

URGENT ACTION



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22 May 2008

UA 134/08 Death penalty

USA (Texas) Derrick Sonnier (m), black, aged 40

Derrick Sonnier is scheduled to be executed in Texas on 3 June. He was sentenced to death in 1993 for the murder of his neighbor and her young son in 1991. Derrick Sonnier has been on death row for 15 years.

On the afternoon of 16 September 1991, the bodies of Melody Flowers and her two-year-old son Patrick were found in the bathtub of her apartment in Humble, near Houston. She had been struck on the head, strangled and stabbed, and the boy had been stabbed. Derrick Sonnier, who was a neighbor of Melody Flowers, was arrested and charged with the murders. The Texas Court of Criminal Appeals has characterized the evidence against Derrick Sonnier as “entirely circumstantial”, although “nevertheless extremely incriminating”. The state’s evidence indicated that Sonnier had on previous occasions entered Melody Flowers’ home, uninvited, in circumstances that had frightened her, and that he had been in the area at the time of the crime with a serious cut on his hand and acting “peculiarly”. In addition, there was physical evidence that circumstantially linked Sonnier to the crime (for example, police found a bag of bloodied clothes said to have been identical to unsoiled clothing Sonnier had been seen wearing earlier in the day). Blood and DNA testing was generally inconclusive, however, neither positively identifying him as the perpetrator nor ruling him out.



The jury voted to convict Derrick Sonnier, and the trial moved into its sentencing phase. The defense presented no evidence and no witnesses whatsoever. This was at the defendant’s instruction. Derrick Sonnier’s trial lawyers later testified during the appeals process that there had been members of his family who were present in the courtroom who they had intended to call as mitigation witnesses on his behalf. They said, however, that Sonnier had refused to allow them to present such testimony despite their advice that it would be beneficial to do so. After the judge had confirmed with Sonnier that this was his position, the sentencing went forward without any mitigation evidence. The prosecutor’s final argument for a death sentence stressed this to the jury: “If there was a parade of character witnesses to say what a fine man this is, you know you would have heard those too.” The jury voted for the death penalty.

Since the trial, it has been shown that the trial lawyers did minimal investigation and preparation of the witnesses they said they had intended to call – for example, both Sonnier’s mother and stepmother later testified that they had had only brief conversations with the trial lawyers shortly before the trial, were never interviewed about Sonnier’s background or asked to testify about him. The US Court of Appeals for the Fifth Circuit found that the lawyers had done only a “truncated investigation” of character witnesses, and “did not talk to Sonnier’s family and acquaintances at the length or in the depth required” for the purpose of preparing a mitigating defense. It concluded that the lawyers had “stopped short of making a reasonable investigation for purposes of uncovering relevant mitigating evidence that could have been useful in reaching two goals that it was their duty to pursue: (1) fully informing

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Sonnier of all available mitigating evidence and their opinion of its potential effectiveness based on their professional knowledge and experience; and (2) persuading the sentencing jury that Sonnier's moral culpability was not sufficient to warrant the death penalty". However, a successful appeal on a claim of inadequate legal representation is difficult to achieve under US constitutional law. The prisoner must prove that not only was the trial counsel's performance sub-standard, but that this had altered the outcome of the trial. In Derrick Sonnier's case, the Fifth Circuit concluded that he had failed to prove this second aspect. Although the Fifth Circuit said that the mitigation evidence would have shown positive aspects of his character, it concluded that it still would not have outweighed the aggravating facts of the crime, and the trial outcome would have been the same.

Ultimately, a post-conviction assessment – however carefully made – of how a jury would have voted if it had been presented with particular evidence effectively amounts to judicial guesswork, clearly troubling when a life is at stake. Moreover, when defendants refuse to allow their defense counsel to present available mitigating evidence, for whatever reason, it feeds into the arbitrariness of the death penalty. The mandatory death penalty has long been ruled unconstitutional in the USA, and the capital sentencing decision is supposed to be individualized, with the jury being able to take into account any mitigating evidence and the prosecution presenting the reasons why the defendant should be executed rather than imprisoned. As a US Supreme Court Justice said in 1979, "This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating factors." If the defendant refuses to allow any mitigating evidence, despite its availability, the system comes closer to tolerating a quasi-mandatory death sentence, with the jury not in a position to take into account the background and circumstances of the defendant to weigh against the facts of the crime and the government's bid for a death sentence. At the jury selection for Sonnier's 1993 trial, the judge refused to allow the defense to inform the jurors that Sonnier would be ineligible for parole for 35 years if convicted and sentenced to imprisonment rather than death. In 1994, the US Supreme Court ruled that in cases where a state argues for execution based on the notion of a defendant's future dangerousness – in Texas, the jury's finding of future dangerousness is a prerequisite for a death sentence – the defendant must be allowed to respond by showing that if sentenced to life imprisonment, he or she would not be eligible for parole. However, at the time of Sonnier's trial, the choice facing the jury was only the death penalty or life imprisonment with the possibility of parole, albeit only after 35 years. Sonnier's case has been deemed not to fall within the scope of the 1994 precedent. There have been 1,101 executions since judicial killing resumed in 1977, 405 of them in Texas. In late 2007, the UN General Assembly passed a landmark resolution calling for a worldwide moratorium on executions. Amnesty International opposes the death penalty in all cases, unconditionally. There is no such thing as a humane, fair, reliable or useful death penalty system (see *The pointless and needless extinction of life: USA should now look beyond lethal injection issue to wider death penalty questions*, <http://www.amnesty.org/en/library/info/AMR51/031/2008/en>).

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible:

- expressing sympathy for any family of Melody and Patrick Flowers, and explaining that you are not seeking to excuse the manner of their deaths or to downplay the suffering caused;
- opposing the execution of Derrick Sonnier;
- expressing concern that the jurors who sentenced Derrick Sonnier to death had heard no mitigating evidence, despite the availability of such evidence, noting that the Fifth Circuit Court of Appeals found that he had received inadequate defense representation;
- pointing out that the power of executive clemency is not restricted by rules of procedure and precedent in the way that the courts are;
- calling for Derrick Sonnier to be granted clemency, and for his death sentence to be commuted.

APPEALS TO:

Rissie Owens, Presiding Officer,
Board of Pardons and Paroles,
Executive Clemency Section
8610 Shoal Creek Boulevard
Austin, TX 78757

Fax: 1 512 463 8120

Salutation: Dear Ms Owens

Governor Rick Perry,
Office of the Governor
P.O. Box 12428
Austin, TX 78711-2428

Fax: 1 512 463 1849

Salutation: Dear Governor

PLEASE SEND APPEALS IMMEDIATELY.

Check with the Urgent Action office if sending appeals after 3 June 2008.