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UNITED STATES OF AMERICA

Evolving standards of decency

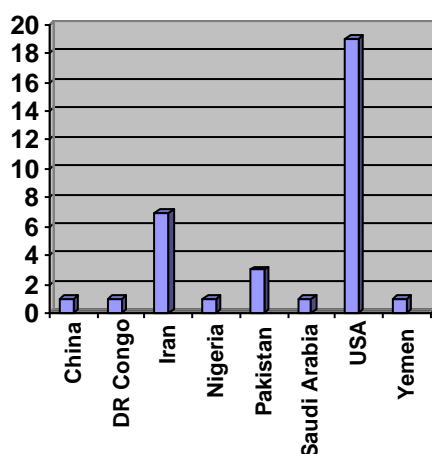
6 January 2004

AI Index: AMR 51/003/2004

On 23 December 2003, a Virginia jury did what some will not have expected it to do. The eight women and four men voted that the defendant, Lee Boyd Malvo, should not be executed. A few days earlier, they had convicted him of the murder of Linda Franklin, one of 10 people killed in a spate of sniper shootings in Maryland, Virginia and Washington DC in October 2002. The seriousness of these crimes and the depth of the suffering caused are not in doubt. The prosecution's pursuit of the ultimate punishment is what must be questioned.

Lee Malvo was 17 years old at the time of the crime. In almost no other country in the world would he have even faced the possibility of the death penalty. The imposition of a death sentence on someone who was under 18 at the time of the crime violates a fundamental principle of international law, a principle recognized and respected by almost every country in the world.¹ Anyone asked to list characteristics they associate with childhood would likely include at least one of the following: immaturity, impulsiveness, lack of self-control, poor judgment, an underdeveloped sense of responsibility, a susceptibility to peer pressure, and a vulnerability to the domination or example of elders. Common agreement about such attributes, and a young person's potential to change, lie behind the global ban on the use of the death penalty for the crimes of children.

Executions of child offenders
worldwide since 1990



If Lee Malvo's jury had voted for death, he would have joined more than 70 others facing execution in the United States for crimes committed when they were younger than 18 years old. It is no idle threat. The USA accounts for over 70 per cent of such executions known since 1998 – including four of the five reported in the world in the past two years. It is an aspect of the death penalty which has become an almost exclusively US practice.²

After Lee Malvo's arrest on 24 October 2002, US Attorney General John Ashcroft had ordered that the suspect be transferred from federal custody to local prosecuting authorities in Virginia. His decision was based on a number of considerations, including that "the first prosecutions should occur in those jurisdictions that provide the best law... and the best range of available penalties". He added that it was "imperative" that the death penalty be an option.³ Neither federal nor Maryland law provides for the death penalty for those under 18 at the time of the

crime, but Virginia law does. Virginia is known for the relative speed at which it takes capital defendants from conviction to execution, and has executed three child offenders since 1998.

Attorney General Ashcroft and President Bush are known as keen proponents of judicial killing. Neither opposes the execution of child offenders – the Attorney General’s move in the Malvo case is a stark indicator of this. The President’s involvement has been even more direct – as Governor of Texas he allowed four executions of child offenders to proceed during his five-year term in office. Such officials should reflect upon where their support for this internationally illegal practice places them in the court of world opinion. A recent meeting in Rome of more than 20 Nobel Peace laureates, for example, concluded that “the death penalty is a particularly cruel and unusual punishment that should be abolished. It is especially unconscionable when imposed on children.”⁴ Today, 112 countries are abolitionist in law or practice, choosing not to carry out the death penalty against anyone, let alone child offenders.

In June 2002, the US Supreme Court overturned its 1989 decision, *Penry v Lynaugh*, in which it had found that the execution of people with mental retardation did not violate the constitutional ban on cruel and unusual punishments. Thirteen years later, in *Atkins v Virginia*, the Court found that “standards of decency”, primarily reflected in state-level legislation, had evolved to the point where such executions were now unconstitutional.⁵ On the same day in 1989 as the *Penry* decision, the Supreme Court ruled that the execution of 16- and 17-year-old offenders was constitutional. This decision, *Stanford v Kentucky*, still stands and was why Virginia prosecutors were allowed to pursue a death sentence against Lee Malvo.

In September 2002, Amnesty International published a 105-page report arguing that the Supreme Court could not claim to be a consistent arbiter of the US Constitution and at the same time fail to outlaw the execution of people for crimes committed when they were under 18 years old.⁶ In other words, the *Atkins* decision must lead to an overturning of *Stanford*. Four US Supreme Court Justices, one short of a majority, have since agreed that “given our recent decision in *Atkins v Virginia*, we certainly should [reconsider *Stanford*]”. These dissenters said that “offences committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.”⁷ Since then, Kevin Stanford, the prisoner at the centre of the *Stanford v Kentucky* ruling has had his death sentence commuted by the outgoing Kentucky governor. Governor Paul Patton described the death sentence in the case as an “injustice” because Stanford was 17 years old at the time of the crime.⁸

The Supreme Court’s 1989 ruling included 16-year-old offenders by amalgamating Kevin Stanford’s case with one from Missouri, that of Heath Wilkins, 16 at the time of his crime.⁹ It is especially noteworthy, then, that in August 2003, it was the Missouri Supreme Court which decided that the death penalty against child offenders was now unconstitutional: “Applying the approach taken in *Atkins*, this Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders...”¹⁰ The state has appealed to the US Supreme Court.

There has been speculation that the Supreme Court refused to revisit its *Stanford* decision in 2002 and 2003 in the wake of *Atkins* because Lee Malvo’s trial was still pending.¹¹ Perhaps the Court should now view the Virginia jury’s decision not to sentence the teenager to death as another indicator of an evolving standard of decency in the USA. After all, this was the state selected by the country’s Attorney General for its death penalty credentials.¹² In any event, the Supreme Court should take the very next opportunity to overturn *Stanford* and bring the USA into line with a standard of decency recognized around the world.

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¹ *The exclusion of child offenders from the death penalty under general international law*, AI Index: ACT 50/004/2003, 18 July 2003. <http://web.amnesty.org/library/Index/ENGACT500042003>

² See forthcoming *Stop Child Executions! – Ending the death penalty for child offenders*, AI Index: ACT50/001/2004, to be published 21 January 2004.

³ Remarks of Attorney General John Ashcroft, Press Conference, 7 November 2002.

⁴ Final Statement, 4th Global Summit of Nobel Peace Laureates, Rome, 30 November 2003.

⁵ The Atkins majority also noted that, “within the world community”, the execution of mentally retarded offenders is “overwhelmingly disapproved”. The execution of child offenders is at least equally disapproved of, and is a practice expressly prohibited under international law.

⁶ *USA: Indecent and internationally illegal: The death penalty against child offenders*, AI Index: AMR 51/143/2002, September 2002. <http://web.amnesty.org/library/Index/ENGAMR511432002>

⁷ *In re Kevin Nigel Stanford*. 537 U.S. ___ (2002). Justice Stevens dissenting, 21 October 2002.

⁸ Kevin Stanford’s sentence was commuted to life imprisonment without the possibility of parole, the same sentence the Virginia jury recommended for Lee Malvo. Life without the possibility of release also violates international law, specifically article 37 of the Convention on the Rights of the Child, a treaty ratified by 192 countries. There may be several hundred people serving life without parole sentences in the USA for crimes committed when they were under 18 years old.

⁹ He is now serving a life sentence after his death sentence was overturned by a federal judge.

¹⁰ *Simmons v Roper*, SC84454, Missouri Supreme Court, 26 August 2003.

¹¹ See, for example, *Did the Malvo case influence the Supreme Court on juvenile executions?*, By Elaine Cassell, 17 November 2003. Special to CNN.com.

¹² Lee Malvo may yet face other trials. He and his older co-defendant, who was sentenced to death in Virginia in a separate trial which ended before Malvo’s, have been implicated in other killings. For example, they have been charged in Louisiana with the murder of Hong Im Ballenger in Baton Rouge in September 2002. A prosecutor in East Baton Rouge Parish has said that he wants to seek the death penalty against both defendants. Claudine Parker was shot dead in September 2002 in Alabama. The District Attorney has said she intends to seek the death sentence against both defendants. *Snipers face more death penalty trials*, Associated Press, 24 December 2003.