

USA

**SENSELESS KILLING
AFTER SENSELESS
KILLING**

**TEXAS INMATE WITH MENTAL DISABILITY
CLAIM FACING EXECUTION FOR MURDER
COMMITTED AS TEENAGER**

*500TH EXECUTION AND 30TH ANNIVERSARY OF JUDICIAL
KILLING IN TEXAS APPROACHES*

**AMNESTY
INTERNATIONAL**



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SENSELESS KILLING

The night Mr Meziere died, it was Dwight's idea to go jacking. Jacking meant to take someone's car. Before we got to the 7-Eleven, there was no plan to kill Mr Meziere or anyone else. Once we were at the 7-Eleven, the fact that we didn't have masks to cover our faces came up. I said that we should kill Mr Meziere and Yogi [Yokamon Hearn] said he was cool with it. It was never Yogi's idea to kill the man
Delvin Diles, sworn statement, 6 July 2006

Eight years after he came less than half an hour from execution before receiving a stay from a federal court, Yokamon Laneal Hearn is once again scheduled to be killed in the Texas death chamber, this time at or soon after 6pm on 18 July 2012.

Yokamon Hearn was sentenced to death for the murder of 23-year-old stockbroker Joseph Franklin (Frank) Meziere committed in Dallas in March 1998. Frank Meziere was shot in the head 10 times after being abducted by four youths who wanted to steal his car. All four were charged with capital murder.

Yokamon Hearn pleaded not guilty at his December 1998 trial, but the jury took only 50 minutes to convict him of murder committed in the course of a kidnapping and robbery – a capital offence – and the following day, after about an hour's deliberation, decided that he would pose a future risk to society if allowed to live, even in prison.

According to the prosecution, Yokamon Hearn had fired six of the 10 shots while another of the suspects, Delvin Diles, had fired four. After Yokamon Hearn's trial, and with the approval of Frank Meziere's family, the prosecution offered Delvin Diles a plea deal under which he would waive trial by jury and avoid the possibility of the death penalty. Delvin Diles, who was 18 years old at the time of the shooting, pleaded guilty to capital murder and was sentenced to life imprisonment in February 1999. The other two co-defendants, Teresa Shavonn Shirley and Dwight Paul Burley, respectively aged 19 and 20 at the time of the crime, pleaded guilty to aggravated robbery and were sentenced to 10 years in prison.

Yokamon Hearn was 19 years and four months old when Frank Meziere was killed. In 2005, in *Roper v. Simmons*, the US Supreme Court ruled that those who were under 18 at the time of the crime could not be executed, finally bringing the USA into line with a long-standing principle of international law. The *Roper* decision recognized the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility associated with youth, as well as the susceptibility of young people to "outside pressures, including peer pressure". The Court acknowledged that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18". Indeed, scientific research shows that brain development continues into a person's 20s. The Court also wrote:

"An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."

At Yokamon Hearn's sentencing, the prosecution described evidence of the defendant's past criminal conduct – including of burglary, assault and arson – as "bonus information". The crime itself and the alleged remorseless demeanour of this defendant following it, the prosecutor asserted, were enough to warrant execution. From what his co-defendants have said in statements signed in 2006, however, Yokoman Hearn's conduct during and after the murder appear to have stemmed from immaturity and impairment rather than pre-planning and a calculating intellect.

In addition to Yokamon Hearn's youth at the time of the crime, there is evidence that he has some form of learning disability. His lawyers assert that this impairment amounts to "mental

retardation” and that his execution would be unconstitutional under the 2002 US Supreme Court decision *Atkins v. Virginia* which prohibited the execution of offenders with such disabilities.¹ Like the *Roper v. Simmons* ruling three years later, the *Atkins* decision was based on the Court’s assessment of “evolving standards of decency that mark the progress of a maturing society.”² In the *Atkins* ruling, the Court wrote:

“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”

In a society such as the USA, an individual’s birth date is usually known and documented.³ Even if the level of maturity of any particular individual is hard to determine, then, the *Roper* age 18 cut-off for death penalty eligibility in law is generally easy to enforce.⁴ Not so in relation to qualification for relief under *Atkins*. The claim that Yokamon Hearn should be removed from death row under *Atkins* has run into the problem that he has achieved IQ scores higher than what is normally considered to be an indicator of mental retardation. His lawyers have obtained expert opinion that he nonetheless should qualify for *Atkins* relief, but in 2010, the Texas Court of Criminal Appeals (TCCA) disagreed. Under the high level of deference federal courts are required to give state court decisions under US federal law, in particular given that the Supreme Court had left it up to the states as to how to comply with the *Atkins* ruling, the federal judiciary have upheld the TCCA’s ruling.

While the depth of Yokamon Hearn’s mental disability remains disputed, the crime for which he was sent to death row was undoubtedly serious. At the same time, there is no denying the fact that death sentences – while more and more aberrational in an increasingly abolitionist world – are a relative rarity in the USA. The murder of Frank Meziere was one of nearly 17,000 murders committed in the USA in 1998, for example, while Yokamon Hearn was one of 294 people sentenced to death that year.⁵ In other words, this teenaged offender with some degree of mental deficit became one of the small percentage of people convicted of murder in the USA who are branded the “worst of the worst” deserving of the death penalty.⁶

After obtaining the death sentence, the lead prosecutor told the media that jurors had told him that “the facts of the murder of Frank Meziere alone justified the death penalty. They flat-out said this murder was senseless”.⁷ Ten years later, the “pointless and needless extinction of life” was how the then most senior judge on the US Supreme Court, Justice John Paul Stevens, described executions. With only “marginal contributions to any discernible social or public purposes”, this senseless retributive killing was, he wrote, “patently excessive and cruel.”⁸ Amnesty International opposes the death penalty in all cases, in all countries, unconditionally. There is no getting away from its cruelty or the unacceptable costs and risks of this irrevocable punishment.

Among other things, Justice Stevens noted that race continued to play an unacceptable role in capital sentencing, with cases involving white victims, particularly if the accused is black, more likely to end in a death sentence than other cases. Since 1982 Texas has killed at least 70 people in its execution chamber who were aged 17, 18 or 19 at the time of the crimes in question. Of these teenaged offenders, 39 were African American (55 per cent), of whom 27 (70 per cent) were executed for crimes involving white victims. Some 78 per cent of those executed in the USA since 1977 were sentenced to death for killing a white victim. One in five (20 per cent) were African Americans convicted of killing a white. In Texas, nearly 40

per cent of those executed for crimes committed when they were under 20 were African Americans convicted of killing whites. Yokamon Hearn is one of at least 40 prisoners currently on death row in Texas for crimes committed when they were 18 or 19. More than half of them (22), like Yokamon Hearn, are black. Frank Meziere was white.

The year 2012 ought to give Texas pause for thought. This is the year that will see the 30th anniversary of the resumption of executions in Texas.⁹ The first execution, after 18 years without them, was of Charlie Brooks who was killed in its death chamber on 7 December 1982. This African American man had been sentenced to death in 1978 for the abduction and murder of a 26-year-old white mechanic in order to steal a car. David Gregory was taken to a motel, tied up and shot in the head. Charlie Brooks' co-defendant had his death sentence overturned on appeal and later received a 40-year prison sentence as a result of a plea bargain. It was not known which of the two men had actually shot the victim. Questions of arbitrariness were present from day one of executions in Texas.

Today, Texas is approaching its 500th execution since the US Supreme Court gave the green light in 1976 for judicial killing to resume in the USA. At the time of writing, Yokamon Hearn was scheduled to become the 483rd person to be put to death in Texas since 1982. Texas accounts for some 37 per cent of the national judicial death toll.¹⁰ Before the *Atkins* ruling, Texas accounted for more executions of people with Intellectual Disabilities than any other state in the USA. Before the *Roper* ruling, it accounted for more executions of people under 18 at the time of the crime than any other state. Texas has executed five men so far in 2012, one of whom was 19 years old at the time of the crime.¹¹ Yokamon Hearn is one of two prisoners who were facing execution before the end of July 2012 who were 19 at the time of the crime.¹² Another prisoner who was 18 at the time of the crime has just lost his appeal to the US Court of Appeals for the Fifth Circuit, bringing an execution date closer.¹³ Writing off a selection of teenaged offenders seems to have become somewhat normalized in Texas.

Yokamon Hearn was about 20 minutes from his scheduled execution time of 6pm on 4 March 2004, and had already eaten his 'final meal', when he was granted a stay by the US Court of Appeals for the Fifth Circuit in order that the court could have more time to consider his '*Atkins* claim'. In the eight years since then, while the question of his mental impairment has been litigated, the USA's enthusiasm for the death penalty has apparently continued to cool. Five states – New York, New Jersey, New Mexico, Illinois and Connecticut – have turned abolitionist. A sixth, Oregon, has a governor-imposed moratorium on executions in place, and in California some 800,000 citizen-signatures mean that repeal of that state's death penalty will be put to the popular vote in November this year.¹⁴ The annual number of death sentences in the USA has continued to decline – down by some two thirds from their peaks seen in the 1990s, and executions are down by about half from what they were in the late 1990s.

Standards of decency – to use the US Supreme Court's parlance – appear to be evolving in the USA towards a future without judicial killing. Texas is a drag on this evolution. In this, its 30th year of executions it should ask itself, what has been the point of all this killing and would not it, and the wider USA, be better off without it?

DEATH QUALIFICATION, DANGEROUSNESS AND DETERRENCE

Our intent is the execution of this man
Prosecutor, trial of Yokamon Hearn, December 1998

On 26 March 1998, the body of Frank Meziere, a 23-year-old finance graduate from Texas A&M University who had been working with Merrill Lynch in Dallas for the previous eight months, was found in a field near a water treatment plant in Oak Cliff, southwest Dallas. He had last been seen alive the previous evening at a restaurant in the Upper Greenville area in

the north of the city. After leaving the restaurant, he had apparently gone to a coin-operated carwash to wash his car and had been spotted by a group of youths in a nearby 7-Eleven store who were looking to steal a car. Two hours after his body was discovered, Frank Meziere's abandoned Ford Mustang was found in the car park of a shopping centre about five miles (eight kilometres) away in East Kiest, Dallas.

Yokamon Hearn and Delvin Diles were arrested at a motel in Dallas on 29 March 1998.¹⁵ In an interview that weekend, Yokamon Hearn's mother described Yokamon, her only child, as "a little slow, to be honest... He's like a 15-year-old". Having spoken to him by phone on 29 March after his arrest, she said that he was "trying not to break down, but I could hear the scaredness in his voice".¹⁶ Yokamon Hearn could not afford a lawyer so he was appointed one by the trial judge.¹⁷

Yokamon Hearn's current lawyers have argued that his conduct following the crime – including what the prosecution portrayed to the jury as remorselessness and a reason for the death penalty – provide an insight into his mental deficiencies:

"Mr Hearn drove the murder victim's car back to the house of one of his co-defendants. Someone told him to leave the car somewhere else, and another person directed him to leave it in the parking lot of a shopping center. Mr Hearn left the car in a shopping center parking lot, as directed, but failed to take minimal steps to ensure that the car would be inconspicuous. The lights were left on and the trunk was left open, thereby drawing attention of an individual who notified the police. In addition, Mr Hearn left the victim's wallet with a friend, Aaron Runnels, who was himself impaired. A relative of Mr Runnels found the wallet in Mr Runnels' room, where it had been left in plain sight. After the commission of the crime, Mr Hearn boasted to others that he had killed someone. One person explained [at the trial] that Mr Hearn, 'was trying to make himself look... like a big person... [He] was talking loud, walking around, smiling. He kept repeating what they did and he said he killed a white boy...' Aaron Runnels testified that the day after the murder, Mr Hearn was waving a newspaper article about the case, 'telling everybody that he killed the man.'"¹⁸

In 2006, Yokamon Hearn's current lawyers obtained sworn statements from his three co-defendants, Delvin Diles, Teresa Shavonn Shirley, and Dwight Paul Burley, all serving sentences at that time in various facilities in Texas for their roles in the abduction and killing of Frank Meziere. Delvin Diles said:

"The night Mr Meziere died, it was Dwight's idea to go jacking. Jacking meant to take someone's car. Before we got to the 7-Eleven, there was no plan to kill Mr Meziere or anyone else. Once we were at the 7-Eleven, the fact that we didn't have masks to cover our faces came up. I said that we should kill Mr Meziere and Yogi [Yokamon] said he was cool with it. It was never Yogi's idea to kill the man".¹⁹

Teresa Shirley said:

"Yogi was an 'impressionist'. When I say that Yogi was an 'impressionist', I mean that he did things to impress the guys in the group... The night Mr Meziere got shot, the plan was to go to North Dallas and 'hit a lick'. To 'hit a lick' means to rob someone. I know that the plan was not to kill anyone because when we returned to Dwight's house after Mr Meziere got shot, Dwight and Yogi got into a fight. Dwight was yelling at Yogi asking him why he shot the guy, why he did that".²⁰

Dwight Burley said:

"Yogi rolled with the flow. Yogi followed along with what the group decided... Yogi was a follower. He didn't have the skills to be a leader. When we went to North Dallas the day Mr Meziere got killed, the plan was not to kill anyone. We only planned to get money. The whole thing wasn't supposed to be like it happened. There was no plan, it just

happened. He never said he was going to shoot the guy”.²¹

On 10 December 1998 – the 50th anniversary of the adoption of the Universal Declaration of Human Rights – the 12 jurors deliberated for about 50 minutes before rejecting Yokamon Hearn’s not guilty plea and finding him guilty of the murder of Frank Meziere. “We’re pleased with the verdict and the speed of the verdict”, the prosecutor was quoted as saying afterwards.²² The speed continued. The sentencing hearing began on that same day and ended on the next, 11 December 1998. The jury deliberated for about an hour before handing down a death sentence.²³

At the conclusion of the sentencing phase, the jury had been asked to consider a question, namely: “Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Yokamon Laneal Hearn, would commit criminal acts of violence in the future that would constitute a continuing threat to society?” A jury’s affirmative response to the so-called “future dangerousness” question is a prerequisite for a death sentence in Texas. Such a sentencing scheme asks a jury to engage in little more than crystal ball gazing – predicting human behaviour based on an individual’s past conduct. Prosecutors encourage jurors to vote for death by painting a picture of a dangerously irredeemable defendant, and perhaps by stoking fear of crime. Arguing for the death penalty at the 2011 murder trial of teenaged offender Cortne Mareese Robinson, for example, a Texas prosecutor told the jury that a razor blade had been found in Robinson’s possession while in pre-trial custody. “The World Trade Center was brought down by a razor blade,” the prosecutor said.²⁴ The jury voted for death.

In Yokamon Hearn’s case, the prosecution presented evidence that the defendant had boasted to friends that the killing had made the headlines. The case “proved that criminals read the paper”, the lead prosecutor said immediately after Hearn’s trial. “Hopefully, the next group of would-be criminals will read this paper about Yokamon Hearn getting the death penalty and it will be a deterrent”.²⁵ In the absence of proof of any special deterrent effect of the death penalty, hope – rather than any guarantee – that the death penalty will deter murder is all there can be for its advocates. Hope is an unsafe platform on which to base an irrevocable punishment.

Forty years ago, concurring in the decision to end the death penalty in the USA as then being applied, US Supreme Court Justice Thurgood Marshall referred to this absence of proof:

“Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject.”²⁶

Four decades later, in 2012, the Committee on Deterrence and the Death Penalty at the National Research Council issued its conclusion of a review into research on deterrence and judicial killing in the USA conducted in the 35 years since judicial killing resumed:

“The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment”.²⁷

Texas has sentenced more than 150 people to death for crimes committed since Yokamon

Hearn's prosecutor made his deterrence comment to the media. These condemned defendants include Cortne Robinson, the first of three suspects to be tried for the shooting murder of an elderly man during a burglary in Marshall, Texas, in September 2009. Robinson was aged 18 at the time of the crime. His two co-defendants were 20 and 16.

In 1976, in *Gregg v. Georgia*, the opinion giving the green light for executions to resume under revised state laws, the US Supreme Court batted the deterrence question away to the individual state legislatures:

“Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act... The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”

In the past five years, legislatures of four states – New Jersey, New Mexico, Illinois and Connecticut have passed bills to abolish the death penalty which have then been signed into law by the state governors. Signing such a bill in 2010 Governor Pat Quinn of Illinois said that he had found “no credible evidence that the death penalty has a deterrent effect on the crime of murder”. In New Mexico in 2007, Governor Bill Richardson also questioned the purported deterrent effect of the death penalty. In New Jersey in 2009, Governor Jon Corzine said the death penalty had little if any deterrent value, while risking a brutalizing effect through its erosion of “our commitment to the sanctity of life”. Justice Stevens had voted with the majority in the *Gregg* opinion, a ruling he would later come to view as wrongly decided. In 2008, he wrote that, “despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.”²⁸

In the same opinion, Justice Stevens drew attention to capital jury selection in the USA:

“Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a ‘death qualified jury’ is really a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.”²⁹

In a state (as opposed to federal) capital trial in the USA, 12 citizens from the county in which the trial is held (the county where the crime is committed unless a change of venue is granted) are selected to sit as a “death qualified” jury. At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be “irrevocably committed” to vote against the death penalty can be excluded for cause by the prosecution, under the 1968 US Supreme Court ruling in *Witherspoon v. Illinois*.³⁰ In 1985, in *Wainwright v. Witt*, the Supreme Court relaxed the *Witherspoon* standard, thereby expanding the class of potential jurors who could be dismissed for cause during jury selection.³¹ Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings about the death penalty would “prevent or

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". In 1987, the US Supreme Court ruled that a death sentence must be reversed even if only one juror has been improperly excluded from serving on the jury.³²

A few months before Yokamon Hearn's trial, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions had expressed concern that in the USA, "while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors".³³ The problem goes beyond this, however. As Justice Stevens noted, there is evidence that a "death-qualified" jury is more conviction-prone than its non-death-qualified counterpart. This raises special concerns given the irrevocability of the death penalty. In 1986, the US Supreme Court acknowledged evidence from research that the "death qualification" of capital jurors "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries".³⁴ The Court had been presented with 15 published studies each finding that death-qualified jurors were more conviction-prone than excludable jurors.

In 1998, a review of the existing research indicated that a "favourable attitude towards the death penalty translates into a 44 per cent increase in the probability of a juror favouring conviction".³⁵ Another expert review in 1998 concluded that:

"Death-qualification standards theoretically exist to ensure that capital defendants will be tried by impartial jurors. The research, however, demonstrates that there is a deep chasm between the law's intentions and the result of death qualification in practice. Rather than ensuring impartiality, the result can more accurately be envisioned as a stacked deck against the defendant: death-qualified jurors, regardless of the standard, are more conviction-prone, less concerned with due process, and they are more inclined to believe the prosecution than are excludable jurors."³⁶

Then there is the question of race. Under the 1986 Supreme Court decision *Batson v Kentucky*, prospective jurors can only be removed for "race neutral" reasons.³⁷ Under *Batson*, if the defence makes a *prima facie* case of discrimination by the prosecution during jury selection, the burden shifts to the state to provide race neutral explanations for its peremptory dismissal of black jurors. As Justice Thurgood Marshall wrote in 1990, "*Batson's* greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors... This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice".³⁸ Prosecutors simply have to come up with a vaguely plausible non-racial reason for dismissing a minority juror. And as a North Carolina judge noted in April 2012, in his ruling finding that prosecutors in that state had systemically employed racially motivated peremptory strikes in capital cases, "post-*Batson* studies of jury selection in the United States show that discrimination against African-Americans remains a significant problem that will not be corrected without a conscious and overt commitment to change".³⁹

During jury selection at Yokamon Hearn's trial in Dallas County, the prosecution's use of a peremptory strike to dismiss an African American man was challenged. During the selection process, this prospective juror had recalled his own grandmother's murder in North Carolina at the hands of a step-grandchild. The state never prosecuted the alleged perpetrator, however, due to insufficient evidence. Asked by the prosecution if this episode would affect his ability to act as an impartial juror in Yokamon Hearn's trial, the would-be juror in question responded that it would not and furthermore that he had no problem participating in a capital case and that he, a practicing Christian, believed that the death penalty was allowed by the Bible. He was peremptorily dismissed by the prosecution, however.

The defence made a *Batson* objection, asserting that the juror was "unquestionably"

qualified to sit as a juror and that he had been dismissed because of his race. The prosecutor responded that he/she had dismissed the juror because he had displayed no anger about his grandmother's murder and that his religion would make it difficult for him to pass the death penalty. "Our intent is the execution of this man [Yokamon Hearn]", the prosecutor continued, "I feel, based on all of his responses, his total personality, that he'd have a real, real tough time doing it, just – just from the religious – the standpoint...." In view of what the prosecution was "trying to do in this courtroom", the prosecutor concluded, "I think it's very clear that he would not be the kind of juror that the State wants".

Without further questioning or comment, the trial judge accepted the prosecutor's "race neutral" assertions for summarily dismissing the prospective juror. The federal courts have in turn accepted the trial judge's decision on the grounds of the "great deference" to which it was entitled.⁴⁰

Yokamon Hearn's lawyer had sought the trial judge's permission to ask prospective jurors whether they would more or less likely, in general, to view a defendant as a continuing threat if they knew he would not be eligible for parole if sentenced to life imprisonment until after serving a minimum of 40 years in prison, the mandatory sentence for capital murder at that time in Texas in a case where the defendant was not sentenced to death.⁴¹ In other words, Yokamon Hearn would not be eligible for parole until he was 60 years old. Surely the jury could consider this in assessing his future dangerousness, not least given his youth. As the US Supreme Court had said five years earlier, "the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."⁴² In 2007, the Supreme Court described youth as "a universally applicable mitigating circumstance that every juror has experienced and which necessarily is transient".⁴³

The trial judge refused to allow the defence motion. During the jury selection process, the defence lawyer was not allowed to correct one prospective juror's mistaken belief that, if sentenced to life, the defendant would be eligible for parole in 15 years and was prevented from discussing whether the defendant could pose "a future danger to society" if sentenced to life imprisonment. Later, during the jury's deliberations, the judge would refuse to answer a note from the jury room requesting information on the law governing parole, and what minimum time the defendant would serve in prison if he was sentenced to life rather than death.

Four years before Yokamon Hearn's trial, in *Simmons v. South Carolina*, the US Supreme Court had ruled that

"If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court".⁴⁴

"In assessing future dangerousness", the Court said, "the actual duration of the defendant's prison sentence is indisputably relevant". However, the decision concerned the question of prisoners who would never be eligible for parole, rather than those who, as in Texas at that time, would be eligible after 40 years. How the jury's decision as to whether or not to pass a death sentence might be affected by its knowledge of parole availability was, the Court said, "speculative", and "we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole".

In 2000, the Supreme Court issued a related decision, *Ramdass v. Angelone*. Four justices (a 'plurality') held that the "parole-ineligibility instruction is required only when, assuming the

jury fixes the sentence at life, the defendant is ineligible for parole under state law.” In a concurring opinion, Justice Sandra Day O’Connor wrote that “Simmons entitles the defendant to inform the capital sentencing jury that he is parole ineligible where the only alternative sentence to death is life without the possibility of parole”. In relation to this issue on appeal in 2003, the Fifth Circuit ruled against Yokamon Hearn, deciding that

“taken together, the plurality and concurring opinions in *Ramdass* indicate that the *Simmons* parole eligibility instruction is only required when the only alternative sentence to the death penalty is life without parole”.

On 17 November 2003, the US Supreme Court refused to review his case, ending Yokamon’s normal state and federal appeals. An execution date of 4 March 2004 was set. At this point, the lawyer who had been appointed to represent Yokamon Hearn in state and federal habeas corpus proceedings withdrew from the case. Subsequently, with the execution date looming, lawyers with the Texas Defender Service, acting *pro bono*, sought to stop the execution. With little time for much investigation, they found evidence from his school and other records that raised a question about whether he might have a substantial mental impairment, and whether he might have a claim under the June 2002 US Supreme Court ruling of *Atkins v. Virginia*, which prohibited the execution of anyone with “mental retardation”.

First the courts had to be persuaded to stay the execution, to appoint counsel, and to allow a new challenge to the death sentence to be brought. In US law, specifically the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, the barriers against death row prisoners being allowed to file second or successive habeas corpus petitions are substantial. For Texas inmates, the obstacles include a state that will fight every step of the way to get the condemned to the death chamber.

AFTER ATKINS

[U]nder certain circumstances, such as when an individual has a mixed pattern of intellectual deficits owing to a diagnosed developmental brain syndrome such as Fetal Alcohol Spectrum Disorder, it is appropriate and necessary to change the operational criteria [used to diagnose mental retardation]
Dr Stephen Greenspan, October 2007

On 3 March 2004, the Texas Court of Criminal Appeals (TCCA) refused to issue a stay of execution to Yokamon Hearn or to appoint him counsel to develop the mental retardation case. The court said that he had had “adequate time” to develop a *prima facie* case of any such disability.⁴⁵ The case went to the US Court of Appeals for the Fifth Circuit, which issued a last-minute stay of execution on 4 March 2004 to allow more time to consider whether Hearn had the right to a lawyer to develop an *Atkins* claim that could then be presented in an application for authorization to file a successive habeas corpus petition under the AEDPA.

On 6 July 2004, a three-judge panel of the Fifth Circuit, by two votes to one, ruled in Yokamon Hearn’s favour. It noted that he had lost his original appeal lawyer “on the very day he became eligible to raise his *Atkins* claim” (that is, when his first federal habeas petition – which had already been filed by the time of the *Atkins* ruling – was dismissed by the US Supreme Court in December 2003). One of the judges in the majority criticized the dissenting judge’s view that federal law required that a “prisoner on death row with no lawyer must make a *prima facie* case that he is so retarded that he cannot be executed in order to have the benefit of counsel” as a “chilling comment on the confused state of the law of capital punishment in this circuit”. The case was remanded to the US District Court “to appoint counsel and furnish reasonably necessary services to help Hearn present his application for authority, and – should such authority be granted – his formal *Atkins* petition.”⁴⁶

In the *Atkins* ruling, the US Supreme Court had not defined mental retardation, although it pointed to definitions used by the American Psychiatric Association and the American Association of Mental Retardation (AAMR, now the American Association on Intellectual and Developmental Disabilities, AAIDD). Under such definitions, mental retardation is a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning (generally indicated by an IQ of less than 70) accompanied by limitations in two or more adaptive skill areas such as communication, self-care, work, and functioning in the community. The Court noted that “not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus [that they should not be put to death]” The Court left it to the individual states to develop “appropriate ways” to comply with the ruling.⁴⁷

The *Atkins* decision noted that on 17 June 2001 the Texas Governor, Rick Perry, had vetoed a bill passed by the Texas legislature exempting people with mental retardation from the death penalty. The Supreme Court also noted that in his veto statement Governor Perry had said that Texas did not execute such prisoners. It also noted that Texas was only one of five states since 1989 to “have executed offenders possessing a known IQ less than 70”.

In a statement responding to the *Atkins* decision, Governor Perry said that “Texas does not execute mentally retarded individuals who meet the three-pronged test cited in the High Court’s decision”.⁴⁸ Clearly the state had been sentencing defendants with mental retardation to death, however, given that by 2008 a dozen Texas prisoners had had their death sentences commuted to life imprisonment on the grounds of mental retardation as a result of the *Atkins* ruling, more than any other state except North Carolina.⁴⁹ And before the *Atkins* decision, according to one survey, Texas accounted for nine of 44 of the USA’s executions since 1977 of people with mental retardation, more than any other state.⁵⁰

Today, a decade after the *Atkins* ruling, the Texas legislature has still not enacted a law to comply with it. In the absence of legislation, the TCCA took it upon itself to issue guidelines for trial courts in making retardation determinations. In February 2004, the TCCA wrote: “The Texas legislature has not yet enacted legislation to carry out the *Atkins* mandate... [W]e must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims”. It asked: “Is there, and should there be, a ‘mental retardation’ bright-line exemption from our state’s maximum statutory punishment?... [W]e decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature”.⁵¹ In February 2007, the TCCA emphasized that its 2004 guidelines “were intended only to be guidelines for trial courts to work with until the Legislature was to reconvene and establish conclusively both the substantive laws and the procedures that would bring our codes into compliance with the mandate issued by *Atkins*. Yet to this day, no such guidance has been provided by the Legislature.” Five years later this remains the case.

Yokamon Hearn’s case demonstrates the difficulties that can be faced by lawyers seeking *Atkins* relief for their client, especially where that prisoner’s alleged disability lies somewhere around the margins of “mental retardation”.

After lawyers were appointed to represent Yokamon Hearn for his *Atkins* claim, the Fifth Circuit authorized the filing of a successive habeas corpus petition on 20 July 2005. The petition was filed in the US District Court the following week, raising the claim that Yokamon Hearn had mental retardation.⁵²

The petition pointed to indicators from Yokamon Hearn’s childhood often associated with mental retardation. Relatives, friends, and a former teacher consistently described him as “slow”, and his mother related that during his childhood, other children referred to her son as “dumb” and “stupid”. He was described by witnesses to his life history variously as a “follower”, “gullible”, “easily influenced” and “impressionable”. At school he displayed a

pattern of substandard performance in academic subjects. At home, relatives said he was able to perform simple tasks, but not complex ones, and that he required close supervision when given chores.

The brief also pointed to the presence in Yokamon Hearn's case of "risk factors" commonly associated with mental retardation, as identified by the AAMR. They included parental alcohol and drug abuse, Fetal Alcohol Syndrome, poverty, parental mental illness and cognitive disability, impaired parenting and parental cognitive disability.

Yokamon Hearn's father was an inmate in Dallas County Jail at the time of his son's birth, and was transferred to prison when the boy was four months old. After he was released some 20 months later, he did not assume a parental role and became homeless, living in a car. There is evidence that he had substandard intellectual functioning. He died of leukaemia before his son's capital trial.

Yokamon Hearn's mother, who became pregnant with Yokamon at the age of 17 and gave birth to him at 18, reported that she drank alcohol heavily during the first six months of her pregnancy, almost daily drinking until she passed out. This appears to have been in an effort at self-medication, to suppress the voices she was hearing (she was subsequently diagnosed with bipolar disorder and possibly schizophrenia). Yokamon Hearn's current lawyers sought expert assessment, and the doctor they retained concluded that the information from available records suggested "very strongly that Mr Hearn has Fetal Alcohol Syndrome" (FAS). He concluded: "One of the frequently occurring consequences of FAS is mental retardation. Indeed, FAS is the most commonly-identified cause of mental retardation".⁵³

Yokamon Hearn's lawyers also obtained a psychological evaluation of their client in May 2005.⁵⁴ His IQ was assessed at 74. The lawyers then obtained a "mental retardation assessment" from a specialist, James Patton. Dr Patton's review of materials, including the psychological evaluation and information on Yokamon Hearn's academic, behavioural, and personal background led him to conclude that "Mr Hearn meets the criteria of mental retardation, as defined by the American Association on Mental Retardation".⁵⁵

The State of Texas responded that Yokamon Hearn had been "properly convicted of, and sentenced to die for, murdering Frank Meziere during the course of a felony", and that he had "failed to demonstrate that he is entitled to relief" under *Atkins v. Virginia*.⁵⁶ The state pointed out that Yokamon Hearn had achieved an IQ score of 82 in January 1999 on death row. The state returned to the scene of the crime, so to speak, arguing that Yokamon Hearn's conduct at the time of the murder were "not the impulsive acts of a mentally retarded person but rather demonstrate a deliberate manipulation of others to gain advantage". It asserted that

"The commission of this capital murder required forethought, planning, and complex execution of purpose. To commit the capital murder of Frank Meziere, Hearn had to borrow a car in exchange for gas money, purchase gas, obtain accomplices and weapons, search for an appropriate victim and location, abduct Meziere using Meziere's own car, then drive him to an isolated spot, rob him, and shoot him. Any number of things could have gone wrong in this plan, but Hearn executed it smoothly and without wavering".

Yokamon Hearn's lawyers rejected the state's suggestion that their client was the mastermind of an elaborate crime. They pointed to the absence in the trial record of any evidence that it was Yokamon Hearn's idea to commit robbery or murder.

They also asserted that his conduct at the time of the crime, if anything supported rather than refuted the claim that he has a substantial mental impairment. They had recently obtained declarations from Hearn's three co-defendants (see page 4) who portrayed Yokamon Hearn as a follower rather than a leader, and his conduct at the time of the crime as impulsive rather pre-planned. The lawyers wrote:

“His participation was guided by impulse, not a plan that he or anyone else developed. His shooting of Mr Meziere was the result of Mr Diles’s spontaneous suggestion just before the crime commenced, to which Mr Hearn acceded. He had no idea how to dispose of Mr Meziere’s car and wallet so as to avoid apprehension. Rather than being circumspect about what he had done, he boasted about it.”⁵⁷

James Patton, the specialist who had earlier concluded that Yokamon Hearn had mental retardation, said that he

“found the suggestions that there was a complex plan or that Mr Hearn played a leadership role incongruous with other testimony presented at trial... Testimony about Mr Hearn’s behaviors following the crime suggested that Mr Hearn displayed a high degree of immaturity... His behaviour more clearly shows a lack of judgment, and a child-like naïveté often associated with mental retardation”.⁵⁸

Having reviewed the newly obtained statements from Yokamon Hearn’s co-defendants, James Patton wrote:

“The information describing Mr Hearn provided in these declarations further support the fact that he displayed characteristic features of someone with mild mental retardation and specific deficits in various adaptive functioning areas. Mr Hearn was described by his relatives as a ‘loner’ when he was growing up. The overwhelming need to be accepted by others was manifest in his hanging with the group of individuals who eventually would be his co-defendants. Although he would at times try to impress others, his typical behaviour, as described in all of the declarations, was characterized as being in the background and he was not an active participant in the usual activities (e.g., rapping) that occurred. He was considered a ‘follower’ of others and not perceived in any way as a leader in social situations.”

In November 2006 success on an *Atkins* claim became less likely when psychologists for the state assessed Yokamon Hearn’s IQ at 88 on one scale and 93 on another. And in May 2007, an expert retained by the defence assessed his IQ at 87 on yet another scale. Yokamon Hearn’s lawyers went back to the District Court to acknowledge that, “under the prevailing definition of mental retardation, he does not have mental retardation”. Nevertheless, they asserted, his execution would still be unconstitutional under *Atkins*:

“Mr Hearn has a disability due to impairments in brain functioning that affect him in the same way as mental retardation. He has significant limitations in adaptive behaviour that are characteristic of mental retardation, and these limitations were apparent long before he was eighteen years old. However, Mr Hearn does not have significantly sub-average intellectual functioning as measured by intellectual tests...

Mr Hearn’s brain impairment has produced a disability identical to mental retardation in its disabling features, as those features were described in *Atkins*... The factual basis for his claim has changed but not in any manner that is *legally* significant”.⁵⁹

In support, the lawyers obtained an assessment of Yokamon Hearn from a neuro-psychologist, Dr Dale Watson, who concluded that Yokamon Hearn had “mild neuropsychological deficit” in his left brain hemisphere, deficit “frequently associated with structural brain damage”, and that Yokamon Hearn indeed manifested “evidence of brain dysfunction”. Dr Watson wrote:

“The implications of these deficits are consistent with an individual with a history of school failure, difficulties paying attention to conversations, poor problem solving, concrete verbal thinking, who is slow to learn from experience and despite an impulsive style displays a slowness in processing information. Many of his difficulties are on verbally mediated tasks so he will face challenges in his daily life when confronted with tasks that require complex communications, verbal reasoning and verbal learning. He

will perform more efficiently on tasks that are visual in nature. Mr Hearn's neuropsychological deficits appear to underlie the previous findings of deficits in adaptive functions... These deficits are likely developmental in nature."⁶⁰

The Texas authorities responded that the argument that Yokamon Hearn's impairment was the "equivalent of mentally retarded" was "legally and logically meritless". Under this argument, the state asserted, "those who demonstrate by their behaviour that they communicate poorly, do not learn from their mistakes, act illogically and on impulse, and seem to care not for the reactions of others should not be executed because they share characteristics with a retarded person". This would "unlimit *Atkins*", the Attorney General's brief argued:

"From the perspective of a non-criminal, normal person, every murderer displays those characteristics. Put bluntly, the characteristics he would like to blame on this 'mild disorder' are typical of capital murderers and, instead of absolving him of moral blameworthiness, are exactly what make him so deserving of the jury's verdict".⁶¹

Yokamon Hearn's lawyers urged the District Court to "discard the hyperbole and mischaracterization" put forward by the state.

"Mr Hearn is not arguing that *Atkins* applies to every capital defendant or petitioner who has poor judgment or impulse control. Poor judgment and impulse control can occur for numerous reasons and can vary tremendously in degree and frequency. The kind of poor judgment and impulse control associated with mental retardation is severely disabling and unrelenting and lasts a lifetime. Mr Hearn has that kind of poor judgment and impulse control".⁶²

The state argued that the District Court should summarily dismiss the case on the grounds that his successive petition was now in violation of the requirements for such a petition under the AEDPA. The argument that Hearn had the equivalent of mental retardation, it said, was "legally and logically bankrupt" and "granting Hearn's wish to expand *Atkins* is legally indefensible".⁶³

On 27 September 2007, the District Court judge ruled against Hearn. The argument that Yokamon Hearn's impairment was tantamount to mental retardation failed, Judge Sidney Fitzwater ruled, because in its *Atkins* ruling in 2002, the Supreme Court had "left it to the states to define mental retardation". The Texas definition – put in place not by the legislature but by the TCCA – "requires evidence of significantly sub-average intellectual functioning". This evidence "Hearn cannot produce", and this failure, said Judge Fitzwater, was "fatal to his claim". He dismissed the habeas corpus petition without reaching its merits because the AEDPA's requirements for filing a successive petition had not been met.

Yokamon Hearn's lawyers sought to have Judge Fitzwater reconsider his ruling on the grounds of new evidence. They obtained another expert opinion, and a new opinion from James Patton, concluding that Yokamon Hearn "does have mental retardation in spite of his IQ scores that are well above 75". The new expert was Dr Stephen Greenspan, described as "one of the country's pre-eminent scholars on mental retardation". He explained about mental retardation (MR), which he noted was "in the process of being widely renamed Intellectual Disabilities (ID)":

"The biggest problem in defining and diagnosing MR is at the upper boundary, namely in the sub-category of 'mild MR, at the cusp of 'MR' and 'normality'. This is also the sub-category from which virtually all successful *Atkins* pleaders are likely to be found. The reason why mild MR is so difficult to diagnose is because the disorder is somewhat hidden, in the sense that people with mild MR are more likely to look normal, to talk in complete and syntactically correct sentences, and to have a number of strengths mixed in with their weaknesses. It is because people with mild MR can function normally in

many areas, that current definitions of MR do not require global adaptive functioning impairments. Instead, it is necessary only to show impairments in some areas, and these can differ from individual to individual”.

Dr Greenspan explained that, while the three-prong definition of mental retardation (intellectual deficits / adaptive deficits / onset prior to age of 18) is widely accepted, “it is in the operational definition of these constitutive elements that things become problematic and controversial”. He continued:

“The problem with defining and diagnosing MR, especially in its milder forms, is that it is a bureaucratic category masquerading as a natural or medical category... As example, patients with cancer and tuberculosis may share certain external qualities (such as fever, exhaustion, confusion) but one can differentiate them precisely based on underlying causative agents (a bacteria in the case of TB, a tumor in the case of cancer). In the case of MR, the criteria (an IQ score below a certain level, adaptive deficits in one or more areas) are arbitrary and may not always serve to accurately discriminate between those with a real disability and those without one. The use of IQ scores is an attempt to create an illusion of scientific certainty in identifying a disorder whose causes and manifestations are often hidden and subtle.

This is not to say that mild MR is not a real disability, or for that matter that it lacks a biological basis... The problem is that there is a tendency to ‘reify’ IQ scores, that is to put them on a pedestal and consider them to be the phenomenon of interest rather than merely an external manifestation of an underlying biological mechanism and a predictor of limitations in real-world functioning...

[U]nder certain circumstances, such as when an individual has a mixed pattern of intellectual deficits owing to a diagnosed developmental brain syndrome such as Fetal Alcohol Spectrum Disorder, it is appropriate and necessary to change the operational criteria [used to diagnose MR]...

In sum, I believe that a reasonable case can be made under existing diagnostic standards for saying that someone can meet the intellectual prong for a diagnosis of MR, even with a full-scale IQ in the 80’s or even 90’s. This is because for individuals with a diagnosed brain syndrome, full-scale IQ can be, and usually is, highly misleading. In a syndrome such as Fetal Alcohol Spectrum Disorder, one typically finds a mixed pattern, with areas of relative strength combined with areas of severe impairment. Such a mixed pattern can be very misleading, in that it masks the true extent of the individual’s limitations in learning and in other areas of adaptive functioning, including social vulnerability...

As is true of most other human service disability categories, MR/ID is an evolving construct, which is not set in stone but which has changed and continues to change”.⁶⁴

Yokamon Hearn’s lawyers also obtained another opinion from James Patton in light of Dr Greenspan’s declaration. Dr Patton responded:

“All along, I have been confident in my findings that Mr Hearn demonstrates the kinds of limitations in adaptive behaviour – particularly in the social and practical domains – that are seen in people who have mental retardation, and indeed, that are characteristics of mental retardation. At the same time, I have seen Mr Hearn demonstrate some conceptual skills that are unusual for people with mental retardation. The additional IQ testing and the neuropsychological testing have clarified this for me. IQ testing has clearly measured the strengths Mr Hearn demonstrates in the conceptual domain. Neuropsychological testing, together with the diagnosis of fetal alcohol syndrome, has demonstrated that the significant limitations I have identified in Mr Hearn’s adaptive behaviour are, nevertheless, a product of intellectual deficits...

Knowing that the 'atypicality' of Mr Hearn's intellectual limitations is the result of a brain syndrome and neuropsychological deficits is very helpful in understanding Mr Hearn's disability... I am satisfied that Mr Hearn has mental retardation".⁶⁵

In March 2008, District Judge Fitzwater concluded that Yokamon Hearn was entitled to reconsideration of the court's earlier dismissal of the petition, "based on his having made the required *prima facie* showing of mental retardation". However, the state had argued that the TCCA's refusal to stay Yokamon Hearn's execution on 3 March 2004 on the grounds that he had not made a *prima facie* case of mental retardation was, under the AEDPA, due a high level of deference from the federal courts and should lead to dismissal of the federal petition as a result. Judge Fitzwater decided to defer his ruling, pending further briefing by the parties on whether he should dismiss the case under the requirements of the AEDPA, namely whether the TCCA's 2004 order was "unreasonable".⁶⁶

The state of Texas argued that Yokamon Hearn's claim had not been raised and exhausted in state court, and was therefore procedurally barred from review in federal court. However, Judge Fitzwater decided that his 2007 ruling should be vacated and Yokamon Hearn's federal petition stayed so that he could file an *Atkins* claim in state court in Texas.⁶⁷ That petition reached the TCCA in September 2009.

On 28 April 2010, the TCCA ruled against Yokamon Hearn. Again, it noted that the Texas legislature had, eight years on, failed to enact legislation to enforce the *Atkins* ruling, and that in the absence of such legislation the TCCA would continue to apply the guidelines the court had itself introduced as a temporary measure in 2004.

On the question of IQ scores, the TCCA said that "determining whether one has significantly sub-average intellectual functioning is a question of fact. It is defined as an IQ of about 70 or below." In Yokamon Hearn's case, three tests had yielded IQ scores of 87, 88 and 93. The court noted the opinion of Dr Greenspan that substituting measures of neuropsychological deficits was justified in cases where there is a medical diagnosis of brain syndrome, and Dr Patton's opinion that Yokamon Hearn has mental retardation despite his IQ scores. However, the TCCA said that, "without significantly greater assistance from the legislature", it would adhere to its 2004 guidelines, including the "about 70" language in relation to IQ, which it took to represent a "rough ceiling, above which a finding of mental retardation in the capital context is precluded".⁶⁸ The legislature has not acted.

Now that there had indisputably been a ruling from the state court on the *Atkins* question, federal review of that decision under the AEDPA had to be "highly deferential", and the prisoner would not succeed unless he showed that the state court decision was "contrary to, or involved and unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or that it was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding". On 3 March 2011, the US District Court ruled that the TCCA had done "nothing more than perform the task left open to it by *Atkins*". Moreover, Judge Fitzwater noted, the Supreme Court has "not yet clearly established the precise boundaries" of what evidence states can or cannot consider when determining mental retardation in this context. The TCCA's decision was not "unreasonable".⁶⁹

The Fifth Circuit upheld the decision on 30 January 2012, noting that binding precedent in the Circuit was that, because the Supreme Court in *Atkins* had explicitly left it up to states as to how to comply with the ruling, "it would be wholly inappropriate for this court, by judicial fiat, to tell the States how to conduct an inquiry into a defendant's mental retardation":

"In summary, considering that the Supreme Court has delegated to the states the responsibility of developing appropriate ways to enforce the constitutional restriction against executing mentally retarded defendants, we cannot second-guess the CCA's decision. Were this court to hold that the CCA's decision was an unreasonable

application of federal law under *Atkins*, we would be requiring the state court to substantially alter its established rule despite the Supreme Court's delegation of such rulemaking to the state. This is precisely what a federal court reviewing a state court decision under AEDPA's deferential standard cannot do in the absence of an unreasonable application of a clearly established federal law as defined by the Supreme Court."⁷⁰

YOUTH: MORE THAN A CHRONOLOGICAL FACT

A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults, and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions
US Supreme Court 1993, in case of 19-year-old offender

A long-standing principle of international law is that the death penalty must never be used against those who were under 18 years old at the time of the crime. It was not until a quarter of a century after executions resumed in the USA in 1977 that US law was brought into compliance with this principle. In 2005, in *Roper v. Simmons*, the US Supreme Court outlawed the use of the death penalty against defendants who were under 18 years old at the time of the crime. Before this ruling, Texas accounted for 13 of the 22 such executions in the USA since 1977.

When the *Roper* ruling was issued, Governor Rick Perry issued a statement saying that prior to the ruling, "the state upheld the law as it was written and interpreted to ensure justice for the victims of some horrible crimes". He did not mention the fact that his state, and the USA more broadly, had until then been violating international law. On 22 June 2005, Governor Perry commuted the death sentences of 28 Texas prisoners for crimes committed when they were 17 years old. His statement announcing the commutations emphasised that his hand had been forced by the *Roper* ruling: "While these individuals were convicted by juries of brutal murders and sentenced to die for their heinous crimes, I have no choice but to commute these sentences to life in prison as a result of the Supreme Court ruling".⁷¹

The *Roper* ruling, unlike Governor Perry's statement, recognized the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility often associated with youth. It also recognized that while it was coming up with a categorical rule – one that reflects international law – the age of 18 as a cut-off for death eligibility is a *minimum* standard. While making the age of 18 "the line for which death eligibility ought to rest", the Court noted that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18". Indeed, scientific research shows that development of the brain and psychological and emotional maturation continues at least into a person's early 20s.

In 1993, in the case of a Texas death row prisoner who was 19 at the time of the crime, the Supreme Court emphasised that:

"youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults, and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions... [T]he signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."⁷²

Four years before that, in 1989, four Supreme Court Justices had noted that "age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals", and "it is in fact a

conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.”⁷³

A study conducted more than 40 years ago noted that a number of countries set the minimum age for the death penalty above the age of 18. For example, Austria, Liechtenstein and Switzerland set the minimum age at 20; Chile, Denmark, Ethiopia, Gabon, Greece, Hungary, Lebanon, Peru, and Sudan set the minimum age at 21, and Paraguay set its minimum age at 22.⁷⁴ Today all these countries, apart from Ethiopia, Lebanon, Sudan and Vietnam, are abolitionist in law or practice.

Texas continues to sentence to death and execute offenders who were teenagers at the time of the crime, that is, 18 or 19 years old. For example, Cortne Robinson, black, was sentenced to death in March 2011, for a crime committed in 2009 when he was 18 years old. Dexter Johnson, black, was sentenced to death in 2007 for a crime committed 11 days after his 18th birthday. If the crime had been committed less than two weeks earlier, the state would have been categorically prohibited from seeking the death penalty.

In relation to the prisoners Texas executed for crimes committed when they were 17 years old before the 2005 *Roper* ruling stopped this practice, the question of race was a topical one. Eight of these 13 individuals were African American, six of whom were executed for killing whites. At least another 58 individuals have been put to death in Texas since 1982 for crimes committed when they were 18 or 19 years old.⁷⁵ Thirty-one of the 58 were African Americans, 21 of whom were executed for crimes involving white victims.⁷⁶

In other words, some 15 per cent (71) of the 482 prisoners put to death in Texas since 1982 were teenagers (17, 18 or 19 years old) at the time of the crimes for which they were sentenced to death. Of these individuals, 39 were African American (55 per cent). And of these 39 African American teenaged offenders, 27 (70 per cent) were executed for crimes involving white victims. There have been no white teenaged offenders executed for crimes involving blacks in Texas since 1982.⁷⁷

Including Yokamon Hearn, there are at least another 40 prisoners on death row in Texas for crimes committed when they were 18 or 19 years old.⁷⁸ Twenty-two of these 40 prisoners (55 per cent) are black, eight are Hispanic, eight are white, and one is Asian (a Cambodian national).

Among the 23 African American prisoners in this group is Harvey Earvin, who was 18 years old at the time of the crime, a murder committed during the robbery of a petrol station. That was in 1976. He was still only 19 when he arrived on death row in 1977. He is now 54.⁷⁹

Vincent Gutierrez was executed in 2007. He and Randy Arroyo were sentenced to death for the murder of US Air Force Captain Jose Cobo, who was shot during a carjacking in San Antonio on 11 March 1997. Gutierrez and Arroyo were tried jointly after the trial judge refused their request to be tried separately. Randy Arroyo was 17 at the time of the crime and in 2005 became one of the Texas prisoners whose death sentence was commuted by Governor Perry as a result of the US Supreme Court's *Roper* ruling. Vincent Gutierrez, in contrast, was 18 years old at the time of the murder. At the 1998 trial, the jurors found the two defendants equally culpable and handed down death sentences. After Randy Arroyo's death sentence was commuted, at least six of the original trial jurors signed affidavits supporting the argument presented in Vincent Gutierrez's clemency petition to Governor Perry that it was unfair that he was facing execution while Randy Arroyo was not. International and national law required that Randy Arroyo not be executed. Fairness and justice demanded that Vincent Gutierrez also be spared.

On 3 March 2009, Willie Pondexter was executed in Texas. This African American prisoner was sentenced to death for the murder in 1993 of an elderly white woman during a burglary

committed with others when he was 19 years old. "At 19, you really don't think of the consequences", the 34-year-old Willie Pondexter said in an interview shortly before he was put to death. He said his role in the crime was one taken "basically out of stupidity and ignorance. I know what I did was wrong." "At 19, I was like, a follower. If I didn't go along, you're a punk. At 19, that's my thought process."

His lawyers had petitioned the Board of Pardons and Paroles and Governor Perry for clemency based on Willie Pondexter's rehabilitation on death row, arguing that he no longer posed a future danger to society as the trial jury had found. The clemency petition included statements from two of the jurors from his 1994 trial who no longer believed he should be put to death, given his record of non-violence and reform on death row. It also included statements by a prison guard who said that Willie Pondexter had "never posed a threat within the prison, even when given the opportunity to do so", and that "he would present no risk at all", even if placed within the general prison population. The Archbishop of Galveston-Houston appealed for clemency, writing in a letter dated 13 February 2009 to the clemency authorities:

"It is clear that throughout his youth, Willie Pondexter was not shown love or compassion. He was born to a mother who was mentally ill, abused him, and abandoned him for months at a time when she was hospitalized involuntarily. The young Mr Pondexter was left with his father, a violent man who carried on affairs with several women living in the home. He and his half-brothers and sisters were left to fend for themselves. After his brother's suicide, while in his teens, Mr Pondexter joined a gang.

These facts do not excuse Mr Pondexter's involvement in murder. The abuse and neglect do, however, explain what led to his participation in the crime. Now that he has been removed from this environment, Mr Pondexter has grown to be a peaceful man. By all accounts, over the past 14 years, Mr Pondexter has rehabilitated himself and poses no threat to the guards or his fellow inmates."

The clemency petition sought commutation of his death sentence or, alternatively, a 180-day reprieve so that his lawyers could have more time to collect statements from other prison guards who were apparently willing to testify to Willie Pondexter's rehabilitation. The lawyers presented evidence that the authorities had blocked their efforts to speak to such guards. Their efforts in the federal courts to obtain a stay of execution because of this alleged deliberate frustration of their efforts to investigate and secure evidence in support of the clemency petition were unsuccessful. So, too, was their clemency petition, which had noted that "the members of this Board and Governor Perry have a unique role in the system of capital punishment. It is you who measure and weigh the information provided, and have a most critical role: to decide between life and death." Once again, the Board and the governor chose death.

Four and a half year earlier, on 5 October 2004, Governor Perry had denied the request for a 30-day reprieve for Edward Green, who was put to death in the Texas execution chamber later that day. Edward Green was 18 years old at the time of the double murder, a crime that resulted from an apparently spontaneous decision by Green and his 17-year-old friend to rob the couple. A dozen years later, in interviews from death row, he described the crime as "a real act of ignorance, and there really was no motivating factor." He wondered "if I would have ended up here if I had somebody to take me in and show me what being a man is all about. I think the violence in me came from the lifestyle I was living and not being comfortable in myself. I used to be a real fool, and I liked to show everyone I was a fool". He expressed the wish to meet relatives of the victims if it would help them get "closure", adding that he had "never wanted to put them through that pain". In his final statement before being killed, he said "I can only apologize for all the pain I caused". The Governor's statement denying a reprieve focussed only on the "brutal and senseless murders" and that "there is no doubt about [Green's] guilt". Such a statement would seem to suggest a narrow

view of the power of executive clemency.

Michael Hall was executed in Texas on 15 February 2011. He was 18 years old at the time of the crime for which he was sentenced to death in March 2000, the abduction and murder in 1998 of 19-year-old Amy Robinson, who had learning disabilities. Michael Hall's lawyers claimed that he, too, had mental retardation and that he should be spared execution under the *Atkins* ruling. In 2009, a federal District Judge decided that, despite a number of IQ scores around the 70, "the 85 IQ score for Hall on the testing done...in November 2008 is the best measure the court has been provided of Hall's general intellectual functioning. Therefore, the court cannot find that Hall has satisfied the first element of the definition of mental retardation that he have a 'significantly sub-average general intellectual functioning [defined as an IQ of about 70 or below]'. The court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons. However, the court has not been persuaded by the evidence that Hall's intellectual functioning goes below the dividing line between mental retardation, on the one hand, and less significant forms of learning disability, on the other".⁸⁰

In 2008, a federal judge wrote of Michael Hall: "Hall had low intelligence and lived in a chaotic family environment. He had never been incarcerated, although he had participated in minor shoplifting incidents with other individuals. Hall often associated with people younger than his age but he met an older friend, Robert Neville, in 1997. He appreciated Neville's friendship and attention and spent many hours with him, accepting his offers of gifts, rides, and places to stay, and imitating his style of dress... They decided to kill someone."⁸¹ Neville, who was 23 at the time of the crime, was executed in 2006. Like Robert Neville had five years earlier, in his final statement before being killed, Michael Hall apologised to the victim's family:

"First of all I would like to give my sincere apology to Amy's family. We caused a lot of heartache, grief, pain and suffering, and I am sorry. I know it won't bring her back... I am not the same person that I used to be, that person is dead. It's up to you if you would find it in your heart to forgive.

As for my family, I am sorry I let you down. I caused a lot of heartache, and I ask for your forgiveness... Here I am a big strong youngster, crying like a baby. I am man enough to show my emotions and I am sorry. I am sorry for everything. I wish I could take it back, but I can't."

Milton Mathis was executed four months later, on 21 June 2011, in the same death chamber. He had been 19 years old at the time of the crime for which he was put to death, and his lawyers had raised an *Atkins* claim in his case, too, supported by evidence that his IQ had been assessed at less than 70. In 2007, the Fifth Circuit Court of Appeals had allowed a successive habeas corpus petition to be filed to raise the claim. In March 2008, the District Court dismissed the petition, finding that it had not met the requirements for filing a successor petition under the AEDPA, and that, in any event, the state court's finding that he did not have a level of intellectual disability that would exempt him from execution under *Atkins*, was due a high level of deference by the federal courts. The federal judge noted that the state court had "considered his evidence and testimony and found that, while he exhibited a learning disability and mental impairment due to his heavy drug use, he was not retarded".⁸² In an editorial two days before the execution, the *Houston Chronicle* described the case as one of "an unfortunate convergence of Texas procedure and federal judicial error, coupled with a state court that gave short shrift to his mental retardation claims". The paper urged the Fifth Circuit to block the execution, wondering "where is the justice in our justice system"?⁸³

Justice came in the form of lethal injection for Beunka Adams in the Texas execution chamber on 26 April 2012. He had been sentenced to death for the murder in September

2002 of Kenneth Vandever, who had been abducted during the robbery of a grocery and shot in the head. In his final statement before being killed, he expressed his remorse to those affected by the crime he had committed a decade earlier at the age of 19:

“To the victims, I’m very sorry for everything that happened. I am not the malicious person that you think I am. I was real stupid back then. I made a great many mistakes. What happened was wrong. I was a kid in a grown man’s world. I messed up, and I can’t take it back. I wasn’t old enough to understand. Please don’t carry around that hurt in your heart. You have got to find a way to get rid of the hate. Trust me, killing me is not going to give you closure. I hope you find closure. Don’t let that hate eat you up, find a way to get past it... I am sorry for the victim’s family. Murder isn’t right, killing of any kind isn’t right. Got to find another way.”

His co-defendant, Richard Cobb, remains on death row. He was 18 years old at the time of the crime. On 25 May 2012, he came a step closer to execution when the US Court of Appeals for the Fifth Circuit dismissed his appeal.

Texas should find another way; one that is constructive and compatible with human dignity. The death penalty is neither.

A TEXAS-SIZED DRAG ON THE EVOLUTION

The story of the United States of America is one guided by universal values shared the world over... Our Founders, who proclaimed their ambition ‘to form a more perfect Union,’ bequeathed to us not a static condition but a perpetual aspiration... We associate ourselves with the many countries on all continents that are sincerely committed to advancing human rights

USA, to the United Nations Human Rights Council, 2010⁸⁴

In the past decade, employing its “evolving standards of decency” framework, the US Supreme Court has removed those who were under 18 at the time of the crime and people with “mental retardation” from the reach of the executioner. These decisions were welcome, even if belated in comparison to the state of affairs in much of the rest of the world. The State of Texas, having accounted for more executions in these categories than any other state, displayed a certain begrudging acceptance of the rulings.

At the time of the crime for which he is now facing lethal injection in the Texas death chamber, Yokamon Laneal Hearn was 19 years old and had some form of mental disability. The state has labelled him nonetheless as one of the small percentage of people convicted of murder in the USA whose “extreme culpability makes them the most deserving of execution”.⁸⁵

A clear majority of countries do not execute anyone, let alone youthful offenders or individuals with mental disabilities. Through their abolitionist stance they reject the notion that judicial killing has some special deterrent effect, or that retributive killing constitutes a constructive response to violent crime, or that the selection process employed by the state to decide which defendants “deserve” to die for their crimes can, in an imperfect human world, be free of error, discrimination or unfairness.

Signing a bill to abolish the death penalty in his state in 2010 Governor Pat Quinn of Illinois said that “our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment”, including “on the basis of race, geography or economic circumstance”. In similar vein in New Mexico in 2007, Governor Bill Richardson concluded that the capital justice system is “inherently defective”. In New Jersey in 2009, Governor Jon Corzine said that the

death penalty risked a brutalizing effect through its erosion of “our commitment to the sanctity of life”. After signing his state’s abolitionist bill into law with immediate effect on 25 April 2012, Governor Malloy of Connecticut said that he had come to believe that eradicating the death penalty was “the only way to ensure it would not be unfairly imposed”.

The world is evolving towards a future without this cruel, degrading and brutalizing punishment. So, too, it seems is the USA, with these four states having legislated to abolish the death penalty in the past five years and the annual numbers of death sentences and executions down from their peaks in the 1990s. On 21 May 2012, former US Supreme Court Justice John Paul Stevens told an audience at the American Law Institute:

“I really think that in regard to the death penalty. ... I’m not sure that the democratic process won’t provide the answers sooner than the [Supreme] Court does, because I do think there is a significantly growing appreciation of the basic imbalance in cost-per-person benefit analysis. And the application of the death penalty does a lot of harm, and does really very little good.”⁸⁶

International human rights law, including article 6 of the International Covenant on Civil and Political Rights (ICCPR), recognizes that some countries retain the death penalty. But this acknowledgment of present reality should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of article 6.6 of the ICCPR. The UN Human Rights Committee, the expert body established under the ICCPR to monitor the treaty’s implementation, has said that article 6 “refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life”. The USA ratified the ICCPR two decades ago, on 8 June 1992.

A moratorium on executions can be a step towards abolition, as it proved to be in Illinois, and as yet may result from the moratorium declared in Oregon by the governor there in 2011.⁸⁷ Repeated resolutions at the United Nations General Assembly have called on countries which still use the death penalty to impose a moratorium on executions, pending abolition.

The State of Texas should shut down its execution chamber and join the evolution. The Governor and the Board of Pardons and Paroles should do all in their authority and influence to prevent any further executions in the state pending action by the legislature to repeal the state’s death penalty statute.

The Governor and Board can start by stopping the next execution scheduled in Texas, that of Yokamon Hearn. He was convicted, as the prosecutor said after the trial, of a “senseless” killing. The state should step back from committing another.

APPENDIX: A CHRONOLOGY

- 30 July 1964** – The 362nd (since 1924) and last person is put to death in the electric chair in Texas
- 19 December 1966** – The International Covenant on Civil and Political Rights (ICCPR) is opened for signature. The treaty recognizes that some countries retain the death penalty, but has an abolitionist outlook. Among other things, the ICCPR prohibits the execution of anyone under 18 at the time of the crime
- 29 June 1972** – In *Furman v. Georgia* (consolidated with *Jackson v. Georgia* and *Branch v. Texas*), the US Supreme Court rules that the death penalty as being applied in the USA is unconstitutional. Among other things, the decision notes a conclusion of a study of Texas capital cases from 1924 to 1968 that “Application of the death penalty is unequal: most of those executed were poor, young, and ignorant”
- 23 March 1976** – The ICCPR enters into force, three months after the 35th country becomes party to it
- 2 July 1976** – In *Gregg v. Georgia*, the Supreme Court rules that executions can resume under new capital laws. In *Jurek v. Texas*, it upholds the Texas scheme, including its “future dangerousness” issue
- 17 January 1977** – The USA’s first post-*Gregg* execution (in Utah)
- 5 October 1977** – The USA signs the ICCPR
- 30 April 1982** – The UN Human Rights Committee, established under the ICCPR to monitor its implementation, issues General Comment 6 on the right to life under ICCPR, article 6, which “strongly” indicates the desirability of abolition. The HRC concludes “all measures of abolition should be considered as progress in the enjoyment of the right to life”
- 7 December 1982** – Texas carries out its first post-*Gregg* execution. It is the USA’s first execution by lethal injection
- 11 September 1985** – Texas carries out the USA’s first post-*Gregg* execution of a prisoner who was under 18 at the time of the crime
- 8 June 1992** – USA ratifies the ICCPR
- 27 March 1995** – US Supreme Court refuses to consider whether executing a Texas prisoner after 17 years on death row is unconstitutionally cruel. The prisoner, Clarence Lackey, is executed in April 1997
- 4 October 1995** – Texas carries out its 100th execution
- 24 April 1996** – President Bill Clinton signs into law the Antiterrorism and Effective Death Penalty Act (AEDPA), saying “from now on criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences”
- 12 January 2000** – Texas carries out its 200th execution
- 22 June 2002** – In *Atkins v. Virginia*, the Supreme Court bans the execution of offenders with “mental retardation”. Texas accounts for nine of 44 such executions recorded, more than any other state
- 20 March 2003** – Texas carries out its 300th execution
- 18 May 2004** – Seriously mentally ill inmate Kelsey Patterson is executed in Texas after Governor Rick Perry rejects a rare recommendation for clemency from the state Board of Pardons and Paroles
- 1 March 2005** – In *Roper v. Simmons*, the Supreme Court prohibits the execution of those under 18 at the time of the crime – Texas accounts for 13 of the 22 such executions in the USA since 1976
- 13 June 2005** – In *Miller-El v. Dretke*, the US Supreme Court overturns a Texas death sentence finding that the Dallas County prosecutor’s ‘race-neutral’ explanations of the use of peremptory strikes to dismiss African American prospective jurors were pre-textual and the dismissals were race-based
- 28 June 2007** – In *Panetti v. Quarterman*, the US Supreme Court criticizes the Texas judiciary’s handling of the case of a death row prisoner with serious mental illness. It seeks to clarify the standards governing mental competence for execution. Texas officials indicate they will continue to seek the inmate’s execution (he remains on death row today)⁸⁸
- 22 August 2007** – Texas carries out its 400th execution. By this time, the country’s next busiest death chamber – in the state of Virginia – has seen 98 executions
- 5 August 2008** – In violation of an order by the International Court of Justice (ICJ), Texas executes a Mexican national denied his consular rights under the Vienna Convention on Consular Relations (VCCR)
- 7 July 2011** – In violation of the reiterated ICJ order, Texas executes another Mexican national denied his consular rights after arrest. This is the 22nd post-*Gregg* execution in the USA of a foreign national who has raised a VCCR claim. Texas accounts for 10 of these executions, more than any other state
- 26 April 2012** – Texas carries out its 482nd execution, of an inmate convicted of murder committed when he was aged 19. Texas now accounts for 37 per cent of the USA’s post-1976 executions
- May 2012** – A study published in the Columbia Human Rights Law Review provides compelling evidence that on 7 December 1989 Texas executed Carlos De Luna for a crime he did not commit⁸⁹

ENDNOTES

¹ Since the *Atkins* ruling, "Intellectual Disability" has become the preferred term in the USA for describing significant limitations in both intellectual functioning and adaptive behaviour. In 2007, the American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). On terminology, the AAIDD states: "The term Intellectual Disability covers the same population of individuals who were diagnosed previously with Mental Retardation in number, kind, level, type, duration of disability, and the need of people with this disability for individualized services and supports. Furthermore, every individual who is or was eligible for a diagnosis of Mental Retardation is eligible for a diagnosis of Intellectual Disability. While Intellectual Disability is the preferred term, it takes time for language that is used in legislation, regulation, and even for the names of organizations, to change." See FAQ on Intellectual Disability, at http://www.aaid.org/content_104.cfm

² More than half a century ago, the US Supreme Court ruled that the Eighth Amendment to the US Constitution, which prohibits "cruel and unusual" punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958).

³ But see, for example, Amnesty International Urgent Action on Samnang Prim, 28 March 2002 <http://www.amnesty.org/en/library/info/AMR51/052/2002/en>

⁴ "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." *Roper v. Simmons*.

⁵ Thirty-nine people were sentenced to death in Texas in 1998, more than in any other state. Capital Punishment 1998, Bureau of Justice Statistics, US Department of Justice, December 1999. As of May 2012, 16 of the men sentenced to death in 1998 in Texas remained on death row, including Hearn.

⁶ "Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons* (2005)

⁷ Jurors sentence stockbroker's killer to death. Dallas Morning News, 12 December 1998.

⁸ *Baze v. Rees*, US Supreme Court, 16 April 2008, Justice Stevens concurring in the judgment.

⁹ The last execution in Texas before the US Supreme Court overturned existing capital statutes in the USA, in *Furman v. Georgia* (1972) was that of Joseph Johnson, an African American man killed in the state's electric chair on 30 July 1964. He had been convicted of a murder committed during a robbery of a grocery store. His was the last execution in Texas using the electric chair. All executions in the "modern" era in Texas have been by lethal injection.

¹⁰ By 7 June 2012, there had been 1,297 executions in the USA since 1976. The Texas authorities recently revealed that they had sufficient doses of lethal injection drugs for another 23 executions. See 'Texas has enough lethal drugs for 23 executions, officials say', Austin American-Statesman, 18 May 2012. See also USA: An embarrassment of hitches: Reflections on the death penalty, 35 years after *Gregg v. Georgia*, as states scramble for lethal injection drugs, 1 July 2011, <http://www.amnesty.org/en/library/info/AMR51/058/2011/en>

¹¹ Beunka Adams was executed on 26 April 2012 for a crime committed when he was 19 years old.

¹² Bobby Hines was scheduled to be put to death on 6 June 2012. On 18 May he received a stay of execution for DNA testing of crime scene evidence.

¹³ *Cobb v. Thaler*, US Court of Appeals for the Fifth Circuit, 25 May 2012. Richard Cobb, who was 18 years old at the time of the crime, was the co-defendant of Beunka Adams, 19 years old at the time of the crime and who was executed on 26 April 2012.

¹⁴ USA: Another brick from the wall: Connecticut abolishes death penalty, and North Carolina judge issues landmark race ruling, as momentum against capital punishment continues, 27 April 2012, <http://www.amnesty.org/en/library/info/AMR51/028/2012/en>

¹⁵ On 5 December 1998, two days before Yokamon Hearn's trial was due to begin, Dwight Paul Burley was arrested and charged with capital murder in the case. A week earlier, the same had happened to Teresa Shavonn Shirley. They eventually pleaded guilty to the lesser charge of aggravated robbery.

¹⁶ Suspect's mother says son never saw victim. Evidence ties him to carjack-slaying, police say. Dallas Morning News, 31 March 1998.

¹⁷ Under Texas law, such appointments were supposed to be governed by a process whereby a selection committee of judges and lawyers would adopt standards for the qualification of attorneys for appointment to death penalty cases. A list of qualified lawyers would be drawn up, from which the presiding judges in the courts in which capital cases were being tried would appoint counsel for indigent defendants. A federal court ruling on Yokamon Hearn's case in 2003 found that:

"Apparently, this entire process was ignored in Dallas County. No selection committee was ever formed, no list was created, and no appointments were made on the basis of such a list. Instead, the administrative judge for the region encompassing Dallas County signed an order establishing general standards for the appointment of death penalty counsel. The order delegated the responsibility for selecting death penalty counsel to the trial courts, which were required to post their standards for appointment and list the qualified attorneys. However, the trial court in this case never established any such standards or list.

In sum, the statutory procedure was not followed, and neither was the alternative procedure established by order of the administrative judge. The failure of the Texas courts to follow proper administrative procedure in appointing death penalty counsel is inexplicable."

Hearn v. Cockrell, US Court of Appeals for the Fifth Circuit, 23 June 2003.

¹⁸ *Hearn v. Thaler*, Petitioner-Appellant's brief in support of application for certificate of appealability. US Court of Appeals for the Fifth Circuit, 22 July 2011.

¹⁹ *In re Yokamon Laneal Hearn*. Declaration of Delvin J. Diles, 6 July 2006.

²⁰ *In re Yokamon Laneal Hearn*. Declaration of Teresa Shavonn Shirley, 5 July 2006.

²¹ *In re Yokamon Laneal Hearn*. Declaration of Dwight Paul Burley, 5 July 2006.

²² Man found guilty in carjack-slaying. Dallas Morning News, 11 December 1998.

²³ Jurors sentence stockbroker's killer to death. Dallas Morning News, 12 December 1998.

²⁴ Jury sentences Robinson to die. The Marshall News Messenger (Marshall, Texas), 15 March 2011.

²⁵ Jurors sentence stockbroker's killer to death. Dallas Morning News, 12 December 1998.

²⁶ *Furman v. Georgia*, US Supreme Court, 29 June 1972, Justice Marshall concurring.

²⁷ Deterrence and the death penalty. National Research Council. The National Academies Press, Washington, D.C., 2012.

²⁸ *Baze v. Rees*, US Supreme Court, 16 April 2008, Justice Stevens concurring in the judgment.

²⁹ *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.

³⁰ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

³¹ *Wainwright v. Witt*, 469 U.S. 412 (1985). In 1992, in *Morgan v. Illinois*, the Court explicitly extended the *Witt* standard to include proponents of the death penalty. In other words, anyone whose support for the death penalty would “prevent or substantially impair” them from performing his or her duties as a juror can be dismissed for cause.

³² *Gray v. Mississippi*, 481 U.S. 648 (1987)

³³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Mission to the United States of America, UN Doc. E/CN.4/198/68/Add.3, para. 147. 22 January 1998.

³⁴ *Lockhart v. McCree*, 476 U.S. 162 (1986).

³⁵ Mike Allen, Edward Mabry and Drue-Marie McKelton, *Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment: A meta-analysis*. Law and Human Behaviour, Volume 22, No. 6, 1998, pages 715 to 731.

³⁶ Marla Sandys, *Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality*. In: America’s experiment with capital punishment. Edited by James R. Acker, Robert M. Bohm and Charles S. Lanier. Carolina Academic Press, 1998.

³⁷ *Batson v. Kentucky*, 79 U.S. 476 (1986).

³⁸ *Wilkerson v Texas*, 493, U.S. 924 (1990), Justice Marshall dissenting from denial of *certiorari*.

³⁹ *State v. Robinson*, Order granting motion for appropriate relief, In the General Court of Justice, Superior Court Division (The Honorable Gregory A. Weeks, Senior Resident Superior Court Judge Presiding), 20 April 2012. See USA: Another brick from the wall, *op. cit.*

⁴⁰ *Hearn v. Cockrell*, US Court of Appeals for the Fifth Circuit, 23 June 2003.

⁴¹ Since 1 September 2005, Texas capital juries have had the option of sentencing defendants to Texas life imprisonment without the possibility of parole as an alternative to death. On the same day as he signed this legislation into law, Governor Rick Perry also approved a bill to change the terminology used on death certificates for executed inmates. The bill required the cause of death to be recorded as “judicially ordered execution” rather than “homicide” as then written. “Individuals who commit unspeakable crimes against Texas citizens and are put to death under Texas law are not victims,” the Governor said. “They are criminals and the final document that bears their name should reflect this fact.” Gov. Perry signs life without parole bill, Office of the Governor, news release, 17 June 2005, <http://governor.state.tx.us/news/press-release/3603/>

⁴² *Johnson v. Texas* (1993).

⁴³ *Abdul-Kabir v. Quarterman* (2007).

⁴⁴ *Simmons v. South Carolina* (1994).

⁴⁵ *Ex parte Yokamon Laneal Hearn*. Order on motion for appointment of counsel and stay of execution. Texas Court of Criminal Appeals, 3 March 2004.

⁴⁶ *In re: Yokamon Laneal Hearn & Hearn v. Dretke*, US Court of Appeals for Fifth Circuit, 6 July 2004.

⁴⁷ See also *Bobby v. Bies* (2009) (“Our [*Atkins*] opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within *Atkins*’ compass. We left to the States the task of developing appropriate ways to enforce the constitutional restriction.”)

⁴⁸ Statement of Gov. Rick Perry on U.S. Supreme Court Decision, Press release, Office of the Governor, 20 June 2002, <http://governor.state.tx.us/news/press-release/4256/>

- ⁴⁹ See List compiled by Professor John Blume, Cornell University Law School, as of 8 May 2008, <http://www.deathpenaltyinfo.org/sentence-reversals-intellectual-disability-cases>.
- ⁵⁰ See <http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states>.
- ⁵¹ *Ex parte Briseno*, Texas Court of Criminal Appeals (2004).
- ⁵² *Hearn v. Dretke*, Successive petition for writ of habeas corpus, US District Court, Northern District of Texas, 27 July 2005.
- ⁵³ Assessment of Yokamon Hearn for Fetal Alcohol Syndrome by Pablo Steward, M.D., 20 May 2005.
- ⁵⁴ Psychological evaluation. Mary Alice Conroy, M.D., 10 May 2005.
- ⁵⁵ Mental retardation assessment. James R. Patton, Ed.D., 19 May 2005.
- ⁵⁶ *Hearn v. Dretke*, Respondent Dretke's answer and motion for summary judgment with brief in support. US District Court, Northern District of Texas, 2 May 2006.
- ⁵⁷ *Hearn v. Dretke*, Petitioner's brief in reply to answer and motion for summary judgment. US District Court, Northern District of Texas, 14 July 2006.
- ⁵⁸ Supplemental report of James Patton re: Yokamon Laneal Hearn, 10 July 2006.
- ⁵⁹ *Hearn v. Quarterman*, Petitioner's report to the Court concerning the continued viability of his Atkins claim, US District Court, Northern District of Texas, 20 May 2007.
- ⁶⁰ Re: Yokamon Hearn. Dale G. Watson, Ph.D, Clinical & Forensic Neuropsychology, 19 May 2007.
- ⁶¹ *Hearn v. Quarterman*, Respondent Quarterman's response to status report and motion for dismissal or, alternatively, motion for summary judgment with brief in support. US District Court, Northern District of Texas, 29 May 2007.
- ⁶² *Hearn v. Quarterman*, Petitioner's reply to respondent's response to status report and respondent's motion to dismiss or for summary judgment. US District Court, Northern District of Texas, 1 June 2007.
- ⁶³ *Hearn v. Quarterman*, Respondent Quarterman's answer re-urging motion for summary judgment with brief in support. In the US District Court for the Northern District of Texas, 12 July 2007.
- ⁶⁴ Declaration of Stephen Greenspan, PhD, 10 October 2007.
- ⁶⁵ Declaration of James R. Patton re: Yokamon Laneal Hearn, 11 October 2007.
- ⁶⁶ *Hearn v. Quarterman*, Memorandum opinion and order, US District Court, Northern District of Texas, 13 March 2008.
- ⁶⁷ *Hearn v. Quarterman*, Memorandum opinion and order, US District Court, Northern District of Texas, 12 August 2008.
- ⁶⁸ *Ex parte Yokamon Laneal Hearn*, Opinion, Court of Criminal Appeals of Texas, 28 April 2010.
- ⁶⁹ *Hearn v. Thaler*, Memorandum opinion and order, US District Court, Northern District of Texas, 3 March 2011.
- ⁷⁰ *Hearn v. Thaler*, US Court of Appeals for the Fifth Circuit, 30 January 2012.
- ⁷¹ Gov. Perry issues commutations in accordance With US Supreme Court order, Press release, Office of the Governor, 22 June 2005, <http://governor.state.tx.us/news/press-release/3297/>
- ⁷² *Johnson v. Texas* (1993).
- ⁷³ *Stanford v. Kentucky* (1989), Justice Brennan dissenting (joined by Justices Marshall, Blackmun and Stevens).

⁷⁴ Clarence H. Patrick, The status of capital punishment: A world perspective. *Journal of Criminal Law, Criminology, and Police Science*, Vol. 5, No. 4, December 1965, pages 397-411.

⁷⁵ Beunka Adams (19 at crime / executed 2012); Milton Mathis (19 / 2011); Michael Hall (18 / 2011); Michael Perry (19 / 2010); Peter Cantu (18 / 2010); George Jones (19 / 2010); Reginald Blanton (18 / 2009); Derrick Johnson (18 / 2009); Willie Pondexter (19 / 2009); Joseph Ries (19 / 2008); José Medellin (18 / 2008); Carlton Turner (19 / 2008); John Amador (18 / 2007); DaRoyce Mosley (19 / 2007); Kenneth Parr (18 / 2007); Joseph Nichols (19 / 2007); Ryan Dickson (18 / 2007); Vincent Gutierrez (18 / 2007); Willie Shannon (19 / 2006); Justin Fuller (18 / 2006); Derrick O'Brien (18 / 2006); Jermaine Herron (18 / 2006); Clyde Smith (18 / 2006); Troy Kunkle (18 / 2005); Ronald Howard (18 / 2005); Robert Shields (19 / 2005); Demarco McCullum (19 / 2004); Dominique Green (18 / 2004); Edward Green (18 / 2004); Jasen Busby (19 / 2004); Kenneth Bruce (19 / 2004); Cedric Ransom (18 / 2003); Henry Dunn (19 / 2003); Granville Riddle (19 / 2003); Javier Suárez Medina (19 / 2002); Reginald Reeves (19 / 2002); Monty Delk (19 / 2002); Emerson Rudd (18 / 2001); Jeffery Dillingham (19 / 2000); Juan Soria (18 / 2000); Jessy San Miguel (19 / 2000); James Richardson (19 / 2000); Ponchai Wilkerson (19 / 2000); Jose de la Cruz (19 / 1999); George Cordova (19 / 1999); David Castillo (19 / 1998); Irineo Montoya (18 / 1997); Davis Losada (19 / 1997); Dorsie Johnson (19 / 1997); Fletcher Mann (19 / 1995); Jeffery Motley (19 / 1995); Clifton Russell (19 / 1995); Warren Bridge (19 / 1994); Walter Williams (19 / 1994); Richard Wilkerson (19 / 1993); Danny Harris (19 / 1993); Jesus Romero (19 / 1992); Billy White (18 / 1992); Anthony Williams (19 / 1987)

⁷⁶ Thirteen were Latinos and 14 were white. Forty of the 58 cases, or 69 per cent, involved white victims. Six cases involved black victims and 11 cases involved Latino victims.

⁷⁷ Of the 482 executions carried out in Texas between 1982 and early June 2012, two were of white men for killing solely a black person. Lee Taylor and Lawrence Brewer, both white, were executed in 2011, each for the murder of an African American. In 2003, another white man, Larry Hayes, was executed for killing a black person. He was also convicted of the murder of a white victim

⁷⁸ Cortne Robinson (18 at crime); Blaine Milam (18); James Brodnax (19); Christian Olsen (19); Dexter Johnson (18); LeJames Norman (19); Juan Ramirez (18); Anthony Doyle (18); Damon Matthews (18); Richard Cobb (18); Charles Derrick (18); Clinton Young (18); Irving Davis (18); Perry Williams (19); Miguel Paredes (18); Obie Weathers (18); Larry Estrada (18); Alvin Braziel (18); Robert Woodard (19); Juan Garcia (18); Ray Jasper (19); Anthony Haynes (19); Richard Vasquez (18); Yokamon Hearn (19); Felix Rocha (18); Julius Murphy (18); Howard Guidry (18); Jose Martinez (18); Pablo Melendez (18); Erica Sheppard (19); Billy Wardlow (18); Tony Ford (18); Randolph Greer (18); Robert Campbell (18); Kim Ly Lim (19); Bobby Hines (19); Gustavo Garcia (18); Brent Brewer (19); Marlin Nelson (19); Harvey Earvin (18).

⁷⁹ Also listed by the Texas authorities as still being on death row is Anthony Pierce, who was about two weeks past his 18th birthday at the time of the 1977 crime for which he was originally sentenced to death. In 2008 a federal judge ordered the state of Texas to release Pierce, give him new sentencing hearing, or re-sentence him to a sentence of less than death. After appeals against that order were exhausted in July 2010, Anthony Pierce was returned to Harris County (Houston) to await a new sentencing hearing. That hearing is scheduled to start in September 2012 with the Harris County authorities intending to seek the death penalty again. Anthony Pierce will be 53 years old by then.

⁸⁰ *Hall v. Quarterman*, Memorandum opinion and order, US District Court for the Northern District of Texas, 9 March 2009.

⁸¹ *Hall v. Quarterman*, In the US Court of Appeals for the Fifth Circuit, 30 June 2008 (revised 9 July 2008), Judge Higginbotham, concurring in part and dissenting in part.

⁸² *Mathis v. Quarterman*, Memorandum and order, In the US District Court for the Southern District of Texas, 31 March 2008.

⁸³ Let's avoid a travesty: Court must act swiftly before Texas executes a mentally retarded individual. Houston Chronicle, 9 June 2011.

⁸⁴ UN Doc.: A/HRC/WG.6/9/USA/1.

⁸⁵ See *Roper v. Simmons*, US Supreme Court (2005).

⁸⁶ Address by the Honorable John Paul Stevens, Associate Justice (retired), Supreme Court of the United States, at the American Law Institute 89th annual meeting, 21 May 2012.

⁸⁷ Amnesty International Urgent Action update, USA: Governor imposes moratorium on executions, 23 November 2011, <http://www.amnesty.org/en/library/info/AMR51/096/2011/en>

⁸⁸ USA: Supreme Court tightens standard on 'competence' for execution, 29 June 2007, <http://www.amnesty.org/en/library/info/AMR51/114/2007/en>

⁸⁹ Los Tocayos Carlos, Columbia Human Rights Law Review, Volume 43, No. 3, Summer 2012, available at <http://www3.law.columbia.edu/hrlr/lc/chapter/foreword/1.html>