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Further information on UA 299/04 (AMR 51/156/2004, 08 November 2004) and follow-up (AMR 51/161/2004, 19 November 2004) – Death penalty / Legal concern

USA (Texas) Troy Albert Kunkle (m), white, aged 38

Troy Kunkle has received a new execution date of 25 January. He was convicted in 1985 of the murder of Stephen Horton in 1984. In December 2004, a US Supreme Court Justice said that Troy Kunkle's death sentence was imposed in violation of the US Constitution, but that the Court was procedurally barred by a technical issue of state versus federal law from remedying that violation.

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 (see original UA). It was not discovered until evaluations conducted long after the trial that Troy Kunkle suffers from schizophrenia.

At the time of Troy Kunkle's trial, 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 and the Texas capital statute was changed in 1991 as a result. Under today's law, Texas capital jurors are additionally asked whether they consider there is enough mitigating evidence to warrant a life sentence. Several of the jurors from Troy Kunkle's trial have since suggested that they would have voted for a life sentence if they had been asked the mitigation question (see original UA).

Following the *Penry* ruling, Troy Kunkle's lawyers began appealing to the courts that he be granted a new sentencing hearing. This was based on the grounds that he was sentenced under an unconstitutional law that had prevented his jury from giving mitigating effect to evidence presented by his trial lawyers. For the next 15 years, however, these appeals were denied. Other Texas death row prisoners in the same situation were executed during this period without getting new sentencing hearings. Then, in 2004, in *Tennard v Dretke*, the US Supreme Court moved to remedy the situation of lower courts misapplying the *Penry* ruling, accusing for example the US Court of Appeals for the Fifth Circuit of "invok[ing] its own restrictive gloss" on the *Penry* decision. Several Texas inmates have been granted new sentencing hearings. However, the Texas courts have relied upon a procedural technicality to avoid addressing the merits of Troy Kunkle's claim following the *Tennard* ruling. Court rules prevent inmates from repeatedly filing a claim that they have already lost, but there is no exception for the situation where the inmate earlier lost the claim because the court misapplied the law. Nor can the federal courts intervene because this technical rule is a state law that federal courts are not allowed to interpret.

On 13 December, the Supreme Court announced that it would not consider Troy Kunkle's appeal, having stayed his execution shortly before it was due to be carried out on 18 November. Justice John Paul Stevens wrote that the Court did not have jurisdiction to reach the merits of Troy Kunkle's claim, explaining that the decision of the Texas Court of Criminal Appeals 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 prevented the Supreme Court from itself reaching the underlying federal law claim, adding: "That result is regrettable because it seems plain that Kunkle's sentence was imposed in violation of the Constitution". In other words, according to Justice Stevens, if a review of Troy

Kunkle's claim was granted, his death sentence would be overturned and he would be entitled to a new sentencing hearing.

The State of Texas set a new execution date, apparently unconcerned that Troy Kunkle's death sentence was imposed in violation of the US Constitution. Texas accounts for 337 of the 945 executions carried out in the USA since 1977, many in contravention of international safeguards.

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 friends and family of Stephen Horton, explaining that you are not seeking to condone the manner of his death or to minimize the suffering caused;
- expressing concern that Troy Kunkle was sentenced to death under an old law that did not allow the jury to give proper consideration to mitigating evidence, noting that several jurors from the trial have since said that they would have voted for life if not constrained by this now-defunct law;
- noting that no court has ever held a hearing into Troy Kunkle's claim, that the US Supreme Court has been unable to reach the merits of this claim due to a purely procedural obstacle, and that Justice John Paul Stevens has said Troy Kunkle was sentenced in violation of the US Constitution;
- expressing concern that the jurors who sentenced Troy Kunkle to death were not presented with any expert mental health evidence, noting that post-conviction evaluations suggest that he suffers from serious mental illness, including schizophrenia;
- pointing out that the power of executive clemency exists precisely to remedy errors that the courts are unwilling or unable to remedy;
- calling on the Board of Pardons and Paroles to recommend that the governor commute this death sentence;
- calling on the governor to accept any such recommendation of clemency, or to issue a reprieve in the event of a recommendation against clemency and to urge the Board members to reconsider.

APPEALS TO: (Note: In all appeals please include Troy Kunkle's prison number: #784)

Rissie Owens, Presiding Officer, Board of Pardons and Paroles, 1300 11th St., Suite 520, P.O. Box 599, Huntsville, TX 77342-0599, USA.

Fax: +1 936 291 8367, Salutation: Dear Ms Owens

Elvis Hightower, Board Member, Board of Pardons and Paroles, 1300 11th St., Suite 520, P.O. Box 599, Huntsville, TX 77342-0599, USA.

Fax: +1 936 291 8367, Salutation: Dear Mr Hightower

Charles Aycock, Board of Pardons and Paroles, 5809 S. Western, Suite 237, Amarillo, TX 79110, USA

Fax: +1 806 358 6455, Salutation: Dear Mr Aycock

Linda Garcia, Board of Pardons and Paroles, 1212 N. Velasco, Suite 201, Angleton, TX 77515, USA

Fax: +1 979 849 8741, Salutation: Dear Ms Garcia

Juanita Gonzalez, Board of Pardons and Paroles, 3408 S. State Hwy. 36, Gatesville, TX 76528, USA

Fax: +1 254 865 2629, Salutation: Dear Ms Gonzalez

Jose L. Aliseda, Board of Pardons and Paroles, 1111 West Lacy St., Palestine, TX 75801, USA

Fax: +1 903 723 1441, Salutation: Dear Mr Aliseda

Governor Rick Perry, Office of the Governor, PO Box 12428, Austin, Texas 78711-2428, USA

Fax: +1 512 463 1849, Email via webpage: <http://www.governor.state.tx.us/contact#contactinfo>

Salutation: Dear Governor

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

PLEASE SEND APPEALS IMMEDIATELY. All appeals must arrive by 25 January 2005