

URGENT ACTION

NICARAGUAN NATIONAL FACING EXECUTION IN TEXAS

Bernardo Aban Tercero, a Nicaraguan national, is scheduled to be executed in Texas on 26 August for a murder committed in 1997. The poor quality of the legal representation he received at trial and during state-level appeals is at the centre of his clemency bid.

Robert Berger was shot dead on 31 March 1997 during a robbery of a dry cleaners in which he was waiting with his five-year-old daughter, in Houston, Texas. **Bernardo Aban Tercero** was arrested in 1999 when re-entering the USA having returned to Nicaragua after the crime. In 2000, he was convicted of capital murder. At the sentencing, the prosecution argued that this crime and his alleged involvement in crimes in Nicaragua after he left Texas showed that he would be a future danger – a prerequisite for a death sentence in Texas. Among other things, the prosecutor described the defendant as a “beast” and a “demon”. The defence lawyers did not object to these inflammatory comments meaning that this issue was forfeited on appeal. In a bare mitigation case, the defence presented members of the defendant’s family as character witnesses and to argue that he was capable of rehabilitation. A jail chaplain testified that he had shown remorse. The jury voted for the death penalty.

The defendant’s inexperienced lawyers had done little investigation into possible mitigation and presented no expert testimony to the jury – such as from a mental health expert – or from anyone else who could describe how the defendant’s childhood in Nicaragua – marked by abject poverty, war and exposure to toxic pesticides as a child labourer – might have impacted his life and conduct. Following the trial, the lawyer appointed for state habeas corpus appeals failed to raise a single claim outside of the trial record (the purpose of such appeals), and did not conduct his own investigation of the case or of the mitigation failure by the trial lawyers. In 2006 a leading Texas newspaper published an investigation into the poor quality of capital defence representation in the state. The two lawyers appointed to represent Bernardo Aban Tercero for state level appeals featured prominently in this review.

Bernardo Aban Tercero grew up in extreme poverty in Nicaragua. He was raised by his elderly grandmother after he was abandoned by his mother as a baby and his father refused to have anything to do with him. The family had no electricity or running water, and no access to health care. They lived in an area greatly affected by the civil war in the 1970s and 80s. Poverty meant that even the children worked. According to his clemency petition, which provides the executive authorities with mitigating evidence not presented to the jury, Bernardo Aban Tercero worked in the fields for years from the age of 10. Planes would spray toxic pesticides every two days, with the workers below not provided protective gloves or masks. Bernardo Aban Tercero was among those who became sick and vomited after such sprayings, and suffered severe headaches. Relatives have said that he was one of the worst affected. A neuropsychological assessment is currently being produced for the clemency effort.

Please write immediately in English or your own language:

- Call for this execution to be stopped and for Bernardo Aban Tercero’s death sentence to be commuted;
- Express concern at the inadequacy of his appointed counsel’s representation at trial and on appeal, and calling on the clemency authorities to seriously consider the mitigating evidence which the jury did not hear;
- Explain that you are not seeking to excuse the crime or minimize its very serious consequences.

PLEASE SEND APPEALS BEFORE 26 AUGUST 2015 TO:

Clemency Section, Board of Pardons and Paroles

8610 Shoal Creek Blvd., Austin, Texas 78757-6814, USA

Fax: +1 512 467 0945

Email: bpp-pio@tdcj.state.tx.us

Salutation: **Dear Board members**

Governor Greg Abbott

Office of the Governor, P.O. Box 12428

Austin, Texas 78711-2428, USA

Fax: +1 512 463 1849

Salutation: **Dear Governor**

Also send copies to diplomatic representatives accredited to your country. Please insert local diplomatic addresses below:

Name Address 1 Address 2 Address 3 Fax Fax number Email Email address Salutation Salutation

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

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ADDITIONAL INFORMATION

An employee of the dry cleaning business where the murder occurred said that she had helped to orchestrate the robbery with Bernardo Aban Tercero, who lived with her sister and needed money. According to the record, there was a co-defendant who fled to Mexico and was never tried. At his trial in 2000, the defence argued that Bernardo Aban Tercero had lacked the intent necessary for capital murder. The only witness called by the defence, to counter the 17 witnesses presented by the prosecution, was the defendant himself. He testified that the victim Robert Berger had tried to grab his gun and it had gone off during the ensuing struggle. He also alleged that the employee had been a willing participant in the plan. The prosecution maintained that specific intent could be inferred from evidence that he had used threats to coerce the employee into her participation, that he had taken a loaded gun with him into the dry cleaners, and that he had shot the victim because he could identify him. The jury convicted him of capital murder and, after voting yes to the "future dangerousness" question and finding no mitigation to warrant a life sentence, sentenced him to death.

The Texas prison authorities list Bernardo Aban Tercero as having been 19 years old at the time of the crime. On appeal, it has been claimed that he was in fact 17, which would render his execution unconstitutional. The evidence included a birth certificate indicating that he was born in August 1979 and an affidavit from a social worker who went to Nicaragua to investigate the issue and interview family members. However, the state and federal courts ruled that the post-conviction evidence lacked credibility and was not enough to overturn evidence presented at trial or otherwise on the record that he was over 18 at the time of the crime.

Between 1982 and 2003, Texas executed 13 individuals (eight of whom were African American, four white and one Latino) who were under 18 at the time of the crime, 60 per cent of the national total of such executions until 2005 when the US Supreme Court put a stop to this practice, recognizing attributes of youth such as immaturity, impulsivity, lack of foresight, and vulnerability to peer pressure, as well as the potential for rehabilitation. The Court noted that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18". Scientific research has continued to show that development of the brain and psychological and emotional maturation continues well beyond the late teenage years.

Having previously led in the execution of child offenders, Texas now leads in the execution of young adult offenders who were 18 or 19 at the time of the crime. It has executed more than 70 such individuals since 1985, more than half of them in the past decade. Of the at least 73 individuals who have been put to death in Texas since 1982 for crimes committed when they were 18 or 19 years old, about three quarters were African American or Latino. There are at least 35 inmates on death row in Texas for crimes committed when they were 18 or 19 years old. Thirty of these 35 prisoners (86%) are black or Latino.

Bernardo Aban Tercero was tried and sentenced to death in Harris County. A quarter of the prisoners executed in Texas since 1977 for crimes committed when they were 17, 18 or 19 were prosecuted in Harris County (21 of 86 – 24%). Sixteen of the 35 prisoners (46%) now on death row in Texas for crimes committed when they were 18 or 19 were convicted in Harris County.

Texas accounts for 527 of the 1,412 executions carried out in the USA since judicial killing resumed there in 1977 under revised capital laws; 124 of the Texas executions were of prisoners convicted in Harris County. There have been 18 executions in the USA so far in 2015, nine of them in Texas. Amnesty International opposes the death penalty in all cases, unconditionally. Some 140 countries have abolished the death penalty in law or practice.

Name: Bernardo Aban Tercero

Gender m/f: m

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