

PUBLIC

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EXTRA 17/03

Death penalty / Legal concern

21 February 2003

USA (Texas)

Delma Banks (m), black, aged 43

Delma Banks is scheduled to be executed in Texas on 12 March 2003. He was sentenced to death in October 1980 for the murder of Richard Wayne Whitehead, a 16-year-old white male, in April of that year. Delma Banks has been on death row for more than half his life.

Wayne Whitehead's body was found on 14 April 1980 in a park near Texarkana on the Arkansas border. He had been shot, and his car was missing. Police attention focussed on 21-year-old Delma Banks, a former work colleague of Whitehead who had been drinking with the teenager in the same park on the evening of 11 April, the last time Wayne Whitehead had been seen alive.

Delma Banks had no prior criminal record, and maintains his innocence of this crime. While Amnesty International opposes his execution regardless of his guilt or innocence, it also notes a number of troubling claims raised by his appeal lawyers. Similar claims – of unreliable testimony, prosecutorial misconduct and inadequate legal representation – have been shown to have contributed to errors in convictions and sentencing in scores of capital cases in the USA over the years. The prosecution argued that Delma Banks had shot Wayne Whitehead at about 4am on 12 April 1980. This was based on a statement from a witness who said that he had been awoken by two loud noises at around that time. However, the medical examiner was not prepared to place the time of death at this time, and indicated a number of factors which would suggest a later time of death. A pathologist has reviewed the evidence since the trial and concluded that death did not occur prior to the evening of 12 April. The state further theorized that immediately after the murder, Delma Banks had driven Wayne Whitehead's car to Dallas, 250 kilometres away. This was despite evidence that the car had a serious electrical problem and may not have lasted such a distance.

Two key state witnesses have recanted their trial testimony. Charles Cook testified at the trial that Banks had come to Dallas and left Cook with a car similar to Wayne Whitehead's and a gun, as well as confessing to him that he had killed "a white boy". Charles Cook, a drug addict with two previous criminal convictions, recanted his testimony in 1999, saying that it had been given out of fear of prosecution. The second witness, Robert Farr, also a drug addict, testified at the sentencing phase of the trial that Delma Banks had told him a week after the murder that he wanted to commit other armed robberies and would kill if necessary. This was very damaging testimony in a state where the death penalty can only be passed if the jury decides that the defendant will likely commit further acts of criminal violence if allowed to live. In 1999, Robert Farr admitted that he was a paid police informant in the case and that he had lied at the trial.

Delma Banks was tried in front of an all-white jury after the Bowie County prosecution peremptorily dismissed the only four African Americans in the jury pool. The appeal lawyers have presented evidence that at the time Bowie County prosecutors were engaging in racist tactics in selecting juries. Between 1 January 1975 and 30 September 1980, prosecutors had used peremptory strikes to exclude 94 per cent of blacks eligible to sit on juries. As a result, 1.8 per cent of eligible blacks served on the 37 cases tried in that period despite the fact that African Americans accounted for 21 per cent of the population of Bowie County. The prosecutors used race-coding markers against juror names – for example "B" or "N" – to identify individuals who were black. No such coding was used in the case of prospective white jurors. Delma Banks's trial lawyer made no objection to the dismissal of the four African Americans from the jury pool.

In 2000, a federal District Court Judge, the only judge to have heard all the evidence not heard by the trial jury, ordered the state to reduce the sentence or to give Banks a new sentencing. He cited the trial lawyer's "dismal" performance at the sentencing phase of the 1980 trial, which lasted half a day, and the prosecution's failure to disclose to the jurors that Robert Farr was a paid informant. Together, the federal

judge concluded, these two factors undermined the reliability of the jury's sentencing verdict. However, the state appealed, and in an unpublished opinion in August 2002, the federal US Court of Appeals for the Fifth Circuit reinstated the death sentence.

BACKGROUND INFORMATION

Texas accounts for 297 of the 832 executions carried out in the USA since judicial killing resumed there in 1977. At the time of writing, Delma Banks was scheduled to become the 301st person to be executed in Texas since 1977. For more information see: *Texas: In a world of its own as 300th execution looms* (AMR 51/010/2003, 23 January 2003).

The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty state that "capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts", and that defendants must be provided with "adequate legal assistance at all stages of the proceedings". In its 2001 report on the USA, the UN Committee on the Elimination of Racial Discrimination urged the authorities "to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers...". The UN Guidelines on the Role of Prosecutors require that prosecutors "perform their duties fairly" and avoid all discrimination.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words, using the above information and the following guide:

- expressing sympathy for the family of Richard Wayne Whitehead, explaining that you are not seeking to minimize the suffering his death will have caused;
- noting with concern that Delma Banks was tried in front of an all-white jury after the prosecution had removed the only African Americans during jury selection, and expressing deep concern at evidence of discriminatory selection tactics by Bowie County prosecutors at that time;
- expressing deep concern that the prosecution withheld the fact that one of the key witnesses was a paid informant, and that this and another key state witness have since recanted their trial testimony;
- noting that a federal District Judge characterized the performance of the defence attorney at the sentencing phase as "dismal";
- calling for clemency for Delma Banks.

APPEALS TO (in your appeals please quote Delma Banks's inmate number: #671):

Gerald Garrett, Chairperson, Texas Board of Pardons and Paroles
P.O. Box 13401, Austin, Texas 78711-3401, USA

Fax: + 1 512 463 8120
Salutation: Dear Mr Chairperson

The Honorable Rick Perry, Governor of Texas, State Capitol, PO Box 12428, Austin, TX 78711, USA

Fax: +1 512 463 1849 / 0039 / 1932
Salutation: Dear Governor

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

You may copy appeals to and/or send brief letters to the editor of (not more than 250 words):
Viewpoints, c/o *Houston Chronicle*, PO Box 4260, Houston, Texas 77210, USA

Fax: + 1 713 220 3575
E-mail: viewpoints@chron.com

PLEASE SEND APPEALS IMMEDIATELY.