
amnesty international

UNITED STATES OF AMERICA

New Year's resolution: End a cruel and outdated punishment

21 December 2006

AI Index: AMR 51/205/2006

Before he died, Diaz called his execution an act of vengeance. Perhaps, but given the 27-year lapse between crime and punishment, there was no public outcry for his death. His execution rather shows the capricious nature of a brutal act that should have no place in American society.

Boston Globe editorial following execution of Angel Diaz in Florida¹

On 15 December 2006, 215 years to the day after the Eighth Amendment to the US Constitution was ratified, executions in California and Florida were suspended because of problems with their lethal injection procedures. In each case, the Eighth Amendment – which bans “cruel and unusual” punishment – was cited. In each state, the governor has indicated his wish to fix the system in order that the judicial killing can continue.

The USA's executions in 2006 opened in California on 17 January with the lethal injection of Clarence Allen – a 76-year-old wheelchair bound, virtually blind, diabetic Native American man suffering from advanced heart disease. He had been on death row for 23 years. The execution went ahead in the face of opposition from a US Supreme Court Justice who said that there was a “significant question” as to whether Clarence Allen's execution would amount to “cruel and unusual” punishment under the Eighth Amendment.²

The year's judicial killing ended 12 months later with Puerto Rican native Angel Nieves Diaz being put to death in Florida on 13 December 2006 for a crime committed in December 1979. In his case, the execution went ahead despite the fact that a key prosecution witness had recanted his trial testimony against Diaz, who proclaimed his innocence to the end. The execution team apparently injected the first dose into the condemned man's flesh rather than his veins. Witnesses described Angel Diaz grimacing in pain before a second dose was injected. More than half an hour after the execution began, a hooded doctor signalled that the prisoner was dead.

¹ *Rethinking the death penalty*. Editorial, Boston Globe, 19 December 2006.

² *Allen v. Ornoski*, 16 January 2006, Justice Breyer dissenting.

Two days later, Governor Jeb Bush suspended executions in Florida and established a Commission on Administration of Lethal Injection. "I look forward to the Commission's expeditious review of the lethal injection protocols in Florida," Governor Bush said, "to ensure the method is consistent with the Eighth Amendment."³

Also on 15 December, a US District Judge issued an opinion that suspended executions in California. Judge Jeremy Fogel wrote of the "pervasive lack of professionalism" in the implementation of California's lethal injection protocols, a "deeply disturbing" fact "given that the State is taking a human life." As in other states, lethal injections in California are conducted using three drugs – sodium thiopental to induce unconsciousness; pancuronium bromide to induce paralysis; and potassium chloride to induce cardiac arrest. If the first fails for some reason, the injection of the second two will cause severe pain – although the paralyzing pancuronium bromide may mask any outward signs of suffering. According to Judge Fogel, in at least six of 11 previous executions by lethal injection in California there were substantial questions as to whether the inmate was still conscious when the pancuronium bromide or sodium chloride were injected. The "systemic flaws in the implementation of the protocol," Judge Fogel continued, "make it impossible to determine with any degree of certainty whether one or more inmates may have been conscious during previous executions or whether there is any reasonable assurance going forward that a given inmate will be adequately anesthetized." He wrote that "the responsibility for this uncertainty falls squarely upon [the executive], and the circumstances clearly implicate the Eighth Amendment."⁴

Three days later, Governor Arnold Schwarzenegger ordered his administration to bring California's lethal injection protocol into compliance with the Eighth Amendment. "I am committed to doing whatever it takes," the Governor stated, "to ensure that the lethal injection process is constitutional so that the will of the people is followed and the death penalty is maintained in California."⁵

Despite Governor Schwarzenegger's claim to be giving the people what they want, there are signs that the USA is slowly turning against judicial killing. The 53 executions carried out in 2006 represented the lowest annual total for a decade, and death sentencing continues to drop from its peak in the mid-1990s. The number of people sentenced to death in 2006 will be under half of what it was in 1996, and the lowest since executions resumed in the USA in 1977.⁶ And, although capital jurors in the USA are more pro-prosecution than those who are excluded from such jury service under US law due to their opposition to the death

³ For the Governor's executive order, see

http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/December/06-260-lethalinjection.pdf.

⁴ *Morales v. Tilton*, US District Court for the Northern District of California, 15 December 2006.

⁵ Gov. Schwarzenegger Orders Administration to Amend Implementation of Lethal Injection Protocol, 18 December 2006, <http://gov.ca.gov/index.php?press-release/4940/>.

⁶ 317 people were sentenced to death in the USA in 1996. The Death Penalty Information Center (Washington, DC) is projecting that the 2006 total will be 114 new death sentences. See DPIC's Year End Report, December 2006, <http://www.deathpenaltyinfo.org/2006YearEnd.pdf>.

penalty, the growing reluctance of even these “death-qualified” jurors to hand down death sentences seems to reflect a broader erosion in the public support for the death penalty. This includes an erosion of the public’s belief in the deterrence value of the death penalty, an increased awareness about the frequency of wrongful convictions in capital cases, and a greater confidence that public safety can be guaranteed by life prison terms rather than death sentences.⁷

Perhaps this apparent dampening of enthusiasm for the death penalty is also, in the words of the US Supreme Court, a sign more generally of “evolving standards of decency.” In 1958, the Supreme Court ruled that the meaning of the Eighth Amendment’s ban on “cruel and unusual” punishments was not static, but must be drawn “from the evolving standards of decency that mark the progress of a maturing society.”⁸ It was this criterion that the Court applied, for example, when belatedly concluding in 2002 and 2005 that the execution of offenders with mental retardation and those who committed their crimes when children were now outlawed under the Eighth Amendment. It is the criterion which, if the Court were to be consistent should lead it to exempt people with serious mental illness from the death penalty as well, as Amnesty International argued in a 190-page report issued in January 2006.⁹

But are we drawing closer to the time when the Supreme Court could determine that the execution of anyone offends US society’s standards of decency? After all, in its 1958 decision, it stressed that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” The death penalty cannot but flout human dignity – of prisoner and executioner alike – as graphically illustrated when Angel Diaz was killed. Indeed, the dignity of society as a whole surely “must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place.”¹⁰

A death penalty proponent may contend that lethal injection is humane compared with the way that the lives of murder victims are ended. This notion lies at the heart of the adoption of lethal injection in the USA in the first place and of the attempts to “fix” it when problems emerge. Governor Jeb Bush continues to express confidence that lethal injections can comply with the Eighth Amendment, and District Judge Jeremy Fogel has stated that

⁷ In a Gallup opinion poll taken in the USA in May 2006, more respondents favoured life imprisonment without parole (48 per cent) than the death penalty (47 per cent), when asked to choose between the two. 64 per cent of those polled disagreed with the notion that the death penalty deters murder, a substantial shift upwards from the 1980s and early 1990s. 63 per cent said they believed that an innocent person had been executed in the past five years, up from previous years.

⁸ *Trop v. Dulles* (1958).

⁹ USA: The execution of mentally ill offenders, AI Index: AMR 51/003/2006, January 2006, <http://web.amnesty.org/library/Index/ENGAMR510032006>. See also, for example, Judge Lundberg Stratton’s concurrence in *State v. Ketterer*, Ohio Supreme Court, 25 October 2006 (“I too question whether either justification [deterrence or retribution] applies to severely mentally ill offenders.”)

¹⁰ *The State v. T. Makwanyane and M. Mchunu*, Constitutional Court of the Republic of South Africa, 6 June 1995, Mahomed, J., concurring.

while California's lethal injection process is broken, "it can be fixed." Governor Schwarzenegger was swift to pick up the challenge.

The death penalty can never be fixed, however, because the cruelty and inequities of this punishment consist of more than just the method the state chooses to kill the prisoner. A death sentence thrusts the condemned prisoner into a cycle of hope and despair into which his or her family is also drawn. It is also about the inevitable inconsistencies that characterize a system that attempts to sort those who will be killed for their crimes from those who will not (in the USA, there have been approximately 500,000 murders since 1977, and just over 1,000 executions). It is about discrimination, as race has consistently been shown to be a factor in who does or does not get a death sentence in the USA. It is about the quality of legal representation – as Ronald Chambers said from Texas death row recently – "no rich folks here... If I had the money, I wouldn't be here."¹¹ Ronald Chambers is due to be put to death on 25 January 2007 for a murder committed in 1975.

More than a century ago, the Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it."¹² This is an anguish Ronald Chambers has lived with for the past three decades – he has been in custody for the past 31 years, almost all of it on death row. He was 20 years old at the time of the crime. He is now 51. He was first sentenced to death in 1976, at which time no one had been executed in the USA for about a decade. Since then, some 1,057 men and women have been put to death in the USA, 379 of them in Texas. In the same period, more than 60 countries have abolished the death penalty, bringing to 128 the number that have now done so in law or practice.¹³

Ronald Chambers' lawyers have challenged his death sentence on the grounds that the length of time he has spent on death row – the result of constitutional violations by the state – amounts to "cruel and unusual" punishment prohibited by the Eighth Amendment.¹⁴

¹¹ *Death row dean has date with executioner*. Associated Press, 12 December 2006.

¹² *In re Medley*, 134 U.S. 160 (1890).

¹³ Since 1976 Portugal, Denmark, Luxembourg, Nicaragua, Norway, France, Cape Verde, Netherlands, Australia, Haiti, Liechtenstein, Cambodia, New Zealand, Romania, Slovenia, Andorra, Croatia, Czech Republic, Slovakia, Hungary, Ireland, Mozambique, Namibia, Sao Tomé and Príncipe, Angola, Paraguay, Switzerland, Guinea-Bissau, Hong Kong, Seychelles, Italy, Djibouti, Mauritius, Moldova, Spain, Belgium, Georgia, Nepal, Poland, South Africa, Azerbaijan, Bulgaria, Canada, Estonia, Lithuania, United Kingdom, East Timor, Turkmenistan, Ukraine, Côte d'Ivoire, Malta, Bosnia-Herzegovina, Cyprus, Serbia, Montenegro, Armenia, Bhutan, Greece, Samoa, Senegal, Turkey, Liberia, Mexico and the Philippines have abolished the death penalty for all crimes. Also since 1976, Brazil, Fiji, Peru, El Salvador, Argentina, Bolivia, Latvia, Albania, and Chile have abolished the death penalty for ordinary crimes. For dates and notes, see <http://web.amnesty.org/pages/deathpenalty-countries-eng>.

¹⁴ His death sentence was overturned in 1984 because he had been interviewed by the state's psychologist without being informed that his statements could be used to obtain a death sentence. He was retried and again sentenced to death in 1985. This was reversed in 1986 because of discriminatory

The US Supreme Court has not directly confronted this issue, but individual Justices have raised their concerns. For example, in an opinion in November 2006 involving a California case that was 25 years old, four Supreme Court Justices wrote that “the incremental value to California of carrying out a death sentence at this late date is far outweighed by the interest in maintaining confidence in the fairness of any proceeding that results in a State’s decision to take the life of one of its citizens.”¹⁵

In 1995, Justice Stevens wrote that executing a prisoner who had been on death row for 17 years – more than a decade less than Ronald Chambers has suffered – arguably negated any deterrent or retributive justification for the punishment, supposedly the two main social purposes of the death penalty. If these goals no longer existed, he suggested, the outcome would be “patently excessive and cruel.”¹⁶ In 1999, Justice Breyer expressed his concern – in the case of an inmate in Florida and one in Nebraska who had been on death row for 24 and 19 years respectively – at the “astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures.” He suggested that “where a delay, measured in decades, reflects the State’s own failure to comply with the Constitution’s demands, the claim that time has rendered the execution inhuman is a particularly strong one.”¹⁷ In 2002, in the case of a Florida inmate on death row for about 27 years, Justice Breyer wrote of this “extraordinarily long confinement under sentence of death, a confinement that extends from late youth to later middle age.” If the prisoner was executed, Justice Breyer stated, he would have been “punished both by death and also by more than a generation spent in death row’s twilight. It is fairly asked whether such punishment is both unusual and cruel.”¹⁸

On 19 December 2006, four days after executions in California and Florida were suspended, the Maryland Court of Appeals halted executions in that state after finding that its lethal injection protocols had been adopted improperly.¹⁹ The issue will now be placed within the elected branches of government. Governor-elect Martin O’Malley, who takes office on 17 January 2007 – exactly 30 years after the execution of Gary Gilmore begun the USA’s “modern” era of judicial killing – called on the outgoing Governor to leave the issue for the new administration. The incoming Governor said: “I’m sure all of this will spark a renewed debate as to whether all of the money we spend prosecuting death penalty cases might be better spent fighting violent crime and saving lives.”²⁰

jury selection. Dallas County prosecutors were notorious for their racist jury selection tactics (see *USA: Death by discrimination – the continuing role of race in capital cases*, AI Index: AMr 51/046/2003, April 2003, <http://web.amnesty.org/library/index/engamr510462003>). Chambers was tried for the third time in 1992 and again sentenced to death.

¹⁵ *Ayers v. Belmontes*, 13 November 2006, Justices Stevens, Souter, Ginsburg and Breyer, dissenting.

¹⁶ *Lackey v. Texas*, 27 March 1995, Justice Stevens, respecting the denial of *certiorari*.

¹⁷ *Knight v. Florida, Moore v. Nebraska*, 8 November 1999, Justice Breyer, dissenting from the denial of *certiorari*.

¹⁸ *Foster v. Florida*, 21 October 2002, Justice Breyer, dissenting from denial of *certiorari*.

¹⁹ *Evans v. State*, Court of Appeals of Maryland, 19 December 2006.

²⁰ *Maryland High Court calls halt to executions*. Washington Post, 20 December 2006.

Many countries have decided that the answer to this question is yes – resources expended on the death penalty are wasted resources. In a world in which a clear majority of nations have turned their backs on the death penalty, and 215 years after ratification of the Eighth Amendment, how much longer will the United States remain a member of an ever diminishing club of countries which cling to this cruel and outdated punishment?

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