USA

‘I DON’T REALLY KNOW WHAT MITIGATION MEANS’

ACTION FOR CLEMENCY AS TEXAS AND OHIO EXECUTIONS LOOM

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in July 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: AMR 51/056/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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CAPITAL JUSTICE, THEORY AND PRACTICE

I don't really know what mitigation means
Lawyer for Yokamon Hearn, closing argument at sentencing, 11 December 1998

The USA's resort to the death penalty in an increasingly abolitionist world means that US authorities run into criticism when seeking to defend their country's human rights record even as its executioners go about their macabre business. Defending what much of the rest of the world sees as indefensible becomes even harder when the USA fails even to meet its own stated standards.

Reporting to the UN Human Rights Committee in December 2011 on US compliance with the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the USA in 1992, the administration of President Barack Obama painted the USA's capital justice system as rigorous, reliable and fair:

> "Heightened procedural protections apply in the context of capital punishment. Under Supreme Court decisions, a defendant eligible for the death penalty is entitled to an individualized determination that the death sentence is appropriate in his case, and the jury must be able to consider and give effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death."

That is the public relations version. Reality is another thing. The cases of two men facing execution later this month – one in Texas, the second in Ohio – serve to illustrate the gap.

YOKAMON HEARN – SCHEDULED FOR EXECUTION IN TEXAS, 18 JULY 2012

I wish to die tonight and never see the world again
Yokamon Hearn, aged 10, 1989 prior to hospitalization for 'suicidal ideations'

Yokamon Laneal Hearn was sentenced to death in December 1998 for the murder of 23-year-old stockbroker Frank Meziere committed in Dallas six months earlier. Yokamon Hearn is scheduled to be killed in the Texas death chamber soon after 6pm on 18 July 2012.

Yokamon Hearn pleaded not guilty at his 1998 trial, but the jury took only 50 minutes to convict him of murder committed in the course of a kidnapping and robbery – a capital offence – and the following day, after about an hour's deliberation, decided that he would pose a future risk to society if allowed to live, even in prison.

In addition to Yokamon Hearn's youth at the time of the crime – he was 19 years old – he has a developmental mental disability that, according to expert opinion obtained by his current lawyers, amounts to "mental retardation" which would render his execution unconstitutional.

Yokamon Hearn's current attorneys additionally assert that his trial lawyers failed to adequately investigate his background for the purposes of presenting mitigating evidence to the jury at the 1998 trial. Furthermore they say this claim of inadequate trial representation was never investigated by the original appeal lawyers and because of this has not been reviewed by any court, state or federal.

After a defendant is sentenced to death in Texas, their 'direct' appeal and habeas corpus review are conducted at the same time. Only issues in the trial record – such as rulings made by the trial judge – can be raised on direct appeal. Matters outside the record – such as the failure of the defence lawyer to present particular evidence – are for submission via the habeas corpus appeal. The latter therefore requires that the condemned inmate's lawyers conduct a thorough investigation of the inmate's case.

According to Yokamon Hearn's clemency petition filed with the Texas Board of Pardons and Paroles in late June 2012, his trial lawyers failed to properly investigate his background to

prepare for the sentencing. Their failure meant that the jury never heard the full evidence of the defendant's childhood of poverty, parental mental disabilities, severe parental neglect, his *in utero* exposure to alcohol, his possible exposure to lead poisoning, his suicidal ideation as a child, and his own mental impairment, and how all of these factors may have contributed to his conduct leading up to and during the crime he committed as a teenager for which he now faces execution. Yokamon Hearn's initial appeal lawyers filed no claims in his state habeas corpus petition based on evidence outside the trial record, including the question of his trial representation. They "did not know that [trial] counsel failed to investigate Mr Hearn's life history, because they did not investigate his life history", asserts the clemency petition. Billing records indicate that the lead lawyer worked for less than 33 hours on Yokamon Hearn's case in the 14 months between being appointed to represent him in October 1999 and filing his habeas corpus petition in state court in December 2000.

Generally, at least under US law as it stood until earlier this year, if a state habeas appeal lawyer fails to raise issues, these neglected claims would forever be forfeited from judicial review under the doctrine of 'procedural default'. On 20 March 2012, the US Supreme Court provided for the first time a potential remedy for prisoners denied effective assistance in state habeas corpus proceedings. In *Martinez v. Ryan*, the Court ruled that in a case in which a state habeas lawyer failed to investigate a claim of ineffective assistance of trial counsel, procedural default can be overridden and a federal court can hear the claim that the trial lawyers were ineffective. However, it seems that so far the federal courts have only allowed consideration of such claims in cases that were pending in federal court at the time of the *Martinez* decision. This would exclude judicial remedy for Yokamon Hearn, whose first federal habeas corpus petition was exhausted in 2003 (litigation since then has concerned the specific question of his mental impairment). His lawyers are asking the Texas courts for permission to file a new petition to raise the claim of inadequate trial representation for the first time. If the state courts refuse, the lawyers will go to the federal courts. If this fails, executive clemency would be Yokamon Hearn's final chance to avoid execution.

Since resuming executions in 1982, Texas has killed at least 70 people in its execution chamber who were aged 17, 18 or 19 at the time of the crimes in question. More than half of these teenagers were African American, of whom 70 per cent were convicted of crimes involving white victims. Yokamon Hearn is one of at least 40 prisoners now on death row in Texas for crimes committed when they were 18 or 19. More than half of them, like Yokamon Hearn, are black. Frank Meziere was white.

In 1993, in the case of a Texas death row prisoner who was 19 at the time of the crime, the Supreme Court emphasised that: "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults... These qualities often result in impetuous and ill-considered actions and decisions."

Nineteen years later, here is another 19-year-old offender, with a developmental disability, from a seriously deprived background, condemned to death by a jury which did not hear anything like the full story of the young defendant's background, a defendant who was subsequently represented on appeal by a court-appointed lawyer who failed to investigate the trial representation issue, a failure which may have caused the issue to be permanently precluded from judicial review.

Does Yokamon Hearn's case illustrate the "heightened procedural protections" of the US capital justice system? His crime was undoubtedly serious, but in a world in which most countries have stopped executing anyone, let alone a brain damaged teenaged offender, this execution should surely be another source of shame to a country that promotes itself as a champion of human rights.

JOHN ELEY – SCHEDULED FOR EXECUTION IN OHIO, 26 JULY 2012

If I had been presented the additional mitigating evidence outlined in the clemency petition at the time of the trial, especially evidence of Mr Eley's low intellectual functioning, his impoverished childhood, his significant alcohol and substance abuse, and his probably brain impairment, I would have voted for a sentence less than death

Former Ohio judge and current US federal judge Peter C. Economus, 7 June 2012

On 20 June 2012, the Ohio state parole board announced that it had voted 5-3 against recommending the governor to commute the death sentence of John Jeffrey Eley, scheduled for lethal injection in Ohio's execution chamber on 26 July 2012 after a quarter of a century on death row. The board's decision is not binding on the governor. Governor John Kasich can and should cast his vote for life.

Ihsan Aydah was shot on 26 August 1986 during a robbery of his store in Youngstown, Ohio, and died the following day. John Jeffrey Eley was arrested three days after the shooting and confessed to it in police custody. The robbery had apparently been the idea of John Eley's acquaintance, Melvin Green, who provided the gun. Eley agreed to go into the shop while Green waited outside because Ihsan Aydah could identify him. After Ihsan Aydah was shot, Melvin Green came into the shop, took money from the cash register and a wallet from the fatally wounded store-owner and left with Eley.

The prosecutor offered John Eley a plea bargain – a plea of guilty to manslaughter and a recommended six-year prison term – in return for his testimony against Melvin Green who was suspected of involvement in other crimes. John Eley refused to testify against Green, waived his right to a jury trial and was tried before a three-judge panel. He was convicted, and after a sentencing in July 1987, condemned to death.

When a three-judge panel of the US Court of Appeals for the Sixth Circuit upheld John Eley's death sentence in 2010, one of the judges dissented. He argued that John Eley's legal representation at trial had been constitutionally defective because of his lawyer's failure to investigate mitigating evidence. The judge argued that there was a reasonable probability that if the defence had conducted a proper investigation, "the sentencer would have concluded that [Eley] should not have been sentenced to death".

One of the sentencing judges has indeed now said as much. In June 2012, one of the three judges from John Eley's trial – who since 1995 has been a US federal judge (assuming 'senior status' on the US District Court in July 2009) – wrote to Governor Kasich and the Chair of the Ohio parole board, to urge them to grant clemency in John Eley's case. Judge Peter Economus said that he had agreed to the death sentence in 1987 because the defence lawyers had failed to present "any substantive mitigating evidence" for the judges to weigh against the aggravating circumstances. He said that if the mitigating evidence he had now seen had been presented at the trial – "especially evidence of Mr Eley's low intellectual functioning, his impoverished childhood, his significant alcohol and substance abuse, and his possible brain impairment" – he would not have voted for a death sentence.

In addition, the trial prosecutor, describing himself as a "staunch conservative" who had "no problem asking for the death penalty in a proper case", has also called for clemency, stating that Eley's crime was not the worst sort of crime for which the death penalty should be reserved under US law. He has told the parole board that "at the time I was upset with Mr Eley" for his refusal to testify against Melvin Green and the case "proceeded to trial with a resulting death sentence". Yet it was, according to the prosecutor, Melvin Green "who planned the robbery and gave the gun to Mr Eley". The prosecutor said that he had had "many sleepless nights because of the death sentence given to Eley".

The prosecutor and the judge are not the only supporters of clemency in this case. The

retired detective who investigated the murder and obtained the confession from John Eley has also said that he supports clemency. The probation officer in charge of John Eley's case, who had prepared the pre-sentencing report for Eley's sentencing hearing has also said that in his opinion the death penalty is not appropriate in this case.

An expert on intellectual disability has concluded that John Eley meets the criteria for "mental retardation", which if accepted by the courts (it is still being litigated) would render his execution unconstitutional in the USA. There is also evidence that John Eley suffers from mental illness and that he may lack a rational understanding of his situation.

The three members of the Ohio parole board who voted in favour of clemency did so on the grounds of a combination of factors, including the opposition to the execution of the former officials involved in the case; evidence that without the influence of Melvin Green, who was acquitted in the case, "Eley would not have committed the crime on his own"; given that if John Eley had testified against Green, the prosecution would not have pursued the death penalty; that whether or not his intellectual disability rises to the level of "mental retardation" that would render his execution unconstitutional, John Eley "is intellectually challenged" and this "may have been a factor in the crime", including being led into it, and in his response to his situation since being arrested (which has included refusing to meet with mental health experts); and that the case is not one of those for which the death penalty is supposedly reserved in the USA.

In January 2011, Senior Ohio Supreme Court Justice Paul Pfeifer, who when he was a state legislator was a co-author of Ohio's capital statute enacted in 1981, wrote:

> "I helped craft the law, and I have helped enforce it. From my rather unique perspective, I have come to the conclusion that we are not well served by our ongoing attachment to capital punishment… I ask: do we want our state government – and thus, by extension, all of us – to be in the business of taking lives in what amounts to a death lottery? I can't imagine that's something about which most of us feel comfortable. And, thus, I believe the time has come to abolish the death penalty in Ohio".

The Chief Justice of the Ohio Supreme Court has now ordered a task force to be convened to examine Ohio's capital justice system. The task force consists of judges, prosecutors, defence lawyers, legislators, law professors, and law enforcement officials. It is expected to produce its final report in 2013. Despite this, the state is continuing to schedule executions.

So, three members of the parole board, one of the sentencing judges, the trial prosecutor, the probation officer, and the lead detective, all think John Eley's execution would be wrong. Another federal judge considered that he should have had his death sentence vacated because of the failures of his trial lawyers to conduct an adequate mitigation investigation.

Would the execution of John Eley be an illustration of a capital justice system of which the USA should be proud? Or would it, in the words of then US Supreme Court Justice Stevens in 2008, be merely another example of the "the pointless and needless extinction of life"?

PLEASE TAKE ACTION AGAINST THESE EXECUTIONS

Urge clemency for Yokamon Hearn at http://www.amnesty.org/en/library/info/AMR51/055/2012/en

Urge clemency for John Eley at http://www.amnesty.org/en/library/info/AMR51/053/2012/en

See also:

USA: Deadly formula, 28 June 2012, http://www.amnesty.org/en/library/info/AMR51/050/2012/en

USA: Senseless killing after senseless killing, 7 June 2012, http://www.amnesty.org/en/library/info/AMR51/042/2012/en