a bank robbery in 1999. He is seeking clemency on the grounds that the shooting was accidental and that he was denied a fair trial on the grounds of prosecutorial misconduct.

Earl Shelton Dunning was shot and killed at the Bon Air branch of NationsBank near Richmond, Virginia, on 17 February 1999. He died as a result of a gunshot wound to his chest. John Schmitt was identified as the robber and on 19 February 1999, he was located in a hotel room in Williamsburg, Virginia. Through a police negotiator, Schmitt surrendered the next morning. Before giving himself up, he admitted to robbing the bank and shooting Shelton Dunning. He maintained that the robbery had been to obtain money to purchase drugs (he had been addicted to cocaine and heroin for several years). He told the negotiator that he had never intended to kill anyone, and that the gun had gone off accidentally during a struggle with the guard. At the trial, the jury were told that John Schmitt had robbed the same bank a month earlier (at which time the bank did not employ a security guard and no one had been injured during the robbery).

After John Schmitt's arrest, but before his murder trial, the police arranged for his friend and former employer, Cliff Sauer, to secretly tape record any telephone conversations he had with Schmitt from the jail. A conversation was recorded in which John Schmitt described how he and the security guard had struggled over Schmitt's gun, and that it had gone off accidentally. He said that he had not intended to kill the guard, and expressed confidence that the bank's security video recording would support his version of events. However, not only had none of the witnesses in the bank seen the shooting, but neither had it been captured on the bank's surveillance camera. At the guilt/innocence phase of the trial, at which the only issue was whether the murder was premeditated, the judge did not allow either John Schmitt's statements to the police negotiator or his taped conversation with Cliff Sauer to be introduced by the defence.

The state introduced expert evidence that the gun had been fired at Shelton Dunning at a distance of 12 to 36 inches. According to the clemency petition, there are two autopsy reports, the first dated 31 March 1999 and an "amended" version dated 23 June 1999. In the later version, references to "soot" found on Shelton Dunning's right sleeve and hand, which would be consistent with the gun having been fired at close range during a struggle, had been deleted. The defence lawyers had access to both autopsy reports, but did not cross-examine the medical examiner about the discrepancies. The jury convicted John Schmitt of premeditated murder.

At the sentencing phase, the state introduced evidence of John Schmitt's prior convictions for drug use, receipt of stolen property, commission of a crime in possession of a firearm, together with evidence of his violations of probation, and "victim impact" testimony from members of Shelton Dunning's family. The prosecution also introduced the taped conversation as evidence to support a finding of Schmitt's "future dangerousness", an "aggravating" factor in Virginia that makes a crime punishable by the death penalty. As well as containing Schmitt's claim that the shooting had been accidental, it also indicated a lack of remorse on Schmitt's part. Studies have shown that a perceived lack of remorse in a defendant is a highly aggravating factor in the minds of US capital jurors. The jury sentenced John Schmitt to death.

After the case had moved into the federal appeals process, evidence of prosecutorial misconduct in relation to the secretly taped conversation came to light. Specifically, the state had suppressed evidence that Cliff Sauer had received immunity from prosecution in return for his testimony, and that it had provided Sauer, who was mentally unstable, with a free mental health evaluation. In proceedings before District Judge Robert

Payne, Cliff Sauer testified that he had cooperated with police and prosecutors because he was afraid that he might otherwise face charges, having brokered a deal for Schmitt to buy a car using money stolen from the first bank robbery in January 1999. Judge Payne found that Sauer had been told that the state's purpose in having Sauer tape conversations with Schmitt was to obtain incriminating information about the February 1999 crime.

The prosecutor used this evidence although Schmitt had at the time of the recording already been assigned a lawyer, and despite neither the lawyer nor Schmitt knowing of the secret taping. At the evidentiary hearing before Judge Payne, the prosecutor acknowledged that the taped evidence of Schmitt's lack of remorse was critical at the sentencing phase. Judge Payne himself described it as "a ticket to the death chamber". He found that the evidence of Sauer's relationship to police and prosecutors could have been used to impeach Sauer's credibility, and had been suppressed, thus violating the US Supreme Court's 1963 ruling, *Brady v. Maryland*. Judge Payne held that "the prosecutor suppressed evidence of obvious impeachment value... Moreover, when the prosecutor testified at the evidentiary hearing..., he seemed to regard the whole concept of *Brady* as a game". Nevertheless, Judge Payne let the conviction and death sentence stand.

Upholding this ruling in July 2006, the US Court of Appeals for the Fourth Circuit said: "We emphasise that the intentional suppression of impeachment material and other prosecutorial misconduct should not be taken lightly... And we could not agree more with the district court's conclusion that this prosecution team displayed a disconcerting lack of respect for its sole responsibility to ensure 'that justice shall be done', as opposed to merely winning the case". The Fourth Circuit emphasised that the prosecutorial misconduct in the case "was not confined to a single incident".

Under international law, anyone accused of a criminal offence has the right to the presumption of innocence, equality of arms (i.e. with neither party to a case put at a substantial disadvantage to the opposing party), and an effective defence. An essential element of the right to an effective defence, set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR), requires that the defendant be able "to examine, or have examined, the witnesses against him". In order to be able effectively to challenge any such witness, the defendant must be provided with any information known to the prosecution which may tend to impeach the witness' credibility or reliability, including his or her relationship with the state authorities. Furthermore international standards place a duty on the prosecution to uphold human rights; in particular, the UN Guidelines on the role of prosecutors require that prosecutors "perform their duties fairly...and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system". The prosecutor failed to meet this standard in this case.

Virginia accounts for 97 of the 1,053 executions in the USA since executions resumed in 1977. Amnesty International opposes the death penalty in all cases. Today, 129 countries are abolitionist in law or practice.

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

- expressing sympathy for the family and friends of Earl Shelton Dunning, and explaining that you are not seeking to excuse violent crime or downplay the suffering caused;
- opposing the execution of John Yancey Schmitt, noting evidence that the shooting was not premeditated;
- expressing deep concern at the prosecution's conduct, violating constitutional and international standards;
- noting that the power of executive clemency is not constrained by the restrictions placed on the courts;
- calling on Governor Kaine to grant clemency to John Schmitt in the interest of justice.

APPEALS TO:

Governor Tim Kaine, Office of the Governor
Patrick Henry Building, 3rd Floor, 1111 East Broad Street, Richmond, Virginia 23219, USA
Fax: + 1 804 371-6351
Email, via: <http://www.governor.virginia.gov/AboutTheGovernor/contactGovernor.cfm>.
Salutation: Dear Governor

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

PLEASE SEND APPEALS IMMEDIATELY.