

URGENT ACTION

FAIR TRIAL CONCERN REVISITED AS EXECUTION LOOMS

Stacey Johnson, aged 47, is scheduled to be executed in Arkansas on 20 April for a 1993 murder. Three state Supreme Court Justices argued that he was deprived of a fair trial by being denied access to information regarding the credibility of a key witness against him.

On 2 April 1993, Carol Heath's body was found in her apartment in DeQueen, Arkansas. Her throat had been cut and she had other injuries. Her six-year-old daughter said that a black male with a "girl sounding name" had come to the home, that he and her mother had fought, and that he had a knife. The girl selected **Stacey Johnson** from a photo line-up of seven black males shown to her by police. He was arrested on 14 April 1993 in New Mexico and brought to Sevier County, Arkansas for trial. He was convicted of the murder and sentenced to death in 1994. On appeal in 1996, the Arkansas Supreme Court ordered a retrial on the basis that the police testimony about the girl's identification of the defendant (the judge had found her incompetent to testify) had been inadmissible hearsay.

Stacey Johnson's lawyer sought a change of trial venue due to the extensive publicity. The judge granted the motion but chose Pike County rather than Little River County as requested. The defence objected, arguing that Pike County's population had a much smaller percentage of black people (3% of registered voters compared to 19% in Little River), and this was a black defendant/white victim case. The retrial nevertheless proceeded in Pike County in 1997, before a jury with one African American member on it. The victim's daughter, then aged 10, was found competent to testify, and she became a key witness. Stacey Johnson was convicted and condemned to death again. In 2000, the state Supreme Court narrowly upheld the conviction and death sentence.

Three of the seven judges dissented. They noted that the victim's daughter had been in therapy since the murder. Before the first trial, her legal guardian had waived the therapist/patient privilege for the psychologist in question. The therapist testified at a competency hearing that the girl would suffer mental damage if made to testify, and that she could not accurately recall what happened a year earlier. From 1996 to 1998, the girl was treated by another therapist. For the 1997 retrial, her guardian refused to waive the privilege for this therapist. Stacey Johnson's lawyer was thereby denied access to her records. If he had had such access, the three judges noted, "he would have been able to delve into [the therapist's] conclusions that [the girl's] stories were profoundly inconsistent and that she had been under considerable pressure from her family and the prosecutor to convict Stacey Johnson," information which would have supported "an entirely new basis for attacking [the girl's] credibility." They wrote that "if a patient is allowed to pick and choose between physician witnesses and can, by claim of privilege, prevent impeaching testimony from being disclosed to the court, a mockery might be made of justice." Such "picking and choosing", they continued, was "exactly what occurred" here, and meant that Stacey Johnson was "hamstrung" in his cross-examination of this witness, in his defence in general and "thus, was denied his right to a fair trial."

Please write immediately in English or your own language:

- Calling for clemency for Stacey Johnson and for his death sentence to be commuted;
- Noting the selective use of the therapist/patient privilege, which three state Supreme Court judges said led to an unfair trial by keeping from the defence information about the credibility of a key prosecution witness;
- Explaining that you are not seeking to condone violent crime or to downplay its consequences.

PLEASE SEND APPEALS BEFORE 20 APRIL 2017 TO:

The Honorable Asa Hutchinson, Governor of the State of Arkansas
 State Capitol, Suite 250, 500 Woodlane St, Little Rock, AR 72201, USA
 Fax: +1 501 682 3597
 Email: <http://governor.arkansas.gov/contact-info/> (use US detail)

Salutation: Dear Governor

Also send copies to diplomatic representatives accredited to your country. HIS EXCELLENCY THE HONOURABLE MATTHEW BARZUN
 American Embassy, 24 Grosvenor Square, London W1A 6AE, tel: 020 7499 9000. Salutation: Your Excellency.

Please check with your section office if sending appeals after the above date.

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ADDITIONAL INFORMATION

The three judges who dissented from the 2000 decision to uphold Stacey Johnson's conviction revealed some of the therapist's records denied to the defence. Samples of the therapist's notes after sessions with the girl ("A") before the second trial included the following: "The DA says she's the only one who can 'keep him behind bars'"; "So much of what A says is parroting other family members. For example, she says, 'I'm the only one who can put him behind bars'"; "Her grandmother told A that she 'has to keep him behind bars,' because if he gets out he'll try to kill A next"; "Her grandmother emphasized how much responsibility was on her, and if Johnson's sentence is overturned, A will feel total responsibility"; "A kept wanting to elaborate on what she saw. [DA] emphasized to her that all she has to say is that she saw [Johnson] murder her mom, period." The three dissenters accused their four colleagues of endorsing the state's position that the girl's guardian "should be able to pick and choose which therapist will testify and be made available to the defense. That should not be. It stands to reason that if A's guardian waives the privilege for one key psychotherapist, that waiver should apply to a successive therapist who also treated her to cope with her mother's savage murder before the second trial. Here, the defense was thwarted in its quest to review the records of [the second therapist], who had conducted the more recent therapy sessions with A and who, without question, would have had a better grasp of her current mental state." The "sole support cited by the majority for the State's unique position is a 1915 civil case", which "does not call into play the fundamental rights and policy considerations inherent in a capital murder trial".

Under international law and standards, individuals accused of criminal offences have the right to examine, or have examined, witnesses against them. Restrictions on the accused's right to question prosecution witnesses maybe permissible if the witness is particularly vulnerable, for example, in the case of a child. However, any restriction must be determined by a court to be objectively necessary, and be proportionate and consistent with the rights of the accused and the requirements of a fair trial. In view of the irreversible nature of the death penalty, all proceedings in capital cases must scrupulously observe all international fair trial rights, and the strict application of the highest standards for gathering and assessing evidence.

Study after study has found that race, particularly race of murder victim, has an impact on who receives the death penalty. In 2015, for example, US Supreme Court Justice Stephen Breyer pointed out that multiple studies have concluded that "individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty." In the USA, blacks and whites are the victims of murder in approximately equal numbers (meaning that black people, who make up only about 13% of the population, are disproportionately the victims of murder). In the country as a whole, 78% of executions since 1977 were of people convicted of crimes involving white victims. In Arkansas the figure is 89%.

Like many states, Arkansas has faced problems sourcing chemicals for its lethal injection protocols and implementing protocols that courts find constitutional. On 23 June 2016, the Arkansas Supreme Court upheld the state's three-drug execution protocol, which uses a barbiturate or midazolam as a sedative, vecuronium bromide as a paralytic agent, and potassium chloride to induce fatal cardiac arrest. After the US Supreme Court declined to intervene in February 2017, Governor Hutchinson set execution dates for the eight men on whose behalf the legal challenge to the protocol had been brought: Bruce Ward and Don Davis on 17 April; Ledelle Lee and Stacey Johnson on 20 April; Marcel Williams and Jack Jones on 24 April, and Jason McGehee and Kenneth Williams on 27 April. See <https://www.amnesty.org/en/documents/amr51/5816/2017/en/>.

The six executions in the USA so far this year bring to 1,448 the total since judicial killing resumed in 1977 under laws approved by the US Supreme Court in 1976. The last execution in Arkansas – its 27th since 1977 – was in 2005. Amnesty International opposes the death penalty in all countries and all cases, unconditionally. Some 141 countries are abolitionist in law or practice.