

PUBLIC

AI Index: AMR 51/148/2004

UA 294/04

Death penalty/Legal concern

22 October 2004

USA (Kentucky)

Thomas Clyde Bowling (m), white, aged 51

Kentucky's Attorney General, Greg Stumbo, has asked Governor Ernie Fletcher to set an execution date of 16 November 2004 for Thomas Bowling, who was sentenced to death for a double murder committed in 1990. Governor Fletcher has this week been presented with a clemency petition.

On the morning of 9 April 1990, Tina and Eddie Earley were shot dead outside their small dry-cleaning business in the city of Lexington, Kentucky. Thomas Bowling was arrested on 11 April in neighbouring Tennessee. His car and a .357 calibre handgun were found hidden at his family's home in rural Kentucky.

Thomas Bowling's murder trial was held in December 1990. Among the state's witnesses were two eyewitnesses, the first of whom described the gunman as six feet tall (Bowling's approximate height) and wearing a black jacket and hat (Bowling owned such items). He had not been able to pick Bowling out at a police line-up, however, and also admitted that he may have told police that the gunman had long brown hair, a dark complexion and possibly a moustache – none of which described Bowling. The second eyewitness could not be located at the time of the trial, and instead the jury was played an audiotape of a police interview with him on the day of the shootings. His description did not identify Bowling. The state also presented a witness who said that he had sold a .357 gun to Bowling a few days before the shootings. Expert testimony identified Thomas Bowling's car as the vehicle used in the crime and suggested that the bullets fired at the scene could have come from the retrieved gun. However, the ballistics expert admitted that there could be millions of guns that could have fired the bullets. The defence lawyers presented no witnesses at the guilt/innocence stage of the trial.

At the sentencing, the defence presented six witnesses. A former work colleague and two jail employees testified to Thomas Bowling's good character, and his mother, sister and son testified about their love for him, his marriage break-up, his dependence on alcohol, his recent depressed mental and emotional state, and his limited mental ability. The jury voted for a death sentence.

Thomas Bowling's appeal lawyers are seeking clemency on the grounds that he has mental retardation. In 1990, shortly before Bowling's trial, Kentucky legislated to prohibit the execution of people with mental retardation. His trial lawyers did not raise the issue. In 2002, in *Atkins v. Virginia*, the US Supreme Court outlawed the use of the death penalty against such offenders. It left it up to each individual state how to comply with the ruling. The Court noted that "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18... Because of their impairments... by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." Thomas Bowling's clemency petition argues that he falls within this category. At the age of 12 or 13, Thomas Bowling's IQ was assessed at 74, which with the margin of error in such assessments places him within the range for possible mental retardation if coupled with adaptive deficits which Bowling is said to have. He was described as a "follower" and easily manipulated.

Thomas Bowling's clemency lawyers have also raised evidence that he is innocent. The evidence against him is circumstantial – there is no physical evidence placing him at the scene of the crime, no confession, no

identification of him as the gunman, the weapon linked to him was one of millions that could have been used in the crime, and while the car used in the crime was his, there is no proof that he was driving it at the time. The state did not establish a motive for Thomas Bowling to kill the Earley couple, whom he did not know and had never met.

The clemency petition suggests that Eddie and Tina Earley may have been shot because of their involvement with a local family (the Adams family) – members of which had allegedly run a drug dealing business from a store situated behind the Earleys' dry-cleaning business. The petition raises the possibility that one of the Adams family had shot the Earley couple. The clemency petition also argues that the Lexington Police Department may have focused on Thomas Bowling rather than pursuing suspects from the Adams family because it feared further unfavourable exposure following a recent corruption scandal involving the department. The so-called "Bluegrass Conspiracy" involved a cover-up of the murder of a young woman in the 1970s to prevent exposure of the involvement of police in criminal drugs activity.

In addition to seeking clemency from the governor, Thomas Bowling's lawyers are seeking relief in the appeal courts. They are pursuing the mental retardation issue, which has already been summarily dismissed at the trial court level. They are seeking police records from the case, including 10 video tapes of witness interviews conducted early in the case which may help to show whether the police wrongly turned away from investigating other suspects after Thomas Bowling's arrest. The lawyers are also challenging Kentucky's lethal injection procedures.

The United Nations Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty prohibit the execution of people whose guilt is not based on "clear and convincing evidence leaving no room for an alternative explanation of the facts". Amnesty International opposes the death penalty in all cases, regardless of issues of guilt or innocence, or the method used to kill the prisoner. Today 118 countries are abolitionist in law or practice. Since the USA resumed executions in 1977, it has executed 937 people, including 52 this year. During this time more than 100 people have been released from US death rows on grounds of innocence. Kentucky has carried out two executions since 1977, the most recent of which was in May 1999.

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

- expressing sympathy for the family and friends of Tina and Eddie Earley, and explaining that you are not seeking to condone the manner or their deaths, or to in any way minimize the suffering caused;
- noting evidence that Thomas Bowling has mental retardation, and that if this is the case his execution would violate state and federal law;
- expressing concern at the doubts surrounding his conviction, and reminding the governor of the many wrongful convictions and other errors that have been revealed in capital cases in the USA;
- calling on the governor to grant clemency.

APPEALS TO:

Ernie Fletcher
Governor of Kentucky
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Frankfort, KY 40601, USA
Fax: +1 502 564-2517
Email, via website: <http://governor.ky.gov/contact.htm>
Salutation: Dear Governor

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

PLEASE SEND APPEALS IMMEDIATELY.