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UNITED STATES OF AMERICA

The Death Penalty in California: The case of Robert Harris

California enacted its present death penalty statutes in 1977 and 1978. At the beginning of 1992, 318 prisoners were under sentence of death. One prisoner, Robert Alton Harris, has exhausted all available avenues of legal appeals and his execution in San Quentin Prison's gas chamber is feared to be imminent. If carried out, this would be the first execution in California for 25 years.

The debate over California's use of the death penalty has been fierce. During his term in office, Governor George Deukmejian, who wrote California's 1977 death penalty law, frequently criticized the state's delay in resuming executions. His successor, Governor Pete Wilson, also strongly supports the death penalty. Over the past months a California television station sued unsuccessfully for the right to film executions in San Quentin prison.

ROBERT ALTON HARRIS

Robert Alton Harris is likely to become the first person executed in California since 1967, despite the fact that one-half of the Ninth Circuit Court of Appeals judges who voted on the case in December 1991 reportedly thought he should have been granted a full court review to determine whether he was deprived of effective psychiatric assistance at his original trial.

According to press accounts, the vote was a tie, 13 to 13, with one judge not participating. On 2 March 1992 the US Supreme Court denied Harris' petition for leave to appeal. On 13 March 1992, a hearing convened by the Attorney General is expected to set Robert Harris' execution for a date in April or May.

Robert Harris has been under sentence of death for thirteen years. He was convicted of the kidnap, robbery and murder of two teenage boys in July 1978 and was sentenced to death on 6 March 1979. Harris came within 12 hours of being executed in April 1990.¹

New evidence not available to the jury at Robert Harris' trial indicates strong grounds for granting clemency.

1 Fetal Alcohol Syndrome (FAS).

First identified in the early 1970s, fetal alcohol syndrome (FAS) is the damage some unborn children suffer when their mothers drink alcohol during pregnancy. Damage can range from subtle to severe, causing clumsiness, behavioural problems, stunted growth, disfigurement or mental retardation. There is evidence that Robert Harris' mother drank heavily throughout her pregnancy, and that he shows some of the physical and cognitive characteristics of FAS.

2 Childhood abuse.

Both parents were alcoholics. Robert Harris was born more than two months prematurely after his mother was kicked in the stomach by her husband. At the age of two Robert Harris was beaten unconscious by his father and required hospital treatment. He was beaten throughout his early childhood by his father and a step-father. When Harris was nine, his father was convicted and imprisoned for sexually abusing his daughters.

¹See Urgent Action UA 63/90 (AMR 51/01/90 and AMR 51/09/90); also NWS 11/11/90.

At the age of 14, Robert Harris was abandoned by his mother. He lived rough for a while near his brother's house, then tried to settle with a sister in Oklahoma. When he was 15 he was caught with others driving a stolen car. The others were claimed by their families; he was not, and was sentenced to four years at a federal youth center. There he was diagnosed pre-psychotic, schizophrenic, suicidal and self-destructive. At 19 he was released with a recommendation that he seek treatment for mental health problems. There is no evidence that he received treatment.

3. Organic brain damage.

Organic brain damage can arise from various kinds of injuries, including FAS, physical blows, inhalation of organic solvents or injection of drugs, as well as accidents or assaults. Tests performed on Robert Harris after he was sentenced to death revealed frontal lobe damage of a severity likely to have affected his ability to reflect on actions, weigh consequences, plan or organize, or reason rationally. In addition to FAS, and the physical beatings he received as a child, Robert Harris is known to have sniffed gasoline, glue and paint fumes from the age of eight or nine.

While evidence of mental impairment and physical abuse does not excuse the crime of murder, it does provide some explanation as to why such a crime occurred. The jury at Robert Harris' trial did not learn the full extent of his ill-treatment as a child or his mental disabilities. These are strong reasons not to impose society's ultimate penalty and Amnesty International believes that the interests of justice would best be served by commuting Robert Harris' death sentence on humanitarian grounds.

It was after hearing the above evidence that the Court of Appeals for the Ninth Circuit was split by a 13 to 13 tie vote: which meant, in effect, a refusal to grant the full evidentiary hearing Harris' lawyers had sought. Judge John Noonan, (a member of the three-judge panel who had considered Harris' petition earlier) argued that Harris had indeed raised an issue of "bedrock fairness" concerning the jury's decision to sentence him to death rather than life imprisonment.

Following the tied vote, Judge Stephen Reinhardt wrote in dissent: "Can we really justify the taking of a human life in a case in which, for example... up to half the members of this court of twenty-eight may believe that the law prohibits us from doing so? Should life or death depend on the vote of one judge among many, when there are legitimate arguments on both sides and the decision could as easily go the other way?"

Robert Harris will appeal to Governor Pete Wilson for clemency. There are no clear criteria by which the Governor considers clemency applications. Governor Wilson is being urged to convene a panel of experts and to hear testimony from all interested parties. In order to commute Harris' death sentence, Governor Wilson would require approval from a majority of the seven-member California Supreme Court. This is because Harris has two prior felony convictions.

International law and trends

Amnesty International believes that Robert Harris' execution would be inconsistent with internationally recognized minimum standards safeguarding the rights of those facing the death penalty. In May 1989, the United Nations Economic and Social Council (EcoSoc) adopted Resolution 1989/64 which advocates "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution."

International treaties and standards encourage governments to restrict the use of the death penalty with a view to its ultimate abolition. United Nations General Assembly Resolution 2857 (XXVI), adopted in December 1971, affirms that: "...in order fully to guarantee the right to life, as provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries."

Nearly half the countries of the world have now abolished the death penalty in law or practice: a trend particularly marked in both Western and Eastern Europe. Countries which have abolished the death penalty for all offences since 1989 include the Czech and Slovak Federative Republic, Romania, Hungary, New Zealand, Cambodia, Ireland, Mozambique and Namibia. In 1990 Nepal abolished the death penalty for murder and Bulgaria announced a moratorium on executions pending consideration of the country's capital punishment laws. In July 1991 the then Soviet Union reduced the number of crimes punishable by death from 18 to five. South Africa has suspended all executions since February 1990.

California's move to resume executions after a quarter of a century would be a retrograde step for human rights. It would be contrary to the spirit of article 4 of the American Convention on Human Rights (ACHR) and article 6 of the International Covenant on Civil and Political Rights (ICCPR), which encourage progress towards abolition of the death penalty. In 1977 the USA signed both the ACHR and the ICCPR, but neither has been ratified.

BACKGROUND TO CALIFORNIA'S DEATH PENALTY

Between 1893 and 1967, 502 executions were carried out in California: 308 by hanging and 194 by lethal gas. Between 1967 and 1972 there was a de facto moratorium on executions in California and in February 1972 the California Supreme Court, in *People v Anderson*, declared the death penalty unconstitutional under the state prohibition of cruel and unusual punishment. In June 1972 the US Supreme Court invalidated the death penalty statutes in most other states on similar grounds. However, in November 1972 Californians voted in favour of a constitutional amendment to restore the state's death penalty.

In *Gregg v Georgia* (1976), the US Supreme Court permitted states to reintroduce the death penalty in accordance with new constitutional guidelines. But in December 1976 the California Supreme Court again held California's death penalty law to be unconstitutional, this time on the grounds that it did not comply with the US Supreme Court's new guidelines.

In 1977 the California legislature enacted a death penalty law written by Governor (then State Senator) George Deukmejian. But in November 1978 the people of California voted to replace it with a new, broader, death penalty law. This initiative measure, popularly known as the "Briggs Initiative" after its author Senator John Briggs, broadly expanded the categories of cases involving "special circumstances" in which the death penalty could be imposed.

The "special circumstances" provisions of the new law were criticized by legal scholars for their overbroad definition of 'intent' and for careless drafting errors. The inconsistencies and ambiguities within California's death penalty statute led to three-quarters of the "special circumstance" findings being struck down by the California Supreme Court over the next eight years. By March 1986 the Court had reviewed 54 death penalty cases; it affirmed three and reversed 51 (65 per cent of these reversals affected the death sentence only, not the underlying murder conviction). This reversal rate was no surprise to legal experts.

However, the California public interpreted the Court's high reversal rate as an attempt by some of the justices themselves to frustrate the implementation of the death penalty in California. In November 1986 the California electorate voted not to retain Chief Justice Rose Bird and two associate justices in office. This followed a highly politicized campaign against them, which focused almost exclusively on the Court's record in reversing death judgments (only five percent of its overall caseload).

Governor Deukmejian appointed Malcolm Lucas to succeed Rose Bird as Chief Justice, and appointed four new associate justices to the California Supreme Court. The new court upheld 72 percent of the death sentences it reviewed in the first three years. In 1990, it upheld 25 out of 27 death sentences, and in 1991 it upheld 24 out of 25. Although it has disposed of a record number of cases (more than 100) since 1987, given the number of new death sentences passed annually in California the Court still faces a considerable backlog. According to *California Lawyer*, (June 1988):

"...the court is delivering exactly what the electorate ordered: accelerated processing of death penalty appeals. The price of meeting that priority, however, is becoming starkly apparent. The California Supreme Court is no longer functioning as the architect of California case law. It has become chiefly a death penalty review court. And the foreseeable future offers the court little relief from that role."

Move to televise California executions

In March 1990, San Francisco public TV station KQED requested permission to videotape Robert Harris' execution, then scheduled for 3 April. San Quentin prison's warden, Daniel Vasquez, refused permission and imposed a blanket ban on all media coverage of executions in San Quentin. Harris received a stay of execution but KQED pursued its request by filing suit against the warden, challenging the constitutionality of San Quentin's media regulations. On 7 June 1991 a federal court in San Francisco upheld the ban on videotaping executions but said that rules barring all reporters were "irrational and capricious."

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Amnesty International opposes the death penalty in all cases as a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment, as proclaimed in the Universal Declaration of Human Rights. Amnesty International believes that California's move to resume executions after 25 years would be a retrograde step for human rights.