

EXTRA 61/02

Death penalty / Legal concern 7 August 2002USA (Ohio) Gregory Lott (m), black, aged 41

Gregory Lott is scheduled to be executed in Ohio on 27 August. He was sentenced to death in 1987 for the murder of John McGrath in 1986.

On 15 July 1986, police went to the home of John McGrath, an 82-year-old white man, in order to check on his welfare. They had been alerted that another man had been seen driving McGrath's car the day before. The eyewitness, a trained artist, made a sketch of the man she had seen in the car. She later identified Gregory Lott from a photo line-up.

The police found John McGrath in his home. He had been tied up, doused with heating-lamp oil, and apparently set on fire. Although badly injured, he was able to identify his assailant as a six-foot tall, very light-complexioned African-American man, with long straight hair. He also said that he and his attacker went to the same barber shop. When shown the witness sketch, he did not identify the man depicted in it as his attacker.

John McGrath died on 23 July from pneumonia arising from his injuries. Gregory Lott was arrested on 30 July. His fingerprints had been found in John McGrath's home, and a shoeprint was found that was generally consistent with a pair of shoes found in his car at the time of the arrest. In an alleged statement, which was not written or signed by Lott or recorded or witnessed by anyone except the police officer who allegedly took it, Lott admitted to burgling McGrath's home on this occasion and previously, and to tying him up, but not to burning him. The "confession" was ruled inadmissible as evidence. Lott waived his right to a jury trial. In July 1987, a three-judge panel unanimously sentenced him to death.

Gregory Lott has consistently maintained his innocence of the murder, while admitting that he burgled the house. The Ohio Supreme Court acknowledged in 1990 that Lott had been convicted of the murder on circumstantial evidence, and in 2001, the US Court of Appeals for the Sixth Circuit said that "this is the most troubling aspect of the case".

Another disturbing aspect is prosecutorial misconduct. The prosecutor did not turn over to the defence the description that John McGrath had given police, or his belief that he and his attacker went to the same barber, or the information that McGrath had not identified his assailant from the sketch. In contrast to the description given by McGrath, Gregory Lott has medium to dark skin tone, is five feet 10 inches tall, and at the time of his arrest had very short hair. No evidence was presented that he ever worn his hair long, and all the available evidence indicates that he had short hair at the time of the crime. The defence was therefore denied important evidence with which to contest the prosecution's version of events.

The prosecutor also argued that the attacker must have taken the heating-lamp oil into the home with the intent to burn the victim because John McGrath had owned no such lamp: "Nothing in that man's house uses kerosene or lamp oil. So, with that in mind, consider the intent of the individual who would break into an old man's house, knowing the frailty that age has inflicted on him, bringing with him a cord to tie him up and the lamp oil to burn him". Such argumentation is very damaging to the defendant in the context of a death penalty trial. Moreover, an oil-burning lamp had in

fact been found in the house, and this was stated in a police report given to the prosecutor. In several other cases, this same prosecutor has been reprimanded by the courts for improper behaviour. Indeed, one of the trial judges rebuked him during the Lott proceedings for accusing the panel of "legal gymnastics" for discussing other possible explanations for the fire.

Gregory Lott's previous appeal lawyer discovered the withheld evidence in 1991. However, he failed to present it in the state appeal courts. His failure to do so has meant that federal courts have not reviewed it. Generally, the federal courts are barred from reviewing claims not properly raised in the state courts. In 2001, a state court rejected the claim that the withheld evidence had affected the outcome of the trial, because there was only a two-inch difference between Lott's height and the height described by McGrath; Lott could have cut his hair after the crime; and he could have worn make-up to lighten his skin. It is not clear whether the federal courts will review this decision.

After the US Supreme Court ruled on 20 June 2002 in *Atkins v Virginia* that the execution of people with mental retardation is unconstitutional, the Ohio Department of Corrections turned over records showing that it had assessed Gregory Lott's IQ at 72 in 1986. This could indicate possible mental retardation, and Lott's lawyers are asking for the execution to be stayed while the state establishes procedures for determining which inmates are protected by the *Atkins* ruling. The prosecution continues to pursue Lott's execution, arguing that he does not have mental retardation, and that an IQ test before the trial had placed his IQ at 86.

International safeguards not only oppose the use of the death penalty against people with mental retardation, but also require that capital defendants receive adequate legal representation "at all stages of the proceedings", and that the death penalty be withheld if guilt is not "based upon clear and convincing evidence leaving no room for an alternative explanation of the facts". Furthermore, the UN Guidelines on the Role of Prosecutors require prosecutors to "perform their duties fairly, consistently and expeditiously...thus contributing to ensuring due process and the smooth functioning of the criminal justice system." Amnesty International opposes the death penalty unreservedly in all cases.

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

- expressing sympathy for any relatives of John McGrath and explaining that you are not seeking to excuse the manner of his death;
- noting that Gregory Lott was convicted on circumstantial evidence, expressing concern that the prosecutor withheld evidence from the defence, that Gregory Lott's appeal lawyer failed to raise this claim in timely fashion in the courts, and citing the international standards noted above;
- noting that Gregory Lott's IQ has been assessed by the Department of Corrections at 72, which could indicate possible mental retardation;
- calling for Gregory Lott to be granted clemency.

APPEALS TO:

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Salutation:Dear Governor

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

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