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Death by default

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On 2 July 1976, in *Gregg v Georgia*, the US Supreme Court lifted the moratorium on executions in the United States it had imposed four years earlier in *Furman v Georgia*. In the *Furman* ruling, the Court had found the death penalty to be unconstitutional in the arbitrary and capricious way in which it was being applied. Individual states moved to rewrite their capital statutes. In *Gregg*, the Supreme Court looked at some of those statutes and wrote:

> "*The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information*."

Nearly three decades later, on 25 January 2005, Troy Kunkle is due to become the 947th person put to death in the USA since the *Gregg* ruling. He was sentenced to death under a statute that failed to ensure that the jury was given adequate information and guidance.

Troy Kunkle's case is one of death by default. Some of his trial jurors say that they did not want to vote for death but had felt forced by the law to do so. At the other end of the process, a US Supreme Court Justice has explained that he and his colleagues cannot stop the execution because of a procedural obstacle blocking their way. This is "regrettable", he added, "because it seems plain that Kunkle's sentence was imposed in violation of the Constitution".

Troy Kunkle was convicted in Texas in 1985 of the murder of Stephen Horton a year earlier. At the sentencing hearing, the prosecution argued for execution and the defence presented evidence for a life sentence. At that time, Texas capital juries were only asked two questions when deciding sentencing: whether the defendant had caused the death, and whether there was a probability that the defendant would commit future criminal acts of violence. An affirmative response to both questions resulted in a death sentence, regardless of whether the jury believed the defendant should get a life sentence.

This procedure was found unconstitutional by the US Supreme Court in *Penry v Lynaugh* in 1989 on the grounds that juries were unable to give effect to mitigating evidence. The Texas statute was changed in 1991. Under today's law, Texas capital jurors are additionally asked whether they consider there is enough mitigating evidence to warrant a life sentence.

At the time of the crime, Troy Kunkle was just over 18 years old, with no criminal record, and emerging from a childhood of deprivation and abuse. One of the jurors from his trial recalls: "At least two of us were inclined to give life, but that wasn't one of the questions". Another has said: "I was upset that I was put in that position…We just had to follow the law and answer the questions. I wish we would've had a choice to vote for life in prison."

In its 1989 *Penry* decision, the US Supreme Court did not provide any guidance as to how the courts should deal with the cases of those people, like Troy Kunkle, who had been sentenced to death under the old, unconstitutional Texas statute. The state and federal appeal courts responsible for Texas capital cases therefore developed their own "screening" system for applying the *Penry* ruling. For the next 15 years, condemned prisoners in Texas sentenced before the law was changed appealed for new sentencing hearings. Several were executed. Troy Kunkle's appeal was rejected by the Texas Court of Criminal Appeals (TCCA) in 1993.

Then in 2004, the US Supreme Court took such a case. In *Tennard v Dretke*, it found that the post-*Penry* "screening" system applied to Texas cases had "no foundation" in Supreme Court jurisprudence. In other words, the courts had been misapplying the *Penry* ruling. The *Tennard* decision stated that the only relevant screening question should have been whether the evidence presented in mitigation was of a type that might serve as a basis for a sentence less than death. Clearly, Troy Kunkle's youth and other mitigating factors presented at his trial were just such evidence. The unfairness of his case is compounded by post-conviction evidence that he suffers from schizophrenia, which the jury did not know.

The *Tennard* opinion was handed down on 24 June 2004. At that time Troy Kunkle was facing execution on 7 July, and had already filed an appeal to the US Supreme Court based on the arguments that were then pending in the Tennard case. At the same time, his lawyers filed a petition in the TCCA. This was dismissed based upon a unique Texas procedural obstacle known as the "two forum rule", which barred simultaneous appeals in two courts. The US Supreme Court stayed the 7 July execution, but later dismissed the case without comment.

Following the *Tennard* decision, Troy Kunkle's lawyers went back to the TCCA, asking it to remedy its 1993 mistaken application of the *Penry* ruling and this time to grant Kunkle a new sentencing. However, the TCCA dismissed the petition on the grounds that it violated the rule preventing individuals from bringing the same claim to the same court more than once. The federal courts are similarly procedurally barred. Such rules are supposed to be for reasons of efficiency, to prevent inmates from repeatedly filing a claim that they have already lost. It is clearly a nightmarish outcome when a condemned man runs into the cold fact that there is no exception granted where he earlier lost the claim because the court had misapplied the law.

Troy Kunkle was given another execution date, 18 November 2004. Hours before it was due to be carried out, the US Supreme Court issued a stay. However, on 13 December, the Court announced that it would not consider the merits of Troy Kunkle's appeal. This time there was an explanation, given by Justice Stevens in recognition that "granting a stay of execution is not without costs". Justice Stevens explained that the Court did not have jurisdiction to reach the merits of Troy Kunkle's claim, because the decision of the TCCA not to stop the execution had been "independently based on a determination of state law" rather than on the merits of Kunkle's federal constitutional claim.

Justice Stevens said that this procedural obstacle of state versus federal law prevented the Court from itself reaching the underlying claim, adding his comment that the death sentence had been unconstitutionally imposed. In other words, a review of the merits of Troy Kunkle's federal law claim would lead to a new sentencing being granted, as has occurred in several other Texas cases since the *Tennard* ruling. Instead he has been given a new execution date.

Thus Troy Kunkle is ensnared in a tangle of procedural technicalities with his execution fast approaching. As would have concerned the Supreme Court in *Furman v Georgia* in 1972, an arbitrary and capricious death sentence has survived the appeals process intact. Amnesty International activists worldwide are urging the Texas clemency authorities to stop this killing in the name of fairness and decency.