



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

January 5, 2017

Mr. Nils Melzer
Special Rapporteur on torture and other cruel,
Inhuman or degrading treatment or punishment
Office of the High Commissioner on Human Rights
Geneva, Switzerland

Dear Mr. Melzer:

Thank you for your letter dated November 23, 2016 (Ref. OL USA 15/2016),
inquiring about U.S. jurisprudence concerning methods employed to carry out
sentences of capital punishment, including *Glossip v. Gross*, 135 S. Ct. 2726
(2015), and the situation of Mr. Thomas Arthur. Attached please find the response
from the Government of the United States.

Sincerely,

Keith M. Harper
Ambassador
U.S. Permanent Representative to
the UN Human Rights Council

OHCHR REGISTRY

- 6 JAN. 2017

Recipients :...S.P.D.....
.....Torture.....

Enclosure

SUBJECT: Response to request for additional information related to U.S. jurisprudence concerning methods employed to carry out sentences of capital punishment

Thank you for your letter dated November 23, 2016, inquiring about U.S. jurisprudence concerning methods employed to carry out sentences of capital punishment, including *Glossip v. Gross*, 135 S. Ct. 2726 (2015), and the situation of Mr. Thomas Arthur. The United States takes its obligations under the UN Convention Against Torture very seriously, and is committed to preventing torture and cruel, inhuman, and degrading treatment or punishment. We hope the below information in response to your inquiry is useful.

First, the U.S. judicial system provides an exhaustive system of protections at both the federal and state levels to ensure that the death penalty is not applied in a summary, arbitrary or discriminatory manner, and that its implementation is undertaken with exacting procedural safeguards, after multiple layers of judicial review, in conformity with the U.S. Constitution and U.S. international obligations, including the International Covenant on Civil and Political Rights and the UN Convention Against Torture. All criminal defendants, including those facing the death penalty, enjoy strong constitutional protections and procedural rights. Defendants eligible for the death penalty receive heightened procedural safeguards in both federal and state courts, safeguards that are over and above the procedural process guarantees enjoyed by all criminal defendants. The United States takes seriously the importance of working with the courts at all levels to make sure that all defendants, including indigent defendants, receive adequate legal representation as they pursue their cases. The U.S. Constitution guarantees the right of habeas corpus to all persons, including those on death row. Pursuant to this constitutional guarantee, the Antiterrorism and Effective Death Penalty Act of 1996 grants state and federal prisoners a well-defined means to raise a post-conviction claim in federal court that their constitutional rights were violated in lower courts.

The United States has always endeavored to carry out its most serious criminal punishment in the most humane and responsible fashion. Lethal injection is the primary execution method used by all states that provide for capital punishment in their criminal laws, as well as the federal government. States that retain capital punishment have often adopted lethal injection as a more humane method than other methods that have been tried or used in the past. The UN Human Rights Committee has taken the view that lethal injection does not violate Article 7 of the International Covenant on Civil and Political Rights, which prohibits torture and

cruel, inhuman, or degrading treatment or punishment and medical experimentation without consent. See *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993 (1994), para. 17.3; *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), para. 16. It noted that lethal injection was “at the end of the spectrum of methods designed to cause the least pain.” *Id.* at para. 9.7.

State and federal laws provide robust opportunities for inmates facing capital punishment to challenge their method of execution and such lawsuits are regularly entertained by state and federal courts. Specifically, in 2006 the U.S. Supreme Court held that death row inmates may, under civil rights laws, challenge the manner in which a capital sentence by lethal injection is carried out. *Hill v. McDonough*, 547 U.S. 573 (2006).

U.S. courts have carefully reviewed and rejected a number of claims alleging that U.S. states’ lethal injection protocols constitute cruel and unusual punishment. In *Baze v. Rees*, a plurality of the U.S. Supreme Court held that a method of execution does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment unless it creates an “objectively intolerable” risk that severe pain will be inflicted on the condemned inmate, and the state need not adopt an alternative method of execution unless it would significantly reduce a substantial risk of serious harm. 553 U.S. 35 (2008). In that case, the Court noted that given that capital punishment is lawful, some means is necessary for carrying it out, and the U.S. Constitution does not demand the avoidance of *any possible* pain. *Id.* at 47. Although the Court was divided as to the proper test for determining the constitutionality of a method of execution, a majority held in that case that the state of Kentucky’s three-drug lethal injection protocol – which mirrored the protocols followed by most states and the federal government at that time – did not constitute cruel and unusual punishment. *Id.* at 56.

Second, we provide the following information in response to your inquiries concerning *Glossip v. Gross*. In this case, the U.S. Supreme Court rejected capital defendants’ claim that the use of a certain drug (midazolam) is cruel and unusual because it would fail to render a person insensate to pain and would therefore result in severe pain. The Court based its decision on two findings: first, “the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.” 135 S. Ct. at 2731. Second, the prisoners failed to demonstrate that “any risk posed by midazolam is substantial when compared to known and available alternative methods of execution.” *Id.* at 2737. In other words, the test for whether a

particular method of execution violates the Eighth Amendment requires first and foremost that the petitioners demonstrate that the particular method carried a substantial risk of severe pain and suffering. In this case, the District Court heard evidence from a variety of medical experts on behalf of both the state and the petitioners, and in weighing the evidence found that the particular drug combination did not carry a substantial risk of severe pain and suffering – both the Court of Appeals and the U.S. Supreme Court found no clear error in this assessment. *Id.* at 2740-2741. The full text of this decision is available at https://www.supremecourt.gov/opinions/14pdf/14-7955_aplc.pdf.

Third, we provide the following information in response to your inquiries concerning the case of Mr. Thomas Arthur. Mr. Arthur was convicted of the murder of Mr. Troy Wicker. At the time of Mr. Wicker's murder, Mr. Arthur was already serving a life sentence in prison for a prior fatal shooting, and he was convicted of killing Mr. Wicker while he was out of prison on work release. In both murders, Mr. Arthur executed the victims with a single pistol shot through the right eye. Mr. Arthur received three trials: in the first trial, he was convicted of the murder of Mr. Wicker and sentenced to death, but his conviction was reversed on appeal because of the improper admission of certain evidence at trial. *Arthur v. State*, 472 So. 2d 650, 661 (Ala. Crim App. 1984). In his second trial, he was again convicted of the murder and sentenced to death, but his conviction was once again reversed on appeal because of a separate evidentiary error during the second trial. *Arthur v. State*, 575 So. 2d 1165 (Ala. Crim. App. 1990). In his third trial he was convicted and sentenced to death for a third time, and his conviction was affirmed on appeal. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996). Mr. Arthur's execution remains stayed pending the U.S. Supreme Court's decision as to whether to hear the merits of his petition. As of the writing of this letter, the Court has not yet issued a decision.

Finally, we wish to reiterate our commitment to the absolute prohibition on torture and cruel, inhuman, and degrading treatment or punishment, and to reiterate our strong support for your mandate.