

**Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

REFERENCE: UA USA 13/2016:

3 November 2016

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions, and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 26/12 and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged imminent execution of Mr. Thomas "Tommy" Arthur**.

Thomas "Tommy" Arthur, 74, was convicted of killing Troy Wicker in Muscle Shoals, Alabama, in 1982, and has been on death row for 34 years. His conviction at two of three trials was overturned because of constitutional violations, and his execution has been stayed six times.

The Alabama Supreme Court has now scheduled his execution for Thursday 3 November at 6pm CDT, by lethal injection. Information received from the source allege that the drug cocktails used in Alabama for lethal injections, may cause severe physical and mental suffering of the condemned before his death, which may amount to **cruel, inhumane or degrading treatment or punishment**.

The relevant lethal injection protocol consists of three drugs: (1) midazolam hydrochloride, (2) rocuronium bromide, and (3) potassium chloride administered in sequence. The second drug is a paralytic that stops muscle usage (but not the sensation of pain or brain function), and so will suffocate a conscious inmate in a manner that has been compared to being buried alive. The third drug is designed to stop the heart and produces a sensation akin to fire running through the veins. Thus, unless the first drug acts as an effective anaesthetic rendering the condemned prisoner unconscious and insensate to pain, the execution is torturous. Midazolam, the first drug in Alabama's protocol, is not an anaesthetic, but is commonly used in clinical settings to relieve anxiety and/or as a mild sedative.

In a case brought before the United States District Court in Alabama Mr. Arthur offered evidence from a world-renowned anaesthesiologist, Dr. Alan Kaye, Chairman of the Department of Anaesthesiology at Louisiana State University Health Sciences Center,

stating that midazolam, at any dose, is pharmacologically incapable of holding an inmate unconscious in the presence of the pain stimuli from the second and third drugs in the protocol. Dr. Kaye further explained that there are well-accepted scientific reasons why midazolam is not used as a general anaesthetic for major surgery, which demonstrate equally that it is not suitable for use in an acceptable execution protocol. The District Court never considered Dr. Kaye's testimony, however, taking the view that Mr. Arthur could not challenge a method of execution—no matter how torturous—without providing a feasible alternative method.

According to the source, Mr. Arthur has consistently maintained his innocence and no physical evidence has ever linked him to the killing. It is alleged that at the final stage of his trial, the Alabama Supreme Court failed to ensure fair trial guarantees to Mr. Arthur. Prior to 2008, he petitioned for more than six years to DNA testing which could be an important part of his defence, on a rape kit taken from Judy Wicker at the time of the murder. The State informed Mr. Arthur that it was unable to locate the rape kit, which allegedly was destroyed by the State. It is believed that the kit is a key piece of evidence that could help demonstrate Mr. Arthur's innocence.

On July 30, 2008, Mr. Arthur's execution was stayed for a fourth time after another man, Bobby Ray Gilbert, confessed under oath that he, not Mr. Arthur, murdered Troy Wicker. Limited DNA testing in 2009 failed to identify any of Mr. Gilbert's DNA on the crime scene evidence that was available for testing, leading the Court to conclude that Mr. Gilbert did not kill Troy Wicker. Mr. Arthur's DNA was also not found on the items, but the Court refused to apply the same logic regarding Mr. Arthur.

During his third and final trial, Mr. Arthur's legal counsel allegedly conducted no independent investigation, made almost no attempt to locate key witnesses or suspects or hire experts, and barely had any contact with Mr. Arthur. Before the trial, the council allegedly also failed to interview key witnesses. No court has ever reviewed Mr. Arthur's ineffective assistance of counsel claim on the merits. This claim could only be raised in a post-conviction petition, but Mr. Arthur did not have counsel to help him prepare such a petition. Consequently, Mr. Arthur was not able to file such petition on a timely basis and he has been procedurally barred from raising this claim.

Based on the above allegations we would like to express serious concern that the death penalty may be carried out against Mr. Arthur following judicial procedures that may not fulfill the most stringent guarantees of fair trial and due process, including access to adequate legal assistance and conviction upon clear and convincing evidence leaving no room for an alternative explanation of the facts surrounding the crime. We also would like to express serious concern that the death penalty may be carried out in a manner that may amount to cruel, inhumane or degrading treatment or punishment, or even torture.

In view of the urgency of the matter, and of the irreversibility of the punishment of the death penalty, we call upon your Excellency's Government as a

matter of urgency to halt the execution of Mr. Arthur, which, on the facts available to us, may constitute a violation of applicable international human rights standards and thus an arbitrary execution, and to carefully review both the trial against him and the punishment imposed on him with a view to ensuring compliance with the most stringent international standards.

Without making any judgment as to the accuracy of the information made available to us, the above allegations, if found to be true, point to a potential violation of the **right to fair proceedings** before an independent and impartial tribunal, as set forth in article 10 of the Universal Declaration of Human Rights (UDHR) and in article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a State Party. Any execution resulting from such proceedings, in turn, would amount to a violation of the **right to life** as set out in article 3 of the UDHR and in article 6.1 of the ICCPR.

We would also like to draw the attention of your Excellency's Government to article 5 of the United Nations Safeguards Protecting the Rights of those Facing the Death Penalty (Safeguards), which provides that capital punishment may only be carried out pursuant to legal procedures which give all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the ICCPR, including the right to adequate legal assistance at all stages of the proceedings. Only full respect for stringent due process guarantees distinguishes capital punishment as possibly permitted under international law from an arbitrary execution. Article 4 of the Safeguards also stipulate that the death penalty may only be imposed when the guilt of the person charged is based upon **clear and convincing evidence leaving no room for an alternative explanation of the facts.** .

We also wish to remind your Excellency's Government of the **absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment**, which is recognized as an international norm of *jus cogens*, and has been codified, inter alia, in the **Convention against Torture** and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States ratified in 1994, as well as in article 7 of the ICCPR. Beyond the specific concerns that have been raised in relation to the method of execution allegedly foreseen in the case of Mr. Arthur, we would also like to call the attention of your Excellency's Government to an evolving trend within international bodies and an increasingly robust State practice framing the debate about the permissibility of the death penalty within the context of the fundamental concept of human dignity and of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. As a matter of law, this trend may well reflect the ongoing evolution of an emerging customary norm prohibiting the death penalty as a form of cruel, inhuman, or degrading punishment (see also: Report of the former Special Rapporteur on Torture, A/67/279).

Apart from the **inherent nature of the punishment** as such, **the circumstances surrounding the imposition or execution** of the death penalty can, in and of themselves,

amount to cruel, inhuman or degrading treatment or punishment or even torture. Thus, the harshness of the death penalty goes beyond the execution itself and may be inflicted on a convict, as well as on relatives awaiting his or her execution at various stages throughout the proceedings, the detention and the actual execution. More specifically, the conditions of detention on death row are often worse than those of the rest of the prison population, and regularly involve long periods of anxiety, uncertainty, and isolation, all of which can produce mental trauma and physical deterioration (“death row phenomenon”) (*ibid.*, para. 42, 75).

Finally, we would like to recall that, according to paragraph 4 of General Comment 31 of the Human Rights Committee, the obligations contained in the Covenant are binding on every State as a whole and that all branches of the State (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency’s Government to safeguard the rights of the above-mentioned person(s) in compliance with international instruments.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

Your Excellency’s Government’s response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment