

**Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**

REFERENCE:  
UA USA 20/2019

22 October 2019

Excellency,

We have the honor to address you in our capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions and Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to Human Rights Council resolutions 35/15 and 32/2.

We are writing to reiterate our concerns in the case of Mr. Charles Rhines, who is set to be executed by the State of South Dakota during the first week of November 2019. This case was raised with Your Excellency's Government in an urgent appeal dated 31 July 2018 to which, to this date, we have not received a reply.

As we have expressed in detail in our previous correspondence to the Government of the United States, our mandates have received information to the effect that Mr. Rhines' sexual orientation was part of the considerations that led to his condemnation to the death penalty, and a colorable claim that it may have been a determining factor in that decision. If the choice of death penalty was based, even in part, on the sexual orientation of the accused, imposing the death penalty would constitute an arbitrary deprivation of life. Our mandates are therefore concerned that if Mr. Rhines is executed, it would be in violation of the principles of fair trial and non-discrimination, central principles under international human rights law and the US Constitution. We are also deeply concerned that imposing the death penalty under such conditions would amount to an arbitrary deprivation of life. In this connection, we wish to draw your attention to our analysis of the possible breach of international human rights obligations that the execution of Mr. Rhines might entail.

According to the information received:

Mr. Charles Rhines is an openly gay man. In June 1992, he was arrested and charged with killing a man earlier that year during a botched robbery of a store in Rapid City, South Dakota. Mr. Rhines offered to plead guilty in exchange for a life sentence. The state refused and pursued the death penalty.

*Allegations that jurors sentenced Mr. Rhines to death because they held an anti-gay bias and stereotypes about gay men*

During jury selection, Mr. Rhines' attorneys asked prospective jurors if they had any anti-gay bias that would prevent them from giving Mr. Rhines a fair trial. Ten of the jurors expressed neutral feelings about homosexuality. One juror stated that she regarded homosexuality as a sin, but that she would not be affected by this belief in deliberating the case. Mr. Rhines' homosexuality was revealed in testimonies of two witnesses during the trial. One witness testified that she had seen him cuddling with her husband. Mr. Rhines' former partner also testified about their sexual relationship.

The jury found Mr. Rhines guilty of first-degree murder and third-degree burglary and began their sentencing deliberation in the afternoon of January 25, 1993. The following morning, the jury sent a note to the judge asking, among other things, if Mr. Rhines would be allowed to:

- “mix with the general inmate population;”
- “create a group of followers or admirers;”
- “brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes;”
- be “jailed alone or ... have a cellmate;” or
- “marry or have conjugal visits.”

The judge did not address these questions. He also declined to follow a defense request to instruct the jury not to base its decision on speculation or guesswork. Instead, his response simply noted that the jury instructions included all of the information that he could give. On January 26, 1993, after a day of deliberations, the jury sentenced Mr. Rhines to death.

In 2016, Mr. Rhines' newly appointed attorneys identified evidence supporting allegations that the jurors suffered from an anti-gay bias. First, there were two juror declarations. In one, a juror referred to Mr. Rhines as “that son of a bitch queer,” while another juror said “One of the witnesses talked about how they walked in on Rhines . . . fondling a man in a motel room bed. I got the sense it was a sexual assault situation and not a relationship between the two men,” and that if sentenced to life imprisonment, Mr. Rhines might be “a ‘sexual threat to other inmates and take advantage of other young men in or outside of prison.’”

Additionally, in a signed statement, one juror stated that the jury “knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison.” Another juror recalled a juror saying “if he's gay we'd be sending him where he wants to go if we voted for [life in prison].” A third juror confirmed that “[t]here was lots of discussion of homosexuality. There was a lot of disgust.”

The South Dakota Attorney's General Office investigated these new allegations and interviewed nine jurors in 2017. The jurors, including those identified above, provided self-assessments denying that they had based the death sentence on Mr. Rhines' homosexuality, but no juror retracted his or her earlier statements. According to the investigators, one juror claimed that the statement that Rhines might enjoy a life in prison where he would be among so many men was a joke.

*Allegations of inadequate legal assistance*

In August 1992, the state appointed three attorneys to represent Mr. Rhines. None of the three had worked on capital punishment cases nor received training in handling such cases. One of the attorneys was supposed to focus on investigative matters, but soon discovered that the core pre-trial work, such as preparing jury instructions, was not being completed. He thus shifted to these tasks.

Further, none of the attorneys fully committed into developing a sentencing mitigation case. For instance, none of them visited Mr. Rhines' hometown, none spoke to his acquaintances from military service, and none interviewed his mother. The attorneys also did not seek the advice of a mitigation specialist. Although they hired a psychiatrist to evaluate Mr. Rhines, they did not ask him to conduct a full evaluation of Mr. Rhines' mental health. They also did not provide the psychiatrist with Mr. Rhines' school, military or incarceration records, or an autobiography that Mr. Rhines drafted for the attorneys. The entire pre-trial mitigation investigation simply consisted of one of the attorneys speaking to Mr. Rhines' siblings.

At the trial, Mr. Rhines' sister also testified that Mr. Rhines struggled in school, unlike his other siblings who were all college graduates. She testified that this had developed into Mr. Rhines feeling less capable and worthless. She recalled begging her father to stop Mr. Rhines from entering the military because he had mental health problems, but they did not listen to her. Another sibling testified that Mr. Rhines exhibited longstanding signs of emotional problems.

The South Dakota Supreme Court rejected Mr. Rhines' appeal. Mr. Rhines continued his appeals and had new attorneys assigned between the years 1996 and 2000. One attorney withdrew from representation because of a conflict. Another one represented Mr. Rhines for three years but also failed to use a mitigation specialist. He also did not hire any mental health professionals to evaluate Mr. Rhines's mental health.

During an evidentiary hearing in 1998, an attorney expert hired by Mr. Rhines' defense concluded that the attorney who represented Mr. Rhines at the initial trial failed to adequately investigate mitigating factors.

Mr. Rhines brought his case to federal court in February 2000 and the court appointed two attorneys. The attorneys counseled Mr. Rhines for almost five years but performed almost no investigative work into any mitigating factors.

In 2011, attorneys from the Federal Public Defender's Office for South Dakota and North Dakota were appointed to represent Mr. Rhines. The Public Defender's Office later admitted that the appointed attorneys never conducted the constitutionally mandated fact and mitigation investigations.

On January 2, 2018, the South Dakota Supreme Court rejected Mr. Rhines' appeal. In May 2018, Mr. Rhines' attorneys appealed to the United States Supreme Court, but it refused to hear his case. His attorneys are continuing to litigate the case. Mr. Rhines' execution has been scheduled for the first week in November.

The above are allegations and we do not wish to prejudge their accuracy. However, if true then Mr. Rhines would be executed on the basis of his homosexuality and following an unfair trial, in violation of his human and civil rights.

We wish to underline that every individual, without discrimination of any kind, has the inherent right to life and no individual shall be arbitrarily deprived of his or her life under articles 2 and 6 of the ICCPR. Sexual orientation and gender identity are prohibited grounds of discrimination under international law. The Human Rights Committee also found that States have a legal obligation to ensure to everyone the rights recognized by the Covenant without discrimination on the basis of sexual orientation or gender identity (CCPR/C/GC/35, paragraph 3).

We would also like to draw the attention of your Excellency to article 5 of the United Nations safeguards protecting the rights of those facing the death penalty, 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. 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. The legal counsel assigned to Mr. Rhines during the initial trial failed to properly investigate mitigating information, particularly concerning his mental health. Similar inaction was repeated by other counsel appointed to represent Mr. Rhines. This had been acknowledged by an attorney expert and the Federal Public Defender's Office for South Dakota and North Dakota. Therefore, if Mr. Rhines' death sentence is carried out, it would be in violation of article 14 of the ICCPR and the United Nations safeguards protecting the rights of those facing the death penalty.

Furthermore, article 6 (4) of the ICCPR and article 7 and 8 of the Safeguards establish that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence and that amnesty, pardon or commutation of the sentence of death may be granted.

In relation to the death penalty, the Human Rights Committee has repeatedly stated that the imposition of the death penalty in a manner that is contrary to another provision of the ICCPR also violates article 6 of the ICCPR. Further, the duty to protect the right to life requires States parties to take exceptional measures of protection towards vulnerable persons, which include lesbian, gay, bisexual, trans and intersex persons.

In the present case, the information available to us suggests that the jury sentenced Mr. Rhines to death because they felt uncomfortable with homosexuality and believed that as a gay man he would enjoy spending the rest of his life in prison with other men. Thus, if Mr. Rhines' death sentence is carried out it would amount to an arbitrary deprivation of life, in violation of the United States' human rights obligations.

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](http://www.ohchr.org) or can be provided upon request.

Please provide any additional information and any comment you may have on the above-mentioned allegations. 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.

Given the importance and urgency of the matter we may publicly express our concerns in this case as, in our view, the information at hand is sufficiently reliable and indicates a matter warranting attention. We indeed believe that given the above circumstances the public should be alerted to these concerns and the human rights implications of the case. Any public statement on our part would indicate that we have been in contact with your Office to clarify the issue in question and recall the State's international legal obligations.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within

60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Agnes Callamard

Special Rapporteur on extrajudicial, summary or arbitrary executions

Victor Madrigal-Borloz

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity