

URGENT ACTION

MENTAL DISABILITY CONCERN AS EXECUTION NEARS

Eddie Duval Powell, a 41-year-old African American man, is scheduled to be executed in the US state of Alabama on 16 June. He was sentenced to death in 1998 for a murder in 1995. His lawyers claim that he has a mental disability that would render his execution unconstitutional.

Mattie Wesson, a 70-year-old white woman, was raped and shot dead in her home near Tuscaloosa, Alabama, in the early hours of 25 March 1995. Eddie Powell, who lived across the street from the victim, was brought to trial in 1997. After the jury was unable to decide on whether to recommend life imprisonment or death, and after the judge agreed that there had been prosecutorial misconduct at the guilt phase, a full new trial was held in June 1998. Eddie Powell was again convicted, and this time the jury of 11 whites and one African American voted by 11 to one to recommend the death penalty.

The jury heard some mitigating evidence at the trial, including that Eddie Powell had been assessed as “mildly retarded” at around the age of 10 and placed in special education classes. Four years after the trial, the US Supreme Court ruled, in *Atkins v. Virginia*, that the execution of people who had “mental retardation” violated the US Constitution. The Court did not define mental retardation, but pointed to definitions used by professional bodies. Under such definitions, it is a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning (generally indicated by an IQ of less than 70) accompanied by limitations in two or more adaptive skill areas such as communication, self-care, work, and functioning in the community. The Court left it to individual states to develop “appropriate ways” to comply with the ruling.

After the Supreme Court’s ruling, Eddie Powell’s appeal lawyers raised an *Atkins* claim, but were unsuccessful. None of the state or federal court held an evidentiary hearing on the issue before ruling against Powell.

Eddie Powell has recently been assessed by a clinical psychologist. Dr Harvey Switzky, who has concluded that “when one puts all the evidence together..., Eddie presents as a person with significantly sub-average general intellectual functioning in the mild range of mental retardation. Eddie was considered as functioning in the mentally retarded range by his family and the educational system during the developmental period”. He has also pointed to “considerable evidence” that “Eddie’s mental retardation was exacerbated by a chaotic, violent, dysfunctional family social environment, brain injury and drug abuse”. Eddie Powell’s lawyers have appealed to the Alabama Supreme Court to order an evidentiary hearing, and are also seeking executive clemency, including on the grounds that the jury did not hear all available mitigating evidence (see overleaf).

PLEASE WRITE IMMEDIATELY in English or your own language, in your own words:

- Acknowledge the seriousness of the crime of which Eddie Powell was convicted and explaining that you are not seeking to downplay the seriousness of the crime or the suffering caused;
- Oppose the execution of Eddie Powell;
- Express concern that no court has ever held an evidentiary hearing into the claim that Eddie Powell has mental retardation, and that the jury did not hear all available mitigating evidence about his background;
- Note that the power of executive clemency is not constrained in the way courts may be by legal procedures;
- Call on the Governor to grant clemency to Eddie Powell and to commute his death sentence.

PLEASE SEND APPEALS AS SOON AS POSSIBLE, AND BEFORE 16 JUNE 2011 TO:

Governor Robert Bentley, Office of the Governor,
State Capitol, 600 Dexter Avenue, Montgomery, Alabama 36130, USA

Fax +1 334 353 0004

Salutation : Dear Governor

Also send copies to diplomatic representatives of the USA accredited to your country. Check with your section office if sending appeals after the above date.

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ADDITIONAL INFORMATION

When the state trial-level court denied Eddie Powell's *Atkins* claim in 2004, the judge found that the claim was "refuted by the record" and therefore could be dismissed without an evidentiary hearing. Among other things, the judge pointed to the trial testimony of Dr Marianne Rosenzweig, a psychologist who had been retained as an expert witness by Eddie Powell's trial lawyers. The reviewing judge noted that at the trial Dr Rosenzweig said that she had found no evidence to support the mental retardation assessment given to Eddie Powell at school, and stated that in her opinion he might simply have been suffering depression.

In 2007, Dr Rosenzweig signed a sworn statement in which she stated that she had been retained by the trial lawyers only six weeks before the trial and had considered that this would not be "enough time to adequately assist in Mr Powell's defense". In addition, she said that the trial lawyers had never asked her to conduct any psychological testing of the defendant or to "confirm Mr Powell's retardation with an IQ test or any other testing instrument". As a result, she said, she was unable "to diagnose Mr Powell with mental retardation" and instead had "attributed his early placement in special education to depression". She said that she had been unaware at that time that Eddie Powell had "spent his entire education career in the Lake County, Illinois school system in special education classes". If she had known then the information that she had been provided by Eddie Powell's appeal lawyers, "I would have insisted that an IQ test be performed in Mr Powell's case", and her review of these materials had led her to conclude that "during his childhood, Mr Powell exhibited many characteristics typical of people with mental retardation: including for example, low self-esteem, lack of self-direction, long-term problems with functional academics, feelings of alienation, and problems with concrete thinking".

In his recent evaluation of Eddie Powell's intellectual functioning, Dr Switzky pointed to relevant evidence from the condemned man's birth and childhood. His birth had been a difficult one that had "resulted in a lack of oxygen to his brain", and during his pregnancy his mother had abused amphetamine and inhalants such as gasoline and insecticides. Eddie Powell had been raised in Illinois in "a high crime neighbourhood in dire poverty", and had been "emotionally and actually abandoned by his parents which led to Eddie's frequent depressions, and acts of self-hurt and frequent suicide attempts". In addition, Dr Switzky continued, "Eddie suffered multiple head injuries as a child" and had been assessed as having sustained damage to the frontal and orbital lobes of his brain.

The appeal lawyers have also presented mitigating evidence on appeal that was not presented to the jury, including the young Eddie Powell's witnessing of violence involving his parents, the poverty in which he grew up (including when they lived in subsidized housing in Illinois, "their apartment was so infested with roaches, rats and bats" that the building was eventually condemned), his mother's struggle with mental illness, his father's alcoholism, and the boy's suicide attempts, and his subjection to sexual assaults when held in an adult prison before he was 18. In a ruling by the US District Court in 2008 upholding Eddie Powell's death sentence, the federal judge noted that "familial violence, severe poverty, alcoholism were not a part of the background evidence presented to the jury", but ruled the outcome of the trial would not have been different even if the jury had heard such evidence.

Amnesty International opposes the death penalty in all cases, regardless of the crime, the offender, or the method of execution. There have been 1,254 executions in the USA since judicial killing resumed there in 1977. Alabama accounts for 52 of these executions, and has carried out three of the 20 executions in the USA so far this year.

Faced with a national shortage of sodium thiopental, one of the drugs until now used by most states in their three-drug lethal injection protocols, a number have moved to amend their procedures to allow for an alternative barbiturate as the first of the three drugs, or to one-drug protocols using a barbiturate alone. The substitute to sodium thiopental already selected and used by a number of states already is pentobarbital. In April, Alabama announced that it had amended its three-drug protocol to allow for the use of pentobarbital, and the state carried out its first such execution on 19 May. The Denmark-based manufacturer of pentobarbital has condemned the use of the drug for executions and has promised that it would "continue to urge states in the US to refrain from using pentobarbital for the execution of prisoners as it contradicts everything we stand for as a company".

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